El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

VESSEY & COMPANY, INC., MARTORI BROTHERS DISTRIBUTORS, JOE MAGGIO, INC.,	}	Case Nos . 79-CE-98-EC
Respondents,	}	79-CE-145-EC 80-CE-112-EC 80-CE-4-EC 80-CE-113-EC 80-CE-4-1-EC 80-CE-117-EC 80-CE-14-EC 80-CE-207-EC 80-CE-74-EC 80-CE-208-EC 80-CE-74-1-EC 80-CE-252-EC 80-CE-lll-EC
and	}	
UNITED FARM WORKERS OF AMERICA, AFL-CIO , 80-CE-253-EC Charging Party.	}	13 ALRB No.17

DECISION AND ORDER

On February 7, 1983, Administrative Law Judge (ALJ) Marvin J. Brenner issued the attached Decision in this matter, which concerns allegations of bad faith bargaining from late 1979 through March 1981. Thereafter, Respondents Vessey & Company, Inc. (Vessay) , Martori Brothers Distributors (Martori), and Joe Maggio, Inc. (Maggio) , the General Counsel, and Charging Party United Farm Workers of America, AFL-CIO (UFW or Union), timely filed exceptions to the ALJ's Decision with supporting briefs. The UFW and the General Counsel filed reply briefs to Respondents' exceptions. Respondents subsequently filed a supplemental brief, to which the General Counsel and the UFW responded.

In Admiral Packing Company, et al. (1981) 7 ALRB No. 43 (Admiral) , the Agricultural Labor Relations Board (ALRB or Board) found that earlier bargaining conduct by these respondents and others violated the Agricultural Labor Relations Act (ALRA or Act) . On review, the Court of Appeal determined that our findings

were not supported by substantial evidence. (Carl Joseph Maggio, Inc., et al. v. Agricultural Labor Relations Board (1984) 154 Cal.App.3d 40 (Carl Joseph Maggio).) On June 22, 1984, the Board requested supplemental briefing by the parties concerning the effect of the court's decision in Carl Joseph Maggio on the present matter. The General Counsel and the UFW filed supplemental briefs. The Employers filed a motion to dismiss this matter altogether in light of the Carl Joseph Maggio decision.

The Board has considered the record and the ALJ's Decision in light of the exceptions, briefs, and supplemental pleadings of the parties, and has decided to affirm the ALJ's rulings, findings, and conclusions only to the extent consistent with this decision, and to adopt his recommended Order with modifications.

Bargaining History

This case involves multiple litigants. The bargaining history of the parties is reflected in several previous Board Decisions as well as in the court's opinion in Carl Joseph Maggio.

In Admiral, the Board concluded that Maggio, Martori, and Vessey, among others, had violated sections 1153(e) and (a)[1/] of the Act by failing to bargain in good faith. However, as indicated above, the Board was reversed by the Court of Appeal in Carl Joseph Maggio. After reviewing all aspects of the bargaining history, the Court of Appeal refused to enforce the Board's Order, and specifically found insufficient evidence of any bargaining violations from February 28, 1979 through August 8, 1979. The

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

court held that the Board, in finding the employers guilty of bad faith bargaining, had failed to adequately consider the overall conduct of the union during the negotiations. In particular, the Court of Appeal noted that the UFW commenced a strike before the employers had an opportunity to submit their complete bargaining proposals to the union. Additionally, it observed that the UFW repeatedly cancelled bargaining sessions, rejected the employers' suggestion that the parties use a mediator, and refused to jointly request an explanation of President Carter's voluntary wage and price guidelines, and the sanctions for noncompliance, from the Council on Wage and Price Stability. Additionally, the court noted that the UFW failed to abide by the parties' prenegotiations agreement to refrain from making public the details of the negotiations.

In contrast to the Board's finding that the employers failed to bargain in good faith, the court found that:

(1) the record did not support a finding that the employers presented their February 21 offer in a "take-it-or-leave-it" manner, but instead showed that, when the offer was given, the union was told that the employers were willing to negotiate further if there was a meaningful union response;

(2) the employers' declaration of impasse on February 28 was neither premature nor unjustified;

(3) the employers said only that the seven percent guidelines might be applicable to some of the parties, and that sanctions might be imposed by the government for failure to adhere

to the guidelines; and

(4) the employers' publicity response, designed to counteract the union's intensive boycott and public relations campaign, was not a per se violation of the Act.

In Martori Brothers (1982) 8 ALRB No. 23, (Martori) the Board determined that Martori[2/] had engaged in a course of unlawful bad faith bargaining from November 29, 1979 to May 1980. In arriving at that determination, the Board found that Martori's November 20, 1979 correspondence from its negotiator to the UFW, purportedly intended to reopen negotiations and break the bargaining impasse, was not a good faith effort to resume negotiations. The Board also found that Martori's summary rejection of the UFW's December 18, 1979 offer, and the company's delay in submitting a counterproposal, further indicated that the employer was continuing its bad faith bargaining.

In Martori Brothers (1985) 11 ALRB No. 26, the Board rejected motions by Martori and the General Counsel to reconsider the 1982 Martori Decision in light of Carl Joseph Maggio. The Board noted that its 1982 Martori Decision was not based upon the bargaining conduct at issue in Carl Joseph Maggio/ but rather was based solely on conduct commencing with the employers' letter of November 20, 1979. (Martori Brothers, supra, 11 ALRB No. 26, p. 4.)

[2/] Martori's negotiator was also Vessey's and Maggio's negotiator, and Martori's conduct in that case reflected the conduct of Vessey and Maggio as well.

As a result of a court remand, the Board, in Joe Maggio, Inc., et al. (1985) 11 ALRB No. 35, reconsidered its findings in Joe Maggio, Inc., et al. (1982) 8 ALRB No. 72 in light of the Carl Joseph Maggio opinion. In its 1982 Maggio Decision, the Board had determined that respondents Maggio, Vessey, and Colace Brothers, Inc. (Colace) participated in a series of common operative events, between November 20, 1979 and December 31, 1979, which served to continue the bad faith bargaining that had been demonstrated in Admiral. On remand, the Board examined the entire record de novo. Preliminarily, the Board noted that Colace had settled all outstanding unfair labor practice charges alleged in the complaint; that Vessey had consummated a formal settlement agreement with the UFW providing that any future assessment of makewhole liability would cease no later than January 1, 1982; and that Maggio's implementation of its carrot harvest rate could no longer be deemed a violation of the Act. Thus, the Board dismissed all allegations against Maggio and determined that the charges against Colace were moot. As a result of the above findings, the only question before the Board was whether Vessey's conduct between February 21, 1979 and December 31, 1979 constituted bad faith bargaining. The Board dismissed the complaint insofar as it alleged that Vessey had engaged in bad faith or surface bargaining. The Board concluded that, although Vessey and the union were at impasse prior to November 20, 1979, Vessey[1]s subsequent wage proposal--which exceeded its last preimpasse offer--broke the impasse and revived Vessey's duty to bargain. However, the Board found that the unilateral wage

proposal, standing alone, was insufficient to have adversely affected the subsequent negotiation process between the parties from December 10, 1979 through December 31, 1979.

1979 Negotiations

On February 28, 1979, the parties agreed that they were at impasse, and negotiations ended. Impasse continued until November 20, 1979, when Thomas Nassif, the negotiator on behalf of Martori, Vessey, and Maggio, sent a letter to the Union reopening negotiations by proposing to increase the piece rate for lettuce harvesting to the same rate as in the Sun Harvest contract.[3/] On December 7, 1979, there were four separate meetings between the Union and Respondents[4/] regarding the November 20, 1979 letter. The Union, through its negotiator Ann Smith, opposed the implementation of any wage increase and stated that any such action would be treated as an unfair labor practice. The Union then proposed that either the Sun Harvest contract be used as a "basis of settlement" or the parties continue to bargain on the basis of the proposals presently on the table. Respondents rejected the Sun Harvest contract.

The Union next submitted a modification of its February proposals on December 19, 1979. On December 31, 1979, Nassif

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

[4/] Joe Colace of Colace Brothers also met with the UFW in one of the meetings.

wrote to Smith, rejecting the Union's proposal and complaining of the Union's tactics in offering "Sun Harvest or worse." Nassif stated that until the Union was willing to negotiate an appropriate agreement or the Company felt compelled to sign the Sun Harvest agreement, the parties appeared to be at impasse. Smith responded that Nassif had misstated the Union's position.

1980 Negotiations

During the second week of January 1980, Nassif and Smith engaged in informal, off-the-record discussions. During these discussions, Nassif first brought up the subject of a flat crop wage differential.[5/] On January 28, 1980, Nassif wrote to Smith that Respondents were interested in continuing negotiations. No reference to Nassif's December 31, 1979 letter was made by the parties. On February 6, 1980, Smith requested data or information justifying the proposed wage differential.

On March 4, 1980, the parties met at a negotiating session. No proposals were made at this meeting. Respondents informed the Union that they would prepare a response to the Union's December 19, 1979 proposal.

On April 16, 1980, Respondents submitted identical proposals to the Union (excluding wage rates) and informed the Union that a separate wage proposal for each Respondent would follow. In this proposal, Respondents agreed to accept the Sun Harvest language on vacation, grievance and arbitration, leaves of absence, hours of work and overtime, rest periods,

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[5/] A flat crop differential would pay lower wages for harvesting row crops other than lettuce.

health and safety, pension, Martin Luther King Fund, reporting on payroll deductions, bereavement, and camp housing. Respondents also agreed to accept other Sun Harvest articles, which, according to Smith, were no different from prior contracts.[6/] Some Sun Harvest terms were rejected, and Respondents made no counteroffers concerning them. Those terms included cost of living, paid union representative, delinquencies, labor-management relations committee, and injury on the job.

At the May 21, 1980 negotiating session, Respondents completed their bargaining proposal by submitting a wage differential for harvesting vegetables and flat crops. In accordance with a wage survey by the Imperial Valley Vegetable Growers Association,[7/] Respondents proposed to pay vegetable harvesters 21£/hour more than workers harvesting a flat crop. In addition to the flat crop differential, Maggio and Vessey agreed to accept the Sun Harvest lettuce harvesting rate and proposed that the rate be effective July 15, 1980.

On July 21, 1980, the Union accepted 29 of Respondents' April language proposals, including pension, Martin Luther King Fund, grievance and arbitration, leaves of absence, rest period, successorship, and no strike. The Union also accepted a contract

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[6/] These articles included no strike, subcontracting, successorship, right of access, discrimination, worker security, maintenance of standards, management rights, union label, new or changed job operation, jury duty, income tax withholding, credit union, bulletin boards, family housing, grower-shipper contracts, location of company operations, modifications, and savings clause.

[7/]The validity of this wage survey and the method by which the wage differential was determined by Respondents is unclear.

expiration date of August 1982. Following these agreements, the parties did not meet again until October 7, 1980.

At the October 7 meeting, the parties discussed Vessey's decision to close down its lettuce operations. As a result of this decision, certain issues were tabled because they were not relevant unless Vessey grew and harvested lettuce. To the extent that the terms would apply to its operations, Vessey proposed to accept Sun Harvest language concerning travel allowance, delinquencies, records, pay periods, and paid July 4th holiday. Smith and Nassif also reviewed the differences between the parties, and agreed that the differences included wages, cost of living, union security, hiring hall, mechanization, holidays, hours of work, overtime, supervisors, supplemental security, and vacations.

On October 8, 1980, there was a meeting between Maggio and the Union. The parties discussed seniority, overtime, and travel. Maggio accepted the medical plan, the paid July 4th holiday, the Sun Harvest delinquency language, and Sun Harvest's duration date of August 31, 1982. Maggio indicated its interest in implementing its May 21, 1980 wage offer, but the Union objected. As a result, wages were not raised.

The parties next met on October 27, 1980. The Union still opposed Maggio's proposed interim wage increases absant a complete agreement. Since Vessey had discontinued its lettuce operations, it maintained that there was no longer any need for articles on seniority, reporting and standby, hours of work and overtime, health and safety, and hiring hall. However, there was

no further movement by Respondents on the proposed articles concerning hiring hall, union security, mechanization, cost of living, and union representative.

November 4, 1980 was the last face-to-face negotiating session prior to the ALRB's March 1981 hearing in this case. During this meeting, Maggio submitted proposals on wages, supervisors, records and pay periods, injury on the job, and mechanization. Maggio was still interested in implementing wage increases, but the Union continued to oppose any wage changes outside of the context of a complete contract.

Correspondence continued between the parties. On November 13, 1980, Smith wrote to Nassif to review the status of negotiations with Vessey. Smith agreed to accept Vessey's proposals on supervisors, health and safety, and seniority, with an appropriate supplemental agreement. Smith also submitted modifications to previous proposals on wages, mechanization, records and pay periods, and duration, and made it clear that the Union had not changed its position on union security, hiring hall, union representative, cost of living, hours of work and overtime, injury on the job, reporting and standby, vacations, and travel allowance. Thus, as of November 13, 1980, the parties had agreed on approximately 33 articles, out of a total of 48 proposed articles.[8/]

[8/] The total number of 48 articles is based upon the 1979 Sun Harvest collective bargaining agreement and Respondents' April 16, 1980 language proposals. Prior collective bargaining agreements covering 1977 through 1979 between the UFW and Respondents Maggio and Vessey contained 43 articles.

On December *22,* 1980, Smith informed Nassif that the Union considered Maggio's November 4, 1980 proposal only a slight modification of prior offers, but would nevertheless present a response. On December 29, 1980, Nassif wrote to Smith regarding the Vessey negotiations to confirm their agreement as to supervisors, duration, health and safety, records and pay periods, seniority, and mechanization. Nassif also submitted proposals on hours of work, overtime, and travel allowance. In March 1981, during the course of the ALRB hearing in this case, Nassif received the Union's response to Maggio's November 4, 1980 proposal.

The ALJ Decision

Based upon these facts, the ALJ concluded that Respondents engaged in bad faith bargaining in violation of sections 1153(e) and (a) of the Act. In his analysis, the ALJ divided the negotiations into five discrete time periods: (1) Prior to February 28, 1979; (2) February 29, 1979 to December 7, 1979; (3) December 7, 1979 to March 4, 1980; (4) March 4, 1980 to November 4, 1980; and (5) November 4, 1980 to December 31, 1980. For each segment, the ALJ discussed and summarized the bargaining between the parties and the progress, if any, toward reaching an agreement. The ALJ concluded that there had been no progress in any major area since 1979.

While recognizing that Respondents' April 16, 1980 proposals accepted many of the Sun Harvest articles and were improvements from prior contracts, the ALJ concluded that the major areas—namely, wages, union security, hiring hall,

mechanization, union representative, holidays, and cost of living--remained untouched. The ALJ found that the October and November sessions were fruitful but accomplished "too little, too late." He determined that mere agreement on secondary issues after two years of bargaining, despite ample room to maneuver, is perfectly consistent with a finding of surface bargaining, which, by definition, is an approach that resembles good faith but is in fact calculated to frustrate agreement. (McFarland Rose Production (1980) 6 ALRB No. 18, citing National Labor Relations Board v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829] .)

In reaching his conclusions, the ALJ relied on acts and conduct of Respondents which were found unlawful in the overruled Admiral, supra, 7 ALRB No. 43, as evidence of Respondents' continuing overall failure to bargain in good faith. The ALJ also consistently credited UFW negotiator Ann Smith, and found that the Union's conduct evidenced a desire to reach agreement.

Analysis

Section 1155.2(a) defines the obligation of good faith bargaining:

> For purposes of this part, 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, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 1153(e) requires an agricultural employer to bargain in good faith with its employees' certified collective bargaining representative.[9/] The difficulty in determining whether challenged conduct constitutes permissible hard bargaining or a type of unlawful bargaining is largely attributable to the Board's dual responsibility of assuring that parties bargain in good faith while, at the same time, giving full recognition to the statute's express acknowledgment that the good faith bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." (Lab. Code § 1155.2(a).) Distinguishing between hard bargaining and surface bargaining is especially difficult since surface bargaining, by definition, is an approach to negotiations by one of the parties which on its face has the attributes of bargaining in good faith, but is in fact calculated to frustrate agreement. (McFarland Rose Production, supra, 6 ALRB No. 18.)

[8/] Sections 8(d) and 8(a)(5) of the National Labor Relations Act (NLRA) are almost identical to sections 1155.2(a) and 1153 of the ALRA:

> 8(d). For the purposes of this section, 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, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Section 8(a)(5) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

In order to determine whether a party has the requisite good faith intent to reach agreement on a contract, the Board must examine the totality of the circumstances, including the parties' conduct both at and away from the bargaining table when such conduct relates to the bargaining negotiations. Since it would be extraordinary for a party to directly admit a "bad faith" intention, motive must of necessity be ascertained from circumstantial evidence. (Continental Insurance Company v. National Labor Relations Board (2nd Cir. 1974) 495 F.2d 44, 48 [86 LRRM 2003].) A state of mind, such as that which evinces bad faith, generally cannot be determined by a consideration of the events viewed separately. Rather, the picture is created by a consideration of all the facts viewed as an integrated whole. (National Labor Relations Board v. Tomco Communications, Inc. (9th Cir. 1978) 567 F.2d 871, 883 [97 LRRM 2660]; National Labor Relations Board v. Stanislaus Implement and Hardware Company (9th Cir. 1955) 226 F.2d 377, 381 ['31 LRRM 1079].) However, when examining the totality of the circumstances, the National Labor Relations Board (NLRB or national board) may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements . (National Labor Relations Board v. American National Insurance Company (1952) 343 U.S. 395, 404 [27 LRRM 2405].) Of course, the national board is not prohibited from examining the contents of the proposals set forth, and must take some cognizance of the reasonableness of the position taken by a party in the course of

bargaining negotiations. (National Labor Relations Board v. Holmes Tuttle Broadway Ford, Inc. (9th Cir. 1972) 465 F.2d 717, 719 [81 LRRM 2036] .)

This Board, too, examines the totality of the circumstances, including the employer's conduct at and away from the bargaining table, to determine whether the employer undertook negotiations with a bona fide intent to reach an agreement. (McFarland Rose Production/ supra, 6 ALRB No. 18; Masaji Eto, et al. (1980) 6 ALRB No. 20; Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36.) Also, the totality of the employer's conduct must be viewed in light of the union's conduct to determine whether the parties evidenced an intent to reach an agreement. (Kaplan's Fruit and Produce Company, supra.) Although the Board must review the totality of the parties' conduct and, in a limited way, take cognizance of the reasonableness of the positions taken by the parties in the course of bargaining, the Board cannot compel agreement or concessions, or sit in judgment of the substantive terms of a contract. (Tex-Cal Land Management, Inc. (1985) 11 ALRB No. 31, p. 22.) The Board must avoid interjecting itself as a party at the bargaining table in evaluating a party's compliance with the statutory bargaining obligation. (Mario Saikhon, Inc. (1987) 13 ALRB No. 8.)

After a careful examination of the totality of circumstances as reflected in the present record, we reject the ALJ's analysis with respect to the issue of bad faith bargaining. The ALJ's determination of Respondents' bad faith bargaining relied on the events of, and became, inextricably intertwined with,

our annulled decision in Admiral.[10/] Thus, the premise underlying the ALJ's conclusion that Respondents continued to bargain in bad faith is no longer viable.

The Board has examined the facts de novo and concludes that Respondents engaged in lawful hard bargaining, rather than surface bargaining, and evidenced an intent to reach agreement during the bargaining period from 1980 until March 1981. The record shows that Respondents, despite an inflexible bargaining strategy on the part of the Union, modified their proposals, resulting in agreement on 33 articles. The Union's strategy is evidenced by its December 1979 proposals, which, from the

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[10/] In his discussion of the facts, the ALJ relied on Admiral, supra, 7 ALRB No. 43 and Joe Maggio, Inc., supra, 8 ALRB No. 72 (which relied on Admiral) to conclude that the following conduct was unlawful and in violation of the Act: (1) The Employer group declaration of impasse on February 28, 1979; (2) Maggio's implementation of some of its wage rates in the fall/winter of 1979; and (3) Vessey's implementation of increased wage rates in December 1979 for the 1979-1980 harvest. (ALJD, p. 9, fn. 14; p. 10, fn. 18; p. 11, fn. 21.)

The ALJ began his analysis with the premise that Respondents' bad faith bargaining during the 1979 negotiations, as determined by the Board in its Admiral Decision, formed the background of the 1980 negotiations. (ALJD, p. 35.) Additionally, the ALJ relied on the "false impasse" found in the Admiral decision to conclude that Respondents' refusal to negotiate an overall contract and the December 31, 1979 declaration of impasse were based on their desire to implement lettuce harvesting rates for the upcoming 1979-1980 season. (ALJD, p. 37.) In the flat crop differential analysis, the ALJ again relied on the Admiral decision to conclude that Respondents' position on the one-year increase of seven percent in wages and benefits under President Carter's anti-inflation wage guidelines was "insincere," "patently improbable," and "evidence of bad faith." (ALJD, pp. 39, 42.)

Finally, in his discussion of the UFWs alleged refusal to bargain in good faith, the ALJ noted that the acts and conduct of Respondents which were found unlawful in Admiral also constituted evidence of Respondents' overall failure to bargain in good faith. (ALJD, p. 52.)

Employers' perspective, were harsher than the Sun Harvest agreement. The Union's position was that Sun Harvest was the result of significant compromises between the UFW and employers. Consequently, the Union was not willing to place Sun Harvest on the table and open it up to bargaining. (ALJD, p. 20, fn. 39.) Although the parties were unable to agree on major issues of concern to the Union,[11/] the fact remains that Respondents evidenced a desire to meet and confer with the Union, as shown by the numerous written communications and face-to-face meetings, which resulted in agreement on 33 articles.

Totality of bargaining conduct includes the parties' behavior, both at and away from the bargaining table, from the preliminary discussions through the consummation of the contract. The Board cannot rely on a scrutiny of only isolated and limited periods of bargaining. Although the ALJ stated that he relied on the "totality of the circumstances" to find that Respondents engaged in surface bargaining, his analysis focused on five discrete time periods and further separated the bargaining conduct into specific categories.[12/] Under the constraints of this analysis, the ALJ failed to examine Respondents' conduct as a whole, and ignored the Union's conduct at the beginning of the

[11/] The Union's major issues of concern included hiring hall, mechanization, union security, cost of living, and paid union representative. We are given no cause to believe that Respondents' positions on the major issues of concern to the Union were without a reasonable basis.

[12/] These categories include the wage proposals, the flat crop differential, and the language proposals, including union security, hiring hall, mechanization, union representative, holidays, and cost of living.

bargaining process.[13/] Additionally, the ALJ failed to adequately assess the progress that was made by the parties within the parameters of their respective bargaining positions.

The Board must also examine Respondents' behavior in light of the Union's conduct during negotiations. In 1979, at the outset of the bargaining relationship, the Union unilaterally violated the agreed-upon bargaining ground rule of a news blackout by making public the details of the negotiations. Additionally, the Union instigated a strike against Respondents' operations before Respondents had completed their first set of proposals. Throughout the negotiations, the Union's strategy was based on the Sun Harvest contract. Its position was that this master contract represented the Union's final terms on the major issues of concern, from which the Union was unwilling to bargain. This conduct helped set a tone of hard bargaining for subsequent negotiations.

Based on the totality of the circumstances, including the parties' behavior both at and away from the bargaining table, the Union's bargaining strategy, and the ultimate agreement on 33 articles, we conclude that Respondents engaged in lawful hard bargaining, and we therefore dismiss the complaint as it relates to Vessey's and Maggio's bargaining conduct during the period from the end of December 1979 through March 1981. Regarding Martori's bargaining conduct, we conclude that Martori engaged in lawful

[13/]The ALJ did not go beyond an examination of the Union's December 19, 1979 offer as evidence of the Union's alleged refusal to bargain in good faith.

hard bargaining from May 21, 1980 through March 1981, and we therefore dismiss the complaint as it relates to bargaining by Martori during this period.[14/]

Termination of Lettuce Operations in California

The General Counsel alleged that when Maggio, Vessey, and Martori ceased certain agricultural operations, they violated sections 1153(c) and (a) because their intent was to discriminate against employees who asserted their rights under the ALRA. The General Counsel also alleged that, in the subsequent negotiations over the effects of the cessation of their respective operations, Maggio, Vessey, and Martori violated section 1153(e) and (a). We agree with the ALJ's recommended dismissal of these allegations. Maggio

On September 23, 1979, Maggio notified the UFW that it was considering terminating its lettuce operations in California, and offered to negotiate over the decision and its effects. On October 5, 1979, Maggio informed the UFW that it was ceasing lettuce operations for a variety of reasons—specifically, the depressed market for its crops, the lack of available land due to overplanting and crop rotation, and the absence of a reliable work force. Maggio continued to make contract proposals during 1980, including wage rates for lettuce harvesting, while increasing its Arizona lettuce operations. Carl Joseph Maggio testified that it cost the same amount to grow lettuce in Arizona

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[14/]As previously discussed, the Board had determined that Martori engaged in a course of unlawful bad faith bargaining from November 29, 1979 to May 1980. (Martori Brothers, supra, 8 ALRB No. 23.)

as in California, but that the availability of a stable work force in Arizona made lettuce production economically feasible there. Maggio stated that he had not permanently discontinued lettuce in California, but had merely stopped planting the 1,000 or so Imperial Valley acres with lettuce, awaiting a stable work force.

In the early part of 1980, the Union asked Nassif, Maggio's negotiator, whether Maggio was planning to harvest lettuce for the 1980-1981 season. Nassif responded that, to his knowledge, Maggio had no present plans to reenter the lettuce market. Maggio testified that he could not remember when he made the decision regarding the 1980-1981 Imperial Valley lettuce season, but thinks it may have been in April or May. After learning of Maggio[1]s decision, the Union requested some information regarding Maggio's past crops and acreage figures, but never asked to bargain over the effects of the decision.

In determining the essential motivation for Maggio's closure decision and whether the closure constituted a violation of section 1153(c) of the Act, the ALJ analyzed this case as one involving multiple motives. For "dual motive" cases, the applicable standard was set forth by the national board in Wright Line, A Division of Wright Line, Inc., (1980) 251 NLRB 1083 [105 LRRM 1169] (Wright Line);

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. (Id. at p. 1089.)

Although the ALJ relied upon the unlawful conduct found in the overruled Admiral Decision to find that the General Counsel carried its burden of proof for establishing a prima facie case that protected activity was a motivating factor in Maggio's decision to close down the Imperial Valley lettuce operations, the Board so finds without reliance on Admiral. Our determination that the General Counsel established a prima facie case is based on the following factors, which the ALJ also relied upon in reaching his conclusion: (1) the long strike and bitter feelings between the parties; (2) the fact that Maggio had never before closed down its lettuce operations; (3) the fact that, under Maggio's good year/bad year theory, Maggio should have reentered the lettuce market in the 1980-1981 season; (4) the conflicting reasons given by Maggio and Nassif regarding the decision to cease the 1979-1980 lettuce operation; (5) Maggio's mixed signals on whether the closure was permanent or temporary; and (6) the fact that Maggio continued to operate its nonunion Arizona lettuce business.

The Board, in agreement with the ALJ's application of the Wright Line standard, further finds that Maggio adequately rebutted the General Counsel's prima facie case, by showing that the same decision would have taken place even in the absence of the alleged protected conduct.

As to the duty to bargain over the effects of the Imperial Valley closure, the Board notes that Nassif's offer to bargain clearly included both the decision to close the lettuce operations and its effects on the bargaining unit. Because Maggio

had other crop operations in California, the Board, like the ALJ, views Maggie's decision to cease its lettuce operations as a partial closure. Accordingly, under First National Maintenance Corporation v. National Labor Relations Board (1981) 452 U.S. 666 [107 LRRM 2705] (First National Maintenance), Maggio is not obligated to bargain over the decision, since the decision itself is not of the type that is amenable to resolution through the bargaining process. Although Maggio offered to bargain over both the decision itself and the impact thereof, the Union failed to make any proposals or to request any negotiating sessions subsequent to the October 5, 1979 meeting. Even in 1980, when Maggio intended to stay out of lettuce for another season, the Union made no request to bargain. The Board agrees that the closure decision itself is not a mandatory subject of bargaining, (See Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36; First National Maintenance Corporation v. National Labor Relations Board, supra, 452 U.S. 666), but we may also rely on the fact that the Union failed to seek bargaining over the effects of the partial closure, despite Maggio's offer to bargain over both the decision and its effects, in concluding that no violation of sections 1153(e) and (a) was established. (See, e.g., 0. P. Murphy Produce Co., Inc._ (1981) 7 ALRB No. 37.)

Vessey

On May 21, 1980, Vessey informed the UFW that it was considering not growing or harvesting lettuce during the 1980-1981 season and offered to bargain about that decision and its effects on the bargaining unit. On July 21, 1980, the UFW requested

information about the tentative decision. On August 13, 1980, Nassif acknowledged the July request and informed the Union that a full reply would be forthcoming in September after his vacation. On September 5, 1980, Vessey informed the UFW of its final decision. Vessey offered to transfer displaced employees to other available Vessey operations, but rejected a UFW severance pay proposal. At the October 7, 1980 meeting, Vessey explained that its decision to cease lettuce operations was based upon an assessment which showed overplanting in the Imperial Valley, a need for large capital outlays to compete in the wrap lettuce and shredded lettuce markets, increased costs of transportation, increased competition from Florida and Texas markets, a generally chaotic market, and increased harvesting costs. On November 13, 1980, the UFW made a formal severance pay proposal.

In finding that the General Counsel carried its burden of proof and established a prima facie case that protected conduct was a motivating factor in the decision to close down the Imperial Valley lettuce operations, the ALJ relied upon his finding of surface bargaining in addition to other factors, including the long strike, bitter feelings between the parties, and the timing of the closure. Even without a specific finding of surface bargaining, we believe that these additional factors support the finding that the General Counsel established a prima facie case of unlawful retaliation. The Board agrees with the ALJ's application of the Wright Line standard, and further agrees that Vessey successfully rebutted the General Counsel's prima facie case of a violation of sections 1153(c) and (a) of the Act, first by

establishing valid business justifications for the closure of its lettuce harvesting operations, and then by showing that the same decision would have occurred in the absence of the alleged protected activity.

As Vessey had other operations in California, its decision to cease harvesting lettuce will be treated as a partial closure. Under First National Maintenance, Vessey therefore had no obligation to bargain over its decision. However, upon notice to the Union of the impending closure and request of the Union, Vessey was obligated to bargain over the effects of its decision. Although we find that Vessey, through its negotiator, offered to bargain about both the decision and its effects, the Board agrees with the ALJ that the bargaining history between the parties on these issues was too short to prove the existence of either good or bad faith at the table, and that therefore no violation of sections 1153(e) and (a) was established regarding Vessey's decision to cease harvesting lettuce.[15/]

Martori

In April 1980, members of the Martori partnership began discussing the possibility of not harvesting lettuce in the 1980-1981 season. However, Martori still had plans to grow lettuce in May 1980, when it submitted *a.* wage proposal to the UFW. In July, Martori's plans changed due to the expiration of its land

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[15/]The Board agrees with the ALJ's analysis regarding the lack of sufficient evidence of Vessey's joint or single employer status with Cortaro Farms of Arizona, and additionally finds that Cortaro Farms was not shown to be an alter ego of Vessey. Accordingly, the Board finds it unnecessary to reach the jurisdictional question on this record.

leases. On July 7, 1980, Nassif notified the UFW that Martori was considering closing its California operations. On July 21, 1980, the UFW requested information about the decision. In Martori's September 19, 1980 response to the Union's request, Martori offered employment in Arizona to its California workers.[16/]

Finally the parties met on October 7, 1980 to discuss the decision and its effects, including a severance pay proposal and an offer of Arizona employment to the California workers. Martori's reasons for its decision to close down the California operation included Steven Martori's impending marriage and his need to be near his new family in Arizona, the lack of any other partner willing to supervise the Imperial Valley lettuce season, the financially unsuccessful winter season in Imperial Valley, the increased cost of maintaining offices in both Arizona and California, and the fact that Arizona's operation was more profitable.

The ALJ found that Martori went out of business in California predominantly because of antiunion feelings. The ALJ based his conclusion upon several factors, the most critical of which were his assessments of the testimonial demeanor of Steven Martori and his senior foremen, Johnny Martinez and Alfonso Reyes. The ALJ found these witnesses to be hostile, evasive, unresponsive, lacking in candor, and difficult to believe. Additionally, in January 1980, pursuant to our Order issued in

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[16/]This apparent delay in Martori's response to the Union's request for information was due to the negotiator's August vacation plans. (See Vessey discussion, infra.)

Martori Brothers Distributors (1978) 4 ALRB No. 80, Martori had reinstated a crew known to be UFW adherents and had made a series of antiunion threats and comments to other workers regarding the reinstatement and the closing down of the business to avoid a UFW contract.

The ALJ concluded that Martori's decision to go out of business in California must be considered a "total closure" of operations under the purview of the ALRA. On the basis of this analysis,[17/] the ALJ concluded that Martori's decision could never be a violation of section 1153(c) of the ALRA, citing, Textile Workers Union of America v. Darlington Manufacturing Co. (1965) 380 U.S. 263, 270 [58 LRRM 2657]:

> [A] proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act.

However, Martori did not go completely out of business; it ceased only the California operations. After its decision to cease the California operations, the Employer continued and expanded its Arizona operations. However, the ALJ found that the ALRB cannot consider Martori's non-California operations because of the jurisdictional limits of the ALRA.

In prior decisions, the Board has held that unlawful employer actions which have extraterritorial implications may not

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[17/]Section 1148 of the ALRA directs the ALRB to follow applicable precedents of the NLRA.

be immune from remedy. (See, e.g., Admiral Packing Company (1984) 10 ALRB No. 9; J. R. Norton Company (1982) 8 ALRB No. 76;[18] Mario Saikhon, Inc. (1978) 4 ALRB No. 72.) In light of the decision in J.R. Norton Company, supra, 192 Cal.App.3d 874, we have doubts about the continuing viability of ALRB precedent which considers the extraterritorial implications of unlawful employer actions. Assuming arguendo that Martori's decision to close its197 California operations constituted only a partial closure,[19] the test for determining whether the decision violated section 1153(c) would be whether Martori was motivated by a desire to "chill unionism in any of the remaining [operations] ... and if the employer may reasonably have foreseen that such closing would likely have that effect." (Textile Workers Union of America v. Darlington Manufacturing Co., supra, 380 U.S. 263, 275.) To determine whether this unlawful motive has been established, the NLRB relies on various circumstantial factors:

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[18] However, the California Court of Appeal for the Fourth Appellate District found that J. R. Norton's discriminatory failure to hire workers in Arizona and New Mexico cannot be remedied by the Board even though the denial of work was in retaliation for California concerted activity protected by the ALRA. (J.R. Norton Company (1987) 192 Cal.App.3d 874.) The Court of Appeal relied in part on a finding that Norton's operations involved harvesting in California 10 out of the 12 months, and that under such circumstances, it would be practically impossible for Norton to purge Union adherents from the ranks of its work force by merely refusing to hire those employees for the remaining two months.

[19] The NLRB/ in applying the Darlington precedent, has seldom found changes in an employer's operation to be a complete closing, reserving that form of immunity from the unfair labor practice laws to situations where the employer completely liquidates its business. (NLRB v. Fort Vancouver Plywood Company (9th Cir. 1979) 604 F.2d 596 [102 LRRM 2232] ; National Family Opinion, Inc. (1979) 246 NLRB 521 [102 LRRM 1641].)

> Generally, the Board in determining whether or not the proscribed "chilling" motivation and its reasonably foreseeable effect can be inferred considers the presence or absence of several factors including, inter alia/ contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to other employees. (Bruce Duncan Co., Inc. (1977) 233 NLRB 1243 [97 LRRM 1027] .)

While geographical proximity could be asserted as between Martori's defunct California and ongoing Arizona operations, evidence regarding the other factors is absent from this record. The fact that there is evidence that two of Martori's foremen at the California operation made antiunion remarks to California employees is irrelevant.[20/] The record contains no evidence that such antiunion remarks were made to Arizona employees, that there was contemporaneous union activity at the Arizona operation, or that there was interchange between the California and Arizona employees. The Board therefore finds insufficient basis for concluding that Martori violated section 1153(c) in closing part of its operations.

Regarding the bargaining obligation, the Board, like the

[20/]These isolated antiunion remarks in California are relevant only to determine whether Martori was motivated by antiunion animus when it made its decision to close its California operations. Without evidence of employee interchange between California and Arizona, these remarks have no bearing on determining whether Martori's decision to close its California operations was motivated by a desire to chill unionism in the remaining operations in Arizona. Although such antiunion remarks could constitute an independent violation of the Act, no such allegation is before the Board in this case.

ALJ, finds that Martori offered to bargain about the decision and its effects, but finds the record insufficient to establish that Martori failed to bargain in good faith with the Union over the effects of the decision to close its California lettuce operations.[21/]

Returning Strikers

The General Counsel alleged that striking employees of Maggio and Vessey tendered unconditional offers to return to work and that their employers failed to treat the offers in a nondiscriminatory fashion in violation of sections 1153(c) and (a) of the Act. The ALJ determined that the returning strikers were entitled to immediate reinstatement to their prior positions. On the basis of reasoning different from that expressed by the ALJ, we agree with his determination.

Maggio Broccoli

Broccoli is harvested by Maggio exclusively in the Salinas Valley, using two harvest crews under the primary supervision of Charles Kirkpatrick. After the 1979 strike, Maggio replaced the harvesters and, in 1980-1981, used only one harvesting crew. Although Kirkpatrick stated that more harvesting crews would have been helpful, he was directed to recall only

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[21/]As a result of the Board's decision to dismiss this allegation, it is unnecessary to consider the jurisdictional issue as it relates to bargaining requirements. Under either the total closure analysis by the ALJ or the partial closure analysis set forth herein, Martori's alleged failure to bargain over the effects of its decision to close the California lettuce operations is not a violation of our Act.

employees who worked the previous season or employees employed by Maggio in other capacities during the previous year. He was ordered by Maggio not to hire strikers or to honor requests for reemployment by striking employees. Domingo de la Torre, the broccoli crew foreman, had such difficulty filling his crew under these limitations that he resorted to hiring new employees under the names of previous (nonstriking) Maggio employees. De la Torre was certain he would have been fired if he had failed to fill his crew or if he had filled his crew with returning strikers.

Carrots

The Imperial Valley carrot harvest begins in November and ends in May, and is followed by the King City carrot harvest, which begins in May and ends in November. Together, the two seasons provide nearly year-round employment to those willing to commute. Humberto Felix supervised both harvests and hired the harvesters for Maggio. For the 1980-1981 Imperial Valley harvest (following Maggio's striking carrot harvesters' offers to return to work), Felix was directed to recall the 1979-1980 replacement workers, any 1980 King City harvesters who desired Imperial Valley employment, any other Maggio employees hired or employed since the strike in any capacity, and then any students seeking weekend or vacation employment. Felix was never given a list of the returning strikers who desired reemployment.

Sprinklers and Weed and Thin Crews

Before the 1979 strike, Maggio utilized two weed and thin crews and some 25-30 sprinklers. After the strike and the elimination of the lettuce operation, Maggio operated with one

weed and thin crew and some 20-25 sprinklers . These employees were recruited in August 1980, and Maggio hired only workers from the previous season. No new employees or returning strikers were hired.

Tractor Drivers and Irrigators

Prior to the strike, Maggio employed 15-20 tractor drivers and 15 irrigators. All but 3 or 4 of the tractor drivers and 3 of the irrigators went on strike. All strikers were replaced. Since receipt of the strikers' offers to return to work, there have been no openings for tractor drivers. Three striking irrigators were rehired in the fall of 1980.

Analysis

Maggio

In agreement with the ALJ, the Board finds that Maggie's striking employees tendered unconditional offers to return to work and that Maggio altered its established seniority practices, imposing new hiring and recall policies designed to limit reemployment opportunities of returning strikers. Accordingly, the Board concludes that Maggio violated sections 1153 (c) and (a) by failing to treat the returning strikers' offers to return to work in a nondiscriminatory fashion. (Vessey & Company, Inc. (1985) 11 ALRB No. 3.) The Board also finds that the uncontradicted evidence in this case establishes that Maggio did not unlawfully fail to reinstate any striking tractor driver or irrigator who sought reemployment, and therefore committed no violation of the Act regarding those returning strikers.

Vessey

In January 1979, all of Vessey 's tractor drivers, irrigators, and sprinklers went on strike and were replaced during February 1979. Additionally, the lettuce harvesters and weed and thin employees also went out on strike. (See Vessey & Company, Inc. , supra, 11 ALRB No. 3.) Jon Vessey testified that those replacement employees were permanent replacements for the striking employees. In December 1979, many of Vessey 's striking employees sought to return to their jobs. Vessey testified that, after receipt of the offers to return, he filled available job vacancies from the lists of returning strikers.

In light of the finding that the strike involved in this matter was an economic strike from the onset and remained so throughout the relevant periods (Carl Joseph Maggio, supra, 154 Cal.App.3d 40), the Board cannot accept the ALJ's conclusion that Vessey 's employees were entitled, as unfair labor practice strikers, to immediate reinstatement upon the tendering of an unconditional offer to return to work. However, the Board agrees that the offers to return to work by Vessey 's employees were sincere and unconditional. (See, e.g., Vessey & Company, Inc., supra, 11 ALRB No. 3.)

In Sam Andrews' Sons (1986) 12 ALRB No. 30, we recently reiterated the burden upon an employer in receipt of economic strikers' unconditional offers to return to work. The employer must establish legitimate and substantial business justifications to deprive such returning employees of their employment.

(National Labor Relations Board v. Fleetwood Trailers Company, Inc. (1967) 389 U.S. 375, 378 [66 LRRM 2737].) Such justifications include the previous hiring of permanent replacements. (National Labor Relations Board v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465]; Hansen Brothers Enterprises (1986) 279 NLRB No. 98.) It is a well-settled principle that the burden is on the employer to prove that the replacements were hired as permanent employees and, further, "theemployer must show a mutual understanding between itself and the replacements that they are permanent."[22/] (Hansen BrothersEnterprises, supra, 279 NLRB No. 98, Slip Opn. at p. 3, emphasis in original; Associated Grocers (1980) 253 NLRB 31, 32 [105 LRRM 1633]; Sam Andrews' Sons, supra, 12 ALRB No. 30, pp. 14-16.)

Here, Jon Vessey testified that the replacements were permanent, yet no evidence of a mutual understanding between the replacements and Vessey was adduced. No evidence was presented showing that those replacement employees had been hired as permanent employees. The "permanent" status of the replacements clearly existed in the mind of Jon Vessey, but that, standing alone, is an insufficient showing to defeat the reinstatement rights of economic strikers. (Associated Grocers, supra, 253 NLRB 31, 32.)

[22/]Chairman Davidian, in his dissent, argues that Vessey met its burden of proof by merely stating that the replacements were hired as permanent'employees. However, we note that Vessey failed to present any evidence showing that the replacements had an understanding that they were permanent. Without such evidence, Vessey did not meet its initial burden and, consequently, there was no need by the General Counsel to present any rebuttal evidence.

The testimony of George Stergios, a supervisor for Maggio, presents a useful comparison. Stergios stated that Maggio replacement employees specifically sought confirmation of the permanent nature of their employment. No such evidence was adduced by Vessey. Therefore, the Board finds it unnecessary to consider, as did the ALJ, whether some of Vessey's employees are seasonal or year-round, and to consequently determine whether a different reinstatement analysis may pertain to a Vessey employee depending upon the seasonal nature of his or her duties.

Having found that Vessey did not establish "legitimate and substantial business justifications" for its failure to immediately reinstate returning economic strikers, the Board orders that all such strikers be offered immediate reinstatement and that they be compensated for all economic losses resulting from Vessey's violations of the Act.

Conclusion

Based on the totality of the circumstances, we conclude that Respondents, separately and collectively, engaged in lawful hard bargaining, and we therefore dismiss the complaint as it relates to the overall bargaining conduct of each Respondent.

With regard to the termination of lettuce operations in California, we find that Maggio and Vessey offered to bargain over the decisions to close their California lettuce operations and the effects of those decisions on the bargaining units. As to Martori, we conclude that there is insufficient evidence to establish that Martori failed to bargain over the effects of its decision to close its California lettuce operations. We therefore

dismiss the complaint as it relates to Respondents' termination of their California lettuce operations.

Regarding the reinstatement of the returning strikers, we find that Maggio and Vessey violated sections 1153(c) and (a) by failing to treat the returning strikers' offers to return to work in a nondiscriminatory fashion. Concerning its striking tractor drivers and irrigators, we find that Maggio did not violate the rights of those returning strikers under the Act, and we dismiss that portion of the complaint as well.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to reinstate striking workers who offer, or who have offered, to return to work because of their strike activity or union activity.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those 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) Offer to all of its employees who went on strike in January of 1979 and thereafter made unconditional offers to return to work at various times in 1980, as listed in Appendix A

to the Third Amended Complaint herein (with the exception of lettuce harvesters), full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them after the receipt of their unconditional offers to return to work, reimbursement plus interest to be made in accordance with the 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.

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

(c) 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.

(d) 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 period from December 1, 1979, until December 1, 1980.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and placets) 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.

(f) 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 places(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.

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

reports at the Regional Director's request, until full compliance is achieved.

Dated: October **23,** 1987

JOHN P. MCCARTHY, Member[23/]

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[23/]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.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged that we 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 refusing to rehire strikers. 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 farm workers 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 fail or refuse to hire or reinstate, or discriminate against any employee because he or she exercises any of these rights, including the right to strike.

WE WILL offer reinstatement to all strikers who unconditionally offered to return to work with us into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights and privileges, and we will reimburse each of them for all pay and other money plus interest they lost because we refused to reinstate them or rehire them.

Dated: VESSEY & COMPANY, 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 (519) 353-2130.

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

DO MOT REMOVE OR MUTILATE

ORDER

It is hereby ordered that the complaint, insofar as it relates to Respondent Martori Brothers Distributors be, and it hereby is, dismissed in its entirety.

Dated: October 23, 1987

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondent Joe Maggio, Inc., (also known as Maggio, Inc., dba Joe Maggio) its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to reinstate striking workers who offer, or who have offered, to return to work because of their strike activity or union activity.

(b) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those 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) Offer to all of its employees who went on strike in January of 1979 and thereafter made unconditional offers to return to work at various time in 1980, as listed in Appendix A to the Third Amended Complaint herein (with the exception of lettuce harvesters), full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire them after the receipt of their unconditional offers to return to work, reimbursement plus interest to be made in accordance with the 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.

(b) Preserve and, upon request, make available to this Board or 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 amounts of makewhole and interest due under the terms of this Order.

(c) 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.

(d) 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 period from January 1, 1980, until January 1, 1981.

(e) 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.

(f) 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.

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

Dated: October 23, 1987

JOHN P. MCCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint that alleged that we 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 refusing to rehire strikers. 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 farm workers 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 fail or refuse to hire or reinstate, or discriminate against any employee because he or she exercises any of these rights, including the right to strike.

WE WILL offer reinstatement to all strikers who unconditionally offered to return to work with us into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights and privileges, and we will reimburse each of them for all pay and other money plus interest they lost because we refused to reinstate them or rehire them.

Dated: JOE MAGGIO, 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

CHAIRMAN DAVTDIAN, Concurring in Part and Dissenting in Part:

I depart from the majority opinion only insofar as it concerns Respondent Vessey & Company, Inc. (Vessey). I would find that counsel for General Counsel failed to satisfy the requisite statutory burden of proving by a preponderance of the evidence that Vessey's failure or refusal to immediately reinstate returning strikers constituted a violation of the Agricultural Labor Relations Act (Act).

Vessey contends that it did not reinstate tractor, irrigation or sprinkler employees upon their offer to return because there were no vacancies for them, the positions which they had held prior to the strike having been filled by replacements. Vessey did accord the former strikers preferential recall to any openings that would arise upon ,the departure of replacements, a course consistent with the reinstatement rights of returning economic strikers for whom permanent replacements have been hired. The only questions therefore are whether the strike was

an economic one and whether the replacements had indeed been hired as permanent employees. The first question was answered by the Court of Appeals in Carl Joseph Maggio Inc., et al. v. ALRB (1984) 154 Cal.App.3d 40, reversing an earlier finding by the Board that the strike involving Vessey, as well as certain other agricultural employers, was an unfair labor practice strike. (Admiral Packing Co., et al. (1981) 7 ALRB No. 43.) The court determined that the strike was economic throughout its duration. As to the next question, concerning the status of the replacements, it is well settled that an employer must establish that there was an understanding between itself and the replacements, prior to the strikers' offer to return to work, that the replacement's positions were permanent. (See, e.g., Hansen Brothers Enterprises (1986) 279 NLRB No. 98 [122 LRRM 1057]; Associated Grocers (1980) 253 NLRB 31 [105 LRRM 1633].)

The record reveals that Jon Vessey testified that the replacements were hired as permanent employees.[1/] No further evidence was offered by Vessey and no rebuttal evidence was presented by any other party. Had counsel for any party presented evidence which either further supported or contradicted Jon Vessey's testimony, then I would be better able to evaluate the facts in determining the permanent or temporary status of the

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[1/]The pertinent testimony on that question is as follows:

> Q. (By Respondents' counsel) And did you have any understanding with those workers when you hired them as to whether or not they were permanent or temporary employees?
>
> A. They were permanent.
> (R.T. Vol. XV, p. 169.)

replacements. After reading Jon Vessey's testimony, however, and without any other evidence, I would find that Vessey met its burden of establishing that the replacements were hired as permanent employees. By hiring permanent replacements, Vessey established "legitimate and substantial business justifications" for not immediately reinstating the returning economic strikers. (See National Labor Relations Board v. Fleetwood Trailers Company, (1967) 389 U.S. 375 [66 LRRM 2737]; National Labor Relations Board v. Great Dane Trailers (1967) 388 U.S. 26 [65 LRRM 2465].)

Accordingly, I would not find that Vessey failed or refused to reinstate returning economic strikers in violation of Labor Code sections 1153(c) and (a) of the Act. Therefore, I would dismiss the complaint in its entirety as to Respondent Vessey.

Dated: October 23, 1987

BEN DAVIDIAN, Chairman

MEMBER HENNING, Dissenting:

I would find that Vessey & Company, Inc. (Vessey), Martori Brothers Distributing (Martori) and Joe Maggio, Inc. (Maggio) (collectively, Respondents) violated sections 1153(e) and (a) of the Agricultural Labor Relations Act (ALRA or Act) by failing to negotiate in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union) from May 20, 1980. I would find that their conduct preceding May 20, 1980, has been the subject of previous decisions of this Board. Those decisions held that up until November 20, 1979, Martori, Vessey, and Maggio were at a bona fide impasse in bargaining, that Respondents subsequently broke the impasse and removed the suspension to the duty to bargain, and that Respondents have not explained why they delayed for over five months in submitting a complete counter-proposal to the UFWs December 18, 1979 offer, an offer summarily rejected by those Respondents.

In Martori Brothers (1985) 11 ALRB No. 26, the

Agricultural Labor Relations Board (ALRB or Board) made the following determination:

> In Martori Brothers (1982) 8 ALRB No. 23, we found that the totality of respondent's conduct including its November 20, 1979, letter to the United Farm Workers of America, AFL-CIO, regarding its desire to resume negotiations, its summary rejection of the Union's December 18, 1979 offer, and its unexplained delay in submitting a counterproposal, established that Respondent was engaged in bad faith bargaining from November 20, 1979, until May 1980. The Board concluded that Respondent violated section 1153(e) and (a) of the Act by engaging in surface bargaining during that period and by previously unilaterally increasing wages when no bona fide impasse existed. (Id., at p. 2-3, fn. omitted.)

Similarly, in Joe Maggio, Inc., et al. (1982) 8 ALRB No. 72, the Board determined that Maggie's and Vessey's November 1979 offer of a lettuce harvesting wage increase and subsequent implementation was in violation of Labor Code sections 1153(e) and (a)[1/] of the Act. In Joe Maggio, Inc., et al. (1985) 11 ALRB No. 35, the Board found that Maggio's interim wage increase in December 1979, was a unilateral change in violation of 1153(e). However, the Board did not find that unilateral change in and of itself was sufficient to find surface bargaining. These cases, to the extent that they are precedential, support the conclusions of the Administrative Law Judge (ALJ) here; i.e., that the November 1979 through May 1980 bargaining conduct by Respondents Martori, Vessey, and Maggio was not indicative of good faith bargaining.

Section 1155.2 of the ALRA defines good faith bargaining

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

as follows:

> ... the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and other terms and conditions of employment, or the confer in good faith with respect to wages, hours, and negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or to require the making of a concession.[2/]

At the heart of this obligation--placed upon both labor and management by the ALRA--is the concept of "good faith."

> If the obligation of the act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible. (Atlas Mills (1937) 3 NLRB 1021 [1 LRRM 60]; see also NLRB v. Boss Mfg. Co. (7th Cir. 1941) 118 F.2d 187 [8 LRRM 729].)

This area of labor law is not an easy one. As one commentator stated, the analysis of "the duty to bargain in good faith" has posed the greatest difficulty for the NLRB. (Morris, The Developing Labor Law (2nd Ed. 1983) ch. 13, pp. 553, et seq.)

While no objective standards can readily be applied to a determination of a party's subjective good faith, there has been no lack of trying. (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829].) In NLRB v. American National Insurance (1952) 343 U.S. 395, [72 S.Ct. 824] the U.S. Supreme Court defined good faith bargaining as an obligation on the

[2/]This language is drawn from the NLRA, section 8(d). (29 U.S.C, § 158(d)).

employer:

> ... to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counterproposals; and to make every reasonable effort to reach an agreement....[However, the NLRA] does not encourage a party to engage in fruitless marathon discussions at the expense of a frank statement in support of his position. And it is equally clear that the [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. (Id._, at 72 S.Ct. 828, 829, quoting Houde Engineering, Inc. (1934) 1 NLRB No. 35.)

An additional aspect of the duty to bargain in good faith is the degree of sincerity reflected in the proposals offered, the claims by either bargainer at the bargaining table must be honest claims. (NLRB v. Truitt Mfg., Co. (1956) 351 U.S. 149 [70 S.Ct. 753]; NLRB v. Wooster Div. of Borq-Warner Corp. (1958) 356 U.S. 342 [78 S.Ct. 718] .)

The proof of bad faith in negotiations must generally be inferred from external conduct, such as stalling (Akron Novelty Mfg. Co. (1976) 224 NLRB 998 [93 LRRM 1106]); sending negotiators without authority (U.S. Gypsum Co., Wal-Lite Div. (1972) 200 NLRB 1098 [82 LRRM 1064]); shifting positions just as agreement is emminent (American Seating Co. v. NLRB (5th Cir. 1970) 424 F.2d 106 [73 LRRM 2966]); quibbling over standard clauses (Reed & Prince Mfg., Co. (1951) 96 NLRB 850, 855 [28 LRRM 1608] enforced sub. nom. (1st. Cir. 1953) 205 F.2d 131 [32 LRRM 2225]); refusing to provide information (Kohler Co. (1960) 128 NLRB 1062, 1073-1074 [46 LRRM 1389]; Diamond Const. Co., Inc. (1967) 163 NLRB 161 [64 LRRM 1333]; and rigidly adhering to predictably unacceptable proposals thereby manifesting a

predilection not to reach agreement (Tomco Communications, Inc. (1975) 220 NLRB 636 [90 LRRM 1321] enforcement den. (9th Cir. 1978) 567 F.2d 871 [97 LRRM 2660]).

We have previously utilized many of the above principles to assess allegations of surface bargaining. For example, in 0. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, we set forth in detail what factors may justify a finding of surface bargaining. Noting that the employer postponed meetings, changed negotiators, "failed to present adequate contract proposals," and made predictably unacceptable proposals, we concluded that the employer did not manifest a sincere effort to resolve its differences if possible.

> While the duty to bargain does not require agreement to any specific proposal, or the making of concessions,... 'the employer is obligated to make some movement in some direction to compose his differences with the union.' (Id., at p. 10 quoting NLRB v. Reed & Prince, Mfg., supra, 205 F.2d at 135 [28 LRRM 1608].) (See also, Masali Eto, et al. (1980) 6 ALRB No. 20 at p. 16. Cf. Kaplan's Fruit & Produce Co. (1980) 6 ALRB No. 36; Pacific Mushroom Farm, a division of Campbell Soup Company (1981) 7 ALRB No. 28.)

The analysis of this case effectively begins in May of 1980. As to Respondents Vessey and Martori, their conduct from November 1979 until May 1980, is indicative of conduct unlawful under 1153(e). Maggio too, delayed meaningful negotiations during this period. In May of 1980, Respondents and the Union engaged in the first meaningful negotiating session since February 1979. At this time they began a discussion of the pending substantive proposals of both parties. The wage proposal offered by the Respondents in May 1980 (the "flat crop differential") effectively

reduced the enormous gap between the parties' pending wage proposals. The ALJ specifically found that the flat crop proposal was made semi-seriously and in an off-hand, unsupported fashion. Despite repeated attempts by the Union to receive some documentation for the proposed difference between the Imperial Valley and the Salinas Valley wage rates, Respondents were unwilling or unable to document the justification for their differential. The ALJ said that this conduct by the parties was a continuation of their 1979 wage proposal, when they had been purported to be bound by the 7 percent presidential guidelines, and he therefore found that the wage proposal was insufficient. To the extent that the ALJ found the wage proposal insufficient, relying on Admiral Packing Company, et al. (1982) 7 ALRB No. 43, he (and the Board) have been effectively overruled. (See, Carl Joseph Maggio, Inc., et al. v. Agricultural Labor Relations Bd. (1984) 154 Cal.App.3d 40 (Maggio).) As such, the wage proposal in and of itself, cannot be said to be indicative of bad faith. At the same time, it cannot be said that wages were such an overwhelming obstacle to good faith bargaining that discussions on any other proposal was effectively rendered impossible, as the Maggio court found the situation existed in February of 1979. The flat-crop differential, a differential on the Sun Harvest wage rate, so narrowed the gap that had existed since February 1979 (and was bridged in November of 1979) that the Maggio court's analysis requires that we consider the other substantive articles of the parties' proposals and bargaining conduct.

Fundamentally, the parties bargained over the terms of

the Sun Harvest "master" contract. The Respondents attempted to bargain for a better contract than Sun Harvest had been able to obtain from the UFW, and the UFW attempted to bargain in such a manner as to protect their "master agreement." In and of itself, such conduct cannot be said to be bad faith by either side. (See e.g., J. R. Norton Company (1982) 8 ALRB No. 89, p. 27.)

We are left then with a single fact. From May 1980 until October 1980 the parties were unable to reach agreement even though Respondents were prepared in large measure to accept significant portions of the Sun Harvest agreement. The reason the parties were unable to reach agreement over this period was because their negotiator, as paxt of his negotiating strategy, chose not to tell the UFW of the position of his clients. In October 1980, when he determined that the time was right, significant progress was made. The ALJ characterized this progress as too-little, too-late, and actually a further indication of surface bargaining.

Also, it is important to note some additional facts. There is no evidence of a violent strike, which influenced the Maggio court decision. There was not a mass of publicity designed to undermine the Union, there was no showing of the Union's unwillingness to compromise or negotiate in good faith, the Union here did not cancel meetings, did not reject mediation, did not call a premature strike and offer small concessions, nor did the Respondents. Nor was there serious strike misconduct which would have justified an employer's refusal to bargain with the Union. What is present on this record is a significant movement in

November 1979 on wages by the Respondents coupled by a significant movement by the Union on major contract terms and a proposed settlement contract in April and May 1980. Then, there was significant movement by the Respondents again on the language terms followed quickly by significant movement by the Union. Finally in October 1980, again, significant movement by the parties resulting in tenative agreement on many of the issues. What the record demonstrates is substantial gaps in time between Respondent's responses and proposals, and little or no justification by the Respondent for their failure to move more quickly. In K-Mart Corp. v. NLRB (9th Cir. 1980) 626 F.2d 704 [105 LRRM 2431], the court upheld the National Labor Relations Board's (NLRB) finding that, even though the employer attended 14 negotiating sessions, and the employer and union reached agreement on many issues, the employer was merely attempting to maintain an appearance of bargaining. The significant factor there was a 6-month delay by the employer in responding to the union's proposals regarding additional sites by the employer. (See also, Shaw College at Detroit Shaw, Inc. (1977) 232 NLRB No. 191 [96 LRRM 1473] enforced sub nom. (6th Cir. 1980) 623 F.2d 488 [105 LRRM 2509] [where little Ox no effort was made by the employer to respond to the union's wage demands for 8 months].)

Other cases by the NLRB and the courts would also support finding in this case that Respondents engaged in bad faith bargaining. For example, in Queen Mary Restaurant, Inc. v. NLRB (9th Cir. 1977) 560 F.2d 403 [96 LRRM 2456], the employer's animus, plus significant other violations of the act, coupled with

the dilatory tactics, were sufficient to support a finding of bad faith bargaining. Here, while we start with the law of the case that these Respondents were not bargaining in bad faith in February 1979, we are also faced with identical conduct by these Respondent's which demonstrates bad faith. Subsequent to the interim offers of November 197i4, there was a five-month gap before new employer wage language contract proposals were offered. Subsequent to that there was another five-month gap by the Employers without any justification for these long delays. (Great Lakes Coal Co. (1984) 268 NLRB 167 [116 LRRM 1310] [where eight-month delay was indicia of bad faith bargaining].) In Carsen Porsche Audi, Inc. (1983) 266 NLRB No. 33 [112 LRRM 1319], there was a similar period of dilatory or long gaps in the bargaining conduct. However, there, the NLRB found that even though the employer was rigid and inflexible in his bargaining positions, subsequent conduct by the employer indicated an intention to reach agreement. The subsequent conduct followed the settlement offers on pending unfair labor practices and resulted in a substantial thawing of the bargaining climate. There is no such justification in the present record. The only motivation for the bargaining of the Employers in this case was their intention of terminating the most labor intensive portions of their business, the lettuce harvesting work.

I would therefore find that Vessey, Martori and Maggio engaged in conduct in violation of sections 1153(e) and (a) of the Act from May 1980 to December 1980, by their failure to promptly

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and expeditiously respond to Union proposals and to treat their bargaining obligations as seriously as they treat other significant business responsibilities.

Dated: October 23, 1987

PATRICK W. HENNING, Member

CASE SUMMARY

Vessey & Company, Inc., et al. (UFW)

13 ALRB No. 17
Case Nos. 79-CE-98-EC, et al.

ALJ DECISION

This matter involves allegations of bad faith bargaining by three employers, Vessey & Co., Inc., Martori Brothers Distributors, and Joe Maggio, Inc. from November 1979 until December 1980. In January 1980 and on dates thereafter, striking employees of Vessey and Maggio sought to return to work and were denied reemployment. Also in 1980, the three employers closed their lettuce operations, Martori going completely out of business in California.

The ALJ found that the three employers had bargained in bad faith, continuing their unlawful strategy exposed in Admiral Packing Co., et al. (1981) 7 ALRB No. 43. He found that the employers unilaterally implemented wage offers, did not timely respond to the contract proposals of the UFW, made semi-serious or offhand proposals and meager wage offers. He also concluded that the employers did not violate the Act by terminating their operations as Vessey and Maggio offered timely notice of the decision and offered to bargain over both the decision and its effects on the bargaining unit. As Martori went completely out of business in California, the ALJ held that notwithstanding Martori's anti-union motivation behind its decision, it had the absolute right to terminate its business, for any reason.

The ALJ also held that Vessey and Maggio unlawfully refused to reinstate returning unfair labor practice strikers following their unconditional offer to return to work. Alternatively, he found that Maggio had conspired to deprive returning economic strikers of any reemployment opportunities and that Vessey failed to prove that it had a mutual understanding with the replacement employees that they were permanent replacements as that term has been defined for agriculture by the Board. He therefore found the returning economic strikers were entitled to oust the temporary replacement workers .

BOARD DECISION

The Board found that the ALJ's analysis had been effectively reversed by Maggio v. ALRB (1984) 154 Cal.3d 40. They rejected the ALJ's analysis as inexorably intertwined with the annulled decision in Admiral Packing, supra, 7 ALRB No. 43. They looked at all the evidence, away from the table as well as bargaining conduct and concluded that the Employers had engaged in lawful hard bargaining.

The Board otherwise adopted the decision of the ALJ with modifications. They assumed arguendo, that they had jurisdiction over Martori's non-California operations and found no violation of the Act in his partial closure of operations. The ALJ's alternative analysis of Vessey's and Maggie's returning economic strikers was also adopted.

CONCURRENCE/DISSENT

Chairman Davidian concurred in the majority opinion in all but one respect. He would find, contrary to his colleagues in the majority, that Respondent Vessey established that strike replacement employees were offered permanent employment status and, therefore, Vessey's failure or refusal to immediately reinstate strikers upon their offer to resume work did not constitute a violation of the Act.

DISSENT

Member Henning dissented, arguing that long delays in the bargaining process, solely attributable to the Employers' bargaining strategy, mandated a finding of unlawful bargaining tactics. He noted the fact that the impasse referred to in Maqgio v. ALRB, supra, 154 Cal.3d 40 had been broken by the Respondents and the monumental gap in the parties wage proposals had been narrowed by the Employers December 1979 wage offers. He would therefore distinguish Maggio v. ALRB, supra, and find the employers violated the Act by bargaining in bad faith with the UFW.

* * *

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: VESSEY & COMPANY, INC., MARTORI BROTHERS DISTRIBUTORS, JOE MAGGIO, INC., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	}	Case Nos. 79-CE-98-EC 79-CE-145-EC 80-CE-4-1-EC 80-CE-4-EC 80-CE-14-EC 80-CE-lll-EC 80-CE-112-EC 80-CE-113-EC 80-CE-117-EC 80-CE-207-EC 80-CE-208-EC 80-CE-74-EC 80-CE-74-1-EC 80-CE-252-EC 80-CE-253-EC

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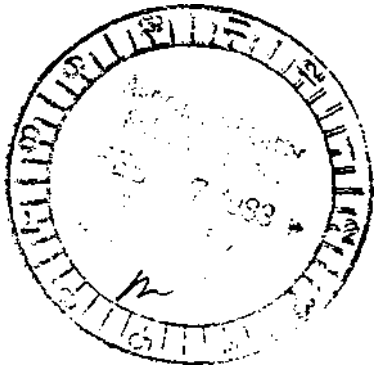

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Judge:

This case was heard by me at various dates throughout 1981 and 1982. The Complaint is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW").[1/] The Regional Director and General Counsel filed various amendments to the Complaint, the last one being the Fourth Amended Complaint on April 24, 1981.

All parties were given a full opportunity to present evidence[2/] and participate in the proceedings; each party filed briefs after the close of the hearing.

Upon the entire record,[3/] including my observation of the demeanor of the witnesses, and after careful consideration of the arguments and briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. Jurisdiction

All three Respondents were engaged in agriculture in the State of California within the meaning of section 1140.4(c) of the Agricultural Labor Relations Act (hereafter the "Act"), as was admitted by Respondents in their Answer. Accordingly, I so find.

Respondents also admitted in their Answer that the UFW was a labor organization within the meaning of section 1140.4(f) of the Act. Accordingly, I so find.

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1. The original Complaint was actually based on UFW charges against four separate respondents, the respondents herein and Colace Brothers, Inc. All four of these cases were consolidated for trial by the Regional Director on the theory of a common bargaining history. At the pre-hearing conference on December 15, 1980, a separate Motion to Sever was filed by each respondent. On December 30, 1980, I granted respondent Colace's motion, and it was severed from this case. The motions were denied as to the other respondents.

2. General Counsel's Motion to Correct Reporter's Transcript (filed on May 17, 1982), to which there was no opposition, is hereby granted. I have corrected the transcript by interlineation where appropriate.

3. Hereafter, General Counsel's exhibits will be identified as "G.C. Ex. __"; Respondents' exhibits as "Resps[1] __"; and joint exhibits as "Jt. Ex. __". References to the Reporter's Transcript will be noted as "TR. __, p. __".

II. The Alleged Unfair Labor Practices

The Fourth Amended Complaint basically raises four main areas of alleged violations. First, it charges all three Respondents, from December 7, 1979, to the present, with bad faith bargaining in violation of sections 1153(e), (c), and (a) of the Act. Second, it is alleged that all three Respondents have partially or totally shut down operations in the Imperial Valley in order to avoid their statutory obligation to bargain in good faith with the UFW and in order to discriminate against their seniority lettuce workers for their protected activities; and that they have refused to bargain in good faith with the UFW regarding either the decision to shut down or the effects of the closure on bargaining unit employees in violation of sections 1153(e), (c) and (a) of the Act. Th ird, Respondent Vessey and Company, Inc. (hereafter "Vessey & Co." or "Vessey") is accused of violating the same sections by allegedly subcontracting and/or transferring bargaining unit work to its alter-ego and/or joint employer, Cortaro Farms, in order to avoid bargaining and to discriminate against its seniority lettuce workers for their protected activity. Finally, Respondents Vessey & Co. and Joe Maggio, Inc. (hereafter "Maggio Inc." or "Maggio") are said to have failed and refused to rehire unfair labor practice strikers or in the alternative, economic strikers, who unconditionally offered to return to work, also in violation of sections 1153(e), (c) and (a) of the Act.

Respondents denied they violated the Act in any way and raised several affirmative defenses.

III. Evidentiary Rulings

A. Admissibility of Negotiation Notes

Respondents seek to introduce into evidence copies of the negotiations notes of Tom Nassif, their contract negotiator, (G.C. Exhs. 10, 12(a)-12(e), 18, 19, 20, 25, 26, 27, 28, 30, 70, 71, 74, 75, 81, 82, and 83. General Counsel originally objected to their admission on the grounds of hearsay. I did not admit the documents preliminarily but gave the parties permission to brief the question, reserving final judgment until later.

The documents, along with General Counsel Exhibits 117, 118, 119, 120, 121, 122, 123, 124, and 125 are hereby admitted.[4/]

4. The General Counsel took the position that should I allow Nassif's negotiations notes into evidence, she would offer copies of Smith's negotiations notes to be admitted on the same basis. Said documents are identified and admitted as follows: General Counsel Exhibit 117, Smith notes from Maggio 4/14/80 negotiations; General Counsel Exhibit 118, Smith notes from Maggio, 5/21/80 negotiations; General Counsel Exhibit 119, Smith notes from

(Footnote continued——)

Bargaining session notes are admissible. In N.L.R.B. v. Tex Tan, Inc. (5th Cir. 1963) 318 F.2d 472, the Court held:

> ... [A]s to most of these written statements, it is not hearsay at all. In passing upon what transpires in the process of collective bargaining negotiations, physical (non-verbal) actions as such are, of course, occasionally pertinent. But primarily negotiations are established by proof of the words that were spoken by the protagonists. Proof of the word spoken is made, not to establish the truth of the things stated, but the fact that the words as such were spoken. . . . Such verbal or operative facts are in no sense hearsay. (318 F.2d at 483-484. Accord, N.L.R.B. v. J.P. Stevens & Co., Inc. (5th Cir. 1976) 538 F.2d 1152, 1162; Allis-Chalmers Mfg. Co. (1969) 179 NLRB No. 1.)

B. Admissibility of Memos to File

Respondents offered a number of Nassif's "memo(s) to file" which were based upon his recordation of the substance of various conversations and meetings with his clients, the officers and chief management officials of the Respondents herein. Said exhibits were originally admitted not for the truth of the matter asserted in the memo but for the limited purpose of showing that memos were, in fact, made. Respondents argue that the memos should have been admitted for all purposes as business records. I again reserved final judgment until the matter could be more fully briefed.

I find that these records qualify for the business records exception to the hearsay rule. Respondent's Exhbits 5, 8, 9, 11, 13, 14, 15, 16, 17, 21, 22, 23, 24, 29, 72, 73, 76, 77, 78, 84, and 85 are hereby admitted. Handwritten memos of telephone correspondence and "diaries" of daily business events have been held to be admissible as corroborating evidence under the business records exception as a "business log". Franco Western Oil Co. v. Fariss (1968) 259 Cal.App.2d 325, 333. See also, Tracy v. GoIdberg (3rd Cir. 1961) 289 F.2d 467. My initial fears that the logs were too self-serving were perhaps unfounded. In Gallup v. Sparks-Mundo Engineering Co. (1954) 43 Cal.2d 1, the California Supreme Court, referring to a business transcription into a log book held:

(Footnote 4 continued——)

Vessey 5/21/80 negotiations; General Counsel Exhibit 120, Smith notes from Martori 5/21/80 negotiations; General Counsel Exhibit 121, Smith notes from Vessey 10/7/80 negotiations; General Counsel Exhibit 122, Smith notes from Martori 10/7/80 negotiations; General Counsel Exhibit 123, Smith notes from Maggio 10/8/80 negotiations; General Counsel Exhibit 124, Smith notes from Vessey 10/27/80 negotiations and General Counsel Exhibit 125, Smith notes from Maggio 11/4/80 session.

> The fact that the notation was self-serving, in a sense, does not make it inadmissible. Most business records are necessarily so. That the record is self-serving does not make it inadmissible . . . This fact was one for the jury to consider in weighing its effect. (43 Cal.2d at 7-8.)

C. General Counsel Exhibit 5(a)

This exhibit was a UFW proposal of February 7, 1979, which the General Counsel offered in order to better clarify the later Union offer of February 28, 1979. Counsel for the General Counsel represented that she wanted to move it into evidence but, as a favor to Respondents, would not do so until counsel for Respondents had the opportunity to verify that it was an accurate copy of the original proposal. (TR. 14, p. 58.) The record does not reflect that such verification ever took place so it is not entirely clear that the document was ever placed into evidence. In that General Counsel intended the document to be admitted and since no objection to the document's admissibility was ever lodged by Respondents, the document is hereby formally admitted at this time. I believe this reflects the intent of the parties judging from other portions of the transcript and the post-hearing Briefs.

D. Ann Smith's Rebuttal Testimony

Respondent Vessey objected to a portion of *UFVI* negotiator Ann Smith's rebuttal testimony concerning whether she received any data from Respondents concerning their reasons for wanting a flat crop differential, infra, and moved to strike on the grounds that such testimony was beyond the scope of the defense, as Jon Vessey never testified to it. (TR. 21, pp. 21-22.) I reserved judgment on the Motion.

Respondent's reason for its objection was its fear that I would find Respondent breached a duty to provide information, an allegation not mentioned in the Fourth Amended Complaint. (Respondents' post-hearing Reply Brief, pp. 57-58.) However, *I* have concluded, infra, that no such separate violation will be found (except that evidence of any such failure to provide data may be relevant to the surface bargaining allegation as it may put into question Respondents' sincerity in proposing *a* wage differetial in the first place). In that the grounds for Respondent's Motion to Strike no longer exist, I shall overrule the Motion. But in addition, my reading of the record suggests that there was such evidence raised in defense and that it was Tom Nassif (not Jon Vessey) who testified that he thought Vessey provided Smith with the results of the wage surveys on both flat crops and vegetables at the October 7, 1980 meeting, infra.

IV. The Business Operations

A. Maggio

Maggio, Inc. is a family-owned business operating farms in the Holtville (hereafter referred to in terms of the "Imperial Valley" operation) and King City (including Salinas and Gonzales) areas. There is also, since 1972 or 1973, an Arizona operation near Chandler, Arizona. The present enterprise is the product of the merger of three separate companies, Anthony Farms, Carl Joseph Maggio, Inc. and Joe Maggio, Inc. All operations continue to use their former names in their day-to-day business dealings. Carl Joseph Maggio is the President of Maggio, Inc. and is responsible for its California operation while his brother, Anthony, is in charge of the Arizona organization. George Stergios is the Secretary/Treasurer of the company and is primarily involved, since 1974, in the growing and harvesting of all crops in the Imperial Valley and the hiring of foremen, who in turn employ the workers. He also oversees, generally, the King City operation, but his role there is much more limited; he also has limited responsibilities in Chandler, Arizona. Stergios reports directly to Carl Maggio.

Carl Maggio testified about an important difference between the Imperial Valley and King City operations. At the latter, a grower was able to obtain 2-3 crops of lettuce on one field in a 12-month period; there were no flat crops,5/ and no need for them. In contrast, because of a much shorter growing season owing to the hot weather, only one major vegetable crop — lettuce — could be grown in the Imperial Valley. As a result, in order to stay profitable, Imperial Valley growers must grow flat crops.

1. The Crops

a) Lettuce

The lettuce harvest season in the Imperial Valley was mid-to late December through mid- to late March; lettuce was planted September 20 through the first week in November. Maggio also grew lettuce in King City and Chandler. The harvest in King City occurred around the 25th of April or the first part of May and finished close to the 20th of June; the second harvest usually began around the 25th of August, lasting until around the 10th of October. And finally, there were two harvests in Chandler, November-middle of December; April 1-end of April or first of May.

b) Carrots

Maggio started harvesting bunch carrots in the Imperial Valley approximately the first of December and ended around the

5. Flat crops are non-vegetable or non-row crops that are usually machine harvested, such as wheat, barley, cotton, and milo.

middle of May.6/ In King City the bunch carrot harvest season lasted approximately from the middle of May through the 1st of December. Thus, it could be said that Maggio harvested bunch carrots all-year round.

c) Broccoli

Broccoli in the Imperial Valley was harvested beginning in mid-December through mid-February. There was no broccoli in King City.

2. The 1979-1980 Imperial Valley Crops

Maggio testified that in September of 1979 and the spring of 1980 in the Imperial Valley he planted and harvested carrots, broccoli, alfalfa, wheat,7/ and what he called a small quantity of fava beans. He did not grow or harvest lettuce and has not done so since.

B. Vessey

Vessey & Co. was incorporated in 1948, and Jon Vessey is, and has been for some time, its General Manager. Vessey employs tractor drivers, irrigators, weeders and thinners, and sprinklers. Prior to the 1980-81 winter lettuce season, Vessey also employed lettuce harvesters for its Imperial Valley lettuce which it had grown and harvested for a number of years; it no longer does so. Before it ceased its lettuce, Vessey also harvested for other companies in Blythe and in Arizona; it no longer does this either.

Currently, the Company is commercially growing carrots and broccoli, (Stipulation, TR. 26, p. 48), alfalfa, cotton, wheat, sugar beets, sudan and dehydrated onions.

C. Martori

Martori Brothers is a partnership based in Arizona and, since around 1969, has grown and harvested lettuce in California. Steven Martori is a partner, and became the General Manager in 1979. Sometime prior to that he was the Field Supervisor and had responsibility for the California operation, most of which was located in the Imperial Valley.

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6. Cello carrots – those without tops that were sold in cellophane bags – were harvested approximately the first of January until the first of June. Those carrots were usually harvested either by a machine or a custom harvester.

7. Roughly, there were 2,000 acres of carrots, 700 acres of broccoli, 1,300-1,500 acres of alfalfa, and 1,100 acres of wheat.

Lettuce was the primary crop in 1977, 1978 and 1979,8/ and it was grown and harvested on approximately 400-500 acres. It was the only Imperial Valley crop in the 1979-1980 period. Since 1969, Steven Martori was involved in California lettuce nearly every year 9/ until he discontinued the crop in 1980.10/

Martori also grew and harvested lettuce in Arizona. Within the last 10 years, the partnership has had lettuce every spring and fall, approximately (at least within the last 3 years) 350-400 acres in the spring, and 400-600 acres in the fall.

V. THE REFUSALS TO BARGAIN A.

Facts

1. Prior Labor Agreements; Industry-wide Bargaining a)

Maggio

Originally, both Joe Maggio, Inc. in Holtville and Carl Joseph Maggio in King City had, beginning in 1973, two labor agreements with the Teamsters Union 11/ (G.C. Exhs. 54 and 55), the duration of which had extended up until the time the UFW became the new bargaining representative. As of May of 1977 both employer entities had separate contracts with the UFW (G.C. Ex. 3) which expired around the end of December 1978 and were extended until January 15, 1979.12/

8. There was a small quantity of other crops — 160 acres of milo, and some cantaloupe, for example, — but Steven Martori could not be certain as to the crops, amounts grown, or period of time grown.

9. Martori was not certain about 1973 and 1974. (Martori was also a custom harvester for other growers during the 1977-78 period.)

10. In the early years, 1969-72, Martori harvested using labor contractors; but in later years — 1976-79 — he used both labor contractors and his own harvesting crews. From 1976 through 1980 Martori employed directly in the lettuce harvest approximately 60 employees, some of whom also worked in the Arizona harvests; he also would hire, through a labor contractor, approximately 15 workers.

11. These contracts were based upon a "Master Agreement" which covered several growers in both the Imperial and Salinas Valleys. The basic terms of those agreements, including most wage rates, was the same for all.

12. Like the Teamsters contracts, these contracts were also based upon *a* "Master Agreement."

Commencing in November of 1978, when the "industry-wide" negotiating group was formed, infra, Tom Nassif was the negotiator for both entities, Joe Maggio, Inc. and Carl Joseph Maggio, Inc. Shortly thereafter, Nassif informed the UFW that the two operations should be referred to as Maggio, Inc., d/b/a Carl Joseph Maggio or Joe Maggio in their respective geographical areas.13/

b) Vessey

Like Maggio, Vessey and Company had also negotiated the same two contracts with the Teamsters Union, starting in 1973 (G.C. Exhs. 54 and 55). Thereafter, the UFW was certified as the representative of Vessey employees in January of 1977 and a contract was signed in April of 1977 to run through December of 1978, also later extended through January 15, 1979 (G.C. Ex. 2). It too was based upon a Master Agreement, the same one Maggio was a party to.

c) Martori

In 1970 and 1973 Martori signed contracts with the Teamsters Union, but an election in January of 1977 resulted in a victory for the UFW; and it was certified in January of 1978 as the collective bargaining representative of Martori's California employees. But unlike Maggio and Vessey, Martori has never had a contract with the UFW. Following the 1977 election, Martori and the UFW failed to reach a contract, and Martori, as mentioned, joined the industry bargaining group in November of 1978.

All UFW contracts signed under this Master Agreement were set to expire at the same time so that besides Respondents Vessey and Maggio, there were many other vegetable growers in both the Imperial and Salinas Valleys whose contracts had a termination date of November, 1978. These growers -- a total of approximately 26 -- entered into industry-wide bargaining to negotiate a new agreement. All three Respondents were members of this industry group, and all three were represented in the group bargaining by Tom Nassif. On February 28, 1979 the employer group declared that an impasse existed and broke off negotiations.14/

13. Ann Smith, the UFW negotiator testified that all wage proposals submitted to her by Maggio included the King City operation as well as the Imperial Valley one because all the proposals were intended to cover the company's entire operation which had been the understanding that she had at the outset of negotiations.

14. This conduct was found to be unlawful and in violation of the Act in Admiral Packing, et al. (1981) 7 ALRB No. 43.

2. February 28, 1979 - December 7, 1979 Bargaining [15]

Between February 28 and December 7, 1979 there was only one negotiating session between Respondents and the UFW, August B.16/ That meeting was fruitless as no bargaining proposals were offered by either side. Nassif testified that the idea for the meeting was his, as he wanted to get the bargaining started again by discussing only present proposals. And when it was discovered the UFW would not change its position on any issue, the meeting ended still, according to Nassif, at impasse.

3. The November 20, 1979 Letters

On November 20 Nassif wrote the negotiator for the UFW, Ann Smith, three letters, one on behalf of Maggio (G.C. Ex. 11), one on behalf of Vessey (G.C. Ex. 9) and the final one for Martori (G.C. Ex. 10). In effect, these letters broke the alleged existing "impasse."

a) Maggio — Nassif testified that he wrote the Maggio letter in order to advise the UFW that the parties had been at impasse since February, that Respondent had made an attempt to break the impasse in August by negotiating but to no avail, and that Maggio wanted to implement the wages that it had proposed on February 21, 1979,1_7_/ to commence with the start of the new season. Specifically, Nassif indicated in his communication that because the "impasse continues" and "the harvesting season is beginning soon" Maggio was considering implementing "some or all" of the rates proposed in its February offer, and Nassif offered to meet and discuss the matter with the UFW.18/

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15. The bargaining conduct of Respondents and the UFW from November, 1978 until the end of 1979 has been litigated in other cases and is not at issue here. This case concerns essentially the 1980 bargaining, though, of course, events in 1979 are relevant to an understanding of the present issues.

16. Nassif testified that there was also a meeting on October 5 but that this was purely for Carl Maggie's announcement of his decision to close down his lettuce operation, infra.

17. The February offer (G.C. Ex. 4) was the last employer offer made during the industry-wide negotiations prior to the "impasse."

18. Carl Maggio testified that his February proposal on wages had been implemented before the November 20 letter, but apparently, he had failed to so inform Nassif because Nassif testified he didn't realize this had occurred when he wrote the letter. The Board determined that some of these rates were implemented in the fall/winter of 1979 and that such conduct was a violation of sections 1153(e) and (a) of the Act. Joe Maggio, Inc., Vessey S Co., et al. (1982) 8 ALRB No. 72.

b) Vessey and Martori -- The Vessey and Martori November 20 letters were different from Maggie's in that they proposed a single change from their last offer of February, which was with reference to the lettuce harvesting piece rate for the upcoming season._19/ Specifically, in the Vessey letter, Nassif again referred to the "impasse" between the parties, but stated that in order to "maintain the Company's historical practice of paying the prevailing industry rate 20/ for lettuce harvesting" that it was offering to pay 75C per carton for the conventional ground pack based on a survey of both Union and non-Union lettuce harvesting companies.21/ Nassif also wrote that Vessey was considering a wrapped lettuce operation, in addition to the conventional ground pack; and he proposed rates for that job category, as well, which were the same as those set forth in the Sun Harvest contract.22/

And Nassif also proposed the 75C piece rate for Martori, pointing out that this company had also in the past "paid the industry rate for its lettuce harvesting operation. "23/ Nassif explained that Martori was considering a "quintetos" system (three cutters and two packers) in place of the conventional lettuce ground pack, but that he would like to discuss it with the Union before doing so.24/ Nassif also testified his letter was intended to

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19. Maggie's failure to make such a similar proposal was occasioned by his October 5 decision not to have any lettuce in the Imperial Valley in the 1979-80 season, infra.

20. This rate happened to be the exact same as that established in the newly negotiated Sun Harvest contract, infra.

21. Vessey unilaterally started paying this rate at the beginning of the 1979-80 harvest in December. Nassif testified that Vessey had raised wages in other classifications to the February offer level before he wrote the November 20 letter. Vessey's raising its wages was also deemed to be unlawful by the ALRB in Joe Maggio, Inc., Vessey & Co., et al., id.

22. Nassif had not proposed a wrap machine rate in February, 1979 because Vessey didn't have nor apparently was not contemplating such an operation then.

23. Nassif testified that one of the purposes of his letter was to inform the UFW of what he thought the prevailing rate was and to bargain about it. However, at some subsequent time, between December 15 - December 31, Martori unilaterally raised the wages of its lettuce harvesters, to the 75C per carton rate, for the 1979-80 season. This conduct was found to be violative of the Act by the Board in Martori Brothers (1982) 8 ALRB No. 23, rev. den. by Ct. App., Fourth Dist., September _, 1982.

24. Nassif testified that he did not know of any UFW lettuce contract that utilized this system, and he did not know for sure how Martori arrived at the proposed rate for it but thought he used a market survey. In any event, Martori did not go to this new rate system.

inform the UFW what he thought the prevailing rate was and to bargain about it.

A meeting to discuss these letters was thereafter scheduled for December 7, 1979.

4. The Sun Harvest Agreement

At the time these negotiations broke off in February of 1979, the two proposals on the table were the employer's offer of February 21, 1979 (G.C. Ex. 4) and the Union's proposal of February 28, 1979 (G.C. Ex. 5). During the summer, the UFW and the Sun Harvest Company were able to negotiate an agreement (Jt. Ex. 2), and many other companies (approximately 18), mainly from the Salinas area,25/ also signed agreements, similar in terms, including the same basic wage rates.

The terms of the Sun Harvest contract were very different from the Union's last proposal of February 28, 1979. Smith testified that the Sun Harvest wages were substantially lower, and the same was true of all other economic provisions, including cost of living, vacations, holidays, overtime, medical plan, pension, travel allowance, injury on the job, and reporting and standby; the Union had also been unable to get an apprenticeship fund. In addition, concessions were given on the hiring hall (a five-day probationary period for a new worker dispatched from the hall) and mechanization (arbitration in the event agreement could not be reached).

Ron Hull, General Manager of the Imperial Valley Vegetable Growers Association, did not disagree. He acknowledged that the Sun Harvest terms were better for the growers than what the Union was offering on February 28, 1979; and in fact, he did not recall any article, including wages, in which the Sun Harvest terms were worse from the growers' point of view.

On the other hand, the employers who accepted Sun Harvest accepted provisions that had not been a part of their February 21 offer at all, such as cost of living, full time union representative, hiring hall and mechanization, while at the same time upping their offer on wages, holidays and vacations. On union security, the employer group had wanted good standing to be determined only on the basis of the payment of dues and initiation fees but had to give this up.

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25. The only Imperial Valley company executing a contract was the Hubbard Company. Jon Vessey distinguished this company from the others by pointing out that Hubbard was a harvesting operation and did not farm and that it had grower/shipper arrangements in which these other growers would pick up the cost of the increased wages. Vessey testified that (except for Sun Harvest itself) no Imperial Valley farming operation had signed a Sun Harvest type contract.

5. The December 7, 1979 Meeting

On December 7, prior to the lettuce harvest, there were four separate meetings 26/ between the UFW, represented by Smith, Jerry Cohen, and Marshall Ganz, and Respondents, who were represented by Nassif and Hull. Martori was the only principal who was present (Jt. Ex. 1). Nassif testified that the purpose of the meeting was to obtain the Union's response to Respondents' November 20 proposals to implement the various rates. (G.C. Exhs. 9, 10 and 11). Nassif testified Respondents Vessey and Martori were especially interested in raising the lettuce harvest rate immediately since the Imperial Valley lettuce harvest was soon to begin, and they wanted to pay the "prevailing rate" for the 1979-80 season. Failure to do so, according to Nassif might make it difficult to secure workers to harvest their crop.27/

The meetings were short -- they had been set up at half-hour intervals because Smith had told Nassif it wouldn't take her long to give a response to the November 20 letters. Smith informed Nassif that the Union opposed the implementation of any wage increases and that it would treat any such activity of that kind as an unfair labor practice.

Smith then made an offer to Respondents. She testified that in light of the contract settlements the Union had reached with Sun Harvest and the other Salinas companies, that there were two alternative courses of action for proceeding with negotiations: one course was that the Sun Harvest contract be accepted by Respondents or that at least it be used as "a basis of settlement;"28/ the

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26. Joe Colace of Colace Brothers also met with the UFW in one of the meetings.

27. During the meeting Vessey's November 20 mention of the wrap operation was not discussed nor was Martori's November 20 reference to the "quintetos" system.

28. Smith testified that by "basis of settlement" she meant that the basic language, economic, and wage provisions of Sun Harvest would be the basis of the agreement but that if there were crops that any of the Respondents had that were not included in the Sun Harvest agreement, new terms would be negotiated with respect to them; e.g. Maggio grew carrots but no carrot rate had been established in the Sun Harvest contract. Smith also testified that if there were operational differences, they would be taken into consideration, as well. Further, Smith testified that she felt Nassif would understand this approach since she had previously (in 1977) negotiated the Vessey and Joe Maggio, Inc. contracts with him using the old Interharvest (now Sun Harvest) Master Agreement as a model. As has previously been alluded to, those contracts provided for the same level of wages and other benefits for both the Salinas and Imperial Valley signatories.

second course was to continue bargaining on the basis of the proposals that were presently on the table from each of the parties at the time. (As a practical matter, that would mean returning to the February 28, 1979 offer of the Union and, except for Respondent Vessey's and Martori's November 20 offer to increase the lettuce harvesting piece rate, to the February 21, 1979 industry-wide offer of the Respondents.)

But both Nassif and Hull dispute Smith's version of what was said at this meeting as regards the Sun Harvest contract or any alternative course available to Respondents. Nassif testified that both Smith and Cohen took the position that Respondents could either proceed to accept Sun Harvest, or if they didn't want it, the parties could go back to the February bargaining proposals that were on the table but that in any event, the Union was not going to bargain down from Sun Harvest because it felt it had already reached a negotiated settlement there. Nassif also testified that during the Vessey meeting on this date, he asked if it wasn't true that Sun Harvest was the very best that the Respondents could achieve if they chose to go with the bargaining proposals, and that Smith responded that that was correct.

Hull described this conversation as having a slightly different tone. He testified that Smith told Nassif that he could accept Sun Harvest or go back to the February proposals which v/ould either ultimately result in Sun Harvest-like provisions or a contract not quite as beneficial from the standpoint of the employers.

After a morning adjournment, Nassif returned that afternoon 29/ and informed Smith, without giving any particular reasons, 30/ that Respondents were not interested in settling on the basis of Sun Harvest.

Carl Maggio, Jon Vessey and Steven Martori all testified about their disagreements with the Sun Harvest contracts:

a) Maggio

Carl Maggio testified that he first became familiar with the agreement around a month or so after it was signed, and that his major problems with its provisions were wages, cost of living,

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29. Nassif testified that after this afternoon meeting, none of the Respondents sat down at the bargaining table again until the 1979-80 season was over or at least, tapering off.

30. Nassif explained during his testimony that there were many Sun Harvest articles that were originally proposed by the Union during the industry negotiations and were discussed at that time; and that subsequent to the December 7 meeting, in January of 1980, he did specifically discuss his objections to Sun Harvest on all the outstanding articles with Smith.

hiring hall, union security, union representative, holidays, and mechanization.

Wages —- Maggio indicated that the Sun Harvest wages were way too high and that he had never seen a labor agreement that called for that much of a raise in the first year. He was especially distressed at the general hourly rate and the irrigator rates, but he testified he could have lived v/ith the lettuce wages.

Cost of Living —- Maggio testified that the cost of living provision provided for a 25C an hour automatic increase on a yearly basis and that wage proposals were high enough as they were.

Hiring Hall — Maggio testified that having lived under a hiring hall in the previous agreement, he was convinced that it was not practical because of the numerous difficulties he experienced. He complained that workers were sometimes not sent out until two-three days after his request, even though he needed them immediately; others that were sent, e.g. broccoli workers, were often unqualified. Thus, he made it clear that though he had accepted the hiring hall the first time, he was not interested in having it in this contract and sought to have it elimiated entirely. He added, however, that he was not saying that under no circumstances would a hiring hall be unacceptable -- that it might be feasible with proper modifications. ^

Union Security -- Under the previous Maggio/UFW agreement (G.C. Ex. 3), it was provided that union membership was a condition of employment, that each worker was required to become a member of the Union, to remain a member in good standing, and that it was the Union who was the sole judge of the good standing of its members; and that those who were determined to be in bad standing, pursuant to the provisions of the Union's Constitution, would be discharged. The Sun Harvest agreement contained the same language except that it expanded the penalty for failure to remain in good standing by adding suspension; i.e. a worker found to be in bad standing, pursuant to the Union Constitution, would be discharged or suspended. Maggio testified he not only opposed the new suspension language but wanted the then-existing contractual provision on union security deleted, as well, because of certain problems he had encountered. By this he explained that UFW representatives had been telling replacement workers during the strike that they would be fired under the union security clause.31/ But he also stated that

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31. Nassif testified that Carl Maggio asked him whether his workers' fears were justified — that they could be fired once the company signed a contract — and that he advised Maggio that if he signed the union security clause the Union sought, this would be the result. Nassif admitted that the good standing provision had not been a problem in the prior UFW contract, but he distinguished that situation from the 1980 negotiations by emphasizing that in the previous contract, Maggio had not been'faced with workers who had wanted to cross picket lines and work but feared if they did, they would lose their jobs.

he might be able to live under an NLRB-like provision, allowing a union to discharge an employee only for non-payment of union dues.

Holidays -— Maggio objected to the Rufino Contreras holiday because the date, February 10, fell in the middle of the season, and he believed there were too many holidays already during this general time frame. Maggio further testified that a paid holiday to celebrate the controversial Contreras' death was also a consideration in his opposition.

Mechanization —— Maggio believed that the mechanization section would allow an arbitrator to decide whether his company could mechanize and that that kind of a decision could only be made by a farmer.32/

Union Representative — Maggio rejected this provision because he personally objected to the concept of paying someone for doing strictly union business.33/

There were three other issues of a more minor nature that concerned Maggio.

Seniority -- Maggio testified that he wanted more versatility depending on the crop. For example, because of the need for faster workers in broccoli, he favored a seniority system just for the broccoli worker classification instead of leaving it open for bid system-wide.

Hours and Overtime -— Maggio favored overtime only after ten hours work; the Union wanted it after eight. Maggio also favored mandatory Saturday work with a required premium; the Union wanted work on Saturday to be optional.

Duration -— Maggio was interested in a three-year agreement from the time of signing.

b) Vessey

Jon Vessey, who had also heard about the Sun Harvest signing in the early fall, had virtually the same difficulties with

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32. Nassif testified that he too read the UFW proposal to mean that an arbitrator could prevent mechanization; and that the position of Respondents was that this was a very fast changing industry and if suddenly there were a new row crop operation that was capable of being mechanized, they didn't want to face going out of business, if they were prohibited from making a change by an arbitrator.

33. Nassif added that his clients feared the representative would not have enough to do and as a consequence, would create grievances where there were none in order to justify the position.

it as Maggio except he would have added injury on the job, discipline and discharge, and delinquencies as problem areas.

Union Security —- Vessey's then existing contract with the UFW (G.C. Ex. 2) had the same union security provision as Maggio's; his problems with it were also the same. Vessey testified that he believed the addition of the word "suspension" to the clause could be used by the UFW as a disciplinary measure not against the employee but against the company; i.e. any member of the bargaining unit who crossed the picket line could be suspended (or fired), and any replacement workers likewise could be suspended (or fired) if the Union had chosen to find them in bad standing for their activity. Vessey also believed the provision could be used to circumvent the no-strike provision by suspending all employees from certain job classifications it wanted.

Wages — Vessey started with the assumption that the Salinas companies were really not his competitors in that they were more a group of conglomerates or co-op shipping operations and not that large a percentage of them was involved in growing, whereas the Imperial Valley companies, by and large, were all growers. As a result of this difference, the Salinas shippers did not really have to pay the Union rates for the growing operations, only the harvesting, as they were simply harvesting and packing for somebody else who was, presumably, non-union, and therefore not subject to the Sun Harvest wages.

Vessey testified that the differences in the cropping patterns were important, as well, and meant that more income could be generated in Salinas than the Imperial Valley. Salinas was a more highly intensified vegetable producing area in that on one piece of ground a Salinas grower and/or shipper could have two crops of lettuce and a crop of broccoli in one year whereas the rotation program in the Imperial Valley would generally call for only a half year of lettuce and a half year of wheat.

As a result of these factors, Vessey regarded the entire Sun Harvest economic package as being too high and testified that it would be close to a 45% cost increase in the first year.

Vessey also testified that the only Sun Harvest wage rate that he could probably end up paying was the lettuce piece rate, as historically, because of the number of competing enterprises statewide, most companies ended up paying the same rate on this crop.

Cost of Living — Vessey's objections were twofold: 1) high wages were being placed on top of high wages and 2) the idea of trying to bring an industrialized concept to an agricultural situation was inappropriate because of the particular method by which sales were made in the agricultural community, so subject, as they were, to purely supply and demand situations which could not always be passed on to the consumer.

Hiring Hall -- Like Maggio, Vessey was not happy with the hiring hall under the old UFW contract. Vessey testified the system was administered very poorly -- he was often unable to get workers; if he did, sometimes they'd arrive too late and in many cases they had no experience. In addition, there were communication problems; some of the people in charge of the hiring hall couldn't speak English.

Holidays -- Also like Maggio, Vessey opposed another winter month holiday, such as February 10; he felt it was unfair to Imperial Valley growers. In addition, he believe it distasteful to ask him to name a holiday after Contreras, since it was a Vessey field that Contreras had gone onto, thereby becoming involved in the controversial incident that led to his death.[34/]

Union Representative — Vessey acknolwedged receipt of the July, 1980 letter from Don Nucci of Mann Packing Co. (G.C. Ex. 36) praising the concept, but Vessey testified he found the letter to be "propaganda" and having no merit. Vessey never actually talked to Nucci about the letter or about the union representative idea, though he was in contact with him about other matters. But Vessey testified he did speak to other growers about the concept; e.g. Hubbard and Oshita, and came away believing the union representative was of little benefit because of the high turnover among the representatives and their lack of knowledge of the contracts.

c) Martori

As for Martori, he disagreed, and for many of the same reasons as the others, with the Union's proposals on union security, hiring hall, union representative, cost of living, holidays, mechanization, duration, injury on the job, and delinquencies.

6. Bargaining from December *1,* 1979 Through the End of 1979 to January 29, 1980

The Sun Harvest option having been rejected, the UFW went back to its February proposals and submitted a modification of them on December 19, 1979 (G.C. Ex. 16) to Vessey and Martori. Smith testified that she offered this new proposal to these two Respondents even though they had revised their February offers on November 20 on only a single item — the lettuce harvesting piece rate.[35/] Smith proposed a lettuce rate of 80c per box, modified her

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34. So sensitive was Jon Vessey on this point that he continued to oppose the Contreras holiday even after he was no longer harvesting lettuce and there was no longer a concern it would fall in the middle of the season.

35. This new proposal was not addressed to Maggio because it had not submitted any modifications to its last offer of

(Footnote continued——)

pension and medical offers, [36] and withdrew her apprentice fund proposal. She also withdrew her proposal for a joint hiring hall, thereby placing back on the table the old proposal for a union operated hall.[37]

Thereafter, on December 31, 1979 Nassif wrote to Smith complaining about what he stated was Smith's "Sun Harvest or somthing worse" negotiating tactics [38] *and* asserted that it appeared the parties were once again at an impasse. (G.C. Ex. 17). Smith responded (G.C. Ex. 21) that Nassif had misstated her position in that all the Union had done was to offer to use the terms of Sun Harvest as a basis of settlement or in the alternative, to pursue

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(Footnote 35 continued——)

February. Presumably, Maggio still considered itself to be in a state of impasse, interrupted only by the Sun Harvest alternative offer which it rejected. Smith testified she informed Massif that she was interested in continuing to bargain with Maggio, but it had to be prepared to make some adjustments from its February proposal.

36. Typical of the misconceptions each party had of the other which plagued these negotiations throughout, Vessey could testify that on the lettuce harvest rate, pension, and medical offers, Smith's proposals were worse than Sun Harvest's, while Smith could claim that her offers were a definite improvement over her February 28 proposal.

37. The jointly operated hiring hall offer was made during the industry-wide bargaining in February of 1979. Smith disagreed with those critics of the concept who characterized it as an effort by the UFW to get the employers to pay for it while it (the Union) still did the hiring. According to Smith, she explained to the growers during bargaining that any problems that arose with the hiring hall; e.g. hours of operation, persons administering the program, qualifications of employees, would be subject to discussion and agreement with the joint operators of the hall. (Under the then existing contract, the employer had no right to interfere with the Union's handling of the hall.)

38. Nassif had stated during his testimony that by the end of the December 7 meeting, he, as the negotiator for Respondents as well as for several other Imperial Valley growers, formed an opinion as to the bargining strategy of the UFW. He testified that rather than negotiate individually company-by-company for a separate agreement, the UFW had decided to concentrate its efforts on treating the Sun Harvest contract as a "Master Agreement" to be used in negotiations with other companies and specifically Respondents, from which there would be few deviations. In other words, according to Nassif, he was led to believe that he could negotiate if he wanted to, but Sun Harvest was the best he could ever expect to get.

bargaining from each party's respective proposals. [39]

On January 28, 1980, Nassif wrote Smith and, making no reference to his December 31 declaration of impasse, indicated that he would be interested in continuing negotiations but asked for the Union's views on where it would be willing to move on those issues deemed critical to Respondents, which Nassif named as union security, cost of living, union representative, mechanization, and seniority. [40] (G.C. Ex. 19).

7. The Wage Differential[41]

The idea of a wage differential was not discussed during the industry-wide negotiations, and the companies' February 21 offer did not include it. The first interest in it appears to have come from Carl Maggio who testified that after he first saw the Sun Harvest rates [42] in October or early November of 1979, he considered a wage differential and spoke to Nassif about it, possibly during January/February of 1980. He also spoke to other Imperial Valley growers about the idea.

Maggio testified that he believed he could not pay Sun Harvest vegetable wages for flat crops, especially since to do so would make him non-competitive with many other Imperial Valley

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39. In this sense, Smith agreed that her December 19 proposal was worse than Sun Harvest in that that agreement was a settlement which already represented significant compromises that both the employer and UFW had made on their previous bargaining positions; and the Union was also not prepared at that point to place the Sun Harvest agreement on the table as a bargaining proposal to be bargained down from.)

40. Nassif explained during his testimony that the seniority he was talking about was contained in the supplemental Sun Harvest seniority agreement and not in the seniority section itself.

41. Carl Maggio explained that a "wage differential," also referred to as a "flat crop differential," was the means by which two different sets of wages could be established to distinguish between employees working on flat crops (wheat, alfalfa, etc.) and those working in row crops (vegetables). Except for an occasional weeding crew, the employees most affected by this difference would be irrigators and tractor drivers, as they were the ones who mostly worked on the flat crops. Thus, irrigators or tractor drivers would receive a different wage — presumably lower — when they worked on a field with flat crops than they would when they worked on a field that had vegetables.

42. Sun Harvest contains different rates for tractor drivers (Tractor Driver A and Tractor Driver B) but no crop differential schedule.

growers who, being non-union paid significantly lower rates.43/ Similarly, Jon Vessey felt that for Imperial Valley growers the Sun Harvest rates, particularly for irrigators and tractor drivers working in non-vegetables, were too high.

Neither Maggio nor Vessey had ever operated under a wage differential before, 44/ and Maggio testified that to his knowledge no other grower had ever tried out the concept either.

The subject matter of the wage differential was initially brought to the UFWs attention around approximately the second week in January, 1980. Smith and Nassif had *a* private "off-the-record" discussion in which, according to Smith, she indicated that although she now knew that Respondents were not interested in Sun Harvest, she could not understand what the real issues were that were preventing a settlement on some other basis; and that Nassif stated to her for the first time 45/ that Respondents had been talking about negotiating a flat crop differential as a necessary part of any settlement. Smith testified she responded that employees like tractor drivers or irrigators mutually would not be pleased by such a distinction; but that if it was an issue, she needed information as too exactly what Respondents wanted.

About a week later, Nassif again raised the possibility, and Smith testified she told him the Union's interest in how much of a differential might depend upon how many companies were interested in it, whether this was a main problem holding things up, and that in any event, Respondents should come to the bargaining table with some information that would justify a differential.

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43. Around this time Maggio had ceased growing lettuce and approximately one-half of Maggio's crops were flat crops, 1,421 acres in alfalfa and 371 acres in wheat (G.C. Ex. 7). In 1981 alfalfa rose to 1800 acres and wheat to 1500.

44. In the past, neither the Teamsters nor the UFW contracts contained any such distinction, and Maggio explained that that was because he could live with the wages under those contracts. As for Vessey, he too had never paid a crop differential before, though he testified that under an old Teamsters contract there was an area differential in which tractor drivers and irrigators in the Imperial Valley were paid a different rate from those in Salinas. Vessey also pointed out that under both Teamsters and UFW contracts there were two sets of tractor driver rates dependent upon what equipment was assigned and generally this would mean that the higher rate was paid to people doing the vegetables because this required more skill.

45. This conversation apparently took place at a recess during one of the ALRB strike injunction hearings in January, 1980. Nassif testified that Vessey had raised the wage differential issue with the Superior Court judge in that proceeding.

Nassif wrote Smith on January 28, 1980 and indicated, apparently for the first time in writing, that Respondents were "very much interested in discussing the possibility of a wage differential for the non-vegetable and non-lettuce crops." (G.C. Ex. 19).

On February 6, 1980, Smith replied that she would like to see "any data, if such data exist, which you believe support the justifications for such a differential." (G.C. Ex. 21).

The first wage differential proposal was made on May 21, 1980 by Maggio (G.C. Ex. 31B) 46/ and Vessey (G.C. Ex. 31A). They were identical. When asked the basis for the proposal, Maggio explained that the $4.12 an hour rate for flat crops was a take-off from his earlier proposal of February 21, 1979,47/ and the 54.33 for vegetables, an increase of 210 over the February offer, was a consensus figure based upon accumulated information compiled by the Vegetable Growers Association from non-union and union companies in Holtville and El Centro which grew both vegetable and non-vegetable crops.

George Stergios testified that he was a participant — he could not remember when — in the formulation of Maggio's flat crop proposal and had concluded, based upon his investigation, that Maggio would not be able to pay as much for the flat crops as for the vegetables. Although he testified this conclusion was based on speaking to other Holtville growers and looking at the cost of crops, he was unable to state with any precision how he formualted the wage differential rate._48/ For example, Stergios did not know what percentage of his costs in alfalfa were labor costs, and he couldn't remember what the farmers he talked to told him about what a competitive wage for irrigators in vegetables would be.

Ron Hull also testified that when some of the Imperial Valley employers expressed an interest in alternatives to maintain their margin in some commodities, he asked some growers about their experiences and found that one of the members of the Association in the Bakersfield area, Sam Andrews, had the differential for his

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46. This proposal was made on behalf of both the Imperial Valley and King City operations. However, the flat crop distinction was intended to apply only to the Imperial Valley.

47. That is to say that many of the rates began at precisely the same level they had been in February; e.g. general field and harvesting, thin and hoe, irrigator and tractor drivers.

48. The General Counsel had subpoenaed from Stergios any documents, memorandum, or personal notations prepared by him regarding a cost analysis of the flat crop/vegetable crop differential. Such evidence was never produced on the grounds that they could not be located.

cotton under a union contract and felt it was a workable system. But Hull did not confer with Nassif, Vessey or Maggio to compute any actual wage figures in order to determine what differential proposals might be realistic.

8. The March 4, 1980 Meeting

This was the negotiating session that followed the December 7 meeting (Jt. Ex. 1). The lettuce harvest was over. As of this date, the last offer of the Union on the table (aside from its Sun Harvest settlement offer) was its February 28, 1979 offer as modified by its December 19 proposal ,49/ Respondents' (Vessey and Martori) last offer was the November 20 offer to raise the lettuce harvesting rate, but their last overall bargaining proposal, as was also the case with Maggio, was the February 21, 1979 offer made during the industry-wide negotiations.

All the principals were at this meeting plus Nassif and Smith. Smith testified that Nassif reported that Respondents were still not prepared to settle on the basis of Sun Harvest but that they wanted to continue bargaining and that they would prepare an appropriate response to the Union's last proposal of December 19, 1979. Again, no mention was made of Nassif"s December 31, 1979 assertion that the negotiations were at impasse.

9. The April 16, 1980 Proposal

Respondents, Maggio, Martori, and Vessey, submitted identical proprosals. 50/ (G.C. Ex. 27). This was the first overall proposal received by the Union from the Imperial Valley companies since February 21, 1979, but did not include wage rates, as Nassif wrote that differences in the companies necessitated *a* separate wage proposal which would be forthcoming later.

Nassif again made no reference to his previous December 31 reference to impasse. Asked why he made this proposal, Nassif testified that he had not received a Union offer since December 19, which he did not regard as one made in good faith since its terms were more onerous than Sun Harvest, (though he admitted more generous than February 28), so he decided to get things moving again by a language proposal.

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49. Nassif denied that the February 28 or December 19 offers were serious. He testified that what the Union was proposing was Sun Harvest and that he looked at Sun Harvest to at least see what was acceptable in it and get as close as he could. He testified he didn't really consider the February 28 offer or the December 19 one because he knew that they were not the Union's position.

50. Jon Vessey testified that all three Respondents had sat down together and formulated a joint proposal.

Respondents accepted the Sun Harvest language on a number of articles which Smith acknowledged were improvements over the now expired, prior UFW labor contracts; e.g. vacation, grievance and arbitration, leaves of absence, hours of work and overtime, rest periods, health and safety, pension, Martin Luther King Fund, reporting on payroll deductions, bereavement and camp housing.

Respondents also agreed to other Sun Harvest articles but these, according to Smith, were no different from the said prior contracts; e.g. no strike, subcontracting, successorship, right of access, discrimination, worker security, maintenance of standards, management rights, union label, new or changed job operation, jury duty, income tax withholding, credit union, bulletin boards, family housing, grower-shippers contracts, location of company operations, modifications, and savings clause.

In the case of discipline and discharge, Respondents accepted Sun Harvest but this was, according to Smith, a step backward. Smith testified that the Sun Harvest contract was favorable to the employer in the sense that it provided for a five-day probationary period for new workers excluding them from the right to use the grievance and arbitration procedure if discharged, which the Union agreed to in exchange for Sun Harvest's consenting to keeping the hiring hall. However, here Respondents were agreeing to a five-day probationary period, while at the same time proposing the elimiation of the hiring hall.

On seniority, Respondents offered to return to the prior agreement which, according to Smith, was better than the February 21, 1979 offer but not as good as Sun Harvest. Smith also testified that in the case of other articles, like mechanization, for example, Respondents offered to return to their February 21, 1979 proposal which was the same as the prior agreement; in another article, supervisors, such a return to the earlier offer was worse than the prior agreement.

Some Sun Harvest articles were rejected outright, and Respondents made no offers concerning them ; e.g. cost of living allowance, union representative, delinquencies, labor-management relations committee, and injury on the job. And on two major areas of contention, hiring hall and union security, Respondents made no change from their earlier February 21 offer, 51/ which had called for the deletion of the provisions of the said prior agreement.

Addressing himself to Martori specifically, Nassif testified that *as* of this date, there were two major areas of dispute between the parties, union security and the hiring hall. As to the first, Nassif testified that Martori was concerned that with

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51. In that offer, Respondents had proposed the elimination of the hiring hall and, as regards union security, that "good standing" be determined solely on the basis of the timely payment or tendering of dues and initiation fees, (G.C. Ex. 4).

the suspension language of that article, the Union had all power to determine, in effect, who the work force would be because it had the ability to suspend or fine or discharge its members for whatever reasons it deemed sufficient.

As to the second, Nassif testified that Martori's basic problem was he didn't want the Union telling him whom he could hire; he knew what his needs were, and he wanted to hire his own people.

10. The May 21, 1980 Meeting

Jon Vessey informed the UFW that he was considering not having lettuce in the Imperial Valley for the 1979-80 season.

Respondents' wage offer (G.C. Exhs. 31A, B and C) were presented at separate meetings on May 21, which completed Respondents' language and economic proposals at that time. As has been referred to earlier, both Maggio and Vessey proposed 52/ for the first time two separate wage categories, one for vegetable crops and the other for flat crops. Nassif testified that based upon surveys done by the Imperial Valley Vegetable Growers Association, and individuals, (though he could not name the individuals), a decision was made that the companies who had flat crops as well as row crops (Maggio and Vessey) would make a proposal that would raise the February 21 wage proposal 21C only for vegetables and leave the other crops at the February level. Nassif testified this 21C vegetable differential was based on an average of what Respondents had found to be the prevailing rate based upon what other vegetable growers, both of vegetables and flat crops, were paying. However, Nassif did not know – though he had requested that they do so – whether Maggio and Vessey had ever actually costed out what they would be saving by having a flat crop differential, and no data was submitted on May 21 as to how the 21C differential as to vegetables was arrived at.53/

As to Martori, Steven Martori testified he didn't recall how the 21C higher rate was formulated, and that he never discussed

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52. Martori made no such proposal because it had no flat crops, only vegetables, mainly lettuce.

53. Carl Maggio testified his broccoli rates were not based upon Sun Harvest because he didn't know if Sun Harvest had broccoli but were, instead, just figures he thought he could live with. He knew that Mann Packing had a UFW rate in broccoli, but he never looked at their contract. (Actually, Sun Harvest provided that when it introduced broccoli, the piece rate for the harvest would be paid at the same rate as the Mann Packing Co.). (Jt. Ex. 2, Addendum to Appendix A). At another point in his testimony, he was asked if he could pay the going rate in lettuce, why couldn't he pay the same for broccoli and carrots; Maggio responded that he thought that in the Imperial Valley he was paying the going rate.

it with other growers or costed it out himself. Ultimately, he felt the proposal was acceptable because through discussions with Nassif, he came to the conclusion that this was the level that other growers in the area would be setting wages at, based upon their surveys; and he testified that it seemed to be within the range of wages that he could pay and still be competitive. He also testified that the proposed rates were higher than what he was paying his California employees in the preceding 1979-80 harvest.

Maggio and Vessey also met the Sun Harvest lettuce harvesting rate,54/ including the one that was set to go into effect on July 15, 1980 (Jt. Ex. 2, Appendix A). Martori's lettuce proposal was lower because, as Nassif explained, it had *a* different method of paying the lettuce ground crews in that loaders were not hired by it; that work was subcontracted out. Thus, Martori's piece rate proposal was only for cutters, packers and closers.

The proposed rates, to be effective July 15, 1980, for other classifications; e.g. general field and harvesting, thin and hoe, irrigator, pipe layer, and tractor driver, were exactly the same for all three Respondents. Nassif denied the three companies talked about it together but that when Jon Vessey, through his own investigation, came up with certain figures, the others decided individually those rates were reasonable and proposed them as well. Vessey testified that he came up with this wage proposal on his own.

There was not much discussion regarding Respondents' proposal, only a brief exchange about the definition of "0", meaning crops other than vegetables. Smith testified that no background information was supplied by Respondents indicating the formula on which the differential was based. At the conclusion of the meeting, Smith testified she told Nassif she would take a look at the Respondents' entire proposal, which was now complete with the addition of the wage proposal, and would then respond. However, she was able to make some quick observations. Smith testified that it was immediately apparent to her that there was no improvement in the Respondents' offer for flat crops in that Respondents proposed the exact same wages to go into effect on July 15, 1980 as it had proposed on February 21, 1979 to go into effect in the second year

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54. It is interesting to note that although Maggio no longer had any lettuce, he made a lettuce piece rate proposal. Maggio explained that in the event he ever got back into the lettuce business, he wanted to pay the going rate. Vessey acknowledged that his lettuce harvest rates were tentative proposals at best, depending upon his final decision whether to continue growing lettuce. But he testified that he was at least, still hoping to have lettuce.

of that contract.55/ (Compare G.C. Exhs. 31A and 31B with G.C. Ex. 4). And as to vegetables, the 21C an hour increase was considered by Smith to be only a minor improvement.

11. The Union's July 21 Agreements and Further Proposals

Twenty-nine articles of Respondents' April language proposal (G.C. Ex. 27) were accepted by the Union on July 21, 1980 (G.C. Exhs. 35, 36, 37), including pension, Martin Luther King, grievance and arbitration, leaves of absence, rest period, successorship and no strike. With one exception, all the articles agreed to were the same as the equivalent provision in the Sun Harvest agreement.56/

The Union proposed a modification of its cost of living and union representative article, and Smith attached a letter from Donald Nucci of Mann Packing Co. that was supportive of the union representative concept.

Smith testified that within this time frame she also accepted August of 1982, the same date as in Sun Harvest, as the date the contract would expire, coming off of the Union's original one year contract demand.

Following the July 21 agreements, the parties did not meet again until October 7, 1980.

12. The October 7 Meeting

Jon Vessey testified that his decision to close down the lettuce operation was discussed. He further testified that as a result of his decision, a number of issues, though perhaps referred to, were generally tabled – mechanization, travel allowance, seniority, etc. -– because they weren't relevant unless Vessey grew and harvested lettuce. Finally, Vessey explained that since his company still had no plans to harvest lettuce, it was interested in negotiating a contract apart from that crop. On the other hand, if in fact it was decided to go back into the harvesting of lettuce, the proposed Sun Harvest rates were still acceptable.

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55. It was suggested that since the February, 1979 rates had already been implemented, Respondents were, on May 21, in effect, offering what they were already paying. Nassif disagreed stating that the second year increases had not gone into effect and that what Respondents were proposing was that the Union accept its second year wage offer immediately so that same could be paid as of July 15, 1980. (See G.C. Exhs. 31A and 31B).

56. The exception was that the Union agreed with Respondents' proposal to delete the "Labor-Management Relations Committee." This was a proposal, accepted by Sun Harvest, which provided for periodic labor/management meetings to discuss common problems.

Nassif testified he told Smith that since Vessey wasn't going to have lettuce anymore, seniority shouldn't be a big problem as there was no need for the elaborate system of Sun Harvest. 51/ He also said he told her that with fewer tractor drivers, irrigators, and thin and hoe workers only occasionally, there didn't seem to be a real need for the hiring hall either, especially in view of their required levels of skill. Similarly, Nassif told Smith that reduced numbers of workers made a union representative less necessary.

Nassif also testified that he proposed that Vessey implement the wage rates offered on May 21 (G,C. Ex. 31A) immediately but that Smith opposed it. (Smith testified Nassif was talking about Vessey's implementation only of its non-vegetable crops since it no longer grew or harvested vegetables.)

Smith testified that Vessey modified some of its proposals. The Company proposed to accept Sun Harvest to the extent it would apply to Vessey in the area of travel allowance, delinquencies, and records and pay periods. The Company also accepted July 4 as a holiday.

Smith and Nassif reviewed the differences at that time between the parties and agreed they were still wages, cost of living, union security, hiring hall, mechanization, holidays, hours of work and overtime, supervisors, supplemental seniority, and vacations.

13. The October 8, 1980 Meeting

On October 8 there was a meeting between Maggio and the UFW. There were discussions about seniority, overtime and travel. The Company accepted the medical plan, July 4 as a paid holiday, the Sun Harvest delinquency language and Sun Harvest's duration date of August 31, 1982.

Maggio was also interested in implementing its last wage offer of May 21, 1980 (G.C. Ex. 31B) in all job classifications, which included the differential, beginning with the broccoli harvesting season and then at the start of each of the appropriate harvesting seasons for the other categories, but Smith objected.58/ Maggio testified that as a result, wages were not raised.

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57. Nassif testified that Smith was willing to accept the Sun Harvest master agreement (which was virtually the same thing as the past agreement) in view of the scaled down operation but that there was still the necessity to negotiate an applicable supplemental agreement.

58. Nassif testified that the last wage increase Maggio had made that he was aware of was in 1979 and that was to raise wages to the level of the February 21 offer. Maggio's offer on

(Footnote continued—)

14. The October 27, 1980 Meeting

Once again Nassif indicated his desire to implement the Maggie wages, but Smith had no change from her previous position.59/

As to Vessey, Nassif testified that proposals were being made in light of the fact that Vessey did not have lettuce; if Vessey decided to have lettuce, it would then make different offers. This being the case, articles that had been in dispute suddenly became acceptable, such *as* seniority, reporting and standby, hours of work and overtime, health and safety and even hiring hall.

On the hall, Vessey maintained that since he had shut down all harvesting operations, there was no longer a need for a hiring hall; so he proposed that if thinners and hoers (but not tractor drivers or irrigators) were required in the future,60/ a hiring hall would be used.

However, Nassif acknowledged that except for this modification of position, subject as it was to future changes, there was no further movement on the part of Vessey nor any movement from the other Respondents either on the hiring hall, union security, mechanization, cost of living, and union representative.

As regards mechanization, Nassif continued to believe that under the contractural provision being offered, an arbitrator could prevent mechanization;61/ but Nassif added two new arguments — that

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(Footnote 58 continued——)

October 8 (like Vessey's on October 7) was to implement the flat crop wages proposed on May 21 to the second year level of the February 21 offer. (The vegetable rates, of course, would have been higher).

59. Nassif acknowledged that throughout the course of negotiations, the UFW had rejected all his offers to implement interim wage agreements short of an agreement on the full contract.

60. Smith testified that she was disappointed to learn not only that Respondent continued to oppose a hiring hall for irrigators and tractor drivers (even though it was now without lettuce) but that it still wanted the same probationary period extended to employees as under the Sun Harvest contract. (Smith had reference to the Union's previous proposal that if Respondents accepted the hiring hall as it had appeared in the previous collective bargaining agreement, the Union would agree to the same probationary period under its discipline and discharge section (five days) as it had with Sun Harvest.

61. Smith testified that at no time during the course of negotiations did any Respondent ever raise any question about the arbitration process as applied to the mechanization clause.

the six months notice requirement was too long and that if mechanization were allowed, Respondents didn't want to have to pay a large sum of money in severance pay.

15. Bargaining from the November 4, 1980 Meeting to the End of 1980

On November 4, Respondent Maggio submitted a proposal (G.C. Ex. 47) on supervisors, records and pay periods, injury on the job, wages and mechanization. The mechanization provision accepted parts of Sun Harvest and provided for thirty days notice to the Union whenever the Company intended to introduce new mechanical equipment.

Respondent was still interested in implementing its last wage offer of May 21, 1980 but wanted to modify it by immediately increasing the hourly wage for tractor drivers to *$5.25* without the application of any wage differential. Carl Maggio testified his rate was based on an averaging 62/ between his proposed flat crop and proposed vegetable wages because the UFW had rejected the differential ,63/ and he wanted very much to implement an interim wage increase. However, he denied that he had abandoned the wage differential idea.64/

In Carl Maggio's view, such an increase was necessary because tractor driver rates were much lower than wages being paid for like work by other companies in the Imperial Valley. 65/ Nassif testified that the increase was only for the tractor drivers because from wage surveys that had been done and the information obtained from other farmers regarding what they were paying, Maggio had

62. This offer was revised to S5.35 on January 6, 1981 when an error was pointed out by Smith and later verified by Respondent (G.C. Ex. 53).

63. It is not clear if Maggio believed the wage differential concept had been rejected or only the May 21 offer which included it. In this regard, it is worthy of note that Maggio also testified that Nassif never told him that the UFW was either opposed to or favored a differential. As for Massif's view, he had written Smith on January 6, 1981: "Since there has been no agreement for *a* flat crop differential, we believe it would be easier on an interim basis to pay just one rate for all crops." (G.C. Ex. 53).

64. The wage differential was still on the table in that the averaging offer was only extended to tractor drivers. Other categories listed in the May 21, 1980 proposal were still presumably being offered a flat crop rate.

65. The rates that Maggio, Inc. was then paying were based upon its February 21, 1979, first year offer and subsequent implementation. The rates had not been increased to the second year levels because the UFW had objected.

determined that the Company was at or above the level for all other classifications, but not tractor drivers. Nassif also testified that he approved the averaging concept because he didn't think implementing a flat crop rate at that point was wise since there had not been an agreement reached with the Union on the subject and Maggio would have a tough enough time implementing new rates at all without trying to implement a change in the system.

Smith continued to oppose any wage implementation on the grounds that it would undercut the UFW position at the bargaining table, and she wanted to resolve the entire contract.

On November 13, Smith wrote to Nass if concerning Vessey (G.C. Ex. 49) reviewing the status of negotiations, which Vessey later testified was an accurate representation. 65/ In this communication, Smith also agreed to accept the Company's proposals on supervisors being allowed to perform certain bargaining unit work, health and safety, and seniority "with the appropriate Supplemental Agreement on seniority in addition." Further, Smith proposed, as had been before, that she would accept the Company position on discipline and discharge (Sun Harvest) if the Company were to accept the Union's position on the hiring hall (Sun Harvest).

Smith also submitted modifications to previous proposals on mechanization, records and pay periods, abd duration (August 31, 1982). She also modified her February, 1979 wage proposal on general field and harvesting, irrigator, tractor drivers, and thinners and hoers. (Yet, after all this time, the parties were still far apart; e.g. irrigator-Respondents' offer: S4.36, UFW offer: $5.60; tractor driver B-Respondents': S5.12, UFW: $6.45; thin and hoe, general field and harvesting-Respondents: $4.25, UFW: $5.50.) (Compare G.C. Exhs. 31A and B with G.C. Ex. 49).67/

Smith made it clear that the Union had not changed its position from previous proposals on union security (from its February 28, 1979 proposal), hiring hall (February 19, 1979 proposal), holidays (still wanted February 10), union representative and cost of living (July 21, 1980 proposals), and the following additional February 28, 1979 offers: hours of work and overtime, injury on the job, reporting and standby, vacations and travel allowance.

Thus, as of November 13, 1980, there had been approximately 33 articles agreed to (and an agreement to delete the

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66. Vessey testified that since this letter, there were additional agreements: hours of work and overtime, reporting and standby and possibly vacation.

67. These rates were for flat crops only and also reflect the unilateral raises.

Labor-Management Relations Committee), but none were the major matters separating the parties when they reconvened back in the winter of 1979.

On December 22, 1980 Smith informed Massif that she considered Maggio's November 4 proposal only a slight modification from previously held positions and that she was "hard-pressed" to make *a* response but that one would be made in the near future. (G.C. Ex. 51). Nassif testified that he received her proposal around March of 1981, during the course of this hearing.

On December 29, 1980 Nassif wrote Smith concerning Vessey confirming that there was an agreement as to supervisors, duration, health and safety, records and pay periods and seniority, adding that "I believe the supplemental agreement for 'seniority' should be fairly simple inasmuch as we will not have harvesting employees." (G.C. Ex. 52). Nassif also added that mechanization was acceptable "because we're not harvesting any vegetables."

Proposals were made on hours of work and overtime, and travel allowance.

Vessey testified that as of the time of his testimony (March, 1981), the principal problems separating the parties were the same he had had in the fall of 1979 when he first saw the Sun Harvest contract — wages, cost of living, union security, hiring hall, holidays, and union representative.

Smith testified that in her view, the wage proposal that the Union had on the table by the end of 1980 was significantly better from the employer's point of view than the Union's earlier February 28, 1979 proposal. On the other hand, the wage proposal of the employers for flat crops was not different in any respect from what their February 21, 1979 proposal had been, and only minor improvement had occurred in vegetables.

Smith also testified that by the end of 1980, the most significant change in the employers' bargaining position from that of the end of 1979 was the fact that they were no longer in the lettuce harvesting business or, in the case of Martori, in business in California at all, infra. This was significant for two reasons: 1) because it eliminated from the range of the bargaining process itself all of the issues that pertained to the growing and/or harvesting of lettuce; and 2) because those management decisions had an important impact on the state of mind of Union representatives with respect to their perception of Respondents' good faith attempts to reach a negotiated settlement of their contract dispute.

Finally, as to Martori, Nassif was asked during the hearing (on March 31, 1981) about the status of those negotiations, and he answered that Respondent's position was that, except for differing positions on severance pay, there was not much further to discuss in view of the fact that Martori no longer had any operations — growing or harvesting — in the State of California.

As of the time of Smith's testimony herein (March 30, 1981), none of the parties of this controversy had met in face to face negotiations since the November 4, 1980 bargaining session.

B. Analysis and Conclusions of Law

The Agricultural Labor Relations Act defines bargaining in good faith in section 1155.2(a), as follows:

> For purposes of this part, 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, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This language is the same as section 8(d) of the National Labor Relations Act. Thus, it is, of course, proper to refer to decisions of the National Labor Relations Board as a guide to deciding the present case.

It has been held that the statutory duty to "bargain collectively in good faith" imposes the obligation to "meet . . . and confer in good faith" with a view towards the ultimate negotiation and execution of an agreement. To be sure, the Act "does not require either party to agree to a proposal or require the making of a concession." N.L.R.B. v. National Shoes, Inc. (2nd Cir. 1953) 208 F.2d 688, 691. On the other hand, an employer's failure to dp little more than reject a union's demands is: "indicative of a failure to comply with the statutory requirement to bargain in good faith." N.L.R.B. v. Century Cement Mfg. Co., Inc. (2d Cir. 1953) 208 F.2d 84, 86. Thus, it is clear that "... the employer is obliged to make some reasonable effort in some direction to compose his differences with the union." N.L.R.B. v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131, 135, 32 LRRM 2225, cert, den., 346 U.S. 887, cited in 0. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, rev. den. by Ct. App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980. In other words, what is required is:

> . . . something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . . Collective bargaining then, is not simply an occasion for purely formal meetings between management and labor, while each matinains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract . . . ." (citations

omitted). N.L.R.B. v. Insurance Agents' International, (1960) 361 U.S. 477, 4 L.Ed 2d 454, 462, 80 S.Ct. 419.

And Mr. Justice Frankfurther, concurring in part and dissenting in part, in N.L.R.B. v. Truitt Mfg. Co. (1956) 351 U.S. 149, 100 L.Ed. 1029, 1033, 38 LRRM 2042 stated:

> These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. "Good faith" means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

Unfortunately, direct evidence of an intent to frustrate the bargaining process will rarely be found. As a result, a party's intent can only be discerned by reviewing the totality of its content. N.L.R.B. v. Reed & Prince Mfg. Co., supra; B. F. Diamond Construction Company (1967) 163 NLRB 161, 64 LRRM 1333, enf'd (5th Cir. 1969) 410 F.2d 462, cert, den., (1969) 396 U.S. 835; 0. P. Murphy Produce Co., Inc. , supra; As-H-Ne Farms (1980) 6 ALRB No. 9, rev. den. by Ct. App., 5th Dist., October 16, 1980, hg. den., November 12, 1980.

> . . . the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union. N.L.R.B. v. Reed & Prince Mfg. Co., supra, 32 LRRM at 2227.

Necessarily, the final determination must rest upon inferences drawn from circumstantial evidence; it involves reaching conclusions from conduct as to whether particular actions of a party were motivated by the desire to negotiate the best bargain possible for itself or were motivated instead by a desire to frustrate negotiations. Columbia Tribune Publishing Co. (1973) 201 NLRB 538, 552; Queen Mary Restaurants v. N.L.R.B. (9th Cir. 1977) 560 F.2d 403. One conclusion results in the finding of a violation; the other that a party merely engaged in permissible hard bargaining. Specific conduct which, standing alone, may not amount to a per se failure to bargain in good faith may, when considered with all the other evidence, support an inference of bad faith. Continental Insurance Co. v. N.L.R.B. (2nd Cir. 1974) 495 F.2d 44, 86 LRRM 2003;

Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, enf'd in relevant part in Montebello Rose Co. v. A.L.R.B. (1981) 119 Cal.App.3d 1, 173 Cal.Rptr. 774 (Ct.App., 5th Dist.), hg. den. August 7, 1981. On the other hand, some action standing alone might clearly manifest an absence of good faith, but when taken in the total context of the parties' relationship does not support such an inference. Deblin Mfg. Corp. (1974) 208 NLRB 392, 399; Western Outdoor Advertising Company (1968) 170 NLRB 1395, 1396-97.

This case raises the important question of how to separate tough negotiating from bad faith surface bargaining. The question is always hard to answer because "surface bargaining, by definition, may look like hard bargaining, and is therefore difficult to detect and harder to prove." K-Mart Corp. v. N.L.R.B. (9th Cir. 1980) 626 F.2d 704, 105 LRRM 2431.

There is no simple formula to ascertain true motive. Each case must rest upon its own facts.

> At the outset we note that no case involving an allegation of surface bargaining presents an easy issue to decide. We fully recognize that such cases present problems of great complexity and ordinarily, as is the present case, are not solvable by pointing to one or two instances during bargaining as proving an allegation that one of the parties was not bargaining in good faith. In fact, no two cases are alike and none can be determinative precedent for another, as good faith "can have meaning only in its application to the particular facts of a particular case." N.L.R.B. v. American National Insurance Co. 343 U.S. 395, 410. It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof required by law. (footnote omitted). Borg-Warner Controls (1972) 198 NLRB 726.

With these rules in mind, it is appropriate to commence an analysis of the bargaining history between these parties to determine their true intention towards each other judged from the totality of their conduct.

1. Introduction

I begin my discussion by noting that the 1979 bargaining between these parties, which has been discussed in this case and which forms the background to the 1980 negotiations, has already been reviewed by the ALRB. In each case, Respondents have been found to have bargained in bad faith. In Joe Maggio, Inc., Vessey & Co., et al., supra, (1982) 8 ALRB No. 72, at p. 9, the Board found that:

> Respondents' conduct between February 21 and December 31, 1979 did not "represent a substantial break with its past unlawful conduct or the adoption of a course of good-faith bargaining." Respondents had no new proposals to offer

> from February 21 until November 20, 1979. On' the latter date, within weeks of the 1979-80 harvest, Respondents did offer new proposals, but attempted to limit the negotiations to those proposals. That belated and limited effort on Respondents' part belies any intention to bargain in good faith and indicates instead a desire to increase employees' wages without following the customary procedures of good-faith bargaining. Respondents' summary rejection of the UFW's December 19 proposal confirms Respondents' lack of genuine desire to resolve differences and reach an agreement. (citations omitted).

Similarly, in Martori Brothers, supra, 8 ALRB No. 23, rev. den. by Ct. App., Fourth Dist., September, 1982 the Board also found bad faith not only for the 1979 bargaining but continuing to May of 1980. In that case, the Board found that Respondent Martori's decision to reject "without explanation" the Sun Harvest contract, its rejection of the UFWs proposed modifications of December 19 and its failure to respond to them until March, 1980, as the harvest was ending, its declaration of impasse "without discussion," and finally, its unilateral wage increase for the harvest season were all evidence of unlawful conduct:

> We agree with the ALO that Respondent's letter of November 20, 1979, was not a good-faith effort to resume the negotiations which Respondent had halted in February 1979. On the contrary, the totality of Respondent's conduct, including the summary rejection of the UFW's December 18, 1979, (sic) offer and its delay in submitting a counter-proposal until May 1980, indicates that from November 20, 1979, until, at least, May 1980, Respondent continued the bad-faith bargaining it began on February 21, 1979. In this context, the November 20 letter appears to have been the first step in a preconceived plan to justify a wage increase which Respondent intended to make, regardless of the UFW's position.

The record in this case supports a finding of bad faith for all of 1980, as well.'

2 . The Wage Proposals

I shall begin my analysis of the wage offers by further reflecting upon some of the 1979 events. Initially, it is important to recall that except for a meaningless August 8 session in which no proposals were exchanged, these parties did not even meet between February 28, 1979 and December 7, 1979, a period of over nine months. The only proposal made in this time frame was Respondents' November 20 letter which did not look to negotiating an overall contract; instead, it sought to implement Maggio's last wage offer of February (which had already been done anyway) and to raise the Vessey and Martori lettuce harvesting rate (Maggio no longer had lettuce) to the Sun Harvest level. Still, it is now obvious why Respondents were, so interested in all of *a* sudden resuming

bargaining. With the 1979-80 winter season rapidly approaching and an ongoing strike (insofar as Vessey and Maggio were concerned) threatening crops, Respondents, who had earlier in February declared a false impasse, Admiral Packing Co., et al., supra (1981) 7 ALRB No. 43, were now most interested in getting through the upcoming season without problems and therefore, were very desirous of scheduling the December 7 meeting to discuss it. The offer to implement wages and the proposed Sun Harvest lettuce harvesting rates were made to attract workers to a competitive market. Respondents' limited proposal on wages was early indicia that they were uninterested in negotiating over other mandatory subjects. Martori Brothers, supra; Joe Maggio, Inc., Vessey & Co., et al., supra; J.R. Norton Company (1982) 8 ALRB No. 76; J.R. Norton Company (1982) 8 ALRB No. 89..

With this as background, it is not difficult to see how Respondents were able to reject out of hand — on the same day it was offered — the UFW's proposal to use the recently negotiated Sun Harvest agreement as a basis of settlement; a full scale contract simply did not fit in with Respondents' plans to implement wages, raise the lettuce piece rate, and to get through the winter season without having to bargain with the Union about an overall contract. Outright rejection without any real attempt to explain or minimize the differences is inconsistent with a bona fide desire to reach an agreement. As-H-Ne Farms, supra, citing Akron Novelty Mfg. Co. (1976) 224 NLRB 998, 93 LRRM 1106, Martori Brothers, supra.

While Respondents' venture out of impasse could hardly be described as an offer for a new contract — only a single item having been proposed — Smith responded on December 19 modifying the previous lettuce rate, the pension and medical proposals.

Rather than respond article by article, Nassif, having just opened negotiations after a nine-month hiatus, now closed them within a month of the first meeting when, on December 31, he declared impasse once again.68/ At this point he had still not explained to the UFW's negotiator what there was about the Sun Harvest agreement or the December 19 proposal 69/ that his clients

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68. Steven Martori was not even aware an impasse was going on. He testified that Nassif and he had formulated a counter-proposal to Sun Harvest, including wages, that he thought would be acceptable to the UFW and that this proposal was made before the 1979-80 harvest. Martori was also expecting to meet again with the UFW after the December 7 meeting.

69. In fact, Nassif did not really respond to the December 19 offer until April 16, 1980 and then, only partially. It was not until May 21 that the response was completed.

could not accept._70/ The truth is that Nassif needed another impasse in order to explain away – after the fact as it turned out – Respondents' unilateral raises, including that of the lettuce harvesting piece rate._70/ Martori Brothers, supra; Joe Maggio, Inc., Vessey & Co., et al., supra.

There is not another meeting until about three months later, March 4, 1980, conveniently scheduled just about the time the winter lettuce harvest ceased. Respondents Vessey and Martori had harvested their lettuce and paid their workers at the "prevailng rate." Martori Brothers, supra, Joe Maggio, Inc., Vessey & Co., et al. , supra. There was now no need for Nassif to maintain his position of impasse, and he didn't. Yet, despite the fact that all of Respondents' principals were present, supposedly to resume bargaining, no proposal was forthcoming from Respondents. Respondents' only existing proposal on the table at this time, over one year since the false impasse, was its one year old February 21, 1979' offer.

It was not until May 21, 1980, almost 15 months after the February impasse, that Respondents made their first wage proposal.

1) The Flat Crop Differential

Assuming arguendo that Respondents Maggio and Vessey were ever really serious about this proposal ,72/ their delay in presenting it remains unexplained. It was never mentioned in the November 20 letters or at the December 7 meeting. Instead, it was first referred to, not at a negotiation sessions, but during a Superior Court injunction proceeding in January of 1980. Later, having written to Smith on January 28 that Respondents were "very much interested in discussing the possibility of a wage differential

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70. Nassif's Monday morning quarterback attempt to explain away his conduct by asserting that all these matters were discussed fully during the industry-wide negotiations between November 1978-February 1979 is not very convincing, especially in light of the fact that many of the Sun Harvest provisions were different from the earlier original UFW offer.

71. Ouare whether Respondents Maggio and Vessey ever had any expectations – in the midst of a UFW strike where there had not yet been any offers to return to work – that the UFW would accept its interim wage increase offers on behalf of a work force consisting of replacement workers.

72. Carl Maggio had testified that after seeing the Sun Harvest contract shortly after it was signed, he would have considered a flat crop differential if the Union had proposed it, and it was reasonable. Yet, Maggio also testified that prior to Nassif's November 20 "offer" (G.C. Ex. 11), a flat crop differential had not been discussed as a means of settlement.

for the non-vegetable and non-lettuce crops" (G.C. Ex. 19), Nassif waited almost four months before engaging in any discussion about it, though it is clear that Smith never indicated she would not talk about it and never rejected the concept. When an offer was finally made, it is surprising that the wages proposed for flat crops were at the same wage level that had been proposed and rejected back in February, 1979. The NLRB has found surface bargaining when the employer proposed predictably unacceptable terms which it knew the union would reject, particularly where its wage offers merely maintained the status quo. Clear Pine Mouldings, Inc. (1978) 238 NLRB No. 13, 99 LRRM 1331, aff'd, (9th Cir. 1980) 632 F.2d 721, 105 LRRM 2132. Accord, O. P. Murphy Produce Co., Inc., supra.

As to those February, 1979 rates, the employers had presented a one-year increase of 7% in wages and benefits, claiming that this was the maximum legally allowable under President Carter's anti-inflation wage quidlines, announced in December, 1978. The UFW claimed that the guidelines did not apply to agriculture and were strictly voluntary anyway. The Board found the employers' position to be insincere and evidence of bad faith in Admiral Packing, et al., supra;

> The Employers' own conduct precluded serious, meaningful negotiation from taking place on economic issues, for they were, as they admitted at the hearing, claiming to be legally bound by federal guidelines which they did not believe to be truly binding upon them. As the U.S. Supreme Court has stated, good faith bargaining necessarily required that claims made by either bargainer should be honest claims. (citations omitted.) By violating this rule and advancing what was at the very least, a "patently improbable" justification for their stance, the Employers made it impossible for the Union to seek possible areas of economic compromise. (citations omitted). Id. at 18-19.

Thus, the proposal being offered in May of 1980 was the same proposal which had already been found to have been insincerely made in February of 1979. In offering identical wages in May of 1980 for the non-vegetable crops,73/ of course, it would be incumbent upon Respondents to justify this same rate by offering a new rationale. What was that rationale? Nassif testified he believed the rate was determined by surveys: "I believe what was done was there had been surveys done of the Imperial Valley by the Vegetable Growers Association and by each of the individual clients

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73. Of course, it would soon become apparent that there was no longer to be any lettuce crop upon which to apply the higher vegetable rates. Jon Vessey, for example, admitted that at the time he made the proposal for a wage differential, he was also considering not having any vegetable crops at all. If there were no vegetable crops, the differential became irrelevant; and Vessey would merely be repeating his February 21, 1979 offer.

with regard to the prevailing rates for the various crop operations. "74/ (TR. 6, p. 145). For this reason, Respondents decried the Union's approach of using Sun Harvest rates as a guide, relying instead upon their own Imperial Valley "surveys." Yet, when it came time to pay the going rate for lettuce harvesters, it was to Sun Harvest that Respondents looked to find out the prevailing wage and not to their alleged surveys.

Upon hearing of Respondents' interest in a wage differential, Smith indicated that her response to the idea might depend upon how many companies were interested in it and whether this was a main problem holding things up. In any event, she made her feelings clear that some kind of supportive data ought to be supplied that could justify such a wage distinction.

Despite the fact that Smith was willing to discuss the differential, no such information or survey was ever presented,75/ though Nassif's testimony suggested that Respondents had no particular objection to letting Smith see the alleged surveys.76/

Respondents vigorously argue that there was no legal requirement that it supply such information, and Respondents are correct. There is no claim of poverty here. See N.L.R.B. v. Truitt Manufacturing Co., (1956) 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027. Information, such as profit data for example, will not be required where the employer's economic inability to pay is not asserted by it during bargaining; and the information, though possibly helpful to the union, is really not relevant to the case. White Furniture Co., (1966) 161 NLRB 444, enf'd sub nom., United Furniture Workers v. N.L.R.B. (4th Cir. 1967) 388 F.2d 880.

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74. Two documents, however, discredit this view. Nassif's notes and memos concerning conversations with Jon Vessey, Carl Maggio, and George Stergios relating to negotiations in May of 1980 (G.C. Exhs. 99 and 100) reveal that Respondents Vessey and Maggio were not relying upon any alleged "surveys" for their decision to keep non-vegetable rates at the same level as the February, 1979 offer but rather were basing their offer again on the 7% presidential guideline.

75. Any failure to provide such requested information is not cited as evidence of any unfair labor practice; no such claim was litigated. It is adduced here only as evidence on the issue of the overall seriousness of Respondents' flat crop differential proposal.

76. Nassif testified that he thought that possibly at the October 7, 1980 meeting Vessey gave Smith the results of all the wage surveys on both flat and vegetable crops. The record does not support this claim. Smith testified, and I credit her, that at no time was she ever provided with any documentation that would support Respondent's rationale for a flat crop differential.

Yet, the thought lingers that if Respondents were serious about this proposal, they would have gone out of their way to see to it that Smith was supplied with their "surveys of prevailing rates" to convince her of the particular Imperial Valley need for lower flat crop wages. This would have added credence to their position. What was the big secret? "The purpose of collective bargaining is to promote the rational exchange of facts and arguments that will measurably increase the chance for amicable agreement . . . ." Admiral Packing Co., et al., supra, citing N.L.R.B. v. General Electric Co., (2d Cir. 1969) 418 F.2d 736, 755, 72 LRRM 2530, cert, den. (1970) 397 U.S. 965, 73 LRRM 2600, enforcing (1964) 150 MLRB 192, 57 LRRM 1491.

And there is little doubt that the simple request was a reasonable one. In the first place, it should be self-evident that for a proposal to be taken seriously a negotiator needs to acquaint herself/himself with all relevant data about the matter so that a reasoned choice can be made as to the offer's acceptability. This is particularly true where we are dealing with a new concept, not heretofore a part of previous contracts. And second, even if the proposal were deemed appropriate by the negotiator, another problem, of a political nature, remained for Smith. Workers who had been out on strike since January of 1979 were being asked to accept a contract provision that called for them to be paid separate rates for the same work depending on what kind of a field they were working in at the time. Smith knew that these workers needed to be provided with a rationale for the difference; without it, she would have a difficult time selling the program to her membership. But no rationale was forthcoming from Respondents.

The fact is that no one knew for sure how accurate these figures were. For example, Maggio claimed in November of 1980 that he needed to raise the tractor rate to $5.35 an hour in order to get the wages up to the prevailing rate. But if this were true, why were the May 1980 tractor driver wages presented as representing, on the basis of surveys, the prevailing rate? In fact, it will be recalled, Stergios had testified that in helping to formulate the flat crop wages he determined, after speaking to growers in Holtville and Brawley, that Maggie's tractor driver (and irrigator) wages were much higher than the wages being paid by other farmers in the area.

Nor did anyone know for sure how the differential was computed. Nassif testified that he had requested Maggio and Vessey to cost out what they would be saving by a differential, but he didn't know if they ever did it. Martori had no idea how the 21C difference in wages was arrived at; he never costed it out himself. Stergios worked on the proposal but, other than stating he spoke to some Imperial Valley growers, he was unable to state how he formulated it. Ron Hull called Sam Andrews, who had a cotton differential, but he did not compute any actual wage figures.

It would not be difficult to conclude that Respondents' "prevailing wage survey" consisted merely of a few phone calls to

other growers. If that is *so,* fine, but why not tell Smith? Could it be that Respondents feared their informal "surveys" were lacking in any real substance that could support their supposed position on the need for a wage differential?77/

Respondents' conception of "prevailing wage" is also troublesome. In November, 1979 the prevailing wage was the Sun Harvest lettuce piece rate because Respondents were willing to pay it in order to "maintain the Company's historical practice of paying the prevailing industry rate for lettuce harvesting" (G.C. Ex. 9). But in May of 1980, after the lettuce harvest had ended, the prevailing vegetable wage is now approximately 570 to close to SI.00 below some of the equivalent Sun Harvest classifications. In view of the Sun Harvest rate readily agreed to in lettuce, there was no reasonable explanation put forward why Respondents' wage offers in the other categories were so much below those of other growers in the same general market.78/ Making insubstantial wage proposals is a relevant factor to consider in determining whether surface bargaining occurred. As the 9th Circuit has pointed out:

> We agree with the ALJ's characterization of the wage proposals as "meager." In an age of double digit inflation, an offer of little or no wage increase is an effort to decrease wages. The ALJ could infer that the ocmpany was not bargaining seriously. K-Mart Corp. v. N.L.R.B., supra, 626 F.2d 704. See also, ITT Henze Valve Services (1967) 166 NLRB 65.

Thus, despite the fact that on the 1980 go around Respondents' gave different reasons from their 1979 7% presidential guidelines position, their rationale ultimately was as "patently improbable" as it was found to be in Admiral Packing, supra.

By the time the parties met again in October, after Respondents' May wage offer, except for Maggio's carrots and broccoli, the flat crop rates, still based as they were on the February of 1979 offer, had become a very important wage proposal because by that time all three companies had firmly decided not to grow or harvest lettuce in the Imperial Valley. Martori was not

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77. As a rebuttal witness for General Counsel, Smith testified that at the October 7, 1980 session Nassif and Vessey put into question the accuracy of the surveys by suggesting that they were not that reliable because the growers responding to them tended to misrepresent, by inflating, what they were actually paying their employees. I credit this testimony and have generally credited Smith throughout. Smith was an impressive witness, exhibiting an unusually good memory and a very professional demeanor. She was very believable.

78. No claim was ever made by Respondents that they could not pay the going rate in vegetables.

farming in California at all and could no longer be said to be bargaining over a new contract. (G.C. Ex. 42). Vessey was not farming any vegetable crops but was still interested in implementing the same wage differential. Maggio was also out of the lettuce business, and he too wanted to implement the May proposals in all job classifications. Despite the closure of the lettuce operation, thereby eliminating – at least for Vessey and Martori – the rationale for any continuation of the wage differential, no Respondent came forward with any proposal to raise the flat crops from the February 1979 level. In fact, Respondents had made no offer since their May 21 flat crop differential proposal except for Maggie's proposal on November 4, 1980 to increase the hourly wage for tractor drivers by averaging the amounts previously offered for flat crops with those of vegetables. Actually, Respondents' May 21 flact crop differential offer was, as a practical matter, Respondents' only wage proposal in two years – between February 1979 to March of 1981, the time of the hearing.

3. The Language Proposals

As of March, 1981, while the hearing in this case was still progressing, the major language problems still dividing the parties were the same that had divided them throughout 1979; there had been very little progress. These problem areas remained union security, hiring, union representative, holidays, cost of living, and, in the case of Maggio and Martori, mechanization.

a). Union Security

Both Respondent Maggio's and Vessey's prior UFW contracts allowed the discharge of an employee found to be by the Union in bad standing. The UFW wished to include suspensions, as well as discharges, among the penalties. As this was the only new language in the article, one would have thought that Respondents' opposition would have addressed the suspension addition only, especially since Nassif had testified that there had not been any problems under the prior UFW contract with the good standing provision. However, it soon became apparent from Respondents' 1980 language proposal (G.C. Ex. 27) that what Respondents opposed was not the addition of the word, "suspension", but rather the entire concept of good standing. That is why Respondents at no time ever offered its prior contractual language. What Respondents really sought was that good standing should be determined, as it had been under the old Teamsters contracts, solely for the non-payment of dues and initiation fees. As Nassif testified: " . . .basically, we just had the problem on the good standing. We wanted . . . initiation fees and dues to be the limits of good standing." (TR. 7, p. 148). And both Maggio and Vessey testified that the only acceptable good standing clause for them would have been what the NLRB permitted.

In reality, what all three Respondents opposed was the fact that the ALRA's allowable standard for good standing was broader than the NLRA. This was made clear in Respondents' Brief:

> . . . Respondent maintains, along with the majority of legislators in this State, that such a provision (the federal standard) is the one most closely designed to protect the statutory rights of farm workers to engage in protected concerted activities or to decline to engage in the same. (Parenthesis added) (Resps[1] Brief, p. 76).

In short, Respondents' objection to the UFW's union security proposal was not based on philosophical difference but was political in nature. Respondents sought to limit good standing to dues and initiation fees because they wanted the ALRA to be consistent with the NLRA; and they opposed good standing not because it permitted the discharge of an employee for the non-compliance of an obligation he/she had towards a union but rather because the degree of this obligation was broader than under the NLRA and also broader than what Respondents apparently thought farm workers ought to have. But these negotiations were conducted under the ALRA which allows good standing for the purposes which the Union sought. Respondents' reasons for persisting in its desire to limit good standing to the NLRA standard did not evince a good faith negotiating attitude. As the Board has held in Montebello Rose Co., Inc., supra, 5 ALRB No. 64, enf'd in relevant part in Montebello Rose Co. v. A.L.R.B. (1981) 119 Cal.App.3d 1, 173 Cal.Rptr. 856, (Ct. App. 5th Dist. 1981), hg. den. August 7, 1981:

> Respondents' concern that the proposed good standing provision would not be lawful under the National Labor Relations Act is patently improbable because it has little if any relevance to the negotiations between Respondents and the UFW; those negotiations are not controlled by the federal labor law. The lack of any logical relationship between the stated concern and the negotiations leads us to conclude that Respondents' justification was pretextual, i.e., a ploy to frustrate negotiations rather than an honestly-held concern. (5 ALRB No. 64 at p. 24.)

In other words, there is no logical connection between what is permitted under the NLRA and is achievable in bargaining under the ALRA, and to rest a legal position on such a premise may be evidence of surface bargaining. Adhering to an untenable legal position during negotiations is inconsistent with the obligation to bargain in good faith. Queen Mary Restaurant Corp. v. N.L.R.B., supra, 560 F.2d 403.

But Nassif's opposition to the UFWs proposal was more than just that it deviated from the federal Act. Nassif gave the proposal a bizarre and completely speculative interpretation by arguing that the addition of the word "suspension" would be used by the UFW to suspend UFW members who crossed the picket line to work or to fire replacements upon the termination of the strike. Yet, Nassif testified he knew this was clearly not the Union's intent in proposing the language and, as previously mentioned, admitted that

good standing had not been a problem in the prior UFW contract.79/ The only apparent basis for such an interpretation were hearsay statements that UFW representatives had allegedly said to replacement workers who then passed on this information to Respondents, mainly Maggio.80/ But completely overlooked by the Nassif interpretation were the safeguards against the termination or suspension of union membership in which the affected member was afforded due process guarantees. (See section 1153(c) of the ALRA and the UFW Constitution (Resps[1] 53)).81/ Also not mentioned by Nassif was the member's simple right to resign from the Union, as the UFW may only discipline its own members.

Respondent Vessey added another theory which was that union security could be used to circumvent the no strike clause by virtue of collusion between the employee and the labor organization to cause slowdowns and work stoppages. This concept is too far fetched to be given much weight and does not appear to have any evidentiary basis. Of course, if the UFW were attempting to use the contractual provision for purposes for which it was never intended, it seems to me that the Company could simply refuse to suspend the employee, claiming that this was not the intent of negotiations; if the Union grieved, let the arbitrator decide.

In J.R. Norton Company, supra, 8 ALRB No. 89, the company had feared the UFW's union security proposal's "potential for abuse." The Board found that in view of respondent's overall bargaining conduct, its union security position indicated bad faith because it demonstrated "a failure to accept the certified collective bargaining representative as the exclusive representative of the employees." Id. at 25.

I am not convinced that Nassif's fears on behalf of Respondents were justified or that his opposition to the union security article flowing from those supposed fears was sincere. If he seriously felt that the UFW would twist the article into a vehicle for action against the company by the addition of the suspension language — though the Union had apparently not done this

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79. Vessey had testified that the UFW had never even requested that any employee be discharged for not being in good standing.

80. Quite often in economic strike situations, these conflicts between striking workers and their replacements are resolved by amnesty agreements which recognize the rights of each group.

81. For example, Article XVI of the UFW Constitution, "Bill of Rights of Members," Section 5, states: "A member may not be disciplined by the Union except for failure to pay dues, unless he is served with specific written charges, is given a reasonable time to prepare his defense, and receives a full and fair hearing.

kind of thing with the discharge language of the prior contract – he surely could have proposed some kind of contractual provision to protect Respondents from this possibility ever occurring. He did not.

In any event, while Nassif was stone-walling on union security, two of his clients had indicated to him that they were willing to move on the issue. Martori told him at a meeting on December 14, 1979 (G.C. Ex. 97) that the UFW's union security proposal would be acceptable 82/ and Vessey wrote him on March 18, 1980 of its acceptability. (G.C. Ex. 104).

b) Hiring Hall

Respondent Maggio's and Respondent Vessey's prior UFW agreements both contained hiring hall provisions. Because of Respondents' complaints, the UFW on February 7, 1979 (G.C. Ex. 5A) offered to modify the hiring article by providing that the hall would be operated and paid for jointly by the employer and the Union. Rather than view this movement as a sign of flexibility on the part of the UFW and bargain over it, Jon Vessey's hard line solidified; and he saw the Union's proposal as an admission of weakness – that it couldn't administer the hiring hall on its own. Vessey testified that there was no modification the UFW could make that would cure the defects. As Respondents had shown no interest, not only in the jointly operated hall idea, but in bargaining over the hiring article at all, the UFW dropped it in its December 19, 1979 offer. (G.C. Ex. 16).

Thereafter, the UFW suggested that if Respondents would accept the hiring hall, it would give them what they wanted in the discipline and discharge section – *a* five-day probationary period in which an unsatisfactory employee could be terminated at will and could not resort to the grievance procedure to protest the action. (G.C. Exhs. 35, 36, and 37). Respondents' answer was to accept the five-day probationary period but to reject the hiring hall. This "offer," of course, eliminated the possibility of compromise the UFW had been seeking by making the proposal in the first place. Yet, a closer look at the situation reveals that, in fact, Respondents were not so opposed to the hiring hall after all. As early as December 14, 1979 at a meeting with Nassif over negotiations, Vessey had indicated that a hiring hall would be acceptable (G.C. Ex. 97) and even agreed in writing to accept the Sun Harvest language on March 13, 1980 (G.C. Ex. 104). At the same December 14 meeting, Martori, addressing the hiring hall, was quoted as saying "if it were more practical, he could live with it." (G.C. Ex. 97). And finally, Carl Maggio was asked during the hearing whether in his opinion a

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82. Martori's employees were not on strike so his concerns about the suspension language and the replacement workers' being fired, etc. was different from the other two Respondents. Yet, this difference in attitude was not conveyed to the UFW. Nassif took the same position with all three Respondents.

hiring hall could be made acceptable to him, and he replied: "It depends on what the modifications were. I'm sure with the proper modifications, it could work." (TR. 2, p. 60).

Despite the apparent willingness of all of Respondents' principals to be more flexible, there were no proposals from Nassif "modifying" the proposal or making it more "practical". Respondents' position remained essentially the same.

c) Mechanization

Respondent Maggie's and Respondent Vessey's prior UFW agreement provided that before commencing the mechanization of any operation, the Company should meet with the Union to discuss the training and placement of any displaced workers. (G.C. Exhs. 2 and 3, Article 15).

The Union made a proposal on February 7, 1979 (G.C. Ex. 5A) which called for a one-year freeze on mechanization. However, the Sun Harvest agreement (Jt. Ex. 2), which was proposed to Respondents herein, had eliminated this demand and the compromised language called for six months notice on 1) the equipment to be introduced; 2) the operation affected; and 3) the number of employees to be displaced. The article also reguired the employer to bargain over the introduction of any such new equipment and further provided that in the event of impasse: "the parties shall submit the dispute to arbitration .... The arbitrator shall have the authority to decide all issues relating to displacement of workers as a result of the introduction of the new kind of equipment." (Emphasis added).

Nassif, however, twisted this clear language into something it wasn't and advised his clients that this section would allow an arbitrator the right to actually decide whether an employer could mechanize at all.83/ Nassif testified that an arbitrator "... if we don't reach an agreement, can actually stop you from mechanizing if that's his decision. ... if you can fit those people into other jobs, that's fine. But to say there's a possibility an arbitrator could just say 'you can't mechanize whatsoever,' well, it's like . . . for some companies . . . signing a death warrant." (TR. 6, pp. 123-124).

Not only did Nassif misconstrue the meaning of the Union's mechanization proposal, but he admitted knowing better for he testified that "a reasonable person could read the Sun Harvest contract and say that it does not allow the arbitrator to refuse to allow you to mechanize. But the Union's interpretation . . .was that that was the intent." (TR. 6, p. 124). Yet, Nassif proposed

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83. For example, Maggio testified he was troubled that an arbitrator, who was not a farmer, could have the power to decide as important an issue as whether he could mechanize. However, Nassif made no proposal requiring arbitrators to have agricultural background or experience.

no language to clear up any possible misunderstanding on this point.

In addition, Martori indicated on December 14, 1979 that the mechanization proposal was acceptable to him (G.C. Ex. 97), but once again, Nassif never communicated this information to the Union. Meanwhile, Vessey had agreed to the mechanization provision of Sun Harvest on March 18, 1980, (G.C. Ex. 104) but Nassif again forgot to tell the UFW.84/ As to Maggio, its first movement on the mechanization article did not occur until November of 1980, about two years after negotiations commenced in 1978. (G.C. Ex. 47). It proposed to give the Union thirty days notice (as opposed to Sun Harvest's six months) of the introduction of new equipment and the number of workers to be displaced, but it eliminated the arbitration provision from the contract entirely.

d) Union Representative

At the December 14, 1979 meeting, Martori indicated an interest in a part time union representative (G.C. Ex. 97), but again this was not conveyed to the UFW. Instead, the provision was rejected in its entirety by all three Respondents on April 16, 1980 (G.C. Ex. 27). Jon Vessey, however, had previously received a favorable report on how well the provision was working from a fellow-grower — Nucci of Mann Packing Co. — but he dismissed this automatically as "propaganda" and never bothered to ask Nucci about it even though he spoke to him on other matters from time to tine.

Further, Nassif testified that he understood that under Sun Harvest, union representatives were proportionate to the number of employees so that at the smaller companies (like Vessey after the lettuce shutdown) it was possible that there would be so few employees that not even one representative would qualify under the contractual provision. Yet, Nassif's response to that possibility was that if Vessey returned to the lettuce business, he would talk about the union representative article then but would not agree to the provision now.

e) Holidays

The UFW wanted two new holidays, February 10, in honor of Rufino Contreras, and July 4. (G.C. Ex. 5). Sun Harvest had accepted February 10 with July 4 to follow in 1981 (Jt. Ex. 2). Respondents were not happy with the holiday schedule as it existed in the prior UFW contract and initially used that as a reason for opposing any new holidays, especially February 10.85/ Respondents'

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84. Much later, December 29, 1980, Nassif agreed to the Union's mechanization language on behalf of Vessey "because we're not harvesting any vegetables." (G.C. Ex. 52).

85. Respondents argued that the majority of holidays fell

(Footnote continued——-)

April 16 language proposal rejected any new holidays and sought to return to book, though as early as December 14, 1979 all three Respondents had indicated to Nassif that they had no objections to a July 4 holiday (G.C. Ex. 97). But it was not until October 7 and 8, 1980 that Nassif finally got around to telling the UFW that July 4 was an acceptable date. Further, it develops that as of March 18, 1980 Vessey was willing to "give a holiday in Spring or Summer" (G.C. Ex. 104), though he still remained opposed to February 10; but this information was also never conveyed by Nassif to the Union.

f) Cost of Living

Respondents' rejected a cost of living provision throughout negotiations and never made an offer on it 86/ although, as has been seen before, Martori indicated he would agree to it as early as December 14, 1979 (G.C. Ex. 97). The primary objection was that wages were too high already. As I have already found that Respondents did not bargain in good faith over wages, this conduct, of course, impacted directly upon the negotiations over a cost of living provision.

g) Summary

The April 16 proposal of Respondents (G.C. Ex. 27) broke no new ground. Although it accepted many of the Sun Harvest articles, some of which were definite improvements, many of the other articles agreed to were no different from Respondent Maggio and Respondent Vessey's prior UFW contract. The major areas remained untouched. Respondents had not changed their February offers on mechanization, union security and hiring halls (they still wanted to delete the latter two from the contract), and made no offers at all on union representative or cost of living.

The October/November sessions were fruitful but by then it was a question of too little too late.87/

Footnote 85 continued——)

during the Imperial Valley winter season (Resps[1] post-hearing Brief, p. 55), but a review of the prior agreement (G.C. Ex. 3, Article 24) indicates that of the four holidays — Labor Day, Thanksgiving, Christmas and New Years — only the last two would so qualify.

86. While there is a disagreement between the parties as to whether a cost of living increase was automatic under the UFW's proposal, the fact is that Respondents never made an offer to limit its application in any way.

87. Even Respondents characterize the October and November, 1980 meeting results as reaching "agreement on a number of minor matters." (Resps[1] post-hearing Brief, p. 140.)

The point is that while secondary issues were being settled, no movement was being made to resolve the major disputes separating the parties for almost two years, despite the fact that there was still plenty of room to maneuver. The fact that other articles were agreed to is conduct which can be perfectly consistent with surface bargaining which, by definition, is an approach that resembles good faith but is in fact calculated to frustrate agreement. McFarland Rose Production (1980) 6 ALRB No. 18, citing N.L.R.B. v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 45 LRRM 2829.

3. The UFWs Alleged Refusal to Bargain in Good Faith

A labor organization's bad faith bargaining may be an affirmative defense to a refusal to bargain allegation against an employer. Montebello Rose Co., supra, citing Continental Nat Co. (1972) 195 NLRB 841, 79 LRRM 1575; Times Publishing Company (1947) 72 NLRB 676, 19 LRRM 1199; McFarland Rose Production, supra.

Respondents' claim that the UFW presented a "take it or leave it" attitude as regards the Sun Harvest contract and that this insistence upon those terms constituted bad faith bargaining. Respondents also argue that the Union's bad faith is demonstrated by Smith's alleged remark that Sun Harvest was the best contract Respondents would ever be able to get.88/

I do not find the UFW engaged in any unlawful conduct. When Nassif called Smith's December 19, 1979 offer an "insult" and accused Smith of bad faith for failing to take into consideration the differences between "relatively small companys (sic) and the giant conglomerate Sun Harvest, "89/ he had apparently expected that any future proposals from the UFW would have had to have been below Sun Harvest levels, based upon his rejection of the Sun Harvest agreement.90/ This expectation was held despite the fact that no concessions on anything had been forthcoming from Respondents except for their November 20 offer to accept the Sun Harvest lettuce piece rates to get them through the season and, in Maggio's case, to implement its February rates, which it turned out had already been done anyway.

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88. Smith denied making the statement.

89. Of the other companies that signed Sun Harvest type agreements, Nassif was unable to name one that he considered to be "giant conglomerates."

90. For example, Nassif testified that when the parties reconvened on March 4, 1980 what was on the table was not the Union's offer of February 28, 1979, as modified by the December 19 offer. Instead, Nassif felt the only proposal to be discussed and bargained down from was Sun Harvest.

I do not understand the bargaining process to function in the terms Nassif sets forth. For this reason I do not find it necessary to decide whether Smith actually made the "Sun Harvest or worse" remark attributed to her as the statement, even if made, was not a categorical demand making further negotiations impossible but was rather language designed to encourage Respondents to take a second look at negotiating along the lines of a Sun Harvest type agreement.91/ Smith was not offering Sun Harvest as a complete proposal in response to a similar offer from Respondents so that a withdrawal of a Sun Harvest article and the substitution of one less favorable to the employers would be deemed to be bad faith conduct. Instead, Smith's offer was an invitation to Respondents to accept in toto, without more, except as it pertained to local issues, a compromised settlement package that 18 other employers had negotiated and agreed to. If Respondents wanted it, fine – it was theirs; if they didn't, then they'd have to go back to where they were and bargain for what they wanted over the table just like everyone else. This is not the say, as Nassif assumed ,92/ that Respondents could not have gotten for themselves a better deal than Sun Harvest, at least in some areas. This is the nature of collective bargaining. It is a fluid, flexible process and during the give and take, parties can gain major benefits in some areas and lose them in others. But Respondents, at least, had to try for

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91. Certainly it was only natural for Smith to have throught Respondents would have been interested in signing a master agreement with local issues resolved separately as these were precisely the agreements she had negotiated with Nassif, who had previously representd Vessey and Joe Maggio, Inc., in 1977. In fact, Jon Vessey testified that he helped formulate the employers' February 21 proposal and that it was his intent that that proposal serve as the master contract; and if necessary, individual companies could have worked out local issues on their own, as had been done in the past.

92. Nassif's attribution to the UFW of bad faith motivation helped to keep the parties apart. Admitting that there were significant differences between the UFWs early February proposal and what it settled for in Sun Harvest, Nassif explained this in terms of the Union's strategy of making proposals that it knew were predictably unacceptable in order to give itself room to move so that it could argue it was bargaining in good faith. Once this premise was accepted, then Nassif could not treat with very much respect any movement on the part of the UFW because he knew, in his own mind, that it was not a serious offer, but merely a part of a strategy to get him to ultimately accept Sun Harvest and keep the Union from being found to have bargained in bad faith. For example, when asked what he thought of the UFWs acceptance of large numbers of Respondents' proposals (G.C. Exhs. 35, 36 and 37), he replied, ". . . it meant we were getting another one of those responses that said, 'since you don't want Sun Harvest, we'll offer you something worse than Sun Harvest and keep playing the same game.[1]'" (TR. 6, p. 153).

them; the UFW wasn't giving them away. The fact is that it was because of Respondents' intransigence in not making meaningful bargaining proposals — and not the UFWs — that negotiations never got. to a point where it could be accurately stated that the UFW, as Respondents maintain, refused to bargain a provision down from Sun Harvest. Negotiations, especially on the major issues never reached that plateau.

From this standpoint, the UFW's December 19 offer, and subsequent offers through 1980, though "worse than Sun Harvest" were nevertheless to be viewed as new proposals, following a long (false) impasse, and indicating the Union's recognition of Respondents' desires to negotiate from the February proposals. This was not inconsistent with the UFW's intent to reach an ultimate agreement. The Board has held that after a respondent rejected the "already fully bargained Sun Harvest contract", it was not bad faith for the Union to come back with an offer higher than Sun Harvest's provisions. J.R. Norton, supra, 8 ALRB No. 89, at 27.

Viewed from the totality, the UFW's conduct here did not constitute bad faith bargaining. The UFW was not the cause of the parties' inability to reach an agreement. The evidence as a whole shows that the UFW desired and worked towards a contract, and the Respondents did not. There is no evidence that if the UFW had acted as Respondents contend it should have, Respondents' bargaining strategy would have been any different. McFarland Rose Production, supra.

Finally, I note that the acts and conduct of Respondents, found unlawful in Admiral Packing, supra, also constitute evidence of Respondents' overall failure to bargain in good faith here. See Mario Saikhon, supra, 8 ALRB No. 88, citing Local 833, UAW, AFL-CIO v. N.L.R.B. (D.C. Cir. 1962) 300 F.2d 699, 49 LRRM 2485.

4. Conclusion

> In order to prove bad-faith bargaining, the General Counsel need not introduce evidence of bad faith for every single meeting between the parties. A finding of surface bargaining is dependent not upon evidence of specific unlawful acts every time the parties meet, but, instead, upon a pattern or course of unlawful conduct which precludes the attainment of agreement or genuine impasse between the parties. McFarland Rose Production, supra, at p. 24.

Under the totality of circumstances I find Respondents and each of them to have engaged in surface bargaining and shall recommend to the Board that they be found in violation of sections 1153(e) and (a) of the Act.

VI. THE CESSATION OF LETTUCE IN THE IMPERIAL VALLEY

A. Vessey & Co.

1. Facts

Jon Vessey testified extensively as to the reasons for his decision to discontinue lettuce in the Imperial Valley in the 1980-81 winter lettuce season and thereafter. Citing economic problems, especially in what was described as a financially disastrous preceding 1979-80 season, Vessey listed several factors as follows: 1) oversupply in the preceding season caused by a) increased overall acreage in the Imperial Valley and b) increased overall yields and production in the general area, including Arizona; 2) increased competition from Arizona, particularly around Yuma where a new variety could now be grown for the first time in January and February, and where cheaper growing costs enabled prices to be kept down; 3) decreased consumption;93/ 4) transportation costs from western markets to the east coast had risen while closer markets in Texas and Florida, which had been developing growing areas, could supply the east coast with lettuce at lower prices because of lower transportation costs; and 5) name recognition, such as Vessey[1]s, was no longer a factor; purchasers only wanted the cheapest lettuce they could find.

Vessey also testified that there had been a very high market in the 1978-79 Imperial Valley season due to the strike and that as a result, a large number of smaller companies that did not have any previous experience in lettuce were encouraged by the inflated price figures (caused by the decline of supplies during said strike) to come into the Imperial Valley market in large number during the 1979-80 and later, the 1980-81 season.

Vessey acknowledged that labor costs were a cost factor contributing to his assessment of whether to continue in the lettuce business but that it was not the only reason. When asked what it was about 1980 that caused him to give up lettuce after so many years in the business, he replied that it was the serious financial loss suffered the preceding season. Vessey denied that the 1979 strike affected his decision.94/

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93. Vessey testified that the only exceptions to this trend were 1) in the fast food market where business concerns contracted with lettuce producers for the shredding and packing (in 5-10 Ib. bags) of lettuce but that such contracts were only being awarded to larger growers who could supply the product year-round; and 2) in wrapped lettuce operations, which Vessey said he did not maintain because of the capital investment involved for the purchase of the required machinery.

94. Vessey did testify, however, that when he received a

(Footnote 94 continued——)

Vessey also did not rule out ever coming back into the lettuce business stating that if conditions ever reached a different level, he might do it.

Vessey testified that he first started thinking about not growing or harvesting anymore lettuce during the 1979-80 season and considered it seriously after the final accounting was in. In May, the UFW was informed of Vessey's thinking. Nassif testified that he told Smith at the May 21, 1980, negotiating session that the company was presently considering not harvesting lettuce anymore, that the decision wasn't final or irreversible, that in fact its wage proposal of that date (G.C. Ex. 31A) included a wage differential for workers employed doing lettuce work, and that Vessey was prepared to discuss both his decision and the effects with the UFW.

Two months later, on July 21, 1980, Smith wrote Nassif expressing her concern over any lettuce cessation and urged that the lettuce harvesting continue as before. (G.C. 36.) She also inquired whether a firm decision had been made not to harvest lettuce and if so, asked that Respondent respond to ten inquiries said to be necessary "to assist us in assessing the impact of such a decision on our members."

Meanwhile, somewhere in this intervening period between the May 21 meeting and Smith's July 21 letter, the final decision on the lettuce closure was made. Vessey testified it occurred around the June/July period, that subsequently, lettuce was not grown or harvested, and that he sold his harvesting equipment.95/

On August 13, 1980, Nassif replied (G.C. Ex 40) to Smith's July 21 letter by acknowledging its receipt but explaining that a full reply would not be forthcoming until around September 2 when he returned from vacation. On September 5 Nassif did respond to Smith's inquiries (G.C. Ex. 41) and stated, inter alia: "Question number ten asked whether the decision not to harvest lettuce was temporary or permanent. I can only answer that by saying that the company presently does not intend to harvest lettuce. Whether it will do so in future years is not presently known."

Additionally, Nassif's letter stated that Respondent had no plans to offer severance pay to workers but would discuss it. He also stated that any persons displaced would be eligible for

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(Footnote 94 continued—)

list of his lettuce harvesters in December of 1979 offering to return to work, he was not convinced that the UFW had called off the strike amd was concerned that once hired back, these workers might very well go out on strike again.

95. Vessey testified he did not sell his growing equipment but that he is using it for other crops.

employment in other areas of the company's operations should there be openings.

The next meeting between these parties was October 7, 1980. Nassif testified that on that date, in answer to Smith's inquiries, he gave an explanation (similar to Vessey's above-stated reasons) as to why it was no longer feasible economically for Vessey to grow and harvest lettuce. At that point Smith asked, according to Nassif, what the Union could do, and that it was Vessey who replied that there was nothing to be done – that his decision had nothing to do with the Union and that he wasn't complaining about the work force. When Smith then inquired about severance pay, Nassif testified that he told her Respondent had no offer to make over this subject matter.

Smith also wanted to know if Respondent was harvesting lettuce in Marana or Willcox, and Nassif testified that he replied that it was not.

Smith also testified about this meeting. According to her, Vessey did indicate his decision on lettuce was final insofar as 1980-81 was concerned but that he made it clear it was not a permanent decision and that he did not know what the future would hold.

Smith also testified that she asked Nassif if the "sister entity"96/ to Vessey & Co. in Arizona would be having lettuce in Arizona, and the response was that it would not.97/

Nassif testified that at the October 27 negotiating session, Smith again asked if the Company intended to make a proposal on severance pay to which it was explained that there was no such plan because lettuce had been a disappointment, and Respondent did not wish to expend any more money on an economically losing proposition. Nassif testified he did tell Smith that if there were job openings, first preference would go to displaced employees.

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96. Smith was referring to Cortaro Farms, a partnership growing lettuce in Arizona, infra. Smith testified that Nassif would have known what she meant by the term "sister entity" because it had come up in the 1977 negotiations leading to a contractual agreement covering Vessey's employees while they work in Arizona (G.C. Ex. 2, "Arizona Supplemental Agreement," p. 40.)

97. This inquiry is not set forth in Smith's negotiating notes for that session. (Resp's 45.) Vessey denied such a response was made or that Smith asked anything about Cortaro. But he testified he did tell Smith, in response to one of her questions, that Vessey and Co. was not going to be growing or harvesting in Arizona.

Smith testified that when Nassif made this reply she asked if this meant that Respondent was offering employment to displaced lettuce harvesting workers in Arizona in the Company's lettuce harvesting operation there but that the response was that there was no intention to imply that there would be an operation in Arizona in which displaced workers could be placed and that the statement referred only to Vessey's California operation.

On November 13, 1980, Smith made a severance pay proposal for an amount of money equal to 25% of each worker's total gross earnings earned during his or her total length of service with the Company. (G.C. Ex. 49, p. 3.)

2. Analysis and Conclusions of Law

a. The 1153(c) Allegation

1) Legal Principles in Dual Motive Cases

For years the NLRB and the federal courts of appeal were perplexed by the difficulty in determining the correct standard to be used in "dual-motive" cases, such is present in the instant case, where an employer's actions were or may have been motivated for both legitimate business reasons and because of employees' protected concerted or union activities. The problem arose because it seemed unfair that an employer, even if motivated by an unlawful intent, should not be able to demonstrate that his conduct would have occurred anyway even if his illegal motive were not present. This issue was finally resolved in Wright Line (1980) 251 NLRB 150, 105 LRRM 1169, when the NLRB held:

> First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once that is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 105 LRRM at pp. 1174-1175.

If the employer then fails to carry its burden in this regard, the NLRB found it was entitled to find a violation had occurred and need not "quantitatively" analyze the effect of the unlawful cause once found; it was enough that the employee's protected activies were causally related to the employer's action which was the basis of the complaint.

Thus, under Wright Line, even where General Counsel makes a prima facie showing of anti-union animus as a motivation for an employer's action, the employer may still foreclose the finding of a section 8(a)(3) (federal statutory equivalent of section 1153(c)) violation by showing that the decision would have been the same in the absence of protected activity.

Both the California Supreme Court and the ALRB have approved of the Wright Line standard for dual motive cases.98/ Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 175 Cal.Rptr. 626; Nishi Greenhouse (1981) 7 ALRB No. 18. In Martori, the Supreme Court reasoned that Wright-Line was essentially a "but for" test that had already been approved by some appellate courts; e.g. Royal Packing Co. v. Agricultural Labor Relations Board (1980) 101 Cal.App.3d 826, 834-835; Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Board (1979) 93 Cal.App.3d 922, 935; Abatti Farms (1980) 107 Cal.App.3d 317 and stood for the proposition that where an employer acted for both legitimate business reasons and illegitimate reasons, the question should be whether the conduct would have occurred "but for" the protected concerted or union acitivity.

Recently the ALRB also approved the NLRB standard that once the General Counsel has carried its burden of proof as to the prima facie case, the burdens of both production and persuasion shift to the employer. Royal Packing Company (1982) 8 ALRB No. 74; Zurn Industries, Inc. v. N.L.R.B. (9th Cir. 1982) 680 F.2d 683, 110 LRRM 2944 at note 9.

Of course, *a* conclusion or an inference that activity would not have occurred but for employees' union or concerted activity must be based upon evidence, direct or circumstantial, not upon mere suspicion. N.L.R.B. v. South Rambler Co. (8th Cir. 1963) 324 F.2d 447. Evidence which does no more than create suspicion or give rise to inconsistent inferences is not sufficient. Schwob Mfg. Co. v. N.L.R.B. (5th Cir. 1962) 297 F.2d 864; Rod McLellan (1977) 3 ALRB No. 71 (1977). Mere suspicion of unlawful motive is not substantial evidence; an unlawful or discriminatory purpose is not to be lightly inferred. Florida Steel Corp. v. N.L.R.B. (5th Cir. 1979) 587 F.2d 735; Lu-Ette Farms, Inc. (1977) 3 ALRB No. 38.

Moreover, where the Board could as reasonably infer a proper motive as an unlawful one, the act of management cannot be found to be unlawful discrimination. N.L.R.B. v. Huber & Huber Motor Express (5th Girl 1955) 223 F.2d 748. Nor may the Board reject a business justification solely on the grounds that it does not appear to be reasonable. Rivcom Corporation, et al. v. Agricultural Labor Relations Board (1982) __ Cal.App.3d __, 5 Civil No. 5121, citing N.L.R.B. v. Joseph (9th Cir. 1979) 605 F.2d 466. In this way, seemingly arbitrary conduct, even if harsh and unreasonable, are not unlawful unless motivated by a desire to discourage protected union activity. N.L.R.B. v. Federal Pacific Electric Co. (5th Cir. 1971) 441 F.2d 765.

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98. In Wright Line, the NLRB distinguished a dual motive case from a pretext case: the latter is one in which the employer's affirmative defense is "wholly without merit," whereas in the former, the affirmative defense has "at least some merit." 105 LRRM at 1170, note 5.

Furthermore, in assessing the meaning of motivation in cases of this nature where prolonged, often fruitless, bargaining in the context of a seemingly endless, sometimes violent strike have soured the atmosphere and helped to destroy any feelings of mutual respect between the parties, what is necessary to find a violation is not that such feelings existed but that they motivated Respondent to a course of action that otherwise it would not have taken.

> . . . Feelings are intense and deply held by both parties when a lack of employment occurs, whether as the result of a strike or a lockout. . . . Statements and conduct which could be the bases for inferring animus, which the parties each entertained toward the other are not difficult to detect. The standard here, however, is not the existence of inchoate animus but rather whether that feeling did in fact motivate .... N.L.R.B. v. Wire Products Mfg. Corp. (7th Cir. 1973) 484 F.2d 760, 765.

Thus, evidence of an 1153(c) violation "must be probative of discrimination, not merely of the employer's hostility toward unionism." Merchants Truck Line, Inc. v. N.L.R.B. (5th Cir. 1978) 577 F.2d 1011, 1014; an employer's general anti-union hostility and its pattern of anti-union activity, may be significant, when an employer's motives are ambiguous, but, without more, they do not supply the element of unlawful motive. Id.

Finally, it is important to note that in cases of the partial closure of a business operation, the importance of motive in establishing violations of section 8(a)(3) has been limited by the strictness of the proof required. In Textile Workers Union v. Darlington Mfg. Co. (1965) 380 U.S. 263, 855 S.Ct. 994, 13 L.Ed. 2d 827, the U.S. Supreme Court held:

> . . . [A] partial closing is an unfair labor practice under section 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect. 13 L.Ed. 2d at 836-837.

Under this rigorous standard, the General Counsel will not prevail unless she can show that the persons exercising control over the business:

> (1) have an interest in. another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities. ..." 13 L.Ed. 2d at 837.

2) The Prima Facie Case

Applying the Wright Line standard to the facts here, I find that the General Counsel has carried her burden of proof and made a prima facie case that protected conduct was a motiviating factor in the decision to close down the Imperial Valley lettuce operation. I think there is a reasonable inference, based upon the surface bargaining I have found the long strike and accompanying bitter feelings, and the timing of the closure, that discriminatory motives have played a role in Jon Vessey's ultimate decision to cease growing and harvesting the lettuce crop. But for reasons stated below, I also find that Vessey's business reasons for its partial closure prevail under the Wright Line test over any anti-union animus that may have also motivated that decision.

3) The Defense

a) The Meeting with the Teamsters Representatives and theDiscrediting of Medoza's Testimony.

Roy Mendoza is the senior business agent of Teamster's Local 890 in Salinas, California, in charge of food processing. Local 890 has a produce driver contract with Vessey. Mendoza testified that in February of 1981 99/ there was a meeting at Nassif's law offices in El Centro at which the following persons were in attendance: Ed Gay, president of the local, Alex Montoya, secretary-treasurer, who was also a business agent for the produce drivers, Jon Vessey, Tom Nassif and Mendoza. The purpose of the meeting, according to Mendoza, was to discuss at the first step, a Teamster grievance 100/ alleging that truck drivers, laid off as a result of Vessey's lettuce closure should be recalled because Vessey was still in the business of growing lettuce.

Mendoza testified that following the grievance discussion, while he, Gay, Montoya, Nassif, and Vessey 101/ were sitting around and talking, the subject matter of the UFW came up and that he (Mendoza) remarked that ". . .we didn't mind them . . . fucking around with the UFW, as long as they didn't fuck us in the process," and that Vessey responded, "Well, you know we can't afford to hassle with having - with the UFW. That's one of the reasons we got out of growing lettuce." (TR. 14, p. 21.) Mendoza further testified that thereafter, "... they made the statement, like usual, that if the Teamsters came back . . . , they would deal with the Teamsters and negotiate . . . ." (Id.)

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99. On cross-examination Mendoza admitted the meeting might have occurred on December 17, 1980.

100. A Teamsters/Vessey labor agreement was then in effect with an expiration date of March 12, 1982.

101. Mendoza could not recall if Vessey attorney Merrill Storms was present.

Merrill Storms testified that acting as the attorney for Vessey & Co., he attended a meeting along with Vessey, Nassif, Mendoza, Gay and Montoya on December 17, 1980, which was held pursuant to his (Storms') November 6, 1980 letter to Montoya (Resp's 33) offering to discuss the effects of Vessey's decision not to grow or harvest lettuce in the Imperial Valley in 1980. A further purpose of the meeting was to select an arbitrator from a panel to hear two grievance matters concerning Cotaro Farms' 102/ alleged subcontracting of Teamsters work and its failure to recall laid off drivers. According to Storms, no grievance had yet been filed accusing Respondent of still being in the lettuce business.103/

Both Storms and Vessey testified about Mendoza's version of what Vessey was alleged to have said at the meeting. Storms testified that at some point the meeting became acrimonious, and Mendoza and Gay both accused Vessey of growing lettuce in Blythe and Yuma. Later on, towards the end of the meeting, while the parties were standing in the hallway of the law office, Mendoza, according to Storms, remarked: "We don't care what you do or how you fuck with the UFW, but whatever you do, don't fuck with the Teamsters," to which Vessey replied, "We're not trying to fuck you over, we've played things straight above the board." (TR. 20, p. 104.) Vessey testified he responded to the Mendoza remark by telling him that he had never had any problems in sitting down in a businesslike fashion and discussing problems and there shouldn't be any difference now.

Both Vessey and Storms denied that there was any discussion of Vessey and Company's moving to Arizona to avoid dealing with the UFW; both testified they gave only economic reasons for the closure. Vessey also denied that he told the Teamsters representatives anything about his decision to cease lettuce production that was different from what he had previously said to UFW representatives in October. Both Vessey and Storms denied that following Mendoza's remark about the Teamsters returning to the fields, there was any remark by Vessey indicating that a contract with the Teamsters would be negotiated or expressing any preference for dealing with the Teamsters over the UFW.

The alleged Vessey remarks are the only direct evidence in this case that Vessey's lettuce closure was motivated by an intent to discriminate against the UFW and thereby to discourage unionism. The General Counsel cites this testimony to support the view that

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102. Jon Vessey is a partner in *an* Arizona fanning operation called "Cortaro Farms", infra.

103. Respondent's attempt to discredit Mendoza on the grounds that he was incorrect about the purpose of the meeting through Respondent's Exhibits 49 and 50 is rejected. A ruling on the admissibility of those documents was reserved pending a review of the transcript. They are not admitted because it is not clear that they attack the credibility of Mendoza by showing his testimony on this point to be inconsistent.

anti-UFW animus was the real reason for Vessey's shutdown of lettuce operations. However, I find that I cannot rely on this evidence because *I* cannot credit Mendoza's testimony. In my view, his testimony was characterized by hostility and contentiousness, and he seemed to have an axe to grind. I believe his emotional feeling that Respondent was violating its labor agreement and deceiving the Teamsters by continuing to grow lettuce colored his testimony. He was also confused about when these events occurred.

In contrast to Mendoz's impetuousness, I found Jon Vessey to be a particularly cautious and deliberate individual. I do not believe he would have been the type of person to have made, in front of Mendoza, the extremely incriminating remarks attributed to him. Nor does it seem logical to me that at a meeting called to discuss the effects of the Company's decision to cease growing lettuce, he would have admitted that the reason was to avoid dealing with another union (albeit a rival one, often at odds with the Teamsters). By admitting an anti-union bias (and thereby admitting a non-economic basis for the change in conditions), Vessey would not have been doing his own position on effects bargaining much good and could have been setting the stage for other Teamster grievances.

I also note that Mendoza testified Gay was present for this conversation, but the General Counsel — on an issue of this importance •— did not call him to testify.

b) The Business Justification

There does not appear to be any dispute about the fact that the 1979-80 Imperial Valley lettuce season was an extremely poor one,104/ especially when compared with the preceding season. The low was $2.00 a carton and the high never got above $4.00, which it only reached on 5 days the entire season. (G.C. Ex 80(d), p. 19.) As the "Highlights" section of the "Federal-State Market News Service" reported for the 1979-80 Imperial Valley season: "... the lightest yields in the last fifteen years due mainly to some economic abandonment (sic) account of market conditions,105/ low prices and light demand through most of the season, at no time did the market exceed $4.00 per carton; ... a short shipping season and the earliest completion date on record." (Id., p. 5.)

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104. The General Counsel apparently concedes the extreme unprofitability of the season, preceding the closure. No contrary evidence was presented to Vessey's testimony that he sustained significant losses in the 1978-79 lettuce crop. Nor did General Counsel demonstrate that this unprofitability was not as great as or even the same as other seasons.

105. Vessey had testified that increased acreage had created an oversupply and that many growers in this period chose not to even harvest all the lettuce they planted.

There is also some support in the record for Vessey's position that the bad season was the result of greater yields (at least in Arizona) and increased acreage (at least in the Imperial Valley) thereby causing the problem of oversupply. The 1980 "Federal-State Market News Service" report for Central Arizona (Marana) 106/ indicates that although this region had the lowest acreage on record for *a* spring, this was offset by the fact that its yields (664 cartons per acre) was an "all time record yield."107/ (G.C. Ex. 80(i), p. 9.)

While this was happening in Arizona, the Imperial Valley's lettuce acreage increased 11% in 1978-79 and another 3% in 1979-1980 but its yields declined in both years (G.C. Exhs. 80(c) and 80(d)), the latter season, as previously mentioned, being the "lightest yield in the last fifteen years."

The General Counsel questions why Respondent would continue its Cortaro interst in the growing of lettuce in Arizona, particularly Marana, from 1976 at least until 1981, arguing that the documentation does not show a better market for Arizona. But actually, prices in central Arizona seem to run overall a bit higher than in the Imperial Valley over the last few years. This is shown by averaging the weekly prices and dividing by the number of weeks;108/ e.g. 1976 Arizona fall, $3.62, 1976-77 Imperial Valley, $3.32; 1977 Arizona spring, $2.05, 1977 Arizona fall, S4.63, 1977-78 Imperial Valley, $3.80; 1978 Arizona spring, $8.04, 1978 Arizona fall, $3.94, 1978-79 Imperial Valley (year of the strike), $7.69; 1979 Arizona spring, $2.75, 1979 Arizona fall, $3.69, 1979-30 Imperial Valley (averaging "mostly" column), $2.67; 1980 Arizona spring, $6.75 109/ (G.C. Exhs 80-80(1)).

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106. Cortaro Farms, in which Jon Vessey was a partner, continued to grow lettuce in Arizona mainly around the Marana area.

107. Yields increased significantly in Central Arizona in just one year. In the spring of 1979 yields were only 258 cartons per acre, a record low. (G.C. Ex. 80(h), p. 7.) in the fall of 1979 it was up to 394 cartons, 440 cartons in Marana. (Id. , p. 5.) On the other hand, Imperial Valley yields had been consistently going downwards following its record high of 582 cartons in 1976-77 (G.C. Ex. 80(a); e.g. 502 in 1977-78, 475 in 1978-79 (G.C. Ex. 80(c)), and 387 in 1979-80 (G.C. Ex. 80(d)).

108. Vessey testified (and the documentation confirms) that some of these figures would actually be lower because they would not "take into consideration any price adjustments or allowances which may have been made after shipments left shipping point." (G.C. Ex. 80(b), p. 7.)

109. Although Vessey testified he first started thinking about getting out of Imperial Valley lettuce during the 1979-80

(Footnote continued—)

The General Counsel also argues that the reasons Vessey gave for discontinuing lettuce in the Imperial Valley apply with equal force to the Arizona operation. Why California?

It is true that while Arizona prices may have been better than the Imperial Valley, they may not have been spectacularly better. But it needs to be recalled that Jon Vessey testified without contradiction that Cortaro Farms had also considered not growing lettuce at all in the fall of 1980 because of competition from New Mexico, Huron, and Bakersfield, and in fact, the business ended up reducing its lettuce acreage by one-half to just around 120 acres that season. (That crop was subsequently packed and sold to Action Packing.) Vessey also testified that he planned to custom grow the 1981 spring Arizona lettuce to fit crop rotation needs and presumably to reduce Cortaro[1]s risk, as well, while staying out of the fall, 1981 lettuce entirely.110/

Finally, despite the fact that I am recommending to the Board that the Respondent be found to have violated section 1153(e) and (a) of the Act for having engaged in surface bargaining, I am still not convinced that this conduct and the other factors previously mentioned were the dominant reason for the closure.111/ I do find Jon Vessey's business explanation for closing down an enterprise he clearly cared about to be reasonable and believable. In short, Vessey[1]s testimony that he discontinued Imperial Valley lettuce for economic reasons, brought to a climax by an extremely bad 1979-80 season in a crop particularly vulnerable to the short term fluctuation of a supply and demand situation, is credible; I

(Footnote 109 continued---)

season, a final decision was not made until later, probably around June or July. Because of Vessey's partnership interest in Cortaro Farms, he would have obviously been aware of the higher prices (and better yields) in Arizona, particularly in the spring of 1980, the immediate season preceding his final decision.

110. General Counsel exhibits show that Vessey[1]s spring Arizona "deals" were not particularly successful in 1979 but were extremely successful in 1978 and 1980 whereas the fall profits had fallen in both 1978 and 1979 from a high in 1977.

111. Even had I found that anti-unionism was the motivating factor, I note that General Counsel did not prove and does not argue the alleged section 1153(c) violation in terms of the partial closure standards set forth in Textile Workers Union v. Darlington Mfg. Co., supra. The proof that would have been required to prove an unfair labor practice was not that Vessey[1]s decision was designed to "chill unionism" at Vessey's Imperial Valley location but that it was intended to "chill unionism" at its other farming locations, if any. Id. See also, R. German, "Basic Text on Labor Law" (1976), pp. 146-147.

shall not second guess that judgment here. General Counsel's attempts to discredit this business defense through market reports in fact, added support to Vessey's reasons. I find that Vessey's business justifications for his cessation of lettuce in the Imperial Valley are sufficient to overcome the prima facie case established by General Counsel. It is my opinion that the same decision would have been reached by him even absent any anti-union animus on his part. I recommend the dismissal of this allegation.

b. The 1153(e) Allegation

1. Decision Bargaining

The leading federal case with respect to the employer's duty to decision bargain over a partial closure is the United States Supreme Court case of First National Maintenance Corp. v. N.L.R.B. (1981) 107 LRRM 2705. The issue in that case was whether the employer's decision (an economically-motivated decision to shut down part of a business) should be considered part of an employer's retained freedom to manage its affairs unrelated to employment consequences. The test was said to be whether the benefit to labor-management relations and the collective bargaining process outweighed the burden placed on the conduct of an employer's business in view of his "need for unencumbered decisionmaking." The Court concluded that bargaining was not mandated:

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of section 8(d)'s "terms and conditions" over which Congress has mandated bargaining. 107 LRRM at 2713.

As to the fear that the partial closure would deal an unfair blow to the labor organization, the Court said:

> (T)he union's legitimate interest in fair dealing is protected by section 8(a)(3), which prohibits partial closings motivated by anti-union animus, when done to gain an unfair advantage. Textile Workers v. Darlington Co., 380 U.S. 263 (1965). Under section 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."
>
> Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that *is* motivated by an

intent to harm a union.112/ 107 LRRM at 2711.

But General Counsel would not have me analyze this case as a partial closure, arguing instead that NLRB precedents are misleading in the context of agriculture, and that, in any event, Respondent's crop discontinuance was more analogous to subcontracting, mechanization, or a runaway shop. (G.C.'s Brief, pp. 92-96.)113/ I disagree. In a subcontracting situation, the company's basic operation has not changed — the company has just replaced existing employees with those of an independent contractor and has required them to do the same work. In that context, bargaining, unlike the Court's determination in First National, supra, can still be meaningful; and the employer's freedom to manage his own business is not abridged. See Fibreboard Paper Products Corp. v. N.L.R.B. (1964) 379 U.S. 203, 214. Likewise, under mechanization the company's operation also remains the same — only a machine is now doing the same work the employees once did. Bargaining can be effective here also, just as in subcontracting, because the union can suggest ways to increase production or reduce

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112. In interpreting First National, the ALRB recently held in Paul W. Bertuccio (1982) 8 ALRB No. 101, that in the agricultural context the determination of whether decision bargaining was required over crop decisions was to be judged on a case-by-case basis because only in this way could competing interests such as the union's interest in attempting to mitigate any losses of bargaining unit work be balanced with the employer's interest in making decisions quickly and with minimal interference. But there is nothing in Bertuccio that would change the result here. Unlike Bertuccio, Respondent's desire to cease growing lettuce did significantly alter its overall farming operation and was not done for the convenience of another party but because Jon Vessey, owing to lettuce losses the preceding year, was desirous of getting out of the lettuce business entirely in order to avoid another unprofitable season. I do not see how, under these circumstances, meaningful bargaining could have taken place. In any event, even if Bertuccio had some application, it would be unfair to retroactively impose such a duty here based upon this recently decided case.

113. First National specifically excluded from its analysis "other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." 107 LRRM at 2713, note 22. In addition, Darlington, supra, has found its greatest acceptance in partial closure situations. Subcontracting and "runaway shop" cases continue to be decided under section 8(a)(3) pre-Darlington criteria; that is a violation is made out when the subcontracting or plant relocation (the "runaway") is motivated by a desire to retaliate for unionization or to evade the duty to bargain, regardless of the "chilling" impact elsewhere. R. German, "Basic Text on Labor Law" (1976), p. 148. See also Local 57, ILGWU v. N.L.R.B. (Garwin Corp.) (D.C. Cir. 1966) 374 F.2d 295, cert, denied (1967) 387 U.S. 942.

costs, again without outweighing the need of an employer to operate relatively freely in the marketplace.

Finally, the plant relocation or runaway shop historically concerned an enterprise that moved its operation when motivated in some part by a union's organizing driver or its selection as bargaining representative. Such an illegal motive would be found not only when the action was designed to escape the union or to punish the employees for unionization but also when the employer assumed (prior to bargaining) that the union would force the adoption of demands concerning wages or other working conditions which would render the continued operation uneconomical. R. German, "Basic Text on Labor Law" (1976), p. 144. Typically, the business would manufacture the same service but in another location; i.e. the organization would have transferred the bargaining unit work to another place where most likely there was no union. Bargaining might be required here in that there was still no major change in the manner of operation. Id., p. 516. See also, ILGWU v. N.L.R.B., (McLoughlin Mfg. Corp.) (D.C. Cir. 1972) 463 F.2d 907.

In this case, however, there is no evidence that Respondent's operation was transferred to another location, outside the Imperial Valley, so as to avoid the effects of unionization.

In that I have found that Vessey's decision to shut down a part of its business was economically motivated, I further find, under the First National and Bertuccio guidelines, that it was under no legal obligation to bargain with the UFW over that decision 114/ and will recommend the dismissal of this allegation. Vessey's interest in determining on its own whether to close down for economic reasons a part of its business "outweighs the incremental benefit that might be gained through the union's participation in making the decision." First National Maintenance Corp. v. N.L.R.B., supra.

2. Effects Bargaining

Vessey's decision to shut down the lettuce portion of his business certainly would have had an impact upon the bargaining unit by eliminating jobs. Respondent was duty bound, upon request, to negotiate over the effects that his closure decision would inevitably cause, and any such bargaining "... must be conducted in a meaningful manner and at *a* meaningful time . . . ." First

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114. Of course, as First National points out, there is nothing to prevent management from conferring "voluntarily with the union to seek concessions that may make continuing the business profitable". This, it could be argued, was done by Vessey at the May 21, 1980, negotiating session. But, of course, there is an important difference between permitted and mandated bargaining, and Vessey could have lawfully refused to continue such discussions anytime he chose.

National Maintenance Corp. v. N.L.R.B., supra. See also N.L.R.B. v. Royal Plating & Polishing Co. (3d Cir. 1965) 350 F.2d 191, 196; N.L.R.B. v. Adams Dairy, Inc. (8th Cir. 1965) 350 F.2d 108, cert, denied, (1966) 382 U.S. 1011.

In this case, the UFW brought up the subject of effects bargaining in a general way on July 21, 1980 (G.C. Ex. 36) and specifically inquired about Respondent's attitude toward severance pay on October 7 and October 27, 1980. No formal proposal was submitted by the Union, however, until November 13, 1980, when it proposed that the Company: pay to each displaced worker: "25% of each worker's total gross earnings earned from the Company during his or her total length of service with the Company." (G.C. Ex. 49.)

Meanwhile, Respondent had previously rejected the concept of any kind of severance pay on September 5, 1980 (G.C. Ex. 41) and did so again at the October 7 and 27, 1980 negotiating sessions. However, Respondent had made it clear that it was willing to discuss preferentially placing laid off employees in other areas of Vessey's operations when openings occurred.

The above factual recitation appears to be the sum total of bargaining over the impact of Respondent's closure decision. The record does not reveal any subsequent discussions or proposals on this issue nor is it clear whose fault it was that the parties never met again to discuss this issue after the October 27 meeting or after the UFWs November 13 proposal. Based upon this short and incomplete negotiating history, General Counsel would ask that I find Respondent violated its duty to bargain over the effects of its decision. I cannot. While Jon Vessey was unwilling to make a proposal on severance pay,115/ he seemed, at least, to be open to alternative ideas such as preferential hiring; but the record does not reveal any UFW response to his preferential hir.ing suggestion.116/ Of course, it is also true that Respondent made no response to the Union's 25% proposal. Still, all in all, while I can find fault with one side, I can find fault with the other, as well. in the final analysis, I am convinced that the bargaining

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115. Originally, Respondent, on September 5, 1980, informed the UFW that it had no plans to offer severance pay but that it "would be willing to discuss that possibility with the Union." (G.C. Ex 41.) While it appears that Respondent later hardened its attitude and rejected any severance pay at all, it is not clear that further face to face negotiations might not have been more productive on this issue.

116. Quaere whether the UFW's November 13, 1980 severance pay offer was a rejection of the preferential hiring concept since the proposal did not address it.

history on this subject matter was too short to allow me to make a reasoned analysis of the parties' good or bad faith intentions towards one another. There is simply an insufficiency of evidence for me to conclude that bad faith negotiations transpired where there still remained at lot of room for discussions, and it could not be said that an impasse, false or otherwise, had occurred.

I recommend the dismissal of this allegation.

B. Maggio, Inc.

1. Facts

a) The Closure Decision

The Maggio family has farmed lettuce in the Imperial Valley since the 1940's. It generally grew between 1,000-1,100 acres and never less than 750.

In the 1978-79 winter lettuce season, the year of the strike, the Company farmed approximately 1,100 acres in the Imperial Valley, but had no lettuce the following season (1979-80) because Carl Maggio had decided to close down the operation. Likewise, the same decision was made for the 1980-81 season, as well. Maggio testified that in fact, no lettuce whatsoever has been grown or harvested by him in the Imperial Valley since July of 1979. However, Maggio, Inc. has continued to farm lettuce in its Chandler, Arizona operation, spring and fall, throughout this period.

Maggio testified that he made the decision to close down the Imperial Valley lettuce operation because of the instability of the labor situation reflected by the difficulty in getting the strikers during 1979 to return to work, the belief that a good and profitable year was often followed by a poor one, and the oversupply of lettuce in the marketplace. As to the latter reason, Maggio gave two factors as contributing to the problem: (1) companies that had not been struck made substantial profits in the 1978-79 lettuce season and were coming back for the next season with plans to significantly increasing their acreage – as much as 60-70% – not only in the Imperial Valley but in Blythe and Yuma, as well; and (2) some of the smaller Imperial Valley companies that had never planted lettuce before, impressed by the profits of 1978-79, decided to grow the crop for the first time. (Maggio further testified that the need to rotate crops was not a factor in his decision because in the past rotation, including rotation of lettuce, was always performed.)

Maggio could not remember when he made the decision regarding the 1980-81 Imperial Valley lettuce season as to whether to have lettuce but thinks it would have been in April or May, as this was when he usually planned his acreage for the upcoming year. In any event, Maggio testified that he decided not to grow lettuce for that season either because: (1) he still did not have access to lettuce crews; (2) rumors abounded that there was going to be *a* lot of acreage planted in Yuma and Blythe; and (3) the unavailability of

ground for vegetables which he considered to be the main reason. Maggio explained that when the 1979 decision was made not to grow lettuce, it was decided that much of that land would be rotated into alfalfa (which was planted in late 1979 and the spring of 1980) but that alfalfa was tied into a three-year cycle because it took that long before a profit could be realized. This situation only left a limited number of acres for lettuce.

b. The Notice and Bargaining

Carl Maggio testified that on September 24, 1979, he notified the UFW (G.C. Ex 6) that he was considering not having any lettuce in the Imperial Valley in the upcoming 1979-80 lettuce season. He also offered to negotiate the decisions and its effects. At that point, he was still being struck, and he testified he anticipated the strike to continue into the winter season. Maggio further testified that he had no plans one way or another regarding any future lettuce crop other than the 1979-80 season but that the UFW was informed that if the Company decided to grow lettuce again, it would contact the Union. According to Maggio, he has had no further communication with the UFW since this September, 1979 letter 117/ because the Company has not grown any Imperial Valley lettuce since that time.

Maggio further testified he never made an offer to pay any severance pay to the displaced Imperial Valley lettuce harvesters because he didn't think there was ever any correspondence one way or the other about the subject. Furthermore, he also testified that he never offered to place any of his Imperial Valley lettuce harvesters in the Arizona operation because the Arizona workers were hired by a labor contractor, Rodriguez, who had been used for about 7 years. Maggio did not know where Rodriguez got his workers but did not suggest to him that he could recruit workers from the closed Imperial Valley lettuce harvest, although in some previous season that had, in fact, been done.

Nassif testified on behalf of Respondent regarding the closure negotiations. According to Nassif, on October 5, 1979, he explained to Smith and UFW attorney, Tom Dalzell, that Carl Maggio's reasons for closing down the lettuce operation were: (1) that he didn't feel he had a reliable workforce to harvest his lettuce inasmuch as all his lettuce crews had gone on strike, that he had had difficulties in securing replacements, and that the strike was

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117. However, Maggio also testified that sometime in February of 1980, he informed the UFW that he was not going to be harvesting lettuce in King City but that a decision for the 1980-81 Imperial Valley lettuce had not been made yet. (A poorer than expected 1979-80 season in the Imperial Valley and the uncertaintees of labor availabilities contributed, according to Maggio, to the King City decision.) Lettuce was not grown in King City in either 1980 or 1981, but the decision not to grow it there does not form the basis of any allegation in the present case.

still on; (2) that Maggio was worried that the successful 1978-79 season would carry over, volume wise, to the 1979-80 one, thereby causing a depressed market (the good year/bad year theory); and (3) that Maggio wanted to rotate the lettuce ground into alfalfa, a good crop for rotation purposes, because one cannot grow lettuce on the same piece of land year after year.

Nassif testified he told Smith and Dalzell that the closure decision was tentative 118/ even for the coming season and that if the Union could offer reasonable suggestions, Maggio might be persuaded to change his mind and stay in the business.119/ On the other hand, Nassif testified that he also told the UFW representatives that Maggio had pretty much made up his mind that it was not going to be practical to remain in lettuce for the coming season, that although he didn't know what his future plans were, he didn't intend to go back into lettuce but that "if we were going to go back into the lettuce business, we'd let the union know." (TR. 6, p. 104.)

Nassif testified that pursuant to a UFW request, he provided some information orally at this meeting regarding Maggie's past crops and acreage figures and more later on in written form (G.C. Ex 7); and that he never heard from the UFW on the matter again.

At some unknown later time, possibly the early part of 1980, Smith asked Nassif whether Maggio would have lettuce in the 1980-81 season in either the Imperial Valley or King City. According to Nassif, he responded that though it was hard to predict each reason, that to his knowledge, Maggio had no present plans to re-enter the lettuce market.120/ Thereafter on March 20, 1980, Nassif wrote the UFW that the Company was anticipating a negative lettuce market in 1980 and that ". . . (i)t is anticipated that none of the Company's operations in California will grow and/or harvest lettuce during 1980. . . ." (G.C. Ex 26.)

Nassif also testified that at the April 14, 1980 meeting he told Smith that to his knowledge there had been no change in the Company's plans to stay out of the lettuce business for the 1980-81

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118. Smith testified that she asked Nassif specifically if the decision for the upcoming season was temporary or permanent and that he told her it was temporary.

119. Smith testified that Nassif told her that it was still possible, even at this late date, for the Company to buy a crop of lettuce and to harvest it that winter.

120. Nassif testified that Maggio's decision not to have lettuce in the 1980-81 Imperial Valley season was not discussed with him so he couldn't say why Maggio made that decision.

season.121/

Nassif was asked at the May 21, 1980 meeting why the Company had a lettuce proposal on the table if there was to be no lettuce, and Nassif testified he told Smith he had made one in case the Company changed its mind and grew lettuce again. In addition, Nassif testified the rate was for all regions of the Company's operation, including King City, should the Company decide to start growing lettuce up there again.

Nassif acknowledged that Maggio had grown lettuce every year up to the 1979-80 season, but he testified that there were other crops? e.g. cantaloupes, that Maggio had also grown in the past but had ceased growing entirely at some later date.

c) The Arizona Operation

While discontinuing lettuce in the Imperial Valley (and later King City), Respondent's Chandler 122/ lettuce business continued unabated. Carl Maggio testified that he had nothing to do with that decision because it was made by his brother, Anthony, who took care of the Arizona operation. Carl Maggio also testified that although he was the president of Maggio, Inc., the merged company, his brother and he were co-equal as stockholders, had equal power, and that their agreement was that Anthony ran the business in Arizona and had the final say while he (Carl) was the decision-maker in the Imperial Valley.

Carl Maggio did not agree with his brother's decision to continue lettuce in Arizona. Nevertheless, he testified he could readily discern important differences between the two operations which would augur in favor of maintaining the Arizona lettuce. First, Maggio testified that an unstable work force was not a problem in Arizona since the labor contractors there seemed to have access to labor in the area; and second, oversupply was not really a problem because there was not that much- lettuce planted in the Phoenix area. According to Maggio, any such problem would only arise where the weather created an overabundance either on the tail end of the Blythe/Yuma "deals" or the beginning of the Bakersf ield/Salinas or Huron "deals". Finally, Maggio pointed out that in his opinion the good year/bad year philosophy didn't really apply to Arizona as the profitability of the short season depended mainly on the weather for success.

Anthony Maggio, Carl's brother and General Manager of the Chandler operation, testified that he made all the final decisions

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121. Smith denied that Nassif informed her of Respondent's 1980-81 plans.

122. Chandler is close *to* Phoenix, Arizona.

in Arizona, including the decision to continue in the lettuce business, while has brother made all California decisions, including the one to go out of the lettuce business; they did not overrule each other. Anthony Maggio also testified that the Arizona operation had two seasons; spring, March 15-April 25 and fall, November 1-December 10. In the spring, Arizona lettuce competed with Blythe and San Joaquin lettuce while in November, the competition was Yuma and possibily Blythe.

Maggio testified that usually a decision was made in favor of growing lettuce because sometimes (but not always) there was a gap in the market in between the California seasons; e.g. after the Imperial Valley season but before the lettuce harvest in Bakersfield, Huron or Salinas, and that often Arizona could hit this gap and make a profit. Still, he testified that while he planned to continue growing lettuce, (lettuce was grown and harvested from 1978 to the spring of 1981), his future plans called for cutting back on the fall, 1981 acreage because the yields were less in the fall, owing to warmer weather, and growing costs had been increasing.

According to Anthony Maggio, his business records revealed the following fluctuating production data going back to 1978 (G.C. Exhs 95 & 96) :

Season	Number of Cartons	Acres Farmed
Spring, 1978	236,116	326
Pall, 1979	32,995	394
Spring, 1979	94,760	309
Fall, 1979	148,059	435
Spring, 1980	89,587	150
Fall, 1980	133,194	225
Spring, 1981	183,111	287

Carlos Gutierrez testified on behalf of the General Counsel that he was hired as *a* packer by labor contractor Rodriguez in 1979 for the Chandler spring and fall harvests and that he also worked there in 1980 and 1981. Guiterrez testified that during a two-month period in the spring of 1979 he packed lettuce exclusively into boxes containing the "Maggio Lettuce" label and the "Garden Prize Lettuce" label 123/ and that both boxes had the UFW "bug" on them.124/ He also testified he saw these boxes being used in 1980 & 1981. (G.C. Exhs. 65 and 66.)

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123. Carl Maggio testified that in April, 1981, the Company farmed around 300 acres using those labels. Anthony Maggio testified that both labels were used for crops other than lettuce; e.g. green onions, mustard, turnips, and collard greens.

124. Maggio workers in Chandler were not represented by the UFW, there was no union contract, and Maggio did not use a union label there.

According to Guiterrez, there was not much lettuce work in Arizona his first year, 1979, and he only worked around 5-6 hours per day, often getting off work early. However, the lettuce increased significantly in 1980 when in March-April he started working 10-12 hours a day, and 4 crews, 16 trios to the crew,125/ were used. Guiterrez testified that based upon his experience (15 years at Cal Coastal), these were larger than normal crews and hours.

Anthony Maggio was asked about the UFW "bug" and the labels. He explained that cartons containing the "bug" were used in Chandler in the spring of 1979 (Maggio could not recall if they were used in the fall of 1979) because the Company was using up the inventory of cartons that had already been purchased for California but had been left over due to the strike. As to why these cartons weren't simply kept in California and used in the Imperial Valley during the 1978-79 season at some point, Maggio testified that they had been bought and delivered; and he didn't like to keep inventories. Maggio did not know why the union label boxes were not used instead in King City where there was lettuce in the spring and fall of 1979.

But Anthony Maggio denied that the Company was shipping lettuce from California. As to why its lettuce carton labels indicated "Shipping in season from California and Arizona" (G.C. Exs. 65 and 66), Maggio testified that this marking appeared on all its cartons, whether the crop was grown in either state; e.g. green onions, rapini, spinach, and cabbage, all grown only in Arizona, were shipped with the same kind of label. As to why lettuce listed under the "Garden Prize" labels listed King City as the home office, though shipped from Arizona, Maggio testified that that was a mistake of the carton company, that he only became aware of it during the hearing, and that he had already taken steps to correct it because anything shipped out of Arizona was supposed to say: "Maggio, Inc., Main Office, Chandler, Arizona." Furthermore, Maggio testified that no lettuce had been shipped out of the King City area in 1980 or 1981, and the Company was not presently harvesting there either.

2. Analysis and Conclusions of Law

a) The 1153(c) Allegations

(1) The Prima Facie Case

Applying the Wright Line standard to the facts here, I find that the General Counsel has carried her burden of proof and made a prima facie case that protected conduct was a motivating factor in Carl Maggie's decision to close down the lettuce operation in the

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125. Carl Maggio had testified that on the Chandler harvests there were generally two crews, 10 trios per crew.

Imperial Valley. I base this on the following factors: (1) the conduct of Respondent found unlawful in Admiral Packing, supra, which constitutes evidence of Respondent's overall failure to bargain in good faith with the UFW: (2) the prolonged strike and accompanying bitter feelings; (3) the fact that Respondent had never closed down its lettuce business before; (4) the fact that under the good year/bad year theory, Respondent should have returned to the market place in the 1980-81 winter season but did not; (5) the conflicting reasons given for the decision to cease the 1979--80 lettuce operation; e.g. Nassif told Smith at the October 7, 1979 meeting that one of the reasons for the closure was Carl Maggio's desire to rotate the lettuce ground into alfalfa, but Maggio testified rotation played no role in his decision; (6) Respondent's mixed signals on whether the closure was permanent or temporary, suggesting that Repsondent was really interested in closing down its operation temporarily so as to weaken the Union and thereby minimize its strike effectiveness, while at the same time avoiding any meaningful bargaining with it; and (7) the fact that Respondent kept its non-union Arizona farm lettuce business operating.

On the basis of these factors, I think it is reasonable to infer that discriminatory motives played a role in Maggio's ultimate decision to cease growing and harvesting its Imperial Valley lettuce crop.

At this point the burden of both production and persuasion shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct. Wright Line, supra; Martori Brothers Distributors v. Agricultural Labor Relations Board, supra; Nishi Greenhouse, supra; Royal Packing Company/ supra.

(2) The Defense

Based upon his knowledge of the lettuce industry and his experience in sales, Carl Maggio testified that he concluded that following the excellent 1978-79 season,126/ the 1979-80 one would be a poor one for the Imperial Valley and that the wisest course of action was for him to close down entirely 127/ the lettuce operation. in addition, Maggio cited the oversupply of lettuce

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126. As the documents demonstrate (G.C. Ex S0(c)), despite the strike, the 1978-79 season was, generally speaking, a very good one for most Imperial Valley companies.

127. The General Counsel attempted to show that Maggio, Inc. was still financially connected with lettuce grown in California. Part of this attempt included documents involving Joe Maggio, father to Carl and Anthony, showing he farmed lettuce in the Imperial Valley in 1981 under either his name or under the name of "Highline Farms". General Counsel argues that Respondent had a duty

(Footnote continued---)

and the unavailability of a work force as other reasons for the closure.

For the reasons cited below, I credit Carl Maggio that he was motivated by business reasons in deciding to discontinue the lettuce crop. On this subject matter he testified in a clear and straightforward manner and made a convincing argument that from a business standpoint, staying out of lettuce during the 1979-80 season was an astute judgment. Subsequent events proved him quite correct, of course, as we now know. It will be recalled that the 1979-80 season was characterized by its "low prices and light demand through most of the season." (G.C. Ex 80(d), p. 5.)128/

Moreover, the lettuce closure decision becomes somewhat less dramatic when one considers the fact that lettuce was one of two major crops; and the other, carrots, remained intact, as did Respondent's other varieties of produce.

In addition, Respondent had completely closed down one of its crop operations in the past — cantaloupes — so that the

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(Footnote 127 continued——)

to inform the UFW of this enterprise and that its failure to do so calls into question its good faith in telling the Union it was going out of the California lettuce business. These documents (G.C. Exhs. 106 (a)-106 (g).) were admitted over strenuous objection to their relevance. They are not persuasive to show that Joe Maggio is the alter ego or successor to Maggio, Inc. or a joint employer with it. In addition, there is no such allegation to that effect in the Complaint. Finally, the parties stipulated that there was no evidence of which they were aware that Maggio, Inc. had approved of, assisted in, or condoned any of Joe Maggie's current farming operations. The other part of General Counsel's attempt was the calling of Alfonso Reyes, an ex-Martori foreman, as a witness, who testified that sometime in 1979 he observed Maggio trucks and boxes on a field in King City. But there was no credible evidence that this field belonged to Maggio or that former Maggio foremen were employed there. Inasmuch as I took Respondent's Motion to Strike certain testimony as to this issue under advisement, it is hereby granted. In short, neither through the stipulation, documentation or testimony has the General Counsel proved the claim that Respondent did not go out of the lettuce business completely in California as it represented to the UFW it did.

128. Carl Maggio also gave essentially unrebutted business reasons for not resuming a lettuce operation in the 1980-81 season, but I do not regard this as an issue in the case, and there is no allegation in the Complaint concerning it. Nor did the UFW, upon hearing in March of 1980 that Respondent did not intend to grow lettuce that winter in the Imperial Valley, either request Respondent to bargain over any such decision or file a charge with the ALRB.

1979-80 lettuce closure could not be said to be the first time Respondent discontinued one of its crops.

Nor is the fact that Respondent declined to re-enter the lettuce market after the poor 1979-80 season persuasive. Maggio testified that a bad year followed a good year not that a good year would always follow a bad one: "... generally speaking after a tremendously good market, the next year is generally bad, and that is my own theory, it's a trend that I have found to be true most of the time, and probably because of those reasons. ..." (TR. 8, p. 36.)

The evidence adduced as to the reasons why the Arizona lettuce business continued in operation was also convincing and never really contradicted by the General Counsel. The Imperial Valley's oversupply problem was not present in Arizona where hitting the right "slot" between the end of the Imperial Valley season and the start of the San Joaquin and Salinas seasons could result in a profit because lettuce produced in this short period might very well face less competition from the other areas that did not yet have any supply on hand. Furthermore, this short season might be attractive because it would also enable investors to minimize their risk. In fact, the only real problem was often the unpredictability of the weather. And as has been shown, lettuce prices in Arizona have been somewhat better than the Imperial Valley in the last few years. (See discussion entitled "The Business Justification" in preceding section concerning Vessey and Company.)

Finally, it was not improper for Respondent to have considered that it might experience less labor difficulty and uncertainty in getting its product harvested in Arizona than it faced in California.129/

The General Counsel also suggests on the basis of one worker's testimony (Gutierrez) that he worked harder and longer in 1980 and 1981 than in 1979, that, like a runaway shop, Respondent ceased its lettuce in the Imperial Valley only to replant it in increased acreage in Arizona. But the testimony concerning the actual figures of the cartons produced and acres farmed in Arizona of Anthony Maggio, whom I credit and who was not contradicted, shows that the acres planted actually went down significantly in Arizona in the spring of 1980, the very season following Respondent's Imperial Valley closing, and never regained the strength of the 1979 fall season until around the spring of 1981.

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129. The General Counsel suggests that the reason for not re-entering the lettuce market in 1980-81 — the unavailability of harvest crews •— was a sham excuse because Maggio employees had made an offer to return to work on March 24, 1980. But Respondent's decision to stay out of lettuce for 1980-81 predated the offer to return, and the Union was informed of it on March 20, 1980 (G.C. Ex. 26.)

The General Counsel claims that Carl Maggie's and Nassif's emphasis at the October 5 meeting on the tentative nature of the closure decision gave the impression that unless informed otherwise, the Union could assume that Respondent would grow and harvest lettuce the next year, 1980-81.

Although I believe both Maggio and Nassif could be said to have given conflicting signals as to what their intentions were, I do not believe they were trying to deceive the Union representatives; it may have been that they were unsure themselves of exactly what their future plans were. Nevertheless, even if, as Smith says, the word "temporary" was used, I don't think it could have been inferred from that alone that Respondent definitely intended to plant and harvest lettuce the next season. After all, it was Nassif who testified that he told Smith and Dalzell on October 5, 1979 that if the Company got back into the lettuce business, he'd let them know, that he told Smith at a later time that Maggio had no present plan to re-enter the lettuce market and that on April 14, 1980 he told Smith the Company's plans to stay out *of* lettuce for 1980-81 had not changed. Finally, it will be recalled that Nassif wrote Smith on March 20, 1980 that Respondent would not grow or harvest lettuce anywhere in California in 1980 (G.C. Ex 26).13Q/

I find that Respondent Maggio's business justification for its Imperial Valley closure was sufficient to overcome the General Counsel's prima facie case of discriminatory motive. In my judgment the same decision would have been made by Carl Maggio, even absent any anti-union animus on his part.131/ I recommend the dismissal of this allegation.

b) The 1153(e) llegations

(1) Decision argaining

As in the Vessey matter and for the same reasons, I view Maggio's ceasing the growing and harvesting of lettuce as a partial closure. As such, I find this case to be governed by the principles *set* forth in First National Maintenance Corp. v. N.L.R.B., supra, (1981) 107 LRRM 2705. Inasmuch as I have found Maggio's decision to shut down part of its business to have been economically motivated, I further find that under the First National and Bertuccio

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130. To the extent that Smith denied ever being informed as to Respondent's 1980-81 plans for the Imperial Valley, I credit Nassif's testimony, corroborated by this letter, that she was so informed.

131. Even had I found anti-unionism to have been the motivating factor, I note, as I did in the analysis of the Vessey closure, supra, that General Counsel neither proved nor argued the section 1153(c) alleged violation in terms of Textile Workers Union v. Darlington Mfg. Co., supra.

guidelines, there was no duty on the part of Respondent to negotiate with the Union over that decision 132/ and will recommend the dismissal of this allegation. Maggie's interest in determining on its own whether to close down for economic reasons a part of its business "outweighs the incremental benefit that might be gained through the union's participating in making the decision."133/ Id.

(2) Effects Bargaining

Maggie's decision to shut down its lettuce operation in the Imperial Valley resulted in the loss of jobs for its lettuce harvesters and possibly others. Respondent was obligated, upon request, to negotiate over the impact of its closure decision, id., and it offered to do just that. But the Union chose not to participate; no proposal was ever made by it nor did it ever request, at any time subsequent to the October 5, 1979 meeting, any negotiating session to discuss the issue. Even later on in 1980, when it became clear that Respondent was no longer uncertain about its future and intended to stay out of lettuce for another season, no request to bargain was forthcoming from the UFW. Under these circumstances, it must be concluded that the Union waived its opportunity to bargain over the effects of Maggio's decision to cease lettuce production in the Imperial Valley. (0. P. Murphy (1981) 7 ALRB No. 37.) As in Murphy, here the Respondent notified the Union of its decision at a time when meaningful bargaining could still take place and responded promptly and apparently completely (not hearing otherwise) to the Union's informational requests, but the Union failed to respond.

I also recommend the dismissal of this allegation.

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132. Viewing decision bargaining on a case by case basis as set forth in Paul W. Bertuccio, supra, 8 ALRB No. 101, I conclude that meaningful bargaining could not have occurred here. Unlike Bertuccio, Respondent's discontinuance of its lettuce was a major alteration in its business enterprise and was effectuated because of Carl Maggio's strong desire to avoid an unprofitable lettuce season, which he earnestly believed would occur should he remain with the crop. I do not see how meaningful bargaiing could have transpired under these circumstances; and in any event, it would be unfair to retroactively impose such a duty here based upon this recently decided case.

133. Even if Respondent were obligated to bargain with the UFW over its decision to cease lettuce production, I note that the Union made no proposals at the October 5, 1979 meeting or thereafter directed towards persuading Carl Maggio to change his mind and keep the lettuce business open.

C. Martori Brothers Distributors

1. Facts

a. The Closure Decision

Steven Martori testified that the members of his partnership first began discussing the possibility of not having lettuce for the 1980-81 season in April, 1980 when the profitability of the previous season was analyzed ._134/ But, he testified that he still had plans to grow lettuce when he submitted his May, 1980 135/ wage proposal to the UFW. However, Martori testified that his plans changed the first part of July because his leases usually expired between March 15-Julyl5 136/ and that if a winter lettuce deal were to be made, July would be the last realistic period in which to negotiate it.

On July 7, 1980, Nassif wrote Smith informing her that Martori was considering "not growing or harvesting any crops in the Imperial Valley hereafter" and offered to meet to discuss both the decision and effects. (G.C. Ex. 34.)

Smith responded on July 21 by asking for information regarding the closure (G.C. Ex 37).

Smith testified that she received no further communication from Nassif regarding any definite plans on the part of Respondent until its September 19 response (G.C. Ex. 42) in which it informed her that in fact, Martori would not be growing or harvesting lettuce in the Imperial Valley in the 1980-81 season. Respondent also provided her with the closure information she had previously requested.

Thereafter, the parties met on October 7. This was the first face-to-face meeting between them since May 21, 1980, and its entire scope related to the closure issue, bargaining over a new collective bargaining agreement having become almost irrelevant at this point. As a matter of fact, Nassif had informed Smith on September 19 that "given the company's posture on not growing or

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134. Prior to that, in February, 1980, Martori's three 1979-80 lettuce leases covering approximately 480 acres were scheduled to expire. But Martori took no action either prior to or at the time of their expiration to re-lease the land or obtain other leases for the 1980-81 season.

135. Nassif was asked about Martori's plans for winter lettuce at the May 21 negotiating session, and he replied that no decision had yet been made but that Smith would be informed if there were to be a change.

136. Martori owned no land in the Imperial Valley.

harvesting crops in the Imperial Valley, it would appear that there would be little or nothing to negotiate by way of a Collective Bargaining Agreement.137/ (G.C. Ex. 42)

At the October 7 meeting Martori confirmed Massif's previous information that the decision not to grow or harvest lettuce in the 1930-81 Imperial Valley season had been finalized.138/

Smith testified (and Martori also confirmed) that she inquired about the Company's future plans and whether it was a temporary or permanent decision and that she was told the decision was temporary but that Martori did not indicate anything regarding his future plans and was unwilling to make any predictions beyond the immediate season at which time the situation would be reevaluated and a decision made.

Nassif testified that at the October 7 meeting he explained to Smith that Martori had a history of being in and out of California and could return but that the Company owned no land other than its office. There was a discussion about Martori's absorbing displaced steadies (irrigators and tractor drivers) and harvesters into his Arizona operation, and Nassif even thought there had been some progress on this score as he testified the UFW had agreed to provide him with a list of workers who were interested in the Arizona work. However, on severance, Nassif testified the Company was considering a proposal on it but had no plans to pay severance because: (1) Respondent had only been in California a short time; (2) he didn't want to have to pay compensation, if he agreed to provide jobs in Arizona for those that were displaced because of the closure; and (3) he felt many laid off employees would find other work immediately anyway.

Martori testified that in fact, he planted no lettuce in the Imperial Valley in 1980 and had no plans to return to California. He gave the following reasons for his decision to close

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137. On the other hand, Steven Martori testified that even after his decision to close down his Imperial Valley lettuce, he did not foreclose the possibility of reaching an agreement with the UFW. When asked what would be the point of such a contract, he replied that it would be nice to have an agreement if he ever returned to the Imperial Valley. He testified that he still considered himself to be negotiating a contract with the UFW and an agreement over the effects of his decision.

138. Martori testified that if the UFW had made some suggestions; e.g. changes in wages, an agreement to withdraw pending legal action, a willingness to take the risk in a lettuce deal, it might have had some impact on his decision which, even as late as October, could have been changed because there were still growers looking for harvesters or joint venture partners.

down his California operation: (1) he was getting married that summer and did not want to be in the Imperial Valley away from a new family for several months because that he been a strain on his previous marriage;139/ (2) his other partners did not want to come to the Imperial Valley to supervise the lettuce season; (3) because of a financially unsuccessful previous winter,140/ the partners did not want to risk another deal; (4) it was becoming more and more expensive to maintain two offices, one in Arizona and one in California, especially when contrasting the relatively few acres that he farmed in the Imperial Valley (around 500 acres) with the larger number (spring and fall) of 750-1000 acres in Aguila, Arizona; and (5) the fact that the Arizona operation had a different marketing season (April-May; October 15-Novmeber 15) from the Imperial Valley and had become more profitable as of late.

Martori also testified that following the closure, some equipment used in California was sold off, but nothing major. The partnership owned a lettuce cooler which was a mobile unit that Martori testified he brought with him when he came to the Imperial Valley and sometimes took it back and forth between the Arizona and California harvests. it is now, according to Martori, in Arizona. Martori also testified that the partnership owned stitcher trucks and tractors which were also used in both California and Arizona and that they too are now back in Arizona. However, Martori did testify that there were some major pieces of farm equipment for cultivating and tilling which were still physically located in California.141/

As to the negotiations over the effects of his going out of business, Martori testified that he believed he was continuing to negotiate over them and that the UFW still had severance on the table; but that in his judgment, some matters had been resolved, such as the offering of employment to California harvesters in his Arizona business.

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139. Martori testified that he had been the "field supervisor" of the 1976 through 1979 Imperial Valley lettuce harvesting seasons.

140. Martori could not recall if his partnership made a profit in the Imperial Valley in 1977 or 1978. He "thought" it made one in 1978-79, the year of the UFW strike. Martori's business was not one of those the UFW struck.

141. Smith testified that Martori told her at the October 7 meeting that as his future plans beyond the immediate season were uncertain, he was keeping his office and shed (the record is not clear what became of them) and that he was considering — had not yet made up his mind — taking the equipment out of the property or selling it. Specifically concerning the cooler, Smith testified Martori told her he might leave it in California and lease it.

b. The Alleged Anti-Union Remarks

Mario Contreras, a cutter and packer at Martori's in the 1978-79 and 1979-80 seasons, worked under foremen Alfonso Reyes and Johnny Martinez respectively. Contreras testified that he was witness to certain anti-UFW remarks made by Martinez and Reyes on different occasions. The first such remark allegedly occurred around the middle of January, 1980. Contreras testified that he heard Martinez tell various trios, around 4 or 5 of them, that if the Company was obligated to sign *a* contract with the Union, it would no longer grow lettuce in the Imperial Valley.

Further, Martinez is also accused of telling trios in this same time frame that when Respndent reinstated those that had previously been fired, the new crew members would have to be laid off as a result.142/

Contreras also testified that on another date, close in time to the above-described conversation, ALRB representatives visited the fields to explain that the fired Ponce crew members would be returning to work and that either that same day or the next day he heard Martinez again tell another trio that if the Company had to sign a contract with the UFW, that it would no longer grow in California. Contreras added that Martinez once again also mentioned that if the workers from the discharged Ponce crew returned, Respondent would have to lay off present workers who had been hired from 1977 to the present.

Contreras further testified that the other foreman, Rsyes, who at this time did not have his own crew but was functioning as Martinez' "helper" or assistant, also commented that the Company would no longer grow if forced to sign a contract. Contreras could • not recall if this remark was directed at his trio or the one next to him.

Johnny Martinez has been working as a foreman at Respondent's for 13 years in both the Imperial Valley and Arizona. The most senior foreman, he has worked directly under Steven Martori and co-owner, Ed Martori, for the entire period. During the 1979-30 lettuce harvest, he would meet on a regular basis with Steven Martori who frequently came to the fields to observe the work.

Martinez denied that he (or Reyes) ever approached any trios and told workers that the Company would close down its lettuce

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142. Martinez' alleged statement would have been referring to the return of the fired Ponce crew, infra. See Martori Brothers Distributors (1978) 4 ALRB No. 80, rev. denied by Fourth Appellate District, Div. 1, June 22, 1979, hg. denied, July 26, 1979," in which the Board found Respondent had "exhibited anti-union animus and was motivated by a desire to rid itself of a pro-union (UFW) crew." Paranthesis added.)

operation before signing a UFW contract.143/ He stated that he made it a practice to avoid discussing those types of matters with the members of his crew.144/

Martinez also testified that at the beginning of the season in January, 1980, Steven Martori gave him a list of the probable people who would come back to work from Ponce's crew and told him to be sure to put them back to work; and that if there were no vacancies, to lay off the newer people with the least seniority. Martinez acknowledged that this information was passed on to his crew.

Martinez was aware that Ponce and his crew were laid off in 1976, but he didn't know the reason and in fact, testified he had no idea. He also testified his supervisors, the Martoris, never discussed with him the fact that Ponce's crew was going to be laid off: "They don't discuss those things with me, and I don't interfere"; he simply arrived at work one day and discovered that Ponce's crew was not there. And he never inquired what happened to the crew afterwards because it didn't concern him.

Finally, Martinez testified that he had no idea whether Steven or Ed Martori thought it was a good idea for their employees to be working under a UFW contract, as he had not discussed that with them or heard them speak of it. As for his own views, he had no opinion about the UFW and had never spoken to any workers about it.

Alfonso Reyes testified he had been a foreman for Respondent for 3 years. He denied making any or the statements attributed to him, that he ever heard Martinez say them, or for that matter, that Martinez ever made any remarks about the UFW. He also denied ever speaking to Martinez about the UFW and in fact, testified he was not aware that Respondent was even negotiating for a contract with the UFW in the 1978-79 period.

But Reyes opinion of Contreras was a favorable one: "... Contreras is one of the few workers that I know who is ... not with the union, and he was a very good worker. I don't remember ever having any problems with him, absolutely none." (TR. 18, p. 160.)

Paul Alvarez has worked for Martori for about 12 years and in January/February of 1980 was a packer in Martinez[1] crew. Alvarez

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143. Steven Martori also denied ever hearing either Martinez or Reyes make such statement and denied he ever authorized them to do so.

144. On cross-examination he testified that what he meant by this was that he never discussed matters beyond packing and cutting.

denied he had ever heard Mart Inez or Reyes say to the crew that the company would move to Arizona before signing *a* contract with the UFW or making any similar statements. He recalled ALRB agents coming at some point to the Martori property,145/ but denied again that Martinez made any anti-union statements at that time either. However, Alvarez admitted that he was sick with the flu during the season missing at least 10 days of work.

Alvarez did not know Contreras, did not know that Ponce and his crew were fired in 1976, and did not know Martori was negotiating a contract with the UFW in 1978-79. He also denied ever hearing any conversations about the UFW among the workers in the fields.

Mariano Larson was a closer for Respondent. He denied ever hearing Martinez or Reyes make the statements Contreras attributed to them but Larson admitted that as a closer, he might work anywhere from 4-20 feet behind a trio. In January/February, 1980, according to Larson, there were around 12 trios to the crew. Normally, depending on the size of the crew, there could be as many as 3 or 4 crews working on the same field. Although he knew conversations were going on among the workers in the field regarding the UFW, Larson testified he never heard what was being said. But he did testify that Martinez was sometimes around in the fields when these UFW conversations took place.

Roberto Lopez, also a closer, testified that he too never heard the alleged Martinez or Reyes remarks but added that being a closer made it difficult, because of his distance from the trios, to ever overhear conversations between Martinez and the workers or between the workers themselves.

Finally, Henry Villa, a cutter and Martinez[1] half-brother, testified that he was absent many days during January and February of 1980 but during those days he was present at work he never heard Martinez or Reyes make the statements Contreras said they did.

He testified that he never heard Martinez talk about the UFW or about the Ponce crew coming back to work because he didn't pay attention to those things. But he did remember his brother's telling workers they would have to be laid off when the Ponce crew returned.

Villa did not know who won the 1977 union election. He testified that he and Respondent's other witnesses, Reyes, Alvarez, Larson, and Lopez, were friends.

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145. On cross-examination, it developed that the ALRB agents Alvarez was referring to were agents supervising the 1977 election activity and not those who came about the Ponce matter. Alvarez did not recall any ALRB representatives coming after the election.

c. The Recall Notices to the Ponce Crew

During the 1976-77 Imperial Valley season, Martori had 3 crews, Martinez', a foreman named Sandoval's, and Adolfo Ponce's. The latter crew and foreman were fired shortly after the start of the season. Martori testified that he decided to recall members of the discharged Ponce crew for the 1978-79 season based upon the results of the ALRB case,146/ even though his appeal was still pending in the Court of Appeal. As the Martinez and Sandoval crews were more senior than Ponce's, Martori testified that they would be hired first but that he would have had room for Ponce's crew because there were always new people hired and the crew size also would have been expanded.

Martori testified that since the season was scheduled to start on December 27, he sent out recall notices (Resps[1] 46) to members of all three crews, including Ponce's. He testified he instructed an employee, Ruth Hopkins, to make a list of Ponce crew members and to mail recall notices to them. Some of these letters were sent back "not received" at which point, according to Martori, he called the UFW's Calexico office for assistance, as he thought it might have the workers' addresses through its hiring hall, and that someone – he couldn't recall her name – said she would help locate the missing workers. Martori testified he did not specifically mention the Ponce crew or anything about a Board order.

Martori further testified that on December 16, 1978, he authorized the sending of *a* letter to the UFW (Resps[1] 47), asking it not only to provide addresses but for it to send the recall notices, as well. He testified that it did not occur to him to copy in the ALRB, even though his intent in recalling these workers was to cut off any liability stemming from the ALRB Order. Nor did he mention his recall efforts to any UFW official or bring it to Smith's attention during negotiations.

Martori testified that some of the Ponce crew members came back to work in the 1978-79 season, but he was not sure as to how many.147/ At another point in his testimony, however, he indicated that he was not sure if any Ponce crew members were rehired that

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146. That decision, Martori Brothers Distributors, supra, 4 ALRB No. 80, was issued on October 24, 1978.

pending in the Court of Appeal. As the Martinez and Sandoval crews were more senior than Ponce's, Martori testified that they would be hired first but that he would have had room for Ponce's crew because there were always new people hired and the crew size also would have been expanded.

147. Martori testified that Ponce himself was not recalled because the Company only had two crews (Martinez' and Sandoval's) and could only have used him had there been a third crew.

season.148/ He also testified he never asked Martinez or Sandoval whether they had hired back in the 1978-79 season any members of the Ponce crew. In 1979-80 though, according to Martori, there were four ex-Ponce crew members whom he knew to have returned to their former jobs.149/

Elena Morgan testified as a rebuttal witness for General Counsel. Morgan worked for the UFW from October of 1976 until March of 1979. In December of 1978 she was working in the Calexico field office and was the para-legal in charge of the Imperial Valley, Blythe and some of Western Arizona. The only two people who were fluent in English in the office were Ann Smith and she. Morgan testified she knew Steven Martori but did not recall speaking to him in December of 1978 on the phone and never received from Martori Brothers copies or originals of any recall notices or letters for the Ponce crew members. She also testified that she would have been the designated person to handle such a matter.150/

2. Analysis and Conclusions of Law

a. The 1153(c) Allegation

I find that General Counsel has carried her burden and made out a prima facie case that protected activity was a motivating factor in Martori's decision to close down his California operation based upon Respondent's surface bargaining, the clear anti-UFW statements of its senior foreman and the other foreman relating to both the closing down of the business to avoid a UFW contract and the statement about the reinstatement of the Ponce crew.

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148. The Fourth Appellate District denied Martori's Writ of Review of the Board Decision on the Ponce crew on June 22, 1979, and the Supreme Court denied a hearing on July 26, 1979. Martori denied that either of these two events, enforcing as they did the Board Order directing reinstatement and back pay for the Ponce crew, had any effect on his later decision to close dov/n his lettuce operation because he had, by sending the Ponce crew recall notices for the 1978-79 season, already reinstated that crew.

149. In the Ponce crew back pay proceeding before ALJ Michael Weiss, the General Counsel, UFW, and Martori agreed that on December 19, 1979, Martori "issued an unconditional offer of reinstatement to the Ponce crew, . . . that said offer was valid, made in good faith, and effective to cut off reinstatement, and backpay for all members of the Ponce crew . . . ." (Resps[1] 65, p. 4). It was stipulated in the instant case that no Ponce crew member was actually rehired until January of 1980.

150. One other witness for the General Counsel, Margarito Hernandez, a member of the Ponce crew, testified that he never received any recall notice from Respondent though the address where he received his mail would have been known to the Company.

At that point the burden of both production and persuasion shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct. Wright Line, supra; Martori Brothers Distributors v. A.L.R.B., supra; Nishi Greenhouse, supra; Royal Packing Company, supra. Respondent failed to carry that burden. Its defense rested upon both personal reasons 151/ and business reasons.152/ For reasons set forth below, I do not believe these were Martori's true reasons for shutting down his operation. Instead, I find that Respondent Martori Brothers closed down its Imperial Valley operation for 1980-81 in order to avoid dealing with the UFW, and I base this decision, in addition to the surface bargaining I have previously found Respondent to have engaged in, on the following additional factors:

1) The Anti-UFW Statements — I credit the Contreras testimony that Martinez and Reyes both told crew members at various times in early 1980 that the Company would quit growing lettuce in the Imperial Valley if forced to sign a contract with the UFW. Contreras was articulate, alert, and his narration of events remained consistent and trustworthy.

In contrast, Respondent's witnesses, particularly Martinez, were unresponsive, lacking in candor, and difficult to believe. Martinez would have me credit his testimony that as the most senior foreman at Martori, who answered only to Steven or Ed Martori, he had no idea how these partners felt about working under a UFW contract, never heard them speak about it, had no opinion about the UFW himself, had no idea why the Ponce crew was laid off, never discussed with the Martoris the layoff, and never inquired about what happened to this crew because he didn't "interfere" in matters that did not "concern him." Apparently, he would have me believe that he arrived at work one day, lo and behold noticed one of his crews was missing, and simply went about his business, asking no questions because it didn't "concern him". Martinez' testimony is untrustworthy. So is Reyes', a foreman for three years, who testified he did not know Martori was engaged in contract negotiations with the UFW. I credit Contreras that Reyes made the statement attributed to him. Furthermore, Reyes' testimony that he never heard Martinez make the anti-UFW remarks is hardly probative of whether the remarks were ever made.

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151. Unlike Vessey and Maggio, Martori brought his personal reasons for closure to the same level as his business justification.

152. The financial documents for Arizona, cited in the discussion over the Vessey closure (G.C. Exhs 80-80(i)) are equally applicable here. Aguila is considered a part of central Arizona in these reports.

As to Respondent's remaining witness, all friends, none was persuasive. Martinez' step-brother, Villa, would have me believe he had no idea who won the union election and never talked to his brother about the Ponce crew's return, although he testified Martinez had mentioned that some workers would have to be laid off us a result. Besides, Villa was sick many days during the period in which Martinez was accused of making the discriminatory comments.

Nor can I believe that having worked for Martori for 12 years, Alvarez never once heard a conversation in the fields among the workers about the UFW. That alone, let alone his ignorance of the Ponce firing and the ongoing contract negotiations, should be enough to cast doubt on his testimony; but in addition, like Villa, he was sick with the flu during a portion of the time in question.

Larson's job as a closer required him to work behind the trios. He admitted that although he heard conversations about the UFW, he was too far behind the workers to hear exactly what was being said. Lopez, also a closer, agreed that it was very difficult to ever overhear conversations between Martinez and the workers.

Martinez' anti-UFW statements are as direct and convincing evidence of anti-union motivation as one is likely to see. It clearly establishes the motive behind the closure. Louis Caric & Sons (1980) 6 ALRB No. 2.

2) The Return of the Ponce Crew — The General Counsel argues that the reinstatement and actual return of some of the members of the Ponce crew in January, 1980 was another contributing factor to Martori's decision to leave California. Respondent denies this and also argues that Respondent's attempts to recall the Ponce crew in the 1978-79 season shows its good faith and lack of animus. The record supports the General Counsel's view.

In the first place, it is now clear that it was the imminent return of the Ponce crew which precipitated the anti-UFW remarks of Respondent's senior foreman, Martinez. These remarks were designed to instill fear in the members of his own crew, the message being that a pro-UFW reinstated crew would soon cost present crew members with more seniority their jobs because they would have to be laid off as the Ponce crew was reinstated. Martinez had testified that, based upon what he said were Martori's instructions to him, the Ponce crew was to be put back to work; and if there were no vacancies, workers more junior in seniority were to be laid off. But in fact, according to Martori's testimony, what Martinez was telling workers was to be the layoff procedure was totally incorrect. Martori testified that the Martinez and Sandoval crews, being more senior, would have been hired before the returning Ponce crew; but that in any event, there would have been room for the Ponce workers because there were always new people hired or the crews could have been enlarged to accommodate them.

Thus, if Martori is to be credited here, we find his chief supervisor, Martinez, lying to the crews and telling them they would

likely *be* laid off *(in* the same period of time Martinez was also telling workers the Company would close down its lettuce operation rather than sign a UFW contract).

As to Respondent's defense that Martori sent recall letters in 1978-79, there is no credible evidence that these alleged letters were ever received by the UFW (let alone the individual crew members), even assuming arguendo that Martori sent them to the UFW, as he testified, which is in question given his general credibility, infra. Serious questions abound as to these alleged recall notices. For example, why, if Martori were interested in mitigating his damages by sending the notices, would he not have followed up the mailing by calling the UFW office to inquire about the receipt of the alleged mailing? Why would he have neglected to inform the ALRB of his good faith in complying with the Board Order and, similarly, why not show his good faith during negotiations by informing Smith of what he had been doing. There are simply too many questions like these for me to give the 1978-79 alleged Martori recall attempt any weight or even that the recall letters were ever received by any employees. Under NLRB precedent, a letter offering reinstatement which does not reach the addressee is not equivalent to a valid offer of reinstatement. Marlene Industries (1978) 234 NLRB 285, 287, 97 LRRM 1351, citing Ertel Mfg. Corp. (1964) 147 NLRB 312, 56 LRRM 1197.

Besides, ultimately, as Martori admitted in his testimony, it was not because of any good faith but because of an intent (as in the 1979-80 season) to cut off monetary back pay liability that precipitated his sending recall notices to the Ponce crew, if they were sent.

3) The Credibility of Steven Martori — Martori denied that anti-union animus played a role in his decision to leave California, and he gave a variety of other reasons for that decision. But I do not credit this denial. Martori's testimony generally was lacking in candor and he was evasive and uncooperative. He displayed an arrogant demeanor, and he showed in my judgment, a distinct contempt for the entire process in which he was participating. Martori's lack of candor was further demonstrated by the fact that while he had told Nassif on April 11, 1980, that he intended to stay out of the Imperial Valley until 1982 (G.C. Ex. 101), he continued to tell the UFW on October 7, 1980, that his future plans were still indefinite.

Moreover, it is to be recalled that Martori, unlike Vessey and Maggio, had strong personal reasons for the closure, equal in importance to the business reasons. These personal reasons were not convincing. For example, Martori, ultimately failed to persuade me that someone else — either another partner or simply an individual hired for the task -— was unavailable and could not have managed the Imperial Valley operation in his absence, if this were indeed, as he claims, one of the reasons for the closure. In short, I did not believe Steven Martori when he addressed personal and business justifications as the reasons for the closing down of the his

Imperial Valley lettuce operation.

In summary, it can be said from the evidence that January/February, 1980 was the time period in which Respondent's anti-union attitude began to publicly express itself, later to become the motivating factor in the closure decision. It was during this time that Martori's principal foreman, who took his orders directly from Steven Martori, told workers that the Company would cease growing lettuce rather than sign a UFW contract and that the return of a pro-UFW crew might result in their layoff. Also within this time period Martori made a decision not to seek the renewal of current leases or any new leases to replace those expiring in February. Meanwhile, during this period and afterwards, Martori did not seriously bargain with the UFW and in fact, later virtually ceased bargaining altogether. Then, once the decision was made to leave the Imperial Valley in April (G.C. Ex 101), it was not communicated to the UFW until September. (G.C. Ex. 42.)

I find that it was Respondent's anti-UFW bias which was the predominant reason for its lettuce closure decision.

But having found Respondent to have closed down its California operation for discriminatory reasons does not end the matter because to determine whether *a* remedy lies it is necessary to inquire whether this closure is viewed as a partial or complete shutdown of operations. Textile Workers Union v. Darlington, supra, 380 U.S. 263, 85 S.Ct. 995, 13 L.Ed. 2d 827. In one sense, the closure was total because Martori in shutting down (unlike Vessey and Maggio) did not retain production units in any different crops or job classifications within the State of California. On the other hand, it could be argued that Martori did not go out of the lettuce business because its Arizona operation continued as before; only the California portion went out of business.

In my view, because this issue has to be seen from the perspective of the jurisdictional constraints of the Agricultural Labor Relations Act, it must be concluded that what occurred here was a complete shutdown of operations.

Section 1 of the ALRA states that it was the hope of the State Legislature "that farm laborers, farmers and all the people of California will be served by the provisions of this act." When Martori left California, there was no longer a jurisdictional base for the protection of farmworker rights under the Act even assuming arguendo that such a move "chilled unionism" among Martori's remaining employees in Arizona. Id. The policy of the State of California to extend to farmworkers the right to self-organization, to bargain collectively and to engage in concerted activities obviously cannot extend to Arizona which has its own legislatively enacted farm labor law. And there is nothing inherently incongruous about workers being subject to ALRB jurisdiction when working in California and subject to the Arizona Agricultural Employment Relations Board when working in Arizona. California does not legislate for or project its labor policies upon Arizona or vice

versa. United Farm Workers v. Arizona Agricultural Employment Relations Board (9th Cir. 1982) 669 F.2d 1249, 1256.

So far as California law is concerned, Martori's act of closing down its California operation was the equivalent of its completely going out of business despite the fact that a going business in a sister state continued. It would be no different if Darlington closed its United States plants but retained a Canadian operation.

Having found Martori's California closure to be a complete closure, I next turn to a consideration of its legal effect under the guidelines established in Textile Workers Union v. Darlington, supra. In Darlington the Supreme Court held that one of the purposes of the National Labor Relations Act was to prohibit the "discriminatory use of economic weapons in an effort to obtain future benefits." The Court pointed to the runaway shop (work transferred to another plant in another location to replace the closed plant) as an example of a "lever which has been used to discourage collective bargaining activities in the future;" but the Court distinguished this situation from a complete liquidation of a business because the latter "yields no such future benefit for the employer, if the termination is bonafide." The Court then went on to say:

> . . . We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, ... 13 L.Ed 2d at 832.
>
> * * *
>
> . . . We hold here . . . that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." 13 L.Ed 2d at pp. 835-836.

Viewing the Darlington shutdown as a complete shutdown of one company, the Court found that the desire to escape the union did not render the shutdown illegal.

Similarly, I find that Martori's complete 153/ shutdown of

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153. Even under a partial closure theory, the General Counsel did not plead this matter nor does she argue it in terms of the Darlington precedent. Under Darlington, the fact that Martori's closure discouraged unionization at its California operation would not be sufficient to establish the commission of an unfair labor practice. It must be demonstrated that the object and effect was to "chill unionism" among the remaining employees of Respondent; i.e. those still employed in the state of Arizona.

its California business, even though motivated chiefly by anti-union considerations, cannot constitute an unfair labor practice. I recommend the dismissal of this allegation.

b. The 1153(e) Allegation

1. Decision Bargaining

As I have found that Martori, though shutting down its California operation for discriminatory reasons, did not commit an unfair labor practice, I likewise find there was no duty to bargain about the decision to go out of business. Textile Workers Union v. Darlington, id. The principles set forth in First National, supra, would also lend credence to this view.154/

2. Effects Bargaining

Martori's decision to shut down the lettuce operation resulted in the loss of jobs for all its California employees. Respondent was obligated, upon request, to negotiate over the impact of its closure decision. On July 7, 1980, Nassif offered to discuss the effects of Martori tentative decision not to grow or harvest any crops in the Imperial Valley "hereafter" with the UFW (G.C. Ex. 34), and the Union was also informed that the decision was final on September 19 (G.C. Ex. 42).

At the October 7, 1980, bargaining session, though Respondent opposed severance pay, there were discussions about integrating displaced lettuce harvesters into the Arizona operation. There even appeared to be some agreements (Nassif testified that he thought the UFW had agreed to provide a list of workers who would be interested in the Arizona work), although misunderstandings about what exactly had been negotiated lingered on (Compare G.C. Ex. 46 with G.C. Ex. 48). At any rate, Respondent, presumably based upon its understanding of what had been finally agreed upon, made written inquiries of all seniority lettuce harvesters and steady workers to determine if any wished to work in Arizona. (G.C. Ex. 48.) Steadies were offered positions provided an opening arose and further provided that the worker would be willing to relocate to Arizona on a permanent basis; lettuce harvesters were told they had jobs on a seniority basis. This information was conveyed to Smith on November 12, 1980 (Id.), and the correspondence also addressed the severance pay question. Although Respondent had originally opposed severance pay, it now informed the UFW that it had not made a final decision, was considering it, and would await a cost analysis to be prepared in December.

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154. Paul W. Bertuccio, supra, 8 ALRB No. 101, would not alter this result as its application appears to be confined to partial closure situations -— in that case, the sale of a small number of acres of garlic on a large farming operation. Even if it applied, I do not think this would be a situation in which meaningful bargaining could occur; and even if it could, I do not believe it would be fair, based upon this recent decition to retroactively impose such a duty here.

Smith apparently *did* not respond to this letter.

On this record, there is no evidence of bad faith bargaining on the part of Respondent nor does it appear that its offers were necessarily disingenuous or designed to stall negotiations. There is likewise no evidence that Respondent refused to meet with the UFW or refused to discuss any Union proposals, the Union having declined to make any, including any proposals on severance. On the contrary, Martori seemed open to meeting and discussing, at least, these issues. Because Respondent never offered severance pay did not mean it was bargaining in bad faith.

I recommend the dismissal of this allegation.

VII. Alleged Discouragement of Union Support by Unilateral Implementation of Warning Notice System

A. Facts

Mario Contreras testified that during the 1978-79 season, he was not aware of the Company's ever giving out any warning notices to workers and that the first time he gained knowledge of this practice was at the end of the 1980 lettuce season around February.

At the hearing, it was stipulated to by the parties that had a Lorenzo Rico testified, he would have testified that he was laid off from the Ponce crew in December, 1976, that he was recalled for the 1979-80 lettuce harvest in the Imperial Valley on January 3, 1980, that January 21, 1980 he received a warning notice, that he had never before received such a warning notice, and that to his knowledge no other workers had received warning notices prior to January of 1980. (TR. 14, p. 50-51). It was further stipulated that of the twelve persons receiving warning notices in 1980 (G.C. Ex 77), four of those were given to former members of the Ponce crew, as follows: Lorenzo Rico, Fernando Espinoza, Francisco Ramirez, and Pedro Martinez. (TR. 14, pp. 51-52.)

The admission of Respondents' Exhibit 34 was also stipulated to. That document consisted of an invoice, forms, and a statement from the bookkeeper for Respondent to the effect that on December 15, 1978, she placed an order for warning notice forms, the same type that appear in General Counsel Exhibit 77.

B. Analysis and Conclusions of Law

Paragraph 26 of the Fourth Amended Complaint alleged that Respondent Martori has acted to discourage union support by unilaterally implementing a warning system.

I recommend the dismissal of this allegation on the grounds that General Counsel has failed to make out a prima facie case either that any obligation to bargain over the "unilateral" implementation of the warning system existed at the time the program

was initiated or that the warning notices were given to employees in a discriminatory manner so as to discourage union activity.

In the first place, General Counsel failed to establish precisely when the system of warning notices was inaugurated. Steven Martori testified, but he was asked no questions about it. Instead, General Counsel chose to back door the issue by asking Contreras and (by stipulation) Rico whether any such system existed while they worked at Respondent's. But both of them experienced limited periods of employment at Respondent's place of business. Contreras only worked for Respondent two seasons in the Imperial Valley, 1978-79 and 1979-80. His testimony that he was unaware that warning notices were given to Respondent's employees hardly proves they were not given — only that he did not receive one. There was no proper foundation laid that he would be in a position to know if others received them.155/

As to Rico, there is no testimony as to how long prior to December of 1976 he worked for Respondent. Thus, the fact that he never received a warning notice before is of limited weight in deciding the issue. So too is the fact that he was not aware of others receiving such notices prior to January of 1980 since he did not work for Respondent between December, 1976 and January, 1980.

There *is* little evidence of just when Respondent commenced a warning notice "system,"156/ but the fact that printed forms were obviously ordered in December of 1978 for use as disciplinary notices to employees is some evidence of the intent to use same during the 1978-79 Imperial Valley season, a full year before the alleged unilateral implementation of such a warning system took place.

Second, even if the disciplinary system were brand new in 1980, General Counsel failed to show that it was applied in a discriminatory manner. The fact that four out of twelve receiving such notices (for different kinds of infractions) were UFW Ponce crew returnees hardly makes a case that this number was disproportionately high,157/ and there is no evidence or even

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155. He testified he first learned of the system in February, 1980, but several notices had already been issued in January, 1980. (G.C. Ex 77.)

156. The Marion Quesenbery one-page cover letter attached to Respondents' Exhibit 1 is hearsay and is not being considered.

157. General Counsel contends that no non-Ponce crew members ever received any warning notices until after the charge of discriminatory treatment was filed on January 26, 1980 (G.C. Ex. l(e)). But the charge was mailed to Respondent on January 26 — it is not clear when it was received — and one non-Ponce crewmember

(Footnote continued-——)

Despite the improper motivation I have found on Respondent's part in the cessation of its Imperial Valley lettuce, I do not find that General Counsel has proved her case on this allegation, as it is based largely upon speculation.

VIII. Allegation of Unlawful Subcontracting and/or Transfer of Bargaining Unit Work to Respondent Vessey's Alleged Alter-Ego and/or Joint Employer, Cortaro Farms

A. Facts

Cortaro Farms (originally called Vessey of Arizona)158/ was formed in 1969 as a partnership between Vessey & Co. and Clarence Robinson d/b/a Robinson Farms 159/ to grow, ship and sell lettuce and other crops 160/ exclusively in the State of Arizona. Under the terms of their partnership agreement (G.C. Ex. 58), Vessey & Co. was to make a capital investment of $220,000 while Robinson put in $100,000, and the profits of the partnership were to be divided 2/3 to Vessey and 1/3 to Robinson; all losses were to be borne in the same proportion. But each partner was to have equal rights in the management of the partnership business; and each agreed to devote such of his time to the conduct of that business, as necessary. The partnership books were to be maintained at the offices of Vessey & Co. in El Centro, but all partnership funds were to be deposited under Cortaro's name in a checking account that would be later designated by the partners.161/ The agreement further provided that: "Vessey will do all harvesting, packing, shipping and selling

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(Footnote 157 continued——)

(Navarro) was disciplined on that date and two others (Sandoval and Villa) were also disciplined for infractions occurring on January 23, 1980 and January 26, 1980 respectively. (G.C. Ex 77).

158. In February, 1979, Vessey of Arizona changed its name to Cortaro Farms. (G.C. Ex. 58A.) For the sake of clarity, this entity will at all times be referred to as Cortaro Farms.

159. Robinson Farms is a partnership located in Blythe. For some time Vessey & Co. and Robinson Farms had entered into joint venture arrangements in the Blythe and Poston, Arizona, areas (G.C. Ex. 57), but Jon Vessey did not have any interest in the Robinson Farms' partnership.

160. Jon Vessey testified that in terms of acreage, cotton was Cortaro's principal crop but that lettuce was the only hand harvested crop grown.

161. Partnership funds are apparently presently kept in the Valley National Bank, Marana office, Marana, Arizona (Resps'38) .

of crops grown or purchased by the partnership,162/ using Vessey labels, or such other labels as Vessey may determine. Vessey agrees that such harvesting, packing, shipping and selling shall be done at actual cost, plus ten cents (10C) per carton of lettuce, or equivalent for other packages. ..."

Following the formation of the partnership, Cortaro bought or leased Arizona land under its own name and grew the lettuce (and other crops), while Vessey & Co. harvested, packed and sold it; Vessey & Co. owned no land in Arizona.

Cortaro grew lettuce in two Arizona locations — Marana, where lettuce was harvested in both the spring and fall, and in Willcox, where it was harvested only in the fall — and used harvesters from Vessey & Co. Thus, following the December-March Imperial Valley harvest, a Vessey lettuce harvester typically would follow the harvest to Blythe (where Vesey might be involved in a joint venture with Robinson Farms) 163/ (G.C. Ex. 57), then to Marana, next, after a layoff for the summer, back to Marana, then to Willcox and finally, ending up back in the Imperial Valley. As a result of these arrangements, it was possible for a lettuce harvester, so long as he/she continued to be employed by Vessey & Co., to have virtually steady work during this entire period.

In addition, this Vessey lettuce harvester would also be covered by the 1977 collective bargaining agreement between Vessey & Co. and the UFW (G.C. Ex. 2, "Arizona Supplemental Agreement", p. 40) 164/ and paid accordingly, 165/ even when he/she worked in the Arizona Cortaro harvests. Thus, it was clear that lettuce harvest workers were not employees of Cortaro; they were working for Vessey & Co. Cortaro was not even mentioned in the Supplemental Agreement.

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162. In point of fact, only lettuce was harvested for Cortaro by Vessey & Co.

163. Vessey testified that he did not grow lettuce in Blythe -- Robinson Farms was the grower — but that he had harvested there every season from 1968-78.

164. Under this contract, Vessey agreed to recognize the UFW "as the sole labor organization representing all lettuce ground crew employees employed by Vessey and Company, Inc., in the State of Arizona." However similar recognition was not accorded to non-harvesting (growing) employees who were not represented by the UFW. For example, Cortaro had always hired its own weeders and thinners. Jon Vessey testified that there had never been any attempt on the part of the UFW to organize the Cortaro employees.

165. Vessey harvesters working at Cortaro were paid under the Vessey contractual scale. However, a lower rate from Vessey's was paid by Cortaro to its other job classifications; e.g., tractor drivers and irrigators.

Since the early 1970's, Vessey & Co. had always harvested Cortaro's lettuce except on two occasions — once, sometime between 1973-76 when Cortaro had sold its spring crop to Bruce Church, and another time, in 1977, when the Hubbard Company did the packing under a custom growing arrangement. But Cortaro had never harvested its own lettuce by hiring its own harvesters until the spring of 1979. On that occasion, a decision was made that Cortaro lettuce was not to be harvested by Vessey & Co. employees but by Cortaro employees. Thereafter, in both the fall of 1979 and the spring of 1980. Cortaro grew and again harvested its own lettuce, and no work was offered to the former Vessey and Co. harvesters, even after they had offered to return to work in December of 1979. In the fall of 1980, Cortaro's lettuce was harvested under a custom harvest agreement by the Action Packing Company, and in 1981 its spring lettuce crop was sold to the Bud Antle Co.

Jon Vessey testified that as a 2/3 partner in Cortaro, he was naturally involved in some of the decision making but that for the most part, he played a minor role leaving more of the decisions and the day to day operations of the farm up to his partner, Clarence Robinson, and to George Scott, Cortaro's General Manager, who resided in Arizona.166/ As regards, the decision not to use Vessey and Co. harvesting crews for the spring, 1979 Marana harvest, Vessey testified he had nothing to do with the decision 167/ and that it was Robinson and Scott's idea. According to Vessey, Robinson and Scott became concerned about the availability of Vessey & Company's harvesting crews for the Marana spring, 1979 season, as they had just all gone out on strike that January. Vessey testified that Scott informed him that as a result of the instability of the labor market, he and Robinson were not interested in Vessey & Co.'s harvesting crews for the upcoming season 168/ and that they would try to make their own arrangements to get the crop harvested. Vessey further testified that he did not disagree with this thinking nor oppose the idea and told them that it was true that he probably could not supply the necessary work force to harvest the Arizona lettuce.

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166. Vessey testified that though Scott was not a partner, in Cortaro, he received a percentage of the farm's net profits. According to Vessey, Scott made all the decisions on hiring, firing, layoffs, and transfers and did not need to check with any of the partners. However, on matters affecting the leasing of land or purchase of equipment, Scott would have to discuss this with one of the partners, usually Robinson.

167. Vessey testified he believed Robinson and Scott made that decision sometime around the January-March 1979 period.

168. Vessey & Co. had also harvested for Robinson Farms, spring and fall, in the Blythe area but did not do so in the spring of 1979 or thereafter either. Apparently, no charges were brought by the UFW concerning this situation.

Vessey testified that, as was customary, he laid off his foremen at the end of the Imperial Valley 1978-79 harvest and that some — but not all — were hired by Cortaro when the Marana harvest started, even though Cortaro was now doing its own harvesting.169/ But Vessey testified that it was local (Marana) foremen, hired by Scott, Salvador Pena and Ismael Sepulveda, who employed the crews for the Marana spring, 1979 harvest.

Vessey also testified that Robinson and Scott likewise decided not to use Vessey harvesting crews for the fall, 1979 Marana season as well (though he could not be sure when that decision was made) because the situation at Vessey & Co. remained the same in that the Imperial Valley strike continued.

As to the spring, 1980 Cortaro harvest, Vessey testified that again Cortaro used its local crews, even though petitions to return from striking lettuce harvesters had been received by Vessey & Co., for the following reasons: 1) Cortaro had gone through two seasons using its own crews and that whereas in prior years there was a feeling that local crews were not qualified to handle the harvest, Robinson and Scott were both satisfied that the quality of the local harvesters' work was as good as those previously brought over from California; 2) in fact, the local crews worked out better because one of the difficulties in the past had been that there were problems with the Vessey crews wanting to leave early Fridays for the weekend and not showing up again until sometime mid-day on Monday;170/ and 3) Jon Vessey had begun during this period to think about going out of the lettuce business the following winter anyway.171/

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169. Two such foremen used by Cortaro through the spring, 1980 harvest were Margarito Dominguez and Miguel Sarabia.

170. Whether this was a real problem is hotly disputed. Francisco Sepulveda, UFW crew representative and Librado Barajas, president of the Ranch Committee, both testified that neither Scott nor Dominguez ever spoke to them about an absenteeism problem.

171. Though Vessey & Co. no longer provided Cortaro with lettuce harvesters in 1979 and 1980, it continued to prepare Cortaro's harvest payrolls for those years. (Payrolls for other Cortaro employee classifications such as tractor drivers and irrigators, were never prepared by Vessey & Co.) Vessey testified checks were issued from a bank account in the Marana Valley National Bank based upon information provided from the Cortaro Farms' employee identification forms (Resps[1] 39). Vessey testified that he did so because George Scott, though he could handle the local farming books, did not have the ability or the office personnel to manage a harvesting payroll which was more complicated. Vessey further testified that he believed Cortaro was billed for Vessey & Co.'s bookkeeping and other administrative work and that payment was made. In addition to the payroll service, Vessey & Co. apparently also provided the Cortaro harvest with a truck and stitcher (both leased) and a bus (owned).

However, those same local crews were not used in the fall of 1980. Vessey testified that this was because Cortaro, owing to competition, reduced its acreage to around 120 acres 172/ and had even, at one point, been thinking of not growing lettuce at all. It was finally decided, according to Vessey, that with this little lettuce on hand, it was not economical for Cortaro to do the harvesting, because there wouldn't be enough work for everyone. Instead, it was concluded that it would be best to enter into a custom harvest arrangement with the Action Packing Company, which operated in the Marana area.

Vessey testified that he had a conversation with George Scott following the receipt of the petitions of his lettuce harvesters to return, probably in January, 1980, that he told Scott that Vessey & Co. had received the petitions, and that Scott was made aware that some of the strikers had returned in the winter 1979-80 Imperial Valley harvest; but that he also told Scott that in his judgment, in view of the continued picketing, the strike was still on.173/ According to Vessey, Scott had already made up his mind to retain the local news because he was basically satisfied with their performance the last two seasons.

George Scott has been employed by Cortaro since 1969 and currently serves as its General Manager. His duties include the hiring, firing, transfer and layoff of personnel, the handling of all matters pertaining to the growing of crops, and in general, the day to day operation of the farm. Scott testified that it was not necessary in the carrying out of most of his duties to check with either one of the partners but that if he did, it would be with Robinson more than with Vessey. For example, with respect to growing decisions — what crops to grow, which fields and whether to rotate — Scott testified he consulted frequently with Robinson, rarely with Vessey. According to Scott, the only times he would consult with Vessey were over the leases and, during the time when Vessey & Co. was doing the harvesting, over how the lettuce growing was going and how many lettuce harvesters would be needed.

Scott testified that he became aware of the 1979 UFW strike through conversations with Vessey where he learned that Vessey & Co. did not have the available crews to perform the lettuce harvesting for the 1979 Marana harvest. Shortly thereafter — early spring of 1979 — Scott testified that he conferred with Clarence Robinson and that the latter did not favor Vessey's doing the harvest that season

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172. Respondents' Exhibit 36 shows that the fall, 1980 , acreage 101.8 acres, was about one half Cortaro's normal amount.

173. Scott couldn't remember during his testimony, infra, if Vessey told him that he had hired back some of his striking lettuce harvesters, but he did remember Vessey telling him the offer to return was not bona fide because the picketing and some violence had continued.

because of the strike. Second, there had been in the past some dissatisfaction with Vessey's California based crews taking off early for the weekend and arriving late the following Monday. As a result of this discussion, Scott testified that both he and Robinson decided to see if local crews could be employed to do the harvesting.

According to Scott, it was only after this preliminary decision to obtain local crews was made by Robinson and him that Jon Vessey's advice was sought. Scott, in fact, testified that Vessey wanted to continue to do the harvest but couldn't guarantee a crew so that ultimately, it was agreed to hire the local workers. Pursuant thereto, Scott testified he hired two local foremen who were able to obtain Marana based crews for the spring, 1979 harvest. Scott also hired two Vessey foremen, Dominguez and Sarabia.174/

In the fall of 1979 Scott testified he again spoke to Vessey and learned that the strike was still on and that crews were still unavailable so that he and Robinson decided to go ahead and again hire back the local harvesters that had been used in the spring of 1979. In addition, Scott testified that he was quite satisfied with the work quality of those employees, and the fall harvest confirmed his confidence in their ability. In fact, Scott testified that he spoke to Vessey and: ". . .we decided immediately after the fall crop of 1979 that we would continue with the local people." (TR. 18, p. 8.) According to Scott, it was an easy decision to make because the labor trouble had continued, he had heard about some violence on the picket lines, and after two successful harvests with the local workers, he was willing to stick with them.

Scott further testified that in approximately January of 1980, Vessey informed him that some of the strikers had offered to return to work but that in his (Vessey's) opinion, the strike was still in full swing, violence continued, Vessey & Co. still could not supply the necessary crews, and that Cortaro should continue to use local crews. Scott testified he assumed the strike was still on but that it really didn't matter at that point anyway because "by this time I didn't want much to do with the problems they was (sic) having out here." (TR. 18, p. 35.)

As to the decision to let Action Produce custom harvest the crop in the fall of 1980, Scott testified that that was his decision. According to Scott, Cortaro had a small amount of lettuce, and Action, which was harvesting in the area, had had a shortage of acreage itself that season and was looking for work to fill in the gaps. This arrangement was beneficial to Cortaro

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174. Scott testified that Dominguez worked for Cortaro from approximately 1973 – spring of 1980 and was head lettuce supervisor starting in 1978. Sarabia had worked for Cortaro ever since Vessey first began harvesting in Arizona and also worked in the spring and fall of 1979 and the spring of 1980.

because it meant it could avoid the expense of organizing its own crew for such a few number of acres.

Finally, Scott testified that local harvesters were not used in the spring of 1981 either as the whole crop was sold to Bud Antle because the economics looked better for such an arrangement in that it allowed the partnership a chance to make money "up front".

B. Analysis and Conclusions of Law

1. The Jurisdictional Issue

The seminal case on the question of the ability of the ALRB to remedy unfair labor practices even though committed in another jurisdiction is Mario Saikhon (1978) 4 ALRB No. 72. In Saikhon, the respondent's headquarters were in Holtville, California, where it maintained at its business office employee personnel records and a management and clerical staff. But its lettuce fields were in Arizona so in order to complete its harvest, each day a company bus picked up the lettuce harvesters in Calexico, California and transported them for work to its Arizona property; then, at the end of the working day, the bus brought them back home to Calexico. On one particular day, as the bus was ready to leave the Arizona work-site for the return journey, one of the employees was fired. The issue in the case was whether the Board lacked subject-matter jurisdiction:

> . . . to remedy the unlawful layoff or discharge of an agricultural employee whose employment commenced and was substantially maintained in California, whose employer is engaged in agriculture in this state and maintains its principal place of business here, solely because the discharge or layoff occurred in the state of Arizona. Id. at pp.3-4.

In deciding that it had such jurisdiction the Board set forth certain standards concerning the "reasonableness of the exercise of jursidiction" for future cases, as follows: 1) the interest of California in providing a forum for its residents and in regulating the business involved; 2) the relative availability of evidence and the burden of defense and prosecution in one place rather than another; 3) the ease of access to an alternative forum; 4) the avoidance of a multiplicity of suits and conflicting adjudications; and 5) the extent to which the course of action arose out of the defendant's activities in the forum state.

In analyzing the above factors in the context of Cortaro Farms, I conclude that, unlike Saikhon, the record does not support a sufficient number of contacts between Cortaro and the State of California for the reasonable exercise of jurisdiction by the ALRB in this matter.

a. The Interest of the State in Providing a Forum

In Saikhon, the Board found that California's special interest in providing a forum included the fact that that company was clearly a resident of California. It was only natural that California jurisdiction would be asserted in Saikhon where the only real contact with Arizona was the situs of the discharge -— it just happened to have occurred in Arizona and could just as easily have taken place that morning in California. All the other essential contacts, however, were in California. But in this case, Cortaro is not a resident of California;175/ it is an Arizona operation which farms and harvests exclusively in that state. Its only real contact with California, essentially, is that employment opportunities have been denied to certain lettuce harvesters, some of whom were California residents, and who were employed by a California company.

b. The Relative Availability of Evidence and the Burden of Defense

In Saikhon, the Board found that this factor was satisfied because all parties were present, and there was no claim of burdensome defense. In this case, Cortaro Farms is not a named respondent, and any remedy imposed on it; e.g. reinstatement of Vessey lettuce harvesters in Arizona based upon the relationship between Cortaro and Vessey & Co., may raise serious due process considerations.

c and d. The Ease of Access to an Alternative Forum and the Avoidance of Conflicting Adjudications

In Saikhon, the Board found that Arizona was an alternative forum but that there was no possibility of a conflicting adjudication because the Arizona Agricultural Employment Relations Act (hereafter AAERA) had been enjoined at the time as unconstitutional by a federal district court. However, this is no longer the case as that decision was reversed by the United States Supreme Court in Babbitt et al. v. United Farm Workers National Union, et al. (1979) 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed. 2d 895, when the Court found the Arizona statute to be constitutional. Thus, the fact is that during the period that workers employed in the Arizona harvest of Cortaro Farms were allegedly aggrieved by the unlawful conduct of certain partners of an Arizona partnership doing business exclusively in Arizona, there presumably would have been a

175. I do not believe that the fact that the partnership's books were maintained in and its payroll records were made out in California are sufficient to confer residence in this State upon Cortaro Farms.

cause of action in Arizona under the AAERA.176/ The very fact that the Arizona forum was indeed an alternative possibility raises the question of conflicting adjudication, the very matter the Board was concerned about in Saikhon.177/

e. The Extent to Which the Cause of Action Arose in the Forum State

In Saikhon, the Board noted that that company was a California corporation with its principal place of business, most of its property, the majority of its employees hired in, and the discharge arising out of its agricultural operation centered in California. In addition, the discharge was said to be in retaliation for the employee's protected concerted activity which occurred in California. In this case, however, the sole contact between the Cortaro partnership and the State of California is the fact that said partnership agreed to contract out its harvesting work to a California corporation. When that activity ceased,178/ so too did any further connection between the Cortaro partnership and the State of California.179/

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176. In Babbitt, the Supreme Court referred to the AAERA as a "comprehensive scheme for the regulation of agricultural employment relations. . . . The statute designates procedures governing the election of employee bargaining representatives, establishes various rights of agricultural employers and employees, proscribes a range of employer and union practices, and establishes a civil and criminal enforcement scheme to ensure compliance with the substantive provisions of the Act."

177. There is no evidence that the UFW or any individual workers filed any unfair labor practice charges against Cortaro with the Arizona Agricultural Employment Relations Board.

178. There remains for consideration whether an unfair labor practice, if one were committed here, ever occurred on California soil. Obviously, the act of not rehiring back the Vessey harvesters occurred in Arizona where the hiring was done. The evidence suggests that the initial decision to use local harvesters was also made in Arizona by Scott and Robinson. The only theory, quite a dubious one, for arguing a tort was committed in California would be to assert that Jon Vessey's consent to an unlawful act; i.e. his going along with Scott's plan to hire local harvesters and not Vessey & Co. workers, occurred while he was on the telephone in his El Centro office within the confines of the State of California.

179. The General Counsel suggested during the hearing that the above jurisdictional discussion is actually irrelevant in view of the fact that all that matters is that Vessey & Co. is a named Respondent; and that it is Vessey"s employees, covered as they are by a collective bargaining agreement when they work in Arizona, who

(Footnote continued——)

Finally, in assessing the interests of California in affording a forum to its aggrieved citizens, the nature of the transaction and whether it was inherently destructive to employee rights must be considered. In so doing, I am struck by the fact that Cortaro was a going, independent operation for a number of years, not a runaway shop or a dummy corporation set up specifically to avoid Vessey's having to rehire strikers. Nor is there evidence that Vessey decreased the crops at his operations in California only to increase the acreage and crops correspondingly in Arizona.

I conclude that there are insufficient employment connections between the State of California and Cortaro Farms and insufficient public interest in that relationship to justify the ALRB's use of its regulatory or remedial power in this matter.

I am recommending the dismissal of this allegation on jurisdictional grounds alone. But I shall proceed to further anlayze the business connection between these two companies, as if the jurisdictional problem did not exist, in order to determine if a joint employer or alter ego relationship existed.

2. Alter Ego and Joint Employer Issues

The General Counsel's entire cases rests on the theory that Cortaro Farms is the alter ego of or joint employer with Vessey & Co. (Only if this kind of relationship were found to exist —- and not a custom harvester or a labor contractor — could the above-described jurisdictional problem be avoided.) Basically, the claim is that because of Jon Vessey's relationship with Cortaro, he had a legal obligation, once his California strikers offered to return to work, to see to it that Cortaro used these returning workers in their future Arizona harvests.

An alter ego relationship would be one way to prove this claim; i.e. Vessey's normal operations were changed via its alter ego, Cortaro Farms, in order to deliberately either get rid of the union or to discourage union support. However, based upon the legal definition of alter ego, Cortaro cannot be said to have been in such a relationship to Vessey & Co. because:

(Footnote 179 continued——)

are the alleged discriminatees. But this view is sustainable only were I to conclude that Vessey & Co. and Cortaro Farms are joint employers, which I have declined to do, infra. If Vessey and Cortaro are not joint employers, then the jurisdictional question is crucial because it was, after all, Cortaro's decisions (and not Vessey's) to discontinue the use of Vessey's harvesting crews for its Arizona harvests.

> (t)he terra "alter ego" ... is reserved for those situations in which a successor entity is: . . . merely a disguised continuance of the old employer. (Citations.) Such cases involve a mere technical change in the structure or identity of the employing entity/ frequently to avoid the effects of the labor laws, without any change in the ownership or management. Howard Johnson Co., Inc. v. Detroit LOG. Jt. Ex. Bd., Etc. (1974) 417 U.S. 249, 260 [86 LRRM 2449]. John Elmore Farms, et al. (1982) 8 ALRB No. 20, p. 4.

The General Counsel has not convinced me that Jon Vessey's individual interest, dating back *a* number of years, in a partnership arrangement, constituted a "Disguised continuance: of Vessey & Co. Nor is there any evidence that Cortaro Farms was created or later involved a "technical change in the structure or identity" of Vessey & Co. in order to avoid dealing with the UFW.

Moreover, a second employer who is found to be the alter ego of the first employer is bound by the agreement between the union and the first employer. Id. See also, N.L.R.B. v. Tri Cor Products Inc. (10th Cir. 1980) 636 F.2d 266, 105 LRRM 3271. Certainly that would not be a proper result where the Arizona Supplemental Agreement covered only Vessey employees working in the lettuce harvest and not Cortaro tractor drivers, irrigators, or other employees.

Alternatively, the General Counsel would argue that Cortaro Farms and Vessey & Co. are joint employees. If it's all the same company, then when Cortaro decided to use local harvesters, it was essentially taking work from one of the company's divisions and subcontracting it away to outsiders, all in an effort, the General Counsel would further argue, to punish workers for engaging in protected activity and to avoid its obligation to bargain with the union. Changing a company's hiring practices, such as contracting out bargaining unit work, without notifying and bargaining with the union about it first is a violation of sections 1153(e) and (a) of the Act. Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85.

In addition, under a joint employer theory, as soon as the offer to return was received by Vessey & Co., Cortaro, being the same enterprise as Vessey & Co., had an obligation to rehire the former strikers in the Arizona harvest. (G.C.'s Brief, pp. 105-106.)

Joint employer cases focus on whether two or more business entities demonstrate a sufficient degree of interrelatedness on a number of levels to be considered a single employer under the Act. John Elmore Farms, et al., supra. Factors to be considered in establishing such status are the interrelation of the operation, common management of the business organization, centralized control over labor relations, and common ownership. Rivcom Corporation, et al. (1979) 5 ALRB No. 55, rev'd on other grounds in Rivcom

Corporation, et al. v. A.L.R.B., supra, ___ Cal.App.3d ___, 5 Civil No. 5121. No single factor is determinative, and the Board will not mechanically apply a given rule in making its decision. Id.

A joint employer was found in Rivcom where one company (Riverbend) owned all the stock of the other (Rivcom). The same person (Harris) was president and manager of both companies, made all the day to day management decisions for both companies, and had actual control over the working conditions and the selection and transfer of employees at both companies. Though Harris did not actually set the wages for Triple M (a company under contract to Riverbend and Rivcom which harvested and hauled fruit for Riverbend to its packing house), the Board found he also exercised control over the terms and conditions of employment for these workers, as well. The Board was also impressed with the fact that Rivcom (the farming operation) was so integrated with Riverbend (the harvesting and packing operation) that the former virtually existed for the benefit of the latter. As such, it was a single enterprise.

In Abatti Farms (1977) 3 ALRB No. 83, a joint employer was found where there were two commonly owned companies, one which planted and grew crops and the other which harvested, packed and shipped those crops, both shared the same office, and all employees were paid out of a common fund which advanced monies, as the need arose, to either the growing corporation or the harvesting corporation. In addition, both the farming and harvesting operations were paid for services rendered by receiving credits on its respective account with the general fund. Moreover, the chief managers for each entity discussed problems together on an almost daily basis including consultations over labor relations policies.

On the other hand, joint ownership has been held not to exist where labor policies were not formed and exercised in common. In Gerace Construction, Inc. (1971) 193 NLRB 645, the national Board found that two corporations (Gerace Construction and Helzer Construction) had common stockholders and common directors and that Gerace management had the legal right to control and direct Helzer, but that they were not a single employer because a critical factor of a single enterprise was missing — common control 180/ over labor relations policies. Moreover, the principal mangerial official of Helzer, though he initially consulted the owners of Gerace on policy matters, "progressively assumed more independent responsibility" . . . and "is in complete charge of day-to-day operations." Id. at 645.

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180. In Gerace common ownership was held not determinative where requisite common control was not shown; and any such common control must be actual or active, as distinguished from potential, citing Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.) (1970) 185 NLRB No. 25, enf'd, (9th Cir. 1971) 443 F.2d 1173; Poole's Warehousing Inc. (1966) 158 NLRB 1281; Miami Newspaper Printing Pressmen's Local No. 46 v. N.L.R.B. (D.C. Cir. 1963) 322 F.2d 405.

charge of day-to-day operations." Id. at 645.

Furthermore, the Board noted that while both respondents shared a common bookkeeper, separate corporate records were kept, each company was a separate legal entity with separate bank and payroll accounts, and the two companies filed separate tax returns. The Board also emphasized that employees were paid different rates at both companies and had separate health, welfare, and workers' compensation insurance contracts.

In the present matter, Scott, as the principal managerial official of Cortaro, had quite a bit of responsibility and was, as in Gerace, in charge of the day to day operations. Most decisions were made by Scott alone or in consultation with Clarence Robinson, rarely with Jon Vessey. While Vessey (along with Robinson) obviously had the right to direct the activities of Cortaro, he chose not to exercise this power. Thus, it is not incredulous, as the General Counsel argues, that the decision to use local Arizona harvesters was actually made by Robinson and Scott. Later, as Vessey testified, he was, of course, informed about the decision and, though presumably he had the power to reverse it had he chosen to, he deferred to their judgment and did not oppose the idea. In fact, Vessey confirmed the basis upon which which Robinson and Scott had formed their opinion as to the need for local harvesters — he could not guarantee a work force. I do not think it is all that unusual for a partnership arrangement to exist where one of the partners puts up the major part of the investment while leaving the actual management of the business to the operating skills of the other partner or to the partnership's subordinates. It would follow that such a partner would also rely heavily upon the initial decision making and recommendations of those others, as well.

Furthermore, as in Gerace, there is no evidence here that these two companies kept the same banking or payroll accounts or in any way commingled their funds into a joint account or central fund.

Moreover, while some (but not all) of Vessey's foremen worked in the Cortaro harvest, there is no evidence of any Cortaro employees working for Vessey in the Imperial Valley. As stated in Gerace; "... while Helzer employees worked for Gerace on occasion, there is no interchange of employees . . . ." Id. at p. 646. At any rate, the evidence is that it was local foremen, and not the Vessey foremen, who did the hiring of the local crews in Arizona.

Further, the General Counsel failed to prove any similarity of fringe benefits between Vessey and Cortaro employees which would help substantiate her claim of a joint employer.

There is also insufficient evidence in this record for me to conclude that Vessey and Co. controlled or directed the labor relations policies of Cortaro Farms. Cortaro did not have a collective bargaining relationship with the UFW. Its employees — irrigators and tractor drivers — were paid at rates determined by

the partnership 181/ which were different from the rates paid by Vessey to its employees in the Imperial Valley. Differences in rates of pay between two groups of employees employed by separate enterprises has been held to be one factor arguing against a finding of *a* joint employer. Signal Produce Company, et al. (1978) 4 ALRB No. 3. (IHE Decision at p. 7.)

The only employee group that was paid the same at Cortaro's as was paid at Vessey's Imperial Valley operation was Vessey"s own lettuce harvesters. But these workers were at all times employees of Vessey & Co. and under Vessey's collective bargaining agreement with the UFW. Under that agreement/ which did not mention Cortaro Farms, Vessey recognized the UFW as the "sole labor organization representing all lettuce ground crew employees employed by Vessey & Co., Inc., in the State of Arizona." (G.C. Ex. 2, "Arizona Supplemental Agreement"). The agreement did not guarantee work in Arizona; it only provided that when there was lettuce harvesting there, Vessey's contractually arrived at rates would apply to the Vessey employees.

Thus, I find that General Counsel has failed to prove an essential ingredient of a joint employer relationship — common control over labor relations policies.182/ I conclude that Cortaro Farms and Vessey &Co. were not joint employers. what this case boils down to then is the fact that Cortaro Farms, a separate legal entity operating exclusively in Arizona, used to utilize the employees of Vessey & Co., also a separate legal entity, to harvest its lettuce crop but that that arrangement ended in the spring of 1979 when Vessey, because of a strike affecting its lettuce harvesters, was no longer able to supply the necessary labor. Thereafter, Cortaro decided to use local harvesters and continued to do so for three seasons.

Under these facts, relief will not lie. Vessey & Co did not unalwfully subcontract or transfer bargaining unit work to any joint employer or alter ego; there was not. I recommend the dismissal of this allegation.

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181. The record does not reveal how those wage rates were set or whether Jon Vessey even played a role in their establishment,

182. In making this finding, I am not unaware that the Board in Rivcom, supra, pointed out that less weight should be accorded to the factor of direct control over labor relations in an agricultural setting than in the industrial setting because of the "unique role of the farm labor contractor." But I do not find this reasoning controlling here, as Vessey and Co. was not a labor contractor for Cortaro.

IX. THE REFUSALS TO REHIRE STRIKERS

A. Vessey & Co.

1. Facts

Jon Vessey testified that all his tractor drivers, irrigators/ and sprinklers went out on strike in January, 1979 and that their positions were filled by February of 1979. According to Vessey, the understanding he reached with these replacements at the time of their hiring was that they were going to be permanent employees. Thus, when he received 183/ the offer to return to work in December of 1979 from his tractor drivers, irrigators and later his sprinklers, he had no openings. However, he testified that later there were two tractor driver and two irrigator positions which he filled directly from the list of petitioning strikers during the fall of 1980.184/ Vessey further testified that there were no subsequent openings following the rehire of the four returning strikers and no other tractor drivers irrigators or sprinklers have been hired since. Vessey explained that one of the reasons for the lack of vacancies was because tractor drivers and irrigators, in particular, worked close to year-round and that none was laid off for any extended period of time; as a consequence, there was virtually no turnover.

The parties stipulated (TR. 27, p. 132) that if one, Antonio Osuna, were called to testify, he would testify that he was an irrigator at Vessey & Co. and a striker who was returned to work pursuant to his offer to return in October of 1980 and that following that return, he noticed that some irrigators were required to work more back-to-back 24-hour shifts than had been required prior to the strike in 1978. Osuna would also testify that more of the week work was being done by the irrigators since his return than was done prior to the strike. But Osuna would not be able to testify that he himself was working more back-to back 24-hour shifts, how many back-to-back 24-hour shifts were currently being

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183. It was stipulated by the parties that the petitions to return to work submitted by the strikers through their certified bargaining representative, the United Farm Workers, (G.C. Exhs. 60-60(c); Appendix A to the Third Amended Complaint, p. 8) were received by Respondent. The date is missing from the xeroxed copy of General Counsel Exhibit 60, and it is unclear whether the petition was delivered on December 4, 1979 as General Counsel claims or December 12, 1979, as Respondent maintains. It seems logical that the date would have been December 4. See Vessey & Company, Inc., supra, 7 ALRB No. 44.

184. The parties stipulated that the following strikers in the tractor driver and irrigator classifications were recalled to work: Antonio Osuna, Jesus Navarro, and Javier Navarro on October 10, 1980; Rodolfo Navarro on November 10, 1980.

worked, or how many people were working them; nor would he be able to testify how many people worked them in 1978, pre-strike. Similarly, Osuna would not be able to testify how much weed work per man or per week was being done by the irrigators now nor how much weed work was done for similar periods in 1978.

It was further sitpulated that if irrigation foreman, Frank Villegas were called to testify, he would testify that working a back-to-back 24-hour shift was voluntary and not mandatory work.

Vessey did not think that his irrigators were working more 24-hour shifts in succession since the strike than before, but he indicated it was possible because of changes in the cropping schedule in 1981 and 1982. Vessey explained that prior to the strike, the general work schedule was on a very routine basis because the Company had had the same type of cropping schedule for many years and knew exactly what work force was needed to take care of those specific crops. But, according to Vessey, since the loss of lettuce, the routine had changed and often he was caught in a situation where he found that during periods when the crops needed irrigation, he had ordered more water than had earlier been anticipated, thereby necessitating the double-shifting of irrigator time. Vessey testified that after consulting with his irrigator foreman, Villegas, it was concluded that it was not necessary to hire additional irrigators because the increase in water was only a temporary situation and that down the line they would end up with more irrigators than was needed.

Vessey also testified that weed and thin work was generally associated with the lettuce crop and that in the past, that work began in the late fall and usually finished up before Christmas. Any weeding work thereafter, according to Vessey, was done by irrigators. Vessey acknowledge that he currently had irrigators doing work besides irrigating such as the weeding of garlic, onions and other crops, but he testified that he didn't think they were doing any more work out of their job classification than they had in the past.185/ (Vessey did not recall exactly if he had as many irrigators working now as before the strike in 1978 but testified it was possible there were a few less.) According to Vessey, with the discontinuance of the lettuce crop and the reduction of acres farmed, there was no need to bring back a weed and thin crew when irrigators could do some of the work, as they had in the past, including the weeding and thinning of garlic and onions; thus no weed and thin workers had been hired since the Company went out of the lettuce business. Vessey further testified that when lettuce was grown, weeders and thinners had approximately 1,200 vegetable acres to work on but that after the closure, these workers would

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185. Vessey testified that payroll records would not reflect how much time an irrigator might be spending on other crops; e.g. weeding, because the records would only show the worker's main classification as irrigator.

have only been necessary for around 80-90 acres of garlic and 10 acres of onions. Additionally, Vessey testified that when he did have a weed and thin crew, he used to provide bus transportation to workers but no longer provided this service.

Juan Lucero, as a witness for General Counsel, testified that he first worked for Vessey in August of 1979 doing caterpillar work, later worked on the service truck, and thereafter moved equipment using a small truck. In early 1981 he was laid off, recalled 10 days later, worked for two weeks doing welding work on the packing shed, was again laid off, this time for two months, and was recalled to do discing on the tractor. Thereafter, Lucero quit to accept a job elsewhere at better wages.

2. Analysis and Conclusions of Law

The Fourth Amended Complaint alleges in Paragraph 24(c) that at various times in 1979 and 1980 unfair labor practice strikers from Vessey & Co., including tractor drivers, irrigators, and sprinkler workers, unconditionally offered to return to work but were refused rehire in violation of sections 1153(c) and (a) of the Act.

In the first place, it is essential to point out that the nature of the UFW's[1] 1979 strike against Respondent Vessey (and Respondent Maggio, infra) has already been determined by the Board which found that said strike, originally an economic one, became converted into an unfair labor practice strike as of February 21, 1979. Admiral Packing, et al., supra, 7 ALRB No. 43. That conclusion renders moot Respondents' attempts to relitigate this matter by arguing that this was an economic strike. Certainly, nothing in these recommended findings should detract from that conclusion. On the contrary, I have found that both Respondents' unlawful surface bargaining continued throughout 1980, as well. As of December 4, 1979 for Vessey and beginning on January 22, 1980 for Maggio, Respondents were required, "upon receiving an unconditional request for reinstatement from unfair-labor-practice strikers, (to) reinstate them to their former positions and oust any replacement workers, if necessary, to provide employment for the returning strikers." (Vessey & Company, Inc., supra, 7 ALRB No. 44 at p. 2, citing Mastro Plastics Corp. v. N.L.R.B. (1956) 350 U.S. 270, 37 LRRM 2537. See also, Colace Brothers, Inc. (1982) 8 ALRB No. 1. Unfair labor practice strikers are accorded broader reinstatement rights than economic strikers because they are regarded as withholding their labor to protest employer violations of the Act and not simply to force financial concessions from an unwilling employer. Frudden Produce, Inc. (1982) 8 ALRB No. 42; Admiral Packing Company, et al., supra.

The testimony in this hearing, confirmed by the payroll records, indicated that subsequent to February 21, 1979, many replacement workers were hired. When Respondents failed to reinstate the returning strikers listed on General Counsel Exhibits 59-59(g), infra, and 60-60(c) (See also, Third Amended Complaint,

Appendix A) and remove the replacement workers hired in their stead during the strike, it violated sections 1153(c) and (a) of the Act; Respondents' returning striking employees are entitled to be made whole for all lost wages and other economic losses resulting from Respondents' unfair labor practices. Vessey & Company, supra.

A precondition for the above result is, of course, that the strikers' offers to return were sincere and unconditional, a contention vigorously denied by both Respondents. This question, however, which Respondents would have me decide, has once again also been litigated and decided by the Board, at least against Respondent Vessey in Vessey & Company, Inc., supra.186/ See also, Colace Brothers, Inc., supra. In Vessey the Board found that when Vessey failed, after December 4, 1979, to reinstate its returning strikers and to remove any replacement workers hired in their stead during the strike, it violated sections 1153(c) and (a) of the Act and that said striking employees were entitled to be made whole for all lost wages and other economic losses from December 4, 1979 until the date Vessey offered them reinstatement to their prior or equivalent positions.187/

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186. The lettuce harvesters' petitions offering to return to work in the Vessey case were couched in the same language as the tractor drivers', irrigators[1] and sprinklers' petitions. (G.C. Exhs. 60-60(c).) The Board found that the words "upon recall," the evidence of the Union's "insincerity"; e.g. agricultural sabatage or other disruption of Respondents' operations, the maintenance of a picket line marred with sporadic violence, and the Union's failure to respond to Vessey's December 6 letter seeking clarification did not defeat the unconditional nature of the offer to return to work. The Board said that the ramifications of specific instances of strike misconduct or violence associated with the picketing and strike activity is more appropriately assessed at the compliance stage. Moreover, the Board pointed out that further evidence of the unsoundness of Respondent's insincerity argument was the fact that "(s)ix.of the strikers were eventually rehired and no evidence was introduced (or excluded) that would have demonstrated that the returned strikers engaged in any type of agricultural sabotage or disruption." Further back door attempts to relitigate the previous Vessey case will not prevail here. For example, Vessey testified that workers told him that the picket line would stay up until a contract was signed even after the petitions to return to work were received. And it will be recalled that Nassif had testified that after the UFW submitted its very first petition lists, Marshall Ganz told him that the strike was still on, as did Ann Smith. This is not "new evidence" and even if it were, it would not suffice to overturn the legal principles set forth in the Vessey case. See also, Admiral Packing, et al., supra.

187. As will be seen, infra, the legal principles enunciated in the Vessey case apply with equal force to Respondent Maggio, as many of the facts and contentions are the same.

The purpose served by an unconditional offer to return to work is simply to notify the employer that the strikers are desirous of returning to work and are not conditioning their return on any demands they may have made before or during the strike. The right to reinstatement also does not depend upon the manner or form of the workers' offer to return to work. Frudden Produce, Inc., supra, citing N.L.R.B. v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375, 66 LRRM 2737 and Swearington Aviation Corporation (1976) 227 NLRB 228, 94 LRRM 13947Nor doesthe law require a worker to use any particular words of art in seeking reinstatement. Flatiron Materials Company (1980) 250 NLRB 554, 560.

Having found this to be a continuing unfair labor practice strike, ordinarily, it would be unnecessary to ascertain whether Respondent failed to recall strikers offering to return to work as vacancies arose. Admiral Packing, et al., supra. Nevertheless, as this case was plead in the alternative, I shall attempt to analyze the facts herein as if the UFW strike had been purely an economic one throughout.

As alluded to, the reinstatement rights of economic strikers are treated differently from those of unfair labor practice strikers. Should this strike activity be characterized as economic, then it is well settled that economic strikers applying for reinstatement have a right to be reinstated immediately unless they have been permanently replaced; thereafter, to have a continuing right to preferential hiring and full reinstatement upon the departure of the permanent replacement or to any equivalent employment that becomes available. N.L.R.B. v. Fleetwood Trailer Co., Inc., supra; Laidlaw Corp. (1968) 171 NLRB 1366, 68 LRRM 1252, enf'd (7th Cir. 1969) 414 F.2d 99, 71 LRRM 3054, cert, denied (1970) 397 U.S. 920, 73 LRRM 2537; Seabreeze Berry Farms (1981) 7 ALRB No. 40. Frudden Produce, Inc., supra. An employer is not required to make jobs available to returning economic strikers by discharging permanent replacements whom it had hired in order to continue its business operations during the strike. N.L.R.B. v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333, 2 LRRM 610; Seabreeze Berry Farms, supra. But if a position becomes available and the returning striker is not offered re-employment, an employer must show a legitimate and substantial business reason for not rehiring replaced economic strikers. Patterson Farms, Inc. (1982) 8 ALRB No. 57, citing Laidlaw Corp., supra.

The key question then is, given the agricultural context, when does a replacement worker become a permanent one? This matter was addressed in Seabreeze, supra. The Board, interested in balancing the needs of an employer during an economic strike to offer replacement workers stable, permanent employment with the importance of maintaining the integrity of the strike weapon as a legitimate use of economic power, arrived at a formula to be applied on a case-by-case basis in which:

> For the season during which the employees go on strike, . . . we shall accept an employer's characterization of its

replacement workers as "permanent" and we shall not require the employer to prove that such offers of employment were necessary in order to induce applicants to accept employment as strike-replacements.

We find, however, that different conditions prevail with respect to subsequent seasons. Crop perishability and the need to complete a harvest or other task with minimal work disruption are not weighty factors when the employer hires employees to begin work in a subsequent season. Therefore, an employer who refuses, at the beginning of a subsequent season, to rehire former economic strikers who have made an unconditional offer to return to work will be found in violation of section 1153(c) and (a) of the Act unless the employer can demonstrate that at the time when replacement workers were hired during the strike, it was necessary to offer the replacement workers employment which would continue in the following season.188/ Id. at pp. 9-10.

The Board further stated that in the future, the determination of whether there was a necessity for the employer to offer replacement workers employment extending beyond the season or beyond the end of the economic strike would be based on evidence as to past employment patterns and practices of the employer, including:

Its use, if any, of labor contractors; the market, weather and labor conditions facing the employer and the employees at the time of the strike; the duration of the season; the skills involved in the agricultural operation; and all other relevant factors." (Footnote omitted.) Id., pp. 10-11.

The General Counsel claims that Respondent did not prove that the striking tractor drivers and irrigators were permanently replaced under the criteria set forth in the Seabreeze case and that therefore, all of them had a right to re-employment in the season following their offer to return.

But Respondent argues that tractor drivers and irrigators were full time and not seasonal employees; and as such, that the rights of reinstatement of the strikers is governed not..by Seabreeze but by the rule established in Kyutoku Nursery, Inc. (1977) 3 ALRB

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188. Of course, as pointed out by the Board in footnote 8, the "necessity of offering employment which is to continue during a season subsequent to the season in which the strike began is relevant only if the employer begins the subsequent season by hiring returning replacements rather than economic strikers who have made an unconditional offer to return to work. The employer would violate the Act by hiring any new employees before hiring the returning economic strikers." Id. at p. 11.

No. 30, a nursery case. In Kyutoku the Board noted that the employment patterns in the nursery industry were much closer to the typical NLRB case in that said industry offered year-round employment for most of its employees and that as a consequence, returning strikers would have only had a right to preferential hiring after the departure of the permanent replacements).

Essentially then, the question in this case is whether the Board in Seabreeze intended its standards to apply to all job classifications in the typical farming operation or whether particular job positions, because of the nature of the job duties and duration of work, would be excluded from its coverage.

Seabreeze concerned the reinstatement rights of strawberry harvest workers who had gone out on strike. In assessing the reinstatement rights of these employees, the Board found it necessary to deviate from NLRB precedent because it determined that the federal legislation was often unsuitable to the complex realities of California agriculture. Specifically, the Board found that the ALRA "shows legislative recognition of the predominantly seasonal nature of agricultural work." Id. at p. 4. The Board Decision then went on to illustrate the differences in agriculture from industrial operations by discussing crop perishability, the need of an employer to complete a harvest with minimal work disruption, the migratory nature of agricultural workers as they follow the harvests, the instances in which these workers can be replaced, and the fact that farm workers are less likely to expect continuing employment with a particular employer than industrial employees – all indicia, of the seasonal nature of agricultural employment.

None of the above considerations, however, would apply to steadies who would in truth more nearly resemble industrial workers than the average farm worker. They are generally more skilled, harder to replace employees, often with long employment histories with the same grower. They often work full time or nearly so, the whole year.189/

For the above reasons, I do not believe the Board intended that the Seabreeze criteria be applied to this classification of workers. Therefore, it was not necessary for Respondent to prove – not that it was successful in doing so 190/ – that at the time

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189. Though Vessey's tractor drivers and irrigators were not "full time" in the industrial sense, it seems to me they displayed enough employment consistency throughout the year to qualify for that designation. (See, for example, General Counsel Exhibits 108 and 109.)

190. Vessey's testimony that he offered permanent employment or other testimony that replacement workers asked if they would be permanent does not satisfy the Seabreeze test.

replacements were hired, it was necessary to offer them employment through the following season. Thus, *I* agree with Respondent that Kyutoku, supra, would govern this situation 191/ and that a returning striker would be hired only after the permanent replacement left.192/

Jon Vessey testified that he had a complete work force of tractor drivers, irrigators and sprinkler workers prior to his receipt of the offers to return, and there is no evidence that in fact, available openings were present prior to that time. I credit this testimony.

The evidence also indicates that subsequent to the receipt of the petition lists, when job vacancies did occur, Vessey hired off the lists. Although General Counsel argues that irrigator work assignments were arranged in an effort to minimize the number of returning strikers and therefore, to discriminate against them; and that a tractor driver position should have been filled when Juan Lucero departed, infra, I cannot give much weight to these arguments. Though a prima facie case of discrimination may be said to have been made out, Frudden Inc., et al., supra, Respondent carried its burden of showing justifiable business reasons for its actions.

All that Osuna's stipulated testimony established was that some irrigators voluntarily worked more back-to-back 24-hour shifts and more weed work was being done by irrigators since October of 1980 than prior to the strike. Rut Vessey testified credibly and without contradiction that owing to the lettuce closure, the cropping pattern changed, thereby causing the need for more 24-hour shifts; and that it was not necessary to hire additional irrigators to perform the job, as apparently the extra work was being handled sufficiently by those volunteering to do so.

However, the General Counsel also argues that irrigators were doing work that the weed and thin crews used to perform.

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191. In referring to the reinstatement rights of the strikers in Kyutoku, the Board speaks to what it calls the employment patterns of nurseries. Similarly, Seabreeze takes note of the industry pattern by referencing Kyutoku as a case bearing upon the rights of economic strikers in a "non-seasonal industry, such as a nursery." (Emphasis added.) (Id. at footnote 5.) Still, I do not believe the Board intended to limit the concept of non-seasonal only to certain kinds of businesses (such as nurseries) rather than to certain kinds of job classifications (such as tractor drivers and irrigators), as well.

192. The application of the Kyutoku rule should only be extended to tractor drivers and irrigators since there was convincing evidence presented of the steady nature of their work. As to sprinklers, however, there was no such evidence introduced.

Again, Respondent's business justification is reasonable and believable, particularly in view of the unrebutted Jon Vessey testimony that irrigators had customarily done weeding and thinning work, specifically in the garlic and onions, and that he no longer provided bus transportation. Vessey also testified without contradiction that there was not enough work to recall the weed and thin crew.193/

Finally, the General Counsel argues that Lucero's position should have gone to a returning striker as his slot was not filled by anyone after he left. But Lucero's own testimony makes it clear that his work schedule was much too sporadic and irregular for me to conclude that he occupied a full time tractor driver position that would create a vacancy in that job classification upon his departure. There is simply not sufficient evidence that an additional tractor driver was needed once Lucero left, particularly in view of the fact that there was probably a lesser need for tractor drivers overall, owing to the discontinuance of the lettuce.

Thus, I find from the evidence that as to the tractor drivers and irrigators, those that were hired after their unconditional offers to return were reviewed, were hired in conformity with the law following the departure of permanent replacements in the fall of 1980.

As regards the sprinklers, however, there was insufficient evidence presented by Respondent of the full time nature of their duties. They could have been hired back as permanent replacements in the season subsequent to the season in which the strike began, only if it could have been demonstrated that it was necessary to offer them, at the time they were hired, employment which would continue through the following season. Seabreeze, supra. This Respondent failed to do. The fact that Jon Vessey hired replacements as "permanent workers" or that said replacements desired permanent work does not satisfy the Seabreeze test.

B. Maggio, Inc.

1. Facts

a) Receipt of the Offers to Return; Establishment of Hiring Procedures

Carl Maggio testified that all categories of his work force went on strike on January 20, 1979, that starting in January of 1980, some of his steadies – tractor drivers and irrigators – offered to return to work (G.C. Ex. 59), followed by most of his carrot bunch harvesters, broccoli harvesters, lettuce workers, and weeders and thinners on March 24, 1980 (G.C. Exhs 59 (a) & (b)).

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193. This Complaint does not concern itself with the reinstatement rights of striking weeders and thinners, as that matter was litigated in Vessey & Company, supra.

Later in April and May most of the remaining strikers requested re-employment (G.C. Exhs 59 (c)-(f)), while the final group applied in November, 1980 (G.C. Ex. 59 (g))[194/]

Upon receipt of these offers to return, Maggio testified he sought some clarification. Therefore, he wrote the UFW on March 3, 1980 (G.C. Ex. 61) and received a reply which he said satisfied some of his questions on March 11, 1980 (G.C. Ex. 61(a)). However, though the UFW assured him that the offers to return were unconditional, Maggio testified he didn't believe the strike was over since he was picketed daily until April or early May of 1980. He also related that he had read about a situation at Cal Coastal where a list of names was given to that company, the workers were put back to work, and then they walked out again. But Maggio acknowledged that he never had discussions with anyone from the UFW regarding these Cal Coastal work stoppages or about his concern that there might be work stoppages on his property if he were to hire back the strikers from the petition list.

In any event, Maggio testified he did not believe he had any legal obligation to reinstate these petitioning workers; and the only reason he hired the three irrigators off the lists was because of advice given him by his attorneys "to protect our legal position. (TR 19, pp. 10-11).

As he continued to receive lists from strikers wanting to return through the spring of 1980, Maggio testified he decided to continue what he said had always been the Company hiring policy – the hiring (at least initially) of only those who had worked for the Company before.195/ To be hired would be those workers travelling from one area to another; e.g. King City workers going to the Imperial Valley as well as workers wanting to transfer from one jo.b classification to another; e.g. a carrot worker moving to a job

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194. It was stipulated by the parties that Respondent Maggio received offers to return to work from the strikers (through the UFW) enumerated in Appendix A to the Third Amended Complaint. It was also stipulated that of those offering to return, three, all irrigators, received their jobs back: Isaac del Campo on October 10, 1980; Manuel Figueroa on October 10, 1980; and Ricardo Leon on November 11, 1980. Juan del Campo, striking Maggio irrigator with the highest seniority, was recalled to work on October 2, 1980 but could not return for medical reasons.

195. As to how long the individual had to have worked for the Company in order to be rehired, Maggio testified that it was not necessary for him/her to have actually worked an entire season; the reliability of the employee was the key because he didn't want workers walking out on him again.

in the broccoli.196/ Next to be hired would be the strikers off the lists, followed by new hires.

Maggio testified that he instructed his foremen to check with the office and not to hire off the lists of strikers offering to return to work because they (the foremen) would not have any idea as to what the seniority number of the worker involved was; and besides, the Union was supplying the Company with a list of names, according to seniority, to be hired back. For example, Maggio specifically remembered telling Cliff Kirkpatrick, broccoli supervisor, that if he needed more workers, he should come to his (Carl Maggio's) office at which point the Company would send out recall notices, according to seniority, which is what, Maggio testified, the Union wanted.

b) Carrots

1) General Background

Carl Maggio testified that before the strike many members of the bunch carrot crews would finish in the Imperial Valley in May, travel to King City and begin bunching the carrots there almost immediately. Thereafter, they would go back for the carrot harvest in the Imperial Valley in November and would also receive immediate employment. Generally, as many workers who travelled to King City and as many who came to the Imperial Valley, would be employed; and Maggio testified the Company encouraged these workers to work in both locations. For these workers, these was no clearly defined layoff period and they had virtually year round jobs.

On the other hand, many Imperial Valley carrot harvesters declined to make the trip to King City; but they, according to George Stergios who was in charge of the growing and harvesting of all crops, did not lose .seniority and were always recalled to the Imperial Valley harvest.[197/] Stergios also testified that

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196. Maggio was asked whether such *a* worker would retain his original date of hire in carrots so that he could bump a less senior (system-wide) broccoli worker or would be given a new seniority date in broccoli. Maggio testified that the situation had not yet come up but that he personally throught it was unfair for the carrot worker to be able to displace the broccoli crew member. (Hiring supervisor David Edwards testified that in his opinion a person who had worked within a particular crew longer than a more junior crew member would have superior seniority for recall purposes even though the latter had in fact worked for the Company longer overall.)

197. The parties stipulated that before the strike some Maggio carrot bunch workers worked only in the Imperial Valley, some worked only in King City, and some worked in both places. Those who

(Footnote continued——-)

generally, the same employees came back to the Imperial Valley year after year, and there was very little turnover, the carrot work force being one of the steadiest of all.198/

Humberto Felix for the last 6 years has been foreman of the carrot bunch crew in both the Imperial Valley and King City. He testified the Imperial Valley harvest usually occurred between the last week of November until May 5-May 15; in King City it began the last part of May until the last part of November. Usually, during the harvests, there was always enough work so all seniority workers were able to be employed. Felix testified that before the strike the usual number of workers in his carrot bunch crew was 125 to 140 but that immediately after the strike, though it varied, there were probably groups of 70-80 workers. In the Imperial Valley season that started in November of 1979, there were around 125, but some of them left and never came back. As to the 1980-81 season, Felix testified he had around 105 harvesters.

However, Felix made it clear that the above figures for all the seasons were constantly fluctuating because there was no given day when the entire crew showed up for work; e.g. in the 1979-80 season, though there were 125 in the crew, the numbers making themselves available each day for work would vary between 70-125. Furthermore, Felix testified that there was no set number of crew members that was necessary for the harvest so that if 70 showed up, that was acceptable; and if 125 showed up, they would still all be put to work except that there was a possibility the entire crew might ultimately have had less work to do that particular day.

The numerically changing nature of the carrot crew was corrobarated by Stergios who also testified that carrot bunch workers frequently drifted in and out of the carrot harvest throughout the season. When asked if he ever had a situation where there were more people applying for work in the carrot harvest than needed, Stergios answered, not to his knowledge. He was next asked

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(Footnote 197 continued——)

worked in the Imperial Valley, regardless of whether they went to King City, would have had seniority over persons who only worked in King City and wanted to come to the Imperial Valley for the first time. In this way, an individual could have worked in the Imperial Valley, not gone to King City, but still have retained his/her Imperial Valley seniority the following season; and a person who worked the Imperial Valley, went to King City, and then came back to the Imperial Valley also had seniority. Both of these classifications would have had seniority over a brand new King City hire or any King City hire who had never come to the Imperial Valley. (TR. 27, pp. 72-73.)

198. Supervisor Edward also testified that the carrot acreage had not decreased since 1978.

whether there was any Company policy that would apply in a situation like that, and he said that he was not aware of any.

2) The Strike and Subsequent Hiring

Felix testified that though the entire carrot bunch crew went out on strike in January, 1979, as many as 1/3 returned while the 1979 season was still on. And around 60 new workers, mainly an Arab crew, were hired to fill in the open slots. Felix testified that following the Imperial Valley harvest, the majority of these new hires went to work in King City.

In November of 1979, Felix was again foreman in the Imperial Valley and hired somewhere between 30-50 new workers.

Thereafter, the majority of the striking carrot bunch harvesters (on March 20, 1980), submitted offers to return to work (G.C. Ex. 59(b)). As regards these offers, Felix testified that Stergios had told him that some people had called the office and wanted their jobs back, but Stergios did not give him the names of those persons or tell him that they would be hired. Felix also testified that Maggio's King City grower, Charlie Watts, told him to give work to those workers if they called back because the Company was short of help; but he too never gave Felix a list of strikers to be rehired. In fact, Felix testified he had never before seen a copy of the offer to return to work and was not aware at any time that those workers listed on the petition wanted to be re-employed.

David Edwards has supervisory duties over all aspects of the operation's hiring. He also serves as Respondent's assistant grower. Edwards testified that his supervisor, George Stergios, made him aware of the strikers' offer to return and told him that if any new openings arose, strikers were to be hired over new people but that replacement workers and persons that worked in King City had priority over the strikers.199/ Edwards also testified that Carl Maggio specifically told him to hire King City workers before the strikers. Pursuant to these directives, Edwards testified that he informed Felix that strikers were to be hired only after replacements and King City workers but that Felix never got that far down the seniority list anyway.200/

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199. Edwards further testified that he authorized his foremen to hire workers for one kind of seasonal work in their crew who had previously worked the prior season in another category of work for another crew because Stergios had told him that this had become Company policy. According to Edwards, Stergios informed him that workers should be moved to other job categories in order to give them steadier, year-round kind of work. Edwards testified that this was a new policy since the strike.

200. Edwards testified that Felix did not tell him and he was not aware that some of the workers Felix hired back were former strikers, infra, or that their names appeared on the petitions to return.

According to Felix, in the summer of 1980 there were workers hired in King City for the first time. (Maggio had also testified to this effect.) Felix collected a list of King City workers who were willing to come to the Imperial Valley the next season for work 201/ (G.C. Ex. 64(a), last page) and turned this list over to the Company's general office.202/ Felix testified that before the strike, there was never any need to compile such a list because there were always sufficient workers who showed up for the fall in the Imperial Valley. Of all the names compiled, only 2 or 3 failed to show up for work that fall.

Felix also testified that he had a full crew for the 1980-81 Imperial Valley season. Many of those hired as replacements were students who had worked on weekends or during summer vacation or workers who had missed part of or the entire previous harvest.203/ Many of the workers hired as replacements for the 1979-80 season did not return and of those that did, many never finished out the 1980-81 season.204/

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201. Maggio testified it was he that made the decision that a list of the 1980 summer King City bunch workers who were planning to come to work in the Imperial Valley in the fall of 1980 s hould be made because he wanted to get an idea of how many people would be starting the Imperial Valley season. Though acknowledging that no such list was ever made prior to the strike, Maggio testified that such a list was needed in 1980 because he had an unstable work force and he needed to know exactly how many workers he could count on.

202. Payroll clerk Esther Angulo testified that the payroll office in King City for the first time in the fall of 1980 sent her a list of persons from King City (G.C. Ex. 64(a), last page) who would be joining the Imperial Valley carrot harvest. As these persons arrived for work, Angulo testified she would call the King City office to verify that said individuals had worked there the season before; and she did the same for persons not on the list but claiming to have worked in King City the preceding season. Angulo further testified that all the King City workers on the list, so far as she knew, showed up for work in the Imperial Valley.

203. These workers retained their original seniority date. Angulo testified, for example, that such would be the case of a worker employed for but one week for the entire season. However, those strikers returning before the general offers to return were received were apparently given not their original date of hire but the date they returned after the strike; e.g., Mario de la Torre and Jose and Rigoberto Franco of the broccoli crew (Resp's 40) and Maria Osuna of the weed and thin crew (Resp's 40(d)).

204. Felix testified that large numbers of harvesters, including the 60 new workers, mainly Arabs, as well as many

(Footnote continued-----)

Felix further testified that some new persons were hired in the 1981 Imperial Valley carrot harvest — workers from King City, some of whom had worked for the first time there in 1980 and who had never worked in the Imperial Valley before.205/

c) Broccoli

The harvesting supervisor for broccoli, Cliff Kirkpatrick testified that broccoli was grown only in the Imperial Valley and that there were usually two broccoli harvesting crews at peak, each with 22-24 workers.

Kirkpatrick testified that all of the broccoli workers struck and in order to harvest, the Company hired some workers from the bunch carrot crew 206/ (initially around 18, enough to fill a small crew, and then more later in the season), as well as new people. The carrot workers were told they could go back to the carrots with no loss of seniority. The 1979-80 broccoli harvest was completed around February 18, 1980; and by the peak of the season the Company had full crews, though the work tapered off towards the end.

In the 1980-81 harvest, the season remained strong throughout, even though only one crew of 34 or 35 workers was used, Kirkpatrick acknowledged, however, that he could have used more people because some had started to leave. In fact, Kirkpatrick testified that his need for broccoli harvesters had actually increased since the strike.

(Footnote 204 continued——)

students, all of whom formed a crew immediately after the strike and whose names appear on the April 13, 1980 bunch carrot harvest seniority list (G,C. Ex 64(a), p. 8), no longer worked for him as of April, 1981. In fact, as regards the largely Arab crew, Felix testifed that none of them were working for him as of November, 1980.

205. It was stipulated that several persons worked in the King City bunch crew in the summer of 1981 for the first time, had not worked in the Imperial Valley in the immediately preceding season, and then appeared on the Imperial Valley bunch payroll for the first time in the 1981-82 season. (TR. 26, pp. 47-48; G.C. Ex. 105.)

206. Kirkpatrick testified that when workers left the carrots to go to broccoli, they were not replaced but that possibly the remaining carrot harvesters may have had to work a little longer or the orders might have been reduced.

c) The Sprinklers

Foreman Nick Diaz testified that sprinklers worked seasonably and that the Imperial Valley season began in August and sometimes lasted as long as January. Sprinklers work in the carrots, broccoli and lettuce but only sometimes in the alfalfa and not at all in cotton. Diaz testified that currently there are 20-25 sprinklers but that before the strike, when the Company still had lettuce, there were 4-5 more.

Diaz testified that the sprinklers were not working at the time of the strike, the season being over, and that he began hiring new workers in August for the 1979 season, which was completed around December. Thereafter no new workers were hired for the 1980 season in that almost all of the crew from the previous year showed up for work. The one or two 207/ who failed to present themselves were not replaced because, according to Diaz, there was less work to do in 1980 than 1979.

d) The 1980-81 Recall of Carrot Bunch Harvesters, Broccoli Harvesters, and Sprinklers

Respondent sent recall letters to the sprinkler crew in September, 1980 and to carrot and broccoli workers in November and December, 1980 (G.C. Ex 63) after the strikers had offered to return to work. According to payroll clerk Angulo, to be eligible for the recall list a worker had to have worked the last day of the preceding season.208/ Angulo also testified that no one was sent a recall notice who was not on the "seniority list." (G.C. Ex. 64(a).) A separate listing on the seniority list, also prepared by Angulo, contained the names of strikers that did not return to work. (G.C. Ex. 64(a), pp. 11-12.) Angulo testified that she never sent recall notices to these persons 207/ because Carl Maggio told her that recalling those that had finished the season and those that were coming from King City would be sufficient — the list of strikers would be utilized only if they were needed after the others were given jobs.

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207. On direct examination by Respondent, Diaz had testified that there had been no openings because all the members of the prior crew had reported for work. .

208. Angulo testified these records did not reflect how many other days during the season the individual worker would have worked.

209. The parties stipulated that except for the three irrigators that were returned to work, infra, none of the other strikers who submitted offers to return were sent recall notices by Respondent from the date of the offers to the present.

Besides those on Angulo's seniority list who had finished the last season, there was another group who were recalled and rehired regardless of whether they finished the season. These were the 1979-80 harvest replacement workers, and they were rehired so long as they worked at any time since the strike (Resps[1] Exhs. 40-40(e).

Felix testified specifically how this system impacted upon carrot bunch harvesters. According to him, Respondent, both before and after the strike, had sent out recall letters to workers with seniority telling them when the operation was starting up again. However, for the November, 1980 Imperial Valley season, the strikers did not receive such letters because they were not considered seniority workers despite the fact they had offered to return to work in March of that year. (G.C. Ex 59(b).) Felix testified that the designation "seniority worker" had, before the strike, applied to anyone who had worked that season and was present at the end of the harvest. If anyone missed a whole harvest, he/she would lose seniority and would be hired back only after all the workers from the seniority list had been hired back.

However, this changed after the strike. According to Felix, in May of 1979 in King City the Company gave work to any person who had worked within the Company before. As hiring supervisor Edwards explained it:

> I believe that now, since the strike, that if they have worked for us before, whether one day or whatever, it's that they would be allowed to come back. They wouldn't be called back at their old seniority date. . . .
>
> I don't know what date is put on their list. I know that when they are called back, that they will be called back at the end of the other workers that did finish the season or that did work most of the season. (TR.17, p. 36.)

Edwards testified that in contrast to the requirement before the strike, it now didn't matter whether this worker finished the season. In this way, Edwards testified, a worker of two seasons experience in broccoli, for example, could miss an entire season and still be allowed to return to work as *a* seniority employee.

As a result of these changes, recall, so far as the 1980-81 carrot bunch harvest was concerned, was extended to 1979-80 replacement workers (whether they finished the season or not), 1980 summer King City harvesters, employees since the strike who had worked at any time in other categories for the Company (including those who had missed previous harvests), and students (over 20 in number) who had previously worked Saturdays, Sundays and summer vacations only. These groupings were all to be hired back before any of the strikers, now petitioning to return to work.

As regards the broccoli, Kirkpatrick testified that at the beginning of the 1980-81 broccoli season, Maggio sent recall notices

to people who had worked for him in the broccoli the prior 1979-80 season and that two full crews were filled by December 18, 1980. Kirkpatrick testified that when individuals applied for work, they were asked to fill out an employment application, and he would check it against the recall list for the 1980-81 season; if the applicant were not on his list, he would turn it over to Angulo and she was supposed to check it against the other lists.

But again, eligibility for recall was not confined to the list of those who worked in the 1979-80 season, as Kirkpatrick told foreman Domingo de la Torre to get together a crew from within the Company. Some of these workers were not on any list.210/

Kirkpatrick estimated that in the 1980-81 season, workers returning from the 1979-80 season constituted around 75% of the crew; the remainder would have been those that had not worked in broccoli before but were working elsewhere for the company.

Kirkpatrick was asked what his instructions were for hiring workers for the 1980-81 season, and he responded that Stergios had told him:

> . . . We had to hire people who were on the recall list, and people that had worked in the broccoli before in 1979-80, and then the other people were to come from the bunch crew and the sprinkler crew people that were Maggio employees. (TR. 18, p. 56.)

When asked what his instructions were as regards hiring back the strikers who had offered to return to work, Kirkpatrick replied:

> We weren't to hire them, no. . . . The people that were striking, we were not supposed to hire them. id.

As the season progressed and vacancies occurred, Kirkpatrick testified that he was supposed to just obtain workers who were currently working for Maggio or had been working for Maggio and were laid off. If these people were not sufficient to fill the vacancies, Kirkpatrick testified the vacancy was supposed to remain open; no one would be hired.

Kirkpatrick also testified that Stergios never explained to him why strikers were not supposed to be hired and that he spoke to Carl Maggio about the strikers' offers to return and that Maggio said: ". . .we weren't to hire them." (TR. 18, p. 76.)

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210. Kirkpatrick acknowledged that some of the workers' names could not be found on the recall list even though he knew they had worked for him before in broccoli or other operations. He testified his personal knowledge of the employee's prior work at Maggie's would be sufficient for hiring.

The Fraud

Domingo de la Torre became one of Respondent's broccoli foremen in the 1979-80 season and reported to Stergios and Kirkpatrick. He has been foreman ever since. De la Torre testified he was the one that was responsible for telling workers whether there were positions available in his crew. When he first started working, Stergios told him not to hire anyone brand new so he kept a list of persons that had worked for him in the past and before hiring anyone, he would check to see if the name appeared on the list. If so, he/she would be hired. De la Torre also testified that occasionally he would have to let a worker go that he had hired when the Maggio office informed him that the records did not show that person to have ever worked for the Company before.

However, de la Torre's list did not include the names of any of the striking employees; it only included individuals hired since the strike.

De la Torre was asked if any new people were hired by him who used the names of workers previously employed in the broccoli crew. He took the Fifth Amendment on the advice of counsel, was granted immunity from prosecution by the Board, and then he denied that there were. After conferring with counsel, he indicated he wished to change his testimony and admitted that he hired new persons in both the 1980-81 and 1981-82 seasons using the names and social security numbers of workers no longer employed by Respondent.211/ De la Torre explained that he needed more workers because many from his crew had left. He further tetified that: "(t)he reason was because I couldn't hire any people without them coming out on the seniority list . . . and I couldn't go to anybody, because I was afraid of losing my job and I just needed to have some people work for me in order to keep my job. ..." (TR. 28, pp. 45-46.) According to de la Torre, he did not mention to anyone from the Company that he needed more workers because he had never been informed he could hire additional harvesters; and he was afraid if he didn't get workers, he would be fired. When the false name scheme netted insufficient numbers of workers, de la Torre testified his crew just worked short, sometimes as few as 8 workers, and for longer hours. De la Torre also testified that no one from the Company had ever told him there was a list of strikers who had previously worked in broccoli who had offered to return to work.

De la Torre denied that Kirkpatrick knew anything about this fraud though he admitted that Kirkpatrick was out in the fields every day. But when asked if any supervisory, Maggio personnel

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211. It is unclear on how many occasions de la Torre perpetrated this fraud. Initially, he testified that it was only 3-4 times. But later he reluctantly admitted to at least nine instances.

would have observed new workers in his crew, he remarked, "... the only one that may have noticed them was like Cliff . . ., but he never mentioned anything to me about that. ..." (TR. 28, p. 77.)

Alphonso Cisneros, a witness for the General Counsel, testified that he applied for work at Maggio's in December of 1980 in broccoli and was asked by Kirkpatrick if he had ever worked for the Company before. When he responded, "no", Kirkpatrick told him he couldn't hire him. He returned 2-3 days later and was hired by de la Torre under his own name. Though he saw Kirkpatrick every day, Kirkpatrick never spoke to him about the fact he had been hired.

According to Cisneros, at some point after he had been working in the broccoli de la Torre approached him, indicated there had been trouble, and that he could continue working for Respondent but would have to change his name and work under the name of "Jose Luciano Ortiz". On cross-examination, Cisneros suggested that Kirkpatrick might have known something about this:

> He (de la Torre) mentioned Cliff's name. Yes. He said that ... I couldn't work there, that something was wrong with the union and Cliff knew about it and I couldn't work there no more under my name. (Parenthesis added.) (TR. 28, p. 109.) 212/

Cisneros testified he worked one month under Ortiz[1] name, December of 1981, which was the last month of the season.

Another witness for the General Counsel, Richard Garibay, testified that he and Domingo de la Torre were friends from junior high school in 1971-72. De la Torre hired Garibay in the 1979-80 broccoli crew where he worked from December 9, 1979-February 2, 1980 (G.C. Exhs. 110(a)-110(f)). He did not work the 1980-81 broccoli season. However, records reveal that thereafter, though Garibay was no longer employed at Respondent's, someone that same season used his name and cashed payroll checks forging his signature. (G.C. Exhs lll(a), lll(b), 112(a), & 112(b).) This pattern was repeated in 1982.213/

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212. Kirkpatrick testified that he remembered Cisneros from the 1979-80 and 1980-81 broccoli season and personally hired him for the 1981-82 season. When Angulo told him Cisneros[1] name was not on the list from the last year, Kirkpatrick testified that he spoke to de la Torre about it and learned that in the 1979-80 season he had used a different•name and social security number but that it was the same person. Kirkpatrick allowed Cisneros to continue his employment.

213. The parties stipulated that the name of Richard Garibay with his social security number showed up on Respondent's payroll records as an employee in the broccoli crew in January of 1982.

Stergios testified that he was unaware of any foreman who was asking individuals to use names other than their own while working for Respondent until this matter was brought to his attention during the hearing. Sometime in early January, 1982, he, Angulo, and the Company attorney, Merrill Storms, went to two different fields where two broccoli crews were working in an effort to ascertain whether the identification cards of workers in the field could be matched with the names on the payroll records. Stergios testified that he was close by while Angulo and Storms checked on the identity of the workers but that he did not observe workers disappearing from the crews and not returning to work at Maggio's. 214/ Stergios also testified that no one was fired or left Respondent's employ voluntarily as a result of this investigation.

f) The Weeders and Thinners

This too was seasonal work. Tony Osuna, the weeding and thinning foreman, working under Dave Edwards, testified that no weeding and thinning was being done at the time of the strike and that he later hired for the fall 1979-80 season in November which only lasted until January/February.215/ He also testified that before the strike he employed 40 weeders and thinners, but in the fall season after the strike, Edwards told him to reduce the crew size, though he couldn't remember the number, it was reduced to. In 1980-81, 30-35 were employed.216/

Except for 7 or 8 strikers who apparently abandoned the strike and came back to work in October, 1979, Osuna was not aware of any other strikers hired by him. Nor was he ever made aware of a list of names of strikers who had offered to return to work. And he further testified that Edwards never gave him any instructions about whom to hire back, though he also testified that it was Edwards, and not he, who did the hiring for the 1980-81 weed and thin season.

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214. De la Torre testified a few workers did not show up after General Counsel attempted to serve subpoenas on them in the field a short time prior to Stergios' and the others investigatory trip but that they returned later. In the interim, there positions were not filled.

215. Payroll clerk Angulo testified that her records showed the 1979-80 season to have commenced on December 17, 1979 and ended on March 18, 1980.

216. Dave Edwards testified that pre-strike, the Company had had 2 crews with 40-50 workers in each crew, and during the strike the crew size remained at 40-50; but because of the absence of 1,000 acres of lettuce, there was only one crew. Angulo testified that payroll records showed that the 1979-80 weed and thin season peaked on January 19, 1980 at 46 workers and then declined to about 20 workers on the last day of the season, March 18. in 1980-81, the crew size peaked on December 31, 1980 at 47 workers and then decreased to as few as 3 or 4 on February 14, 1981.

George Stergios testifed that with the discontinuance of lettuce, weeders and thinners were used mainly in broccoli.217/ When the broccoli weeding finished, the Company decided, rather than laying off the who crew, to move some to the carrot or broccoli harvests.

Osuna also testified that he was responsible for the fava bean harvest. Generally, the weeders and thinners would be laid off in January or February but would then come back in April to work this harvest.218/ Osuna testified that Respondent grew fava beans in 1980 and 1981 and employed 45 workers, each year, probably the same persons.219/

g) The Tractor Drivers

Dave Edwards supervises the hiring of tractor drivers. Edwards testified that he considered 5-6 of the tractor drivers to be year-round; 220/ the others filled in from time to time. Edwards testified that the peak for tractor work was September until January, sometimes February, there usually would be layoffs until June or the first of July 221/ when recalls would then take place by seniority.222/

According to Edwards, in the year before the strike there were as many as 15-20 tractor drivers, but since the strike, that number has been reduced to 10-15, largely because of the discontinuance of the lettuce crop and the fact that broccoli

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217. Edwards testified less thinning was required in broccoli because broccoli acreage was down; and in addition, broccoli was now being planted in a stand rather than planted at 3-inch spacings.

218. Others worked a short time for Kirkpatrick in broccoli and then were hired into fava beans. (Kirkpatrick was also harvesting supervisor for fava beans.)

219. Angulo testified that the payroll records showed an average of 49 people working in the fava bean harvest. She also testified the records revealed an overlap between weed and thin workers and fava bean harvesters; e.g. the 1979-80 season where a majority of the names were the same for both classifications.

220. When Edwards subsequently testified as to the "Seabreeze", infra, aspects of the case, he testified that 12-14 tractor drivers were full time.

221. Also in subsequent testimony, Edwards stated that the longest layoff was only a month.

222. Edwards testified there were no layoffs in January of 1981 because the Company planted cotton for the first time and these workers were needed for that crop.

acreage has decreased a little. Edwards testified that all but 3 or 4 of the tractor drivers went on strike, that he was able to obtain enough replacements for a full complement by the peak time around the fall (although he also testified that he really didn't have what he could call a stable group until August/September, 1980), and that there were no openings in the tractor driver crew at the time the petitions to return was received. Edwards further testified that he had not hired any new people to do tractor driver work since the receipt of the list because there had not been any openings.

h) The Irrigators

Irrigator foreman Nicolas Diaz at first testified that all irrigators worked year round in all crops and that no one has had to be laid off in the last four years.223/ Later, however the parties stipulated that Diaz' testimony would be that Respondent employs approximately 15 steady irrigators in the Imperial Valley for the year, 10 of these are on the payroll year-round, and the remaining irrigators were usually laid off for periods of two weeks to one month. Diaz himself testified that the work force had remained relatively constant pre-strike and afterwards, though the number of irrigators was slightly down owning to the discontinuance of lettuce.

Diaz testified that all but three irrigators went out on strike and that it took him 7-8 months to obtain sufficient replacements.

Irrigator foreman Diaz testified that all irrigators went on strike except for three and that it took him 7-8 months to get sufficient replacements.

Diaz also testified he heard about the strikers' offer to return to work but that there were no openings until the fall of 1980 when three strikers were hired back. There have been no further openings since that time. Diaz also testified that Stergios told him that if extra irrigators were needed, he should report the matter to the office and that Stergios would do the hiring.

2. Analysis and Conclusions of Law

The Fourth Amended Complaint alleges in Paragraphs 24(a) and (b) that at various times in 1980 Maggio's striking tractor drivers, irrigators, carrot bunchers, lettuce harvesters, weeders and thinners, and broccoli workers (Appendix A, attached to Third Amended Complaint) unconditionally offered to return to work but that Maggio failed and refused to hire back these workers.

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223. Stergios testified that irrigators were usually laid off in middle February-early March and recalled towards the end of July.

As was the defense of Respondent Vessey, supra, Respondent Maggio argues that the offers to return were not unconditional. in that Maggio strikers couched their petitions to return to work in the exact same language as the Vessey offers, this issue is controlled by the holding in Vessey & Co., supra, 7 ALRB No. 44. See also Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 (where strikers' offers to return were not invalidated or made conditional by a union's failure to explicitly offer to terminate the strike).

But Respondent argues here that additional evidence here flows from Nassif's testimony that after the UFW gave Maggio its first list of workers offering to return to work, Marshall Ganz, an officer of the UFW, told him the strike was still on. Nassif also testified he heard Smith say the same thing. This testimony, if true, would not be sufficient to jettison this case from the Vessey & Co. rationale. Respondent also claims that newly discovered evidence (Resps[1] Exhs 66 & 67) shows that the strike was continuing and that it was not an unfair labor practice strike. These documents, asuming arguendo they would qualify as "newly discovered evidence" would not detract from the reasoning of the Vessey case either. Moreover, these letters are not binding on the question in this case of whether bad faith bargaining transpired during the period in question. Nor is there anything in these letters stating that the participants were economic as opposed to unfair labor practice strikers. I regard this matter also as having been resolved by Vessey & Co. 224/ See also, Admiral Packing, et al., supra.

As stated earlier in the Vessey "Analysis" section regarding the reinstatement of strikers, I find that Respondent Maggio's strikers were engaged in an unfair labor practice strike and made unconditional offers to return to work. (G.C. Exhs 59(a)-59(g); Appendix A to Third Amended Complaint). When Respondent failed to reinstate them and remove the replacement workers hired in their place, it committed an unfair labor practice. See Mario Saikhon, supra, 8 ALRB No. 88.) But I shall nevertheless, as I did in the case of Respondent Vessey, analyze the reinstatement issue as if the UFW strike had been an economic one.

To begin with, General Counsel made a prima facie case that Respondent's striking employees were engaged in protected activity, that Respondent had knowledge of that activity, and that there was a causal relationship between the protected activity and discriminatory conduct; i.e. the failure to reinstate strikers unconditionally offering to return to work after the departure of the strike replacements and thereafter in the following season. Frudden Produce, Inc., et al., supra, 8 ALRB No. 42, citing Verde Produce Company (1981) 7 ALRB No. 27 and Jackson and Perkins Rose

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224. Even the major case relied upon by Respondent on this issue, Cartriseal Corporation (1969) 178 NLRB No. 47, was also urged (by the same law firm) upon the ALO and Board in support of the same principle in Vessey & Co. and distinguished there (ALOD, p. 16).

Company (1979) 5 ALRB No. 20.

Except for the three irrigators who returned to work in October/November, 1980, not one of the other strikers who submitted an unconditional offer to return to work was rehired by Maggio, unless it happend by accident.225/ Absent an legitimate and substantial business justification, economic strikers are entitled to immediate reinstatement to their former or substantially equivalent jobs, unless their jobs have been permanently filled. N.L.R.B. v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375; Frudden Produce, Inc., supra.

The burden then shifted to Respondent to prove that it would have reached the same decision in the absence of the protected activity. Martori Brothers Distributors v. Agricultural Labor Relations Board, supra, 29 Cal.3d 721. Respondent failed to carry its burden. Rather than provide a business justification for its failure to rehire strikers, the evidence brought forth by Respondent showed a deliberate tampering with established seniority practices in a conscious effort to circumvent strikers' attempts at rehire. What emerges from this record is that Maggio intentionally imposed new hiring and recall policies which were designed to drastically limit the strikers' access to re-employment opportunities. The plan worked.

First, Respondent held down the number of vacancies through the new Company policy of hiring workers who had previously done one type of seasonal work only into any other job category.226/ Despite Carl Maggio's assertions as to what past Company policy was regarding job classification transfers, such "policy" was obviously interrupted by the collective bargaining agreement with the UFW that was in effect between May 24, 1977 and January of 1978. (G.C. Ex. 3.) The whole tenor of the seniority provisions of that contract served to preserve seniority within the job classification; e.g. seniority could not be used to bump another within an established "crew, commodity or area" (G.C. Ex. 3, Article 4H, p. 13), and workers received a seniority date within his or her job classification (and crop operation) which was maintained separately.

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225. Felix was the sole foreman who seemed perfectly willing to rehire back the strikers to his carrot crew if a supervisor had only clearly directed him to do so. As it was, he appears to be the only foreman to rehire former strikers (one in 1980 and four or five in 1981, according to his testimony); but his act in doing so had nothing to do with Company policy and was quite fortuitous – three of the strikers happened to come by his home; and another sent word through an employed relative.

226. Even when *a* carrot harvester moved from carrots to broccoli, for example, his/her position in carrots would not be filled; Respondent would require remaining harvesters to work longer or orders reduced rather than hire back a striker.

(G.C. Ex. 3, Supplemental Argeeraent Number 2.) It was also provided that layoffs would be in order of seniority with the worker "having the least seniority being laid off first and the workers with the highest seniority being recalled first." Id.

Second, another new policy employed after the strike was in regard to the King City workers. Before the strike, Imperial Valley workers had seniority over King City workers who wanted to come to the Imperial Valley for the first time. (Stipulation, TR. 27, pp. 72-73.) This changed after the strike. In fact, King City workers were actively encouraged to "sign up" for the Imperial Valley, as Felix did when he, for the first time, inquired and then wrote down the names of King City workers who were willing to work in Holtville. Upon arrival, these workers were given preference over returning strikers even if they had never worked before in an Imperial Valley harvest or for that matter, never worked in King City before the 1981 harvest. For example, the parties stipulated that several 1981 first time King City workers were employed in the 1981-82 Imperial Valley bunch carrot harvest though they had not worked in the Imperial Valley the preceding season. (Stipulation, TR. 26, pp. 47-48.)

These new policies enacted for the first time since the strike had a profound effect upon striking employees seeking to return to work in 1980. By redefining seniority, the Company had now structured into the rehiring process several new layers of employees a returning striker would have to wade through before being hired back -— workers from King City coming to the Imperial Valley for the first time, anyone who had worked in any job category for the Company before, replacement workers who had missed an entire harvest the year before. Not only were these classes of employees given preference over and hired over strikers seeking to return, but the records suggest that they retained their old seniority dates of hire,227/ as well, while strikers did not.

Respondent argues that strikers were not given any jobs in carrots because there were no vacancies. In the first place, it is difficult to give much weight to this position because, as both Felix and Stergios made clear, there was no such thing as a vacancy — workers drifted in and out of the crews all season and the crew would expand or retract accordingly. Besides, there was as much work as before. Edwards testified that Felix had a full crew for the entire 1980-81 season and that carrot acreage had not decreased since 1978. in addition, Stergios was not even familiar with a situation arising where more carrot harvesters showed up than there were available jobs for and knew of no Company policy that would

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227. For example, workers missing the end of the harvest who had lost their original seniority number, were now under the new seniority system, given their old number back.

even cover that occurrence.228/

Second, as Felix testified, there were vacancies in carrots as early as November, 1980 in the Imperial Valley when many of the 1979-80 replacement workers did not return. Several of those employees listed in General Counsel Exhibit 64(a) were no longer employed at the time Felix testified on April 9, 1981; some had not worked there all that season.

As for broccoli, there were also vacancies in the 1980-81 season. But job placement went first, according to Kirkpatrick, to those that had worked in broccoli in the 1979-80 season, even though, as he admitted, several of these workers did not finish that season or had only worked a few days during it. Next hired were current Maggio workers in other job classifications. Kirkpatrick testified that as the season progressed, there were other vacancies, but they were filled by persons who had previously worked for Maggie but had been laid off. There were no other hirings after that.

As shown by de la Torre's testimony, there were also vacancies in his 1980-81 crew; strikers were not hired. De la Torre was forced to let some people go whose names did not appear on front office lists; the replacements for these workers were not strikers.229/ Finally, desperate for workers but aware he was not to hire back strikers, de la Torre was forced to employ new hires under false names. Obviously, Kirkpatrick, working in the fields daily with de la Torre, would have been aware of his need for additional workers but evidently condoned 230/ the scheme rather

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228. For someone whom Carl Maggio had said foremen were supposed to check with before employing new hires, Stergios, Secretary/Treasurer of the corporation and the person primarily involved in decisions relating to the growing and harvesting of all crops in the Imperial Valley, displayed a surprising ignorance of Company policy. For example, he also did not know whether a senior worker employed only in the Imperial Valley harvest would have priority in hiring in the Imperial Valley over a more junior employee but one who consistently worked in both the King City and Imperial Valley operations. In fact, Stergios was uncertain if there was a Company policy relating to this subject.

229. The same was true of Kirkpatrick who dismissed Gustavo Luna and Miguel Sanchez but did not hire back strikers.

230. It is intersting to note that despite the fraud brought to Kirkpatrick[1]s attention, at least publicly, in January of 1982, de la Torre remained as foreman for the remainder of the season, finishing in March of 1982.

than approve the hiring of petitioning strikers as replacements.231/ Had Respondent in good faith desired to conform its behavior to the law, the names of strikers offering to return to work would have been on the list from which de la Torre could have filled up his crew; there would have been no need for concealment or outright fraud.232/

When Carl Maggio instructed his foremen to hire a "reliable work force", it is now clear that he meant non-strikers —— workers who would not walk out on him again. I recommend that Respondent be found in violation of sections 1153(c) and (a) of the Act.

Even had Respondent not engaged in discriminatory tactics to avoid hiring back strikers, it has failed to meet its burden of showing that it was necessary to offer jobs to replacement workers beyond the season in which those workers were hired, as required of seasonal employees under Seebreeze, supra. Carl Maggio testified that it was he who made the decision to seek permanent replacements, and it was his intention that seasonal workers; e.g. carrot bunch and broccoli harvesters, and weeders and thinners that were hired for the current season be rehired for the following year. In Maggie's view, all persons employed by him at the time the offers to return were received were permanent replacements for all of those who had gone out on strike.233/ But Maggio's views and Maggio's intentions do not satisfy the guidelines set forth in Seabreeze. Likewise, Stergios' and Kirkpatrick's testimony of their intent did not satisfy the Seebreeze requirement either.

Stergios testified that Carl Maggio and he decided that permanent employment should be offered to replacement workers because the main concern of these workers was the length of time they would be employed and whether it was a permanent job. According to Stergios, he was frequently asked these kinds of questions by replacements (at least 100 in all categories of work) both before they were hired and afterwards, while he was visiting the fields. He testified that many of the replacements were

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231. I also credit the Cisneros testimony, which I found to be reliable throughout, that de la Torre implied to him that Kirkpatrick knew about the fraud.

232. Even after several workers had run off (for some days) at the sight of subpoena laden Board agents in the fields who were investigating de la Torre's fraud, rather than offer their work to the strikers, Respondent chose not to fill those positions at all.

233. In this way, Respondent could justify its hiring policy by asserting, as Maggio did during his testimony, that the petitioning strikers could not replace anyone currently working but might be hired (after the foreman checked first with George Stergios) before any new workers would be employed.

concerned about threats and violence and indicated that they didn't want to work part-time or to be laid off later on. (TR. 27, p. 136.) Stergios testified that he assured these workers that they were permanent.234/ Stergios also testified that some of the replacements told him that the foreman who hired them had offered full-time employment.

When the broccoli workers struck, Kirkpatrick testified that among those he hired as replacements were carrot bunch workers on the promise that they could return to carrots and would not lose their seniority. Kirkpatrick also testified that he told them that they would be both permanent members of the broccoli and carrot bunch crews.

However, the fact that employees, quite understandably, were concerned about threats and potential violence and wanted to be assured of permanent employment rather than take a risk for only a short term job is not probative that it was necessary for the employer to offer striker replacements employment extending beyond the season or beyond the end of the economic strike. Even viewed as a purely economic strike, the strikers had a right to return to work in the season following their offer to do so. Seabreeze, supra.

However, as regards the irrigators and tractor drivers, I find that Respondent generally employed them full time and not seasonally and that returning strikers should be hired only after the permanent replacement left. Kyutoku Nursery, Inc., supra.

The parties stipulated that were irrigator foreman Nick Diaz called to testify, he would testify that Maggio Inc. had approximately 15 steady irrigators working in the Imperial Valley during the year and that 4 to 5 were laid off for a period of up to two weeks to one month. Approximately 10 of the irrigators were on the payroll year-round.

Tractor driver supervisor Edwards testified that somewhere between as few as 5-6 and as many as 12-14 of the tractor drivers worked year round; he also testified that tractor drivers were laid off anywhere from 1 month - 4-5 months.

Despite some of the foremen's numerical contradictions, it doesn't seem to me that full time employment necessarily has to be twelve months a year. Irrigators and tractor drivers are traditionally considered permanent employees and nothing about their work patterns at Maggie's, including their relatively short layoffs, convinces me otherwise.

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234. Stergios testified that when he discussed this question with Carl Maggio, no consideration was given to what would happen should the strikers offer to return to work. Likewise, Stergios testified he did not mention this possibility to replacement workers when he offered permanent employment.

Diaz did testify that all irrigator positions were filled *at* the time the offers to return were received and that there were no openings until the fall of 1980 when three strikers were hired back. And, according to Edwards/ there were no openings for tractor drivers at the time the strikers offered to return to work (the operation was acutally slowing down), and there had been none since. There is no contrary evidence.

I find that the record supports Respondent's position that, insofar as irrigators and tractor drivers were concerned, there were no openings at the time the strikers offered to return and that the only subsequent openings – only in the irrigator classification --were lawfully filled by the hiring of strikers following the departure of the permanent replacements.

X. The Offer to Return to Work of Ruben Terrenes A.

Facts

Ruben Terrones worked exclusively in the broccoli for Maggio beginning in 1977. He, along with the rest of his crew, went out on strike in January, 1979. Terrones testified that he decided he was ready to go back to his broccoli work in December of 1979 because he needed the money, as he had been on strike for 10 months. Terrones also testified that he was available for work as early as September,235/ having resigned from the UFW around that time,236/ but that he waited until December because he was asking for reinstatement to his old job, and the season didn't start until then.

Terrones testified that he first met UFW para-legal Ellen Starbird in December of 1979 when he went to the Union's office in Calexico for help in contacting the Company. Terrones testified that he asked Starbird to call Maggio for him to see if he could get his old job back in broccoli because he had called there first but whoever answered did not speak Spanish. Starbird later reported to him that there was not work for him. Terrones testified that this was the first and only attempt he ever made to obtain re-employment with Maggio.

Terrones admitted that though he had obtained employment in both 1977 and 1978 by personally speaking to a broccoli foreman, he did not follow this procedure this time nor did he ever actually go to the broccoli fields or the Maggio office to look for work. He

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235. Terrones testified that he drew unemployment compensation benefits during the strike and that they ran out around August or September, 1979. At that time, he testified he contacted the UFW for assistance with his unemployment benefit problem.

236. Terrones testified that this "resignation" was not communicated to the UFW in any fashion.

testified the reason he did not was because he didn't have a car; but he also testified he never asked any of the people, whom he knew were working for Respondent or anyone from the Calexico UFW Office, for a ride to the field.

Terrones acknowledged that the UFW never told him the strike against Maggio was over nor did he seek permission from any official to cross the picket line and go back to work. Terrones also admitted that though he didn't think there were pickets around the broccoli fields in December of 1979, if there had been, he would not have crossed the picket line.237/

Ellen Starbird testified she worked for the UFW from 1975 to 1980. In December of 1979 she was employed in the Calexico field office working on unemployment matters and translations. During that time, Terrones met her at the office and asked her to contact Maggio on his behalf because he was interested in returning to broccoli work but could not speak English.

Starbird testified that on December 6, 1979 she contacted the Maggio office,238/ first spoke to someone named "Esther," and asked if she or anyone in the office spoke Spanish to which Esther is alleged to have replied, "no." Starbird testified she then, in English, told Esther that she was calling on behalf of Terrones who desired to be recalled to work in the broccoli 239/ but that Esther told her that only the broccoli foreman, Cliff Kirkpatrick, did the hiring andd for her to call back. Starbird testified that she did call back, spoke to a "Susan," stated she was calling for a worker looking for rehire 240/ and that the call was then turned over to

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237. Later during this same cross-examination, Terrones attempted to alter his testimony claiming it was in error, that he had decided in September that he was no longer part of the strike, had resigned from the UFW, and would have crossed the picket line. He testified the UFW would have no objection to his crossing the line and returning to work because he was no longer a member.

238. Starbird testified she had never before contacted Respondent on behalf of any other striker.

239. She later denied she told Esther that Terrones was only applying for broccoli work and testified she told Esther he just wanted to return to work.

240. However, Starbird's Declaration, identified as Joint Exhibit 3, indicates that she told Susan that it was she (Starbird), not Terrones, who was looking for work. As regards this Declaration, it would be appropriate to mention that there is some question whether it is in evidence since counsel for Respondent withdrew his stipulation to its admission pending receipt of the original document, indicating that if the original were

(Footnote continued——)

the bookkeeper. According to Starbird, she recognized the bookkeeper's voice to be that of David Wells, whom she recognized from a May, 1979 unemployment compensation hearing involving another worker, in which she, as UFW representative, cross-examined him. Starbird testified that she informed Wells that she was calling for Terrones,241/ who was looking for broccoli work, but that Wells informed her that the Company wasn't rehiring anyone who didn't finish the season last year 242/ as the strike was still on; but that if Terrenes specifically requested to return and if there were extra work later on after the others were hired back, he would be considered. Wells was then alleged to have told her he would take down the name and address of the worker applying for rehire, which she testified she then gave to him.243/

Starbird testified Terrones was not present during this second conversation (with Wells), and she never reported the results of it back to him. In fact, she testified she did not tell Terrones to file an unfair labor practices charge nor did she even discuss the possibility of such a filing with him; she initiated the charge herself on his behalf.

Starbird further testified that when she spoke to Wells, she did not use her real name but used the name "Maria"244/ because everyone at Maggio's office would have known who she was and therefore, would not have offered Terrones any work. She later explained that actually the only person at Maggio who would have know her was Wells.

(Footnote 240 continued---)

presented and was identical, he would again stipulate the document into evidence. (TR. 12, pp. 70-71.) (Respondent refers to the exhibit in its Brief.) But since it is not clear from the record that the original ever was presented or that counsel for Respondent ever re-offered to enter any stipulation regarding the document, T do not consider it to be in evidence. However, in that the Declaration was used extensively during the cross-examination, the fact that the document itself is not in evidence is not a crucial matter.

241. At no time did Starbird's Declaration indicate that she told anyone during these phone calls with three different Maggio employees that she was calling on behalf of Terrones.

242. In the Declaration, Starbird declared that Wells had told her on the phone that recall cards would be sent out only if there were vacancies "after re-hiring the scabs."

243. The declaration does not indicate that she gave Wells Terrones' name and address.

244. Later in her testimony, Starbird said she told Wells she was Terrones' daughter,. "Maria Terrones."

According to Starbird, she did not know if prior to 1980 the UFW authorized any persons, including Terrones, to return to work at Maggio's. Further, she never dicussed with any UFW official Terrenes' offer to return to work nor did she receive from any such official any assurances on Terrones' behalf that he would not be fined or otherwise disciplined for crossing the picket line.

David Wells is Respondent's controller and office manager, who also is in charge of all accounting functions. He has no connection with the hiring or recall or field workers. Wells testified that usually there were at least four Spanish speakers around the office, including Esther Angulo.

Wells testified that he could not recall having any telephone discussions with anyone applying for reinstatement at Maggio's during the time frame November to January 1979-80. Although he remembered Starbird from the unemployment compensation hearing, he testified he could not recall having any conversation with her or *a* "Maria Terrones" or a "Maria", concerning the rehire of Ruben Terrones. Nor did he recall ever taking down Terrones' name.

Esther Angulo testified that she speaks Spanish, although Susan, who works in the office as a receptionist, does not. It was Angulo's practice to refer workers inquiring about employment to a foreman. If the individual wished to have the foreman telephone him/her, Angulo testified she would take down the name and phone number and then give the message to the foreman; but she would not keep a record of the phone call herself.

Angulo further testified that she did not recall ever speaking to Terrones or to anyone saying she was calling on behalf of Terrones. Nor did she know an Ellen Starbird or a "Maria" or remember making a record of such a phone call and turning the information over to any foreman.

B. Analysis and Conclusions of Law

The Fourth Amended Complaint in Paragraph 25 alleges that on or about December 6, 1979, Respondent Maggio failed and refused to recall or rehire ex-striker Ruben Terrones because of his past participation in protected concerted and union activity.

To begin with, as Terrones' name did not appear on any of the workers' petitions offering to return to work in 1980, it being alleged that Terrones made a personal offer to return prior to that time, the initial inquiry must be whether Terrones intended to abandon the strike and unconditionally offer to return to work.

The main reason I have concluded that he had not abandoned the strike was his own testimony, despite his ineffective attempt to change it, that had there been a picket line at Maggio's broccoli fields when he reported to work, he would not have crossed it. in an attempt to rehabilitate his cause in view of this admission, he

testified he had actually abandoned the strike in August or September. But if this were true, why did he testify that he applied for work in December of 1979 because he had been on strike for 10 months, the strike having begun around January 20, 1979? And if he were truly available for work in the August/September time frame, why did he not apply for some kind of a job at that time? Moreover, if he had resigned from the Union 245/ or was contemplating resigning around that time, why did he continue to ask the UFW for assistance in securing unemployment insurance and rehire with Maggio?

Even if Terrones had intended to make an unconditional offer to return, his mode of conveying same to Respondent was not adequate. In the first place, he made no attempt to contact the proper personnel that customarily would handle such matters. He did not speak to a broccoli foreman, though he had used this method to obtain employment in both 1978 and 1979, nor did he personally go to the Maggio fields or the Maggio office. In Certain-Teed Products Corp. (1966) 161 NLRB 88, 63 LRRM 1256, aff'd, 387 F.2d 639, the NLRB held that proper application for work must be made to the person who has the authority to do the hiring. The Board noted that after only one contact, the former employee made no further effort to obtain employment. In this case, Terrones' only effort was a phone call on one occasion to Maggio's general offices.

Second, the General Counsel did not prove to my satisfaction that Starbird conveyed to Maggio personnel an unconditional offer to return to work on behalf of Terrones.

Starbird testified she made it clear she was calling on behalf of Terrones. It is difficult to credit this statement. There is a serious question whether Terrones was ever mentioned to Company officials as, for one thing, there is no reference of it in Starbird's signed Declaration. This may be because Starbird had more than one purpose in calling Respondent's office at the start of the broccoli season. As the para-legal who was coordinating unemployment insurance claims, Starbird would have also been interested to know whether in fact, there was going to be work available at Maggio's, as apparently claimed by it before unemployment compensation (EDD) officials. When asked why she called Maggio on that day on behalf of Terrones, Starbird replied:

> . . . The people had seen that the broccoli had already started, and Maggio had, in fact, written to the unemployment office and told them that there was work available and that, therefore, they should deny anybody who used to work at Maggio unemployment on the grounds that work was available at Maggio, and when I spoke to Mr. Terrones and he indicated that he would be willing to

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245. This assumes arguendo the resignation was effective, which it could not have been since the UFW was never informed of it.

return to work and wanted to call them, I thought that would be a good time to test the waters and see if they really intended to offer anyone work. (TR. 12, p. 42.)

As Starbird clearly had in mind a larger class when she called on behalf of Terrones, it is quite possible, as her Declaration indicated, that she told Maggio personnel she was calling on behalf of herself (and not Terrones). This idea gains even more support by the fact that Starbird used a false name — which name is not clear — when speaking to Wells 246/ because, based upon her prior experience with him, she must have known that he would connect her with the UFW's unemployment insurance section. If she were calling only for Terrones, it seems to me she would have been more prone, despite her apparent perception of his hostility to her, to use her real name since it would not have concerned an unemployment benefit matter. Furthermore, the Declaration did not state that she specifically asked Wells that Terrones be reinstated or that she left his name and address with Wells.

For all these reasons, the General Counsel has not convinced me that thie offer was properly communicated to Respondent; and if Respondent was unaware of an offer on the part of one of its employees to return to work, there could, obviously, be no duty to rehire such an individual.

Thus, the evidence suggests that though Terrones had a general idea that he wanted to return to work, he was not certain in his own mind that the offer was unconditional; and in any event, he did not take the necessary steps that would have ordinarily been required to appropriately seek rehire. I recommend the dismissal of this allegation.

XI. THE REMEDY

Based on the record as a 'whole, I have concluded that Respondents Maggio, Vessey and Martori have violated sections 1153(e) and (a) of the Act by their refusals to bargain in good faith, continuing the acts and conduct which was found by the Board to be unalwful in Admiral Packing, supra, 7 ALRB No. 43. But in terms of over what period of time the remedy is to run, the results are slightly different. In the case of Respondents Maggio and Vessey, this case traced their bargaining history from December 7, 1979 until March 23, 1981, the first day of the hearing in this proceeding. However, as to Martori, though a.similar history was reviewed here, the Board had meanwhile, in a parallel case in the

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246. Starbird testified that she recognized Wells' voice when he identified himself as the bookkeeper. But in her Declaration she stated that Wells refused to identify himself at all.

sense of overlapping periods of bad faith bargaining allegations, concluded that Martori had engaged in surface bargaining through May 21, 1980, and ordered make whole from November 20, 1979, until May 21, 1980, and thereafter, until Respondent commenced good faith bargaining. Martori Brothers, supra, 8 ALRB No. 23. 247/

I have also concluded that Respondents Maggio and Vessey refused to reinstate the unfair labor practice strikers who had made unconditional offers to return to work in violation of sections 1153(c) and (a) of the Act. The appropriate remedy for the strikers seeking to return to work is immediate reinstatement regardless of any lack of vacancies due to replacement hiring. Several seasons have now passed since the offers to return were made, and Respondents' payroll records show that the replacement workers, whether hired before or after the strike was converted into an unfair labor practice strike, did not return in large numbers the next season. If the strikers were replaced after the economic strike was converted into an unfair labor practice strike, it is clear that the strikers would have had an absolute right to immediate reinstatement upon making unconditional offers to return. Even if the replacement employees were hired before impasse was declared and the strikers were thus not entitled to immediate reinstatement, the evidence establishes that, due to turnover between seasons, Respondents had vacancies at the beginning of the 1980-81 and 1981-82 seasons which they could have filled by hiring strikers who had made unconditional offers to return to work during 1980. Lu-Ette Farms, Inc., supra, 8 ALRB No. 55, pp. 3-4. Moreover, viewing this strike only as an economic one, under Seabreeze, supra, even without the seasonal turnover, the strikers' reinstatement in the season immediately following their offer to return would be required. 248/ Id.

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247. During the hearing in the present case, General Counsel agreed that surface bargaining up to May 21, 1980 had been litigated in the above case and that her claim for make whole covered the period subsequent to May 21, 1980.

248. However, the lettuce harvesters offering to return to work should be excluded from any remedy because I have found, supra, that those jobs were eliminated when Maggio, for non-discriminatory reasons, ceased growing lettuce in the Imperial Valley. A lawful justification for refusing to reinstate striking employees is where the strikers' jobs have been eliminated for "substantial and bona fide reasons other than considerations relating to labor relations." N.L.R.B. v. Fleetwood Trailers Co., supra, 389 U.S. 375, 66 LRRM 2737. Similarly, other job classifications, such as sprinklers, weeders and thinners, tractor drivers, and irrigators may have likewise been affected by the elimination of the lettuce crop. However, I am unable to accurately determine how many job losses can be attributed directly to the closure and for what period of time. I leave this question to the compliance process.

Therefore, in view of Respondents' refusal to bargain in good faith and Respondents' (Maggio and Vessey) acts of discrimination against strikers seeking to return to work, I shall order that Respondents bargain in good faith with the UFW 249/ and make whole their employees for all losses of pay and other economic losses they have suffered. See Mario Saikhon, Inc. (1982) 8 ALRB No. 88.

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249. Although Respondent Martori no longer operates within the State of California, it is not clear that it and the UFW would have nothing to negotiate over should the parties once again engage in collective bargaining. I am therefore ordering it too, upon request, to bargain with the UFW.

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW.

(b) Failing or refusing to reinstate striking workers who offer, or who have offered, to return to work because of their strike activity or union activity.

(c) In any like or related manner interering with, restraining, or coercing agricultural employees in the exercise of those 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, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, and if agreement is reached, embody such agreement in a signed contract.

(b) Make whole its agricultural employees 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, 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, supra. The make whole period shall extend from February 21, 1979, until December 7, 1979, and from December 7, 1979, until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Offer to all of its employees who went on strike in January of 1979 (with the exception of lettuce harvesters) and thereafter made unconditional offers to return to work at various times in 1980, as listed in Appendix A to the Third Amended Complaint herein, full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they

have suffered as a result of Respondent's failure or refusal to rehire them after the receipt of their unconditional offers to return to work, reimbursement plus interest to be made in accordance with the establish Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc., supra.

(d) Preserve and, upon request, make available to this Board or 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 amounts of makewhole and interest due under the terms of this Order.

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from December 7, 1979, until the date on which the said Notice is mailed.

(g) 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.

(h) Provide a copy of the attached Notice to each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

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

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

TT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of the agricultural employees of Joe Maggio, Inc., be and it hereby is extended for one year from the date of the issuance of this order.

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW.

(b) Failing or refusing to reinstate striking workers who offer, or who have offered, to return to work because of their strike activity or union activity.

(c) In any like or related manner interering with, restraining, or coercing agricultural employees in the exercise of those 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, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, and if agreement is reached, embody such agreement in a signed contract.

(b) Make whole its agricultural employees 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, 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, supra. The make whole period shall extend from February 21, 1979, until December 7, 1979, and from December 7, 1979, until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Offer to all of its employees who went on strike in January of 1979 (with the exception of lettuce harvesters) and thereafter made unconditional offers to return to work at various times in 1980, as listed in Appendix A to the Third Amended Complaint herein, full and immediate reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or any other employment rights and privileges and reimburse them for all losses of pay and other economic losses they

have suffered as a result of Respondent's failure or refusal to rehire them after the receipt of their unconditional offers to return to work, reimbursement plus interest to be made in accordance with the establish Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc., supra.

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

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from December 7, 1979, until the date on which the said Notice is mailed.

(g) 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.

(h) Provide a copy of the attached Notice *to* each employee hired by Respondent during the 12-month period following the date of issuance of this Order.

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

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of the agricultural employees of Vessey & Company, Inc., be and it hereby is extended for one year from the date of the issuance of this order.

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW.

(b) In any like or related manner interering with, restraining or coercing agricultural employees in the exercise of those 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, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to said employees' rates of pay, wages, hours of employment, and other terms and conditions of employment, and if agreement is reached, embody such agreement in a signed contract.

(b) Make whole its agricultural employees 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, 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, supra. The make whole period shall extend from February 21, 1979, until May 21, 1980, and from May 21, 1980,until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(c) Preserve and, upon request, make available to this Board or 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 amounts of makewhole and interest due under the terms of this Order.

(d) Sign the Notice to Agricultural Employuees 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 period for May 21, 1980, until the date on which the said Notice is mailed.

(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 employee hired by Respondent 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 he 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.

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of the agricultural employees of Martori Brothers Distributors, be and it hereby is extended for one year from the date of the issuance of this order.

DATED: February 7, 1983

MARVIN J. BRENNER
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we 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 bargaining in bad faith with the UFW regarding a collective bargaining agreement and by refusing to rehire strikers. 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 farm workers 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 MOT do anything in the future that forces you do do, or stops you from doing any of the things listed above.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since December 7, 1979.

WE WILL NOT fail or refuse to hire or reinstate, or discriminate against any employee because he or she exercises any of these rights, including the right to strike.

WE WILL offer reinstatement to all strikers who unconditionally offered to return to work with us into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights and privileges, and we will reimburse each of them for all pay and other money plus interest they lost because we refused to reinstate them or rehire them.

Dated: JOE MAGGIO, 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

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we 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 bargaining in bad faith with the UFW regarding a collective bargaining agreement and by refusing to rehire strikers. 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 farm workers these rights:

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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 do do, or stops you from doing any of the things listed above.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours, and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since December 7, 1979.

WE WILL NOT fail or refuse to hire or reinstate, or discriminate against any employee because he or she exercises any of these rights, including the right to strike.

WE WILL offer reinstatement to all strikers who unconditionally offered to return to work with us into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights and privileges, and we will reimburse each of them for all pay and other money plus interest they lost because we refused to reinstate them or rehire them.

Dated: VESSEY & COMPANY, 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.

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NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we 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 bargaining in bad faith with the UFW regarding a collective bargaining agreement. 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 farm workers 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 meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since May 21, 1980.

Dated: MARTORI BROTHERS DISTRIBUTORS

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.

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