Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GOURMET HARVESTING AND PACKING INC., and GOURMET FARMS, Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos .81-CE-2-EC 81-CE-94-EC 82-CE-18-EC 83-CE-55-EC 83-CE-60-EC 83-CE-62-EC 83-CE-90-EC 83-CE-103-EC 14 ALRB No. 9

ERRATUM

An error exists in the Decision and Order on page 3. The date the UFW was certified should have appeared as March 29, 1978 instead of March 29, 1979.

Dated: September 2, 1988.

BEN DAVIDIAN, CHAIRMAN[1/]

JOHN P. McCARTHY, Member

GREGORY L. GONOT, Member

IVONNE RAMOS RICHARDSON, Member

[1/] 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. Member Smith did not participate in the consideration of this matter.

Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GOURMET HARVESTING AND PACKING, INC., and GOURMET FARMS, Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, ChargingParty	)	Case Nos. 81-CE-2-EC 81-CE-94-EC 82-CE-18-EC 83-CE-55-EC 83-CE-60-EC 83-CE-62-EC 83-CE-90-EC 83-CE-103-EC 14 ALRB No. 9

DECISION AND ORDER

On December 2, 1983, Administrative Law Judge (ALJ) Arie Schoorl issued the attached Decision and recommended Order in this matter. Thereafter, Gourmet Harvesting and Packing, Inc. and Gourmet Farms (Respondents), General Counsel and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the ALJ's Decision with briefs in support of their exceptions and Respondents and General Counsel filed response briefs.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings and conclusions, only to the extent consistent herewith, and to issue the attached Order.

As will be discussed below, we affirm the ALJ's finding that Gourmet Farms is a successor employer to Gourmet Harvesting and Packing, Inc. We also find the successor liable for the predecessor employer's failure to bargain over the effects of the

letter's closure as well as for its own failure to provide the Union with relevant information upon request. We do not, however, find a failure by the successor to satisfy the overall duty to bargain in good faith as that term is defined in Labor Code section 1155.2.[1/] Nor do we find any evidence to support the numerous allegations of discrimination against the crew of Abelardo Varela.

Background

The pertinent facts are undisputed. Gourmet Farms (hereafter referred to as Farms) was founded in 1973 as a growing company to produce various agricultural commodities including asparagus, lettuce, onions, garlic, alfalfa and melons on owned and leased land in the Imperial Valley. Gourmet Packing Company (hereafter Packing) was organized one year later, essentially by the same persons responsible for the creation of Farms. Packing's purpose was to provide general farming services (i.e., weeding and thinning) as well as the harvesting, packing, marketing and shipping of agricultural commodities produced by independent growers. Such services were provided for an unspecified number of growers, including Farms. Packing did not grow crops and therefore did not engage in any direct farming activities on its own behalf.

Farms has never been the subject of representation proceedings before this Board. However, the UFW was certified as

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

the exclusive bargaining representative of all agricultural employees of Packing on March 29, 1979. (Gourmet Harvesting & Packing (1978) 4 ALRB No. 14.) Thereafter, Packing entered into a one-year collective bargaining agreement with the UFW, effective January 1, 1978 to January 1, 1979. In October 1978, Packing contacted the UFW to request that the parties commence negotiations toward a new bargaining agreement. In conjunction with other Imperial Valley vegetable growers, Packing began negotiations with the Union one month later.

On January 19, 1979, the UFW called a strike against those growers. As a direct result of the strike, Packing suffered financial reverses which ultimately led to its collapse.[2/] In July 1979, Production Credit Association revoked Packing's line of credit and refused to roll over its existing loan. Packing notified all its grower clients that they would have to make other arrangements to substitute for the services previously provided by Packing. Farms elected to assume responsibility for its own harvesting services formerly contracted out to Packing. Thereupon, Farms utilized equipment formerly used by Packing and hired former Packing supervisors and employees.

[2/]The ALJ found that the strike had a "devastating effect" on Packing, attributing to the strike Packing's inability to recruit workers during January and February 1979, the height of the asparagus harvest season in which Packing claims it lost upwards of two-and-a-half million dollars. Although all Imperial Valley vegetable growers who were members of the employer's bargaining group were targets of the same strike, Packing contends that most of them, unlike Packing, were primarily lettuce growers and thus were not subjected to a major dollar loss because, although they marketed a less-than-normal output, they received a higher per-unit return than they would have in a normal production year.

Although Packing notified all of its customers in August, 1979 of its inability to continue operations, Packing admittedly failed to notify the Union. The Union learned of the Company's closure some 20 months after the fact, and then only by chance. Packing's attorney-negotiator continued to represent Packing at a series of contract renewal bargaining sessions with the UFW for more than a year following closure and proposed interim wage increases for harvest employees. Both he and the Union learned of Packing's demise at the same time, on April 27, 1981, when Harold Rochester, formerly in charge of Packing's day-to-day operations, testified in an ALRB hearing relative to a different case involving Gourmet Harvesting and Packing Company, Inc. that the Company was "dormant."

Thereafter, the Union rejected Respondents' offer to bargain only as to the effects of Packing's closure. It was the Union's asserted position that Farms was a successor employer and, as such, was obligated to assume Packing's obligation to negotiate an on-going comprehensive collective bargaining agreement covering all terms and conditions of employment. James Enis, one of the founders of both Farms and Packing, general manager of Farms, and a director and majority shareholder of both entities at the times pertinent herein, testified it was his intent that, should the parties reach agreement, Farms would honor the contract just as it had already adopted the collective bargaining agreement consummated between Packing and the Fresh Fruit & Vegetable Workers Union with respect to the employees in the packing sheds which Farms retained.

Successorsh

Respondent excepts to the ALJ's conclusion that Farms is a successor employer to Packing and is thus obligated to bargain with the exclusive representative of its predecessor's employees. The exception lacks merit.

As the Agricultural Labor Relations Act (ALRA) is silent on the issue of successorship, we look to applicable precedents of the National Labor Relations Board (NLRB) and the courts to help us establish guidelines by which successorship can be determined in the agricultural labor context. (Section 1148.) We recognize, however, that not all federal precedents are necessarily applicable because of the obvious differences between California agriculture and the industrial sector.[3/] One major difference involves transfers of property interests, which occur much more often in agriculture than in the businesses or industrial settings governed by the National Labor Relations Act (NLRA). Agricultural land is often mortgaged, divided, leased and leased back, or otherwise conveyed for a variety of business, tax, or family reasons; moreover, such land is frequently placed under management or harvesting contracts. The seasonality of agricultural employment and frequent employee turnover compound the problem. For these reasons, we must emphasize that while the basic factors set out in this opinion for use in determining successorship are generally controlling, each case must be decided on its own

[3/] See, Herman & Zenor, Agricultural Labor and California Land Transactions (January/February 1978) California State Bar Journal at pages 48-57.

facts. Accordingly, we limit the holding of this decision to the facts herein.

In 1972, the U.S. Supreme Court held that where an employer assumes the operations of a prior employer and "[takes] over a bargaining unit that was largely intact, the new, or successor, entity must bargain with the collective bargaining representative of the predecessor's employees.[7] (Burns International Security Services, Inc. (1972) 406 U.S. 272 [80 LRRM 2225]. In numerous cases since Burns, supra, the NLRB has identified several factors which constitute the legal test for successorship. In Contee Sand & Gravel Company, Inc. (1985) 274 NLRB 574 [118 LRRM 1479], the national board endorsed the following criteria set forth by an Administrative Law Judge for "determining whether an employer is a successor of another employer":

> (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the alleged successor employs the same supervisors; (6) whether the same machinery, equipment and processes are used; and (7) whether the same product or services are offered. J-P Mfg., 194 NLRB 965, 968 (1972); Miami Industrial Trucks, Inc., 221 NLRB 1223, 1224 (1975). The Board does not require that all of these factors be present to find successorship, but only enough to warrant a finding that no basic change has occurred in the employing industry. Lincoln Private Police, Inc., 189 NLRB 717, 720 (1971). Nor does the Board require that the entire business of the predecessor be taken over by the successor, it being sufficient if a part of the old operation survives in the successor, Miami Industrial Trucks, supra; Solomon Jonski d/b/a Avenue Meat Center, 184 NLRB 826 (1970). (274 NLRB at 584.)

Thus, "it is not necessary that the new employing industry be a carbon copy of the predecessor," IMS Manufacturing Co., Inc. (1986) 278 NLRB No. 79, si. op. at p. 6 [122 LRRM 1056], as the ultimate test is whether the operations are similar even if the businesses were different. (NLRB v. Jeffries Lithography Co. (9th Cir. 1985) 752 F.2d 459 [118 LRRM 26813.) Although all circumstances must be considered in order to determine whether the employing industry remains substantially unchanged notwithstanding a change in the ownership of the operation, in Fall River Dyeing & Finishing v. NLRB (1987) __ U.S.___, 107 S.Ct. 2225 [125 LRRM 2441], the U.S. Supreme Court, citing from its earlier decision in Golden State Bottlers Co. v. NLRB (1973) 414 U.S. 168 [84 LRRM 2839], reminds that when examining successorship factors in light of the totality of the circumstances, "the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" While no single factor is controlling, the NLRB and the courts traditionally single out one characteristic as an essential determinant of successorship - the concept of workforce majority. As explained in Airport Bus Service, Inc. (1984) 273 NLRB 561, 562 [118 LRRM 1343]:

> Although all the circumstances are considered, the key factor in making a successorship determination is whether a majority of the new employer's bargaining unit employees were members of the predecessor's unit workforce at or near the time it ceased operations.

A company which acquires a unionized work force will be obligated to bargain with the predecessor's union if it retains employees of the predecessor in numbers sufficient to comprise a

majority of its own work force. (Burns International Security Services, Inc. (1972) 406 U.S. 272 [80 LRRM 2225].) In United Maintenance & Manufacturing Co. (1974) 214 NLRB 529 [87 LRRM 1469], the NLRB held as follows:

> [U]nder circumstances where operations under the new employer have not been changed in any substantial way, the standard for determining the new employer's obligations to bargain with the union representing the employees of the predecessor is not . . . the percentage of the predecessor's total complement that the new employer retains, but the percentage of the new employer's work force which had previously worked for the predecessor in the bargaining unit.

Work force majority became the pivotal factor in NLRB v. Jeffries Lithograph Co. (9th Cir. 1985) 752 F.2d 459, 463 [118 LRRM 2681], wherein the court simply defined a successor employer as "a firm which, having hired most of its employees from its predecessor employer's work force, conducts essentially the same business that the predecessor did." Indeed, the Supreme Court in Burns, supra, affirmed the NLRB's finding in that case that the employer, having hired a majority of the predecessor's employees "was therefore [under] a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past." (Burns, supra, at 278.)

The reason for the emphasis on workforce majority as a requisite factor in successorship determinations was made clear in United Food & Commercial Workers International Union v. NLRB (Spencer Foods) (D.C. Cir. 1985) 768 F.2d 1463, 1470 [1109 LRRM 3473] wherein the court stated that "[t]he essential

inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer of ownership." (Emphasis in original.) The court stated:

> The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. As recently noted by the Ninth Circuit Court of Appeals, "the touchstone remains whether there was an 'essential change in the business that would have affected employee attitudes toward representation.'" (Emphasis in original.) (Citations omitted.)

As explained in a somewhat different manner in NLRB v. Security-Columbian, (3d Cir. 1976) 541 F.2d 135, 139 [93 LRRM 2049], the factors to be considered in successorship cases

> . . . should be seen from the perspective of the employee. (Citations.) This 'employee viewpoint' derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from a sudden change in the employment relationship. (Citations.) Thus, the inquiry must ascertain whether the changes in the nature of the employment relationship are sufficiently substantial to vitiate the employee's original choice of a bargaining representative. (Citations.)

Immediately following Packing's closure, Farms hired Harold Rochester to handle its own harvest and packing requirements in precisely the same manner as he had performed those duties for Packing. Rochester immediately advised former Packing field supervisor Alfredo Medrano and foreman Jesus Avila that Packing had ceased operations. Rochester then hired Medrano and Avila to assemble and supervise employees in the same manner and job classifications at Farms in order for them to perform the same type of work they had performed when in Packing's employ.

Farms retained the same seniority policies (including honoring the seniority standing each employee had accrued at Packing), rates of pay, fringe benefits and other terms and conditions of employment.

Farms leased seven of the thirteen buses which Packing owned, as well as two flatbed trucks and harvest equipment owned by Packing, and activated other, but unspecified, harvesting equipment which Farms already owned but which had never been used by Packing. Prior to closure, Packing had required the use of four packing sheds, all of which were leased, including one owned by Farms. Following Packing's closure, Farms reclaimed its own shed and, in addition, took over the lease on one additional shed formerly used by Packing. Farms continued to run the packing operation in the same manner as had Packing. Packing's office space had been leased from Farms and Farms continued to operate out of the same facility.

The ALJ found that Farms had always maintained a relatively constant year-round work force of approximately 50 employees, primarily irrigators and tractor drivers. The parties stipulated as follows: that asparagus was Farms' most highly labor-intensive crop; that, since 1977, Farms had been Packing's only grower-customer farming asparagus; and, that approximately the same number of harvesting and packing employees were required to harvest and pack Farm's produce in the year following Packing's closure as had been supplied by Packing in prior years.[4/] Thus,

---

[4/] We focus only on the harvest employees, as those employees who worked solely in the packing sheds are not agricultural employees within the meaning of Labor Code section 1140.4(b) and in fact had been employed in a unit certified by the NLRB and represented by the Fresh Fruit & Vegetable Workers Union, both before and after Packing's closure.

during the asparagus season alone, Farms required a daily average When of approximately 190 former Packing harvest employees.[5/] When that number is added to Farms' year-round complement of 50 employees, it is clear that a majority of its new work force was drawn from the certified unit.

Turning now to the specific factors as set out in Contee Sand & Gravel Co., Inc. (1985) 274 NLRB 574 [118 LRRM 1479], we find as follows: Farms, as did Packing before it, harvested the same crops, at many of the same locations, utilizing the same supervisors and management team, work force, equipment and processes with no variance in the final product. There was no perceptible difference in job duties, rates of pay or other terms and conditions of employment. Although Packing had previously handled packing and shipping duties for Farms, Farms later assumed direct responsibility for those phases of the operation, ostensibly for eventual sale and delivery of the produce to the same market sources and customers. Moreover, almost two-thirds of Farm's new work force was comprised of former Packing employees. In short, virtually all that remained of Packing, after it ceased harvesting operations for all growers except Farms, was totally subsumed within Farms' operations in essentially the same form in which it existed under Packing.

[5/] Since that figure alone suffices for purposes of determining continuity of the work force, it is not necessary that we ascertain how many additional Packing employees were retained by Farms for other seasonal operations.

NLRB v. Cablevision Systems Development Company (2nd Cir. 1982) 671 F.2d 737 [109 LJRRM 3102] is particularly instructive because of its factual similarities to the instant case. Cablevision developed, maintained and operated cable television services. The Company entered into an agreement with Broadway Maintenance Corporation, an independent contractor, to install and maintain cable installations for Cablevision's, customers. Cablevision ultimately decided to take back installation and maintenance which it had contracted out to Broadway, formed a subsidiary (Atlantic), cancelled its contract with Broadway, and hired a majority of Broadway's former employees to perform for Atlantic the same type of work as they had performed when in Broadway's employ. Cablevision argued that it could not be deemed a successor to Broadway since, overall, the two Companies were engaged in different types of businesses. The court minimized Cablevision[1]s emphasis on business purpose, observing that the "essential inquiry is whether operations as they impinge on union members remain essentially the same after the transfer to the new employer." (Emphasis added.) As the court stated:

> It is difficult to imagine a clearer case for the application of the successorship doctrine than the present one, where the change of employer represents merely a recapture of an operation previously performed by an independent contractor. The great bulk of Atlantic's employees was carried over from Broadway, and the former Broadway employees continued to perform basically the same work as before.

We find that Cablevision, supra, is dispositive of the successorship issue here.

Respondent, in its exceptions to the ALJ's finding of successorship, contends, inter alia,[6/] that the Board is precluded from affirming such a finding in this case because an ALJ in a prior case involving Respondents refused to find that Farms was either the successor to or the alter ego of Packing. Respondents' reliance on Gourmet Harvesting & Packing and Gourmet Farms (1982) 8 ALRB No. 67 is misplaced. That case involved various unfair labor practices, some of which were charged only against Packing and others against Farms. The cases were consolidated for purposes of hearing. During the course of the hearing, General Counsel sought and was granted leave to amend the complaint to allege that Farms had been acting as an agent or alter ego or successor to Packing since March 1979. The ALJ permitted the amendment on the basis of "newly discovered evidence" that Packing became "dormant" and that Farms subsequently hired its

[6/]Respondent proposes that since Farms' own employees had never voted for unionization, it would be error for the Board to now bring them within the certified unit under the guise of successorship. Respondent's concerns are subsumed in the test for determining work force majority, a matter amply discussed above. Under our Act, unlike the NLRA, there can be no question as to the appropriateness of the unit comprised of the new employer's work force. Section 1156.2 provides that the bargaining unit shall be all the agricultural employees of an employer. Those employees who comprised Farms' work force prior to Packing's closure, as well as all harvest employees formerly employed by Packing and subsequently retained by Farms, clearly are agricultural employees as that term is used in section 1140.4(b). (Farmers Reservoir & Irrigation Co. v. McComb (1949) 337 U.S. 775.) Furthermore, even had Farms' entire work force participated in the election held among the unit of Packing's field workers, and had they voted to not be represented by a union, their votes would not have been sufficient to have affected the results of the election. The result of that election was 435 votes for the UFW, 12 votes for No Union, and 5 Unresolved Challenged Ballots. (Gourmet Harvesting & Packing (1978) 4 ALRB No. 14.)

own harvesting force. He also observed that Packing had demonstrated that it had been forced to cease functioning as a result of the UFW sanctioned strike against various Imperial Valley vegetable growers in the winter and spring of 1979. But the ALJ ultimately dismissed the amendment on the grounds that resolution of the question raised in the amendment was not essential to the case and the Board affirmed without comment.

In light of the foregoing, we conclude that there was a substantial continuity in the same business operations. Farm's employees performed essentially the same work, in the same fields, with the same equipment as before, under supervisors who were known to them. Any differences in the business purposes of Gourmet Packing and Harvesting as compared to Gourmet Farms would not be discernible to those former Packing employees who had in the past been dispatched to work at Farms and continued to do so but as Farm's own employees. Those differences in operations, for purposes of assigning successorship, are neither substantial nor material. (See, e.g., Mondovi Food Corp. (1978) 235 NLRB 1080 [98 LRRM 1102].) Thus, "there was no essential change in the business that would have affected employee attitudes towards representation." (Premium Foods v. NLRB (9th Cir. 1983) 709 F.2d 623, 627 [117 LRRM 32611.

With regard to the dissenting opinion of Member Ramos-Richardson, a careful review of our decision herein would reveal to our dissenting colleague that we indeed employed the traditional totality of circumstances test which she implies we failed to acknowledge. It seems incongruous that on the one hand,

she would caution that the totality of circumstances means that no one factor is controlling and then, on the other, fail to follow her own interpretation of prevailing principles by relying almost solely on one factor. In point of fact, the dissenting opinion is based on an analysis of a single consideration (i.e., the predecessor provided harvesting services to independent growers whereas the successor is a growing company performing its own harvest requirements). Thus, the initial fallacy of the dissenting opinion is premised on its failure to apply the totality of circumstances standard and to recognize -- as do the NLRB, the courts, and the majority -- that where, as here, changes in scope or focus of the new employer's business do not affect the employment relationship or the working conditions of the employees, a finding of successorship is appropriate. (Hudson River Aggregates, Inc. (2nd Cir. 1981) 639 F.2d 865 [106 LRRM 2313]; Band-Age, Inc. (1st Cir. 1976) 534 F.2d 1 [92 LRRM 2001] cert. den. (1976) 429 U.S. 921 [93 LRRM 2001].) Furthermore, for the dissent to perceive in Fall River Dyeing & Finishing v. NLRB (1987) supra, __ U.S. ___, 107 S.Ct. 2225 [125 LRRM 2441] (Fall River) a new or different standard for examining the factors which underlie the successorship doctrine is misleading inasmuch as Fall River is no more and no less than a reaffirmation of a long line of NLRB and court decisions which construe and follow the U.S. Supreme Court's decision in NLRB v. Burns International Security Services (1972) 406 U.S. 272 [80 LRRM 2225]. The significance of Fall River is not found in the factors which determine whether there is a continuity of the

employing industry, as that area of the law is not in doubt and certainly has not been altered by Fall River.[7/] Rather, Fall River looks to the time at which continuity of the work force is to be measured vis a vis the union's request to bargain. But the Board here need not reach that question since more than two complete seasons of full employee complement, coupled with ongoing negotiations, had passed between the time Packing ceased operations and when Respondent acknowledged that fact.

Because we have resolved the employer identity question on the basis of successorship, we need not examine General Counsel's alternative theories of employer liability, namely that Farms is an alter ego of Packing or that the two entities constitute a single integrated enterprise.

Duty to Bargain as to the Effects of Packing's Closure

It is well settled that an employer need not bargain with respect to its decision to go completely out of business, even if that decision is motivated by union animus. (Darlington Manufacturing Co., et al. (1965) 380 U.S. 263 [58 LRRM 2657] (Darlington).) Such action, however, does impose upon the employer a duty to timely notify and bargain with the incumbent union as to the effects of its closure on employees affected thereby. (Darlington, supra.)

[7/] On this point, the majority's opinion can best be understood by a careful reading of the underlying NLRB decision in Fall River which the Court of Appeals and the Supreme Court affirmed insofar as it found successorship pursuant to an examination of the various factors which have defined the test for successorship since 1972.

In the instant case, it appears that *a* cessation in Packing's operations became a certainty in August 1979, when the Company began advising grower-customers that it could no longer provide them with harvest and market services. On May 14, 1981, following Rochester's disclosure of April 27, 1981, Respondents finally conceded that Packing was no longer operative and, for the first time, acknowledged that it had a duty to bargain as to the effects of Packing's closure. The Union, however, refused to engage in effects bargaining on the theory that there had been no closure. It was the Union's declared position that Farms had succeeded to the whole of Packing's operations as well as to Packing's statutory obligation to negotiate nothing less than a comprehensive ongoing bargaining agreement.

While the record indicates that there were no Packing employees working in Farms' fields in August 1979, when closure became a fait accompli, nor would there have been before October 1 of that year, it is not clear whether there were any other Packing employees who normally would have been assigned to grower-customers other than Farms prior to the start of the next seasonal operation.

We do know, however, that in 1978, for example, Packing employed approximately 15,000 different agricultural employees (an average of 600 employees per day) in the asparagus harvests as well as approximately 550 employees in the various onion, garlic and melon operations, exclusive of the estimated 300 packing shed workers who are not agricultural employees. The fact that Packing mobilized thirteen buses to transport harvest crews whereas seven

were adequate to meet Farm's requirements would appear to indicate that Farms did not absorb the whole of Packing's employee complement. Therefore, our Order herein contemplates a duty to engage in effects bargaining with regard to employees, if any, who were subsequently hired directly by Farms.[8/]

In similar circumstances, the NLRB has fashioned a limited backpay award for the express purpose of remedying an Employer's failure to permit employees "an opportunity to bargain through their contractual representative at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs were being terminated." (Transmarine Navigational Corporation (1968) 170 NLRB 389 [67 LRRM 1419].) The Transmarine approach to backpay awards has been utilized by this Board on several occasions. (See, e.g., John V. Borchard, et al. (1982) 8 ALRB No. 52; Kaplan's Fruit & Produce Co. (1985) 11 ALRB No. 7.) But, in Holtville Farms (1984) 10 ALRB No. 49 (Holtville), we declined to award a Transmarine backpay remedy because the decision to close in that case occurred during a time when few, if any, employees were working. As we explained:

[8/]The ALJ concluded that it was immaterial whether Packing failed to disclose to the Union the fact that it was no longer in business because "there were hardly any effects to negotiate about." He reasoned that employees who subsequently were hired directly by Farms worked at the same wage rate as they had for Packing, with the same terms and conditions of employment. However, in so holding, the ALJ would appear to have intruded upon the collective bargaining process where such questions may best be resolved by the parties themselves through negotiations.

> The delay did not deprive the Union of any significant bargaining strength, as might have occurred if the initial decision to close had been made during a period of peak employment. . . . All but 20 or 25 year-round workers were generally laid off . . . during the slow spring and summer months. . . . Thus, the Union was not deprived of any significant bargaining strength by the delay of negotiations for a short period of time after May 1, 1981, the approximate date of the decision to close.

Accordingly, the Board imposed a cease and desist order and directed the Company to bargain over the effects of the closure.

As in Holtville, supra, Packing had no employees working at the time it decided to cease operations. Thus, we find Holtville dispositive of the issue and, accordingly, we adopt the remedial provisions set forth in that case.[9/]

Failure or Refusal to Provide Information

Respondents except to the ALJ's finding that they unlawfully refused to provide information to the UFW in violation of section 1153(e) and (a). The exception lacks merit.

On October 30, 1980, more than one year after Packing had ceased operations and six months before the UFW was to learn of that event, the Union made an oral request for bargaining-related information to a member of the law firm which represented both

---

[9/]Successor employers are liable for their predecessors unfair labor practices of which they have knowledge. (See, e.g., Golden State Bottling Co. (1964) 147 NLRB 410 [56 LRRM 1220], modified (9th Cir. 1965) 353 F.2d 667 [60 LRRM 2553].) James Enis, a majority shareholder and director of both Packing and Farms at the time of closure, testified that he perceived no need to notify the UFW of the changes in Packing's operations. Accordingly, as Farms clearly had knowledge of Packing's failure in this regard, our Order herein will direct Farms to engage in effects bargaining.

Packing and Farms. The request was renewed in writing a few days later. Specifically, the Union sought information with respect to projected crop programs, location of operations, number of workers, worker job classifications and rates of pay, and workers names, social security numbers and home addresses. When asked for justification for needing the name and address data, the Union explained that it intended to contact employees at their homes. No such information was relayed to the Union.

Notwithstanding Respondents' position on the question of successorship, and its related belief that it was not under a duty either to bargain with the Union or to provide information, Farms conceded that it took the request for employee identity under advisement and eventually decided that such information could be used by the Union to disrupt operations. Respondents apparently feared a resumption of the strike activity which had paralyzed Packing 19 months before and sought to justify its refusal to release personal employee data, as well as the location of work sites, on the basis of Webster Outdoor Advertising (1968) 170 NLRB 1395 [67 LRRM 1589]. In that case, the union sought payroll information which presumably would have revealed whether the employer was paying higher wages to strike replacement workers. The company agreed to a limited disclosure but only after assurances by the union that the information was necessary for legitimate union purposes and that it would not be used to harass replacement employees. The NLRB found no violation of the duty to bargain because (1) replacements had in fact been harassed by striking workers, (2) the employer did not categorically refuse

to disclose the information, (3) the employer was reasonable in seeking assurances that the requested information was necessary and would not be misused, and (4) the union did not offer guarantees or renew the request after the employer expressed its concerns.

In the present case, the ALJ found no basis for the alleged fear that the Union would use the employee information to harm and intimidate current employees with the intent of disrupting Respondent's operations since the violence associated with the 1979 strike was so remote in time. He also found that Farms and/or Packing had waited an inordinate length of time to finally explain to the Union the reason for its reluctance to turn over employees' names, addresses and work site locations. He concluded that the refusal was asserted in bad faith. We agree with the ALJ that Packing's refusal to timely respond to the Union's request for information, and the grounds upon which it ultimately based that refusal, constituted a violation of section 1153(e) and (a) . In our order herein, we will direct Respondent to cease and desist from failing or refusing to comply with the Union's request for relevant information.

Duty to Bargain

On the question of Farms' overall duty to bargain with the UFW, we begin, as did the ALJ, with the Board's Decision in Admiral Packing Co., et al. (1981) 7 ALRB No. 43 (Admiral). In that case, the Board found that Respondents evidenced a lack of good faith by unjustifiably declaring impasse on February 28, 1979, and ordered Respondents to make employees whole for all

economic losses resulting from the failure to bargain. The period of said obligation was to extend from February 28, 1979 until such time as Respondents commenced good faith bargaining with the UFW which resulted in either a contract or a bona fide impasse. In the instant case, in reliance on Admiral, the ALJ prefaced his analysis of the parties' subsequent bargaining history by ruling that Respondents had the burden of demonstrating that their post-Admiral conduct represented a "substantial break with [their] past unlawful conduct..." and concluded that Respondents merely engaged in a "continuation of the same surface bargaining and delaying tactics as previously found in Admiral." Accordingly, he recommended that Respondents be ordered to make their employees whole from December 7, 1979 (end of the Admiral litigation period) through May 1983 (end of the period litigated in the present case), and thereafter until Respondents commence negotiating in good faith.

On April 2, 1984, four months after the ALJ issued his Decision in this matter, the California Court of Appeal for the Fourth Appellate District reversed the Board's Decision in Admiral, thereby invalidating the Board's prior finding of bad faith bargaining. (Carl Joseph Maggio, Inc. v. ALRB (1984) 154 Cal.App.3d 40.)

We proceed on the premise that Respondents' declaration of impasse on February 28, 1979, was genuine and asserted in good faith. (Carl Joseph Maggio, Inc., supra.) Thereafter, it was not the Union, as the ALJ found, but Respondents who first attempted to resume negotiations. On June 5, 1979, Packing advised the

Union that it was withdrawing from the Employer's bargaining group, that its position had not changed since its last pre-impasse offer, but that it was willing to meet for the purpose of negotiating a contract. The parties did meet, in August 1979, but no progress was made--the Union presented no new proposals and Packing held to its prior position. In September 1979, Respondents submitted to the UFW a written proposal for an interim wage rate. That offer, if in excess of Respondents' last bargaining table offer, would indicate a willingness by Respondents to move from their pre-impasse position and would serve to break the deadlock. (Central Metallic Casket Co. (1950) 91 NLRB 572 [26 LRRM 1520].) However, the Union failed to respond to the offer and the proposed wage increase was not implemented.[10/]

There apparently was no further meaningful contact between Respondents and the Union until October 1980, when, at the request of the Union, Respondents' negotiator agreed to resume bargaining with the UFW on behalf of several clients, including Packing. Although joint meetings were held, each employer negotiated independently of the others. An uneventful meeting was held on December 15, 1980. Thereafter, according to a

[10/]The ALJ expressly rejected General Counsel's contention that the wage increase was proposed by Respondents only for the purpose of further "concealing" Packing's closure and to avoid its obligation to bargain. The ALJ found that Respondents requested Union approval of a wage increase in order that it might "maintain its competitiveness with other Imperial Valley growers and harvesters so it would attract sufficient employees to harvest its crops."

stipulation between the parties, they engaged in 11 meetings between March 3, 1981, and August 3, 1982.

During the August 3, 1982 meeting, the UFWs negotiator observed that since the Union's last proposal carried an expiration date of August 31, 1982, he would prepare and submit to Respondents a revised and updated version of the previous three-year proposal. He also testified that the parties understood that the next move would be that of the Union's. The Union submitted the new proposal on November 18, 1982. The parties next met on February 4, 1983, but primarily for the purpose of discussing negotiations concerning other employers. Upon close of the meeting, the Union's negotiator testified that he asked, "What are we doing on Gourmet? Where are we standing? Are you a successor? Are we negotiating?" He testified that in response, Respondents promised to get back to him in two weeks, which they did. However, his testimony as to the contents of that response was stricken on the grounds that Respondents and General 'Counsel had agreed that there was an understanding between the parties relative to certain off-the-record discussions regarding settlement which could not be discussed at the hearing. There is also an indication in the record that at least one of the off-the-record meetings was held on April 8, or 9, 1983. There is no evidence of any further contact between the parties.

On the basis of the bargaining history set forth above, the ALJ found no evidence of surface bargaining independent of Admiral. Rather, he found that the entirety of the parties' bargaining relationship merely served to demonstrate Respondents'

adherence to its pre-impasse posture. Since the Court of Appeals subsequently deemed that conduct to constitute lawful hard bargaining rather than surface or bad faith bargaining, it would follow that Respondents' carried their burden of proving, in accordance with the ALJ's allocation of that burden, that they had not altered their pre-Admiral (i.e., lawful bargaining) posture.[11/] Thus, based on the totality of circumstances, we find no failure by Respondents of their overall duty to bargain in good faith.

Allegations Concerning the Abelardo Varela Crew

I. Alleged Discrimination Against Varela Crew

A. Alleged Discharge of Crew

The ALJ found that Respondents failed or refused to recall the crew of foreman Abelardo Varsla to the 1982 weed/thin and 1983 asparagus seasons in retaliation for the crew's participation in the 1979 strike and Varela's testimony in a 1981 ALRB hearing and thereby violated section 1153(c), (d) and (a) of

[11/]The ALJ found no evidence of surface bargaining independent of Admiral. In his analysis of the totality of bargaining, he identified four distinct time periods. The first period, February 1979 to December 7, 1979, coincides with the bargaining conduct which the Board had previously determined in Admiral was characterized by Respondents' delaying tactics and surface bargaining. In the next period, from December 7, 1979 until October 1980, the ALJ found that Respondent employed the same delaying tactics which the Board recognized in Admiral but found no evidence of surface bargaining. During the third period, October 1980 to January 1982, the parties engaged in 12 bargaining sessions which the ALJ determined were not fruitful but he found no unlawful conduct. In the fourth and last period, January 1982 to May 1983, he found that Respondents discussed but rarely varied the terms of their 1979 proposals, agreeing only on minor subjects of bargaining but, on the major subjects, "steadfastly held" to virtually all of their 1979 pre-impasse proposals and thereby engaged in a "continuation of the same surface bargaining and delaying tactics as previously found in Admiral."

the Act. The ALJ's findings with respect to failure to recall are clearly premised on his additional, although unalleged, finding that although Varela was not actually discharged near the end of the 1982 asparagus season, he thought he was, and Respondents seized on their knowledge of the foreman's erroneous belief to cancel its obligation to seek him out in subsequent seasons. Many of the ALJ's subsequent findings concerning Respondent's conduct towards the Varela crew were predicated in large part on his finding that the crew had been discriminatorily discharged on April 2, 1982. We find merit in Respondent's exception to the finding that the crew was discharged.[12/]

As is customary in the asparagus harvest, each crew is assigned to one field which it harvests repeatedly until the end of the season. On April 2, 1982, Varela's crew had completed the field initially assigned to it and would normally have been laid off. Supervisor Alfredo Medrano laid off the Vadillo crew instead and transferred Varela to the former Vadillo field where one or more weeks of work remained.[13/] The reassignment brought

---

[12/]Respondents also except to the ALJ's finding that, by the conduct described above, Respondents changed seniority policies with respect to the Varela crew and thereby implemented a unilateral change in conditions of employment without prior notice to and bargaining with the Union in violation of section 1153(e) and (a). We dispose of the finding on the procedural grounds that there is no unfair labor practice charge alleging a unilateral change in employees' terms and conditions of employment. The unfair labor practice charge which alleges a failure to recall in violation of section 1153(c) and (a) is not sufficiently related to and thus cannot support an alleged independent violation of section 1153(e).

[13/] Medrano testified that he wanted to give Varela preference "because he was an older worker." Area supervisor Fidel Mendez testified that Medrano told him at the time of the transfer that Varela would be able to work longer.

Varela under the supervision of Fidel Mendez for the first time that year. Not satisfied that Varela was properly overseeing the crew's performance, Mendez asked Medrano to speak to Varela about it. Medrano did so, prompting Varela to reply, "If you believe and you think that I'm doing those things, I'd better not come back."

Asked several times at the hearing whether he had indicated to his crew that either he or they had been fired or discharged, Varela answered, "No." Rather, he acknowledged that upwards of two or three weeks of work still remained in the harvest for himself and his crew had they desired to continue working but, nevertheless, he testified:

> I told my crew that *I* was being harassed very much and that I could not tolerate that much anymore; that they had done much and I was not going to come back to the asparagus on the following day; that if they wanted to return with another foreman, for them to do so or not to do so, whatever they chose.

Crew member Juan Partida testified that when Varela told his employees he was "stopping [because he was receiving] too much hassle from supervisors," several of them pledged to quit in order to support his resolve. Partida's recollection of events was corroborated by three additional crew members including Roberto Gomez who understood Varela to have said "he wasn't going to work there anymore" and therefore the crew "decided not to work anymore in support of Varela."

As Varela and several other crew members testified that they knowingly and voluntarily relinquished available work, we perceive no evidentiary basis for the ALJ's finding that Varela

was discharged on April 3, 1983, either actually or effectively, or that he or his crew had any cause for such a belief.

B. Alleged Failure to Recall Varela Crew--1982 Fall Weed and Thin

In order to establish a discriminatory refusal to hire, or rehire, General Counsel generally must first establish that the prospective employee made a proper application for work at a time when work was available. Similarly, where it is alleged that a prospective employee was denied rehire because of a discriminatory failure to recall, General Counsel must establish that the respondent did in fact have a policy or practice of recalling former employees as work became available. (Prohoroff Poultry Farms (1979) 5 ALRB No. 9; Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.) For the reasons which follow, we disagree with the ALJ that Respondents had a duty to recall Varela to work in the 1982 weed/thin season but failed to do so for discriminatory reasons.

As a preliminary matter, we believe the ALJ has overstated the evidence insofar as it concerns Respondents' alleged policy or practice of affirmatively recalling crew foremen at the beginning of each season. Crew foreman Fernando Flores testified that "Regarding work, [Medrano] has never gone to my house" nor has he ever "sent word or anyone else to tell me to report for work." Flores suggested that his crew had been the first to begin work in recent seasons only because he had been the

first of the foremen to seek out Medrano.[14/] Crew foreman Vadillo testified that in order to get work, he had to continually check with Medrano. Varela himself suggested that a crew foreman achieves a form of seniority in response to his "punctuality" in seeking work. Medrano agreed with the assessments of both Flores and Vadillo as a general rule concerning the order of hirings but conceded that Varela sometimes was an exception in that, unlike any other foreman, "When I want him to work, I have to look for him, at his home in Calexico" whereas other foreman "usually come to look for me at 3:00 in the morning at my house." Thus, it would appear that Medrano went to Varela's house only when he needed another crew and had not otherwise heard from him. A fair interpretation of the record suggests that crew foremen are hired on a first-come basis as a result of their efforts to contact Medrano. We find insufficient evidence in the record to demonstrate that Varela was not the first to be hired because of his prior strike activity,[15/] or because Respondents implemented a

---

[14/] The ALJ erred when he found that Flores had testified that Respondent appreciated his staying on the job during the strike, the implication being that he was rewarded by being the first of the crew leaders to be recalled. A question was posed to Flores by General Counsel in this manner: "And the company was very appreciative of you working during the strike; is that correct?" An objection to the question on the grounds of relevancy was asserted and sustained before the witness could answer.

[15/] Following the strike, according to the ALJ, Varela's crew was demoted from a first to a third place seniority standing. In that regard, he found that even the payroll designation for the crew had been changed. His finding apparently was premised on Varela's testimony that whereas his checks had always been coded with the number designation "01," that number was changed after the strike

(fn. 15 cont. on p. 30)

significant change in hiring practices in order to avoid having to rehire the crew. (Ukeqawa Brothers (1982) 8 ALRB No. 90.)

The relevant onion and garlic harvest following the 1982 asparagus season began in May of that year. Varela testified that he did not seek work "Because after what he [Medrano] did, it was his turn to go and call me and let me know about the harvest; not I go and see him." When it was suggested to Varela by counsel for Respondents that perhaps if he wanted work, he could have contacted Medrano, he replied, "I was angry and I wanted him to call me." He explained that his anger stemmed from Medrano's prior season chastisement that "I wasn't demanding enough of my crew, that I wasn't correcting their work . . . I think he resented my going out on strike [in 1979]."

Notwithstanding the ALJ's ultimate finding that Respondents deliberately avoided recalling Varela to the 1982 weed/thin season for discriminatory reasons,[16/] he also proposed two probable and nondiscriminatory reasons why Varela may not have been recalled. First, assuming a formal recall policy, the ALJ suggested that Varela had relinquished his recall rights for

---

(fn. 15 cont.)

to "03." We believe that the ALJ's interpretation of the numbering system is incorrect. The new number did not appear on a Varela payroll stub until the payroll period which ended on April 28, 1983, four years following the strike. Moreover, when asked if the change had any meaning in relation to seniority, Varela did not know, but replied, "I would like to think so because they're taking away the [number] one that I had . . . and they've given me number three."

[16/]During that same season, many members of the Varela crew sought and successfully obtained work in other crews.

subsequent seasons because he failed to complete the prior asparagus harvest. Second, the ALJ speculated that Medrano may have doubted that Varela wanted to resume working for Respondent because of the manner in which he quit work during the asparagus harvest.

Even if, as the ALJ found, past practice required Medrano to go to Varela's house in order to offer him work, Medrano understood that Varela had moved, a fact which Varela himself confirmed. During the onion and garlic harvest in May 1982, having rented out his Calexico house, Varela was living with a sister-in-law in Coachella and later rented a house near Indio. There is no evidence that Medrano had been apprised of his whereabouts.

C. Alleged Failure to Recall Varela—1983 Asparagus Season

We also reject the ALJ's finding that Respondents were obligated to timely recall Varela and his crew to the start of the 1983 asparagus harvest and/or that their failure in that regard was motivated by reasons proscribed by the Act.

Varela testified that he was not living in the area at the time the 1983 season began in late December 1982, and he made no effort to contact Medrano because he was still angry with the supervisor. Varela ultimately did apply to Medrano for work, in January 1983. Two full crews had already been hired and several Varela crew members had secured work in those crews. Medrano told Varela he expected he would soon require another crew, promised him work and, in addition, offered to come to his house to notify him when needed. Varela replied that as he had moved, he would

initiate the next contact with Medrano. He did so, a few days later, and was told to report to work the next morning.[17/]

II. Alleged Harassment of Varela Crew

On April 5, 1983, the UFW timely filed an unfair labor practice charge in which it alleged that since February 1983, Respondents' supervisor, Alfredo Medrano, had used "pressure tactics" in his dealings with the Varela crew in retaliation for the crew's concerted activities and because unfair labor practices had been filed on behalf of the crew. (Case No. 83-CE-90-EC.) That charge served as the basis for paragraph 22 of the First Amended Complaint in which General Counsel alleged that Respondents engaged in numerous acts of intimidation and harassment in retaliation for the crew's participation in the 1979 strike and in an attempt to rid the Company of union supporters in violation of section 1153(c), (d) and (a). The conduct was also alleged to constitute an independent violation of section 1153(a).[18/]

[17/]On March 1, 1983, the Union filed an unfair labor practice charge in which it alleged that the Varela crew was again discriminatorily denied rehire on February 20, 1983. (Case No. 83-CE-60-EC.) The ALJ found that the crew was actually laid off on that date for legitimate economic reasons and he dismissed the allegation.

[18/]Specific allegations of acts of harassment were enumerated in the complaint, including the alleged demotion of Varela crew checker Raul Cuen (also the basis of an independent unfair labor practice charge in Case No. 83-CE-62-EC); Rodolfo Castillo's subsequent assignment to the former Cuen position and his alleged unfair treatment of the crew; alleged assignment of Varela to low yield fields; and, Medrano's alleged threats and coercive statements in reference to the crew's participation in the strike and its continued support of the Union. Also listed were matters which we have already reviewed; i.e., the allegation that the crew was laid off on February 20, 1983, which the ALJ dismissed, and the alleged failure to recall the crew according to seniority in August 1982, which the Board has dismissed.

Respondents except to the ALJ's findings that: Raul Cuen was transferred from a checking to a cutting position on March 1, 1983, solely because of his union activities; Rodolfo Castillo replaced Cuen for the express purpose of treating the crew unfairly in an attempt to force it to voluntarily sever its employment; the Varela crew was assigned to a low-yield field, resulting in reduced earnings, in retaliation for protected concerted activities; and, supervisor Medrano constantly berated and taunted the crew about its past strike participation and continued support of the Union. We find merit in each of the exceptions set forth above.

While the facts are not materially in dispute, there is a dispute as to how those facts should be interpreted. Of necessity, therefore, much of the ALJ's Decision is based on his perception of uncontroverted facts. We have reviewed the testimony which the ALJ has credited, but in the context of all the surrounding circumstances. We are not persuaded that the actions of Respondents' supervisory personnel were intended as a reprisal for union or other protected activities in which Varela or any of his crew members may have been engaged in two to four years before.

A. Alleged Improper Demotion of Haul Cuen

Each crew has a full time checker with primary responsibility for assuring proper field pack by asparagus harvesters. Cuen had been appointed to that task by Varela in each of the three most recent harvest seasons. Supervisor Medrano testified that the packing shed had complained during the

preceding 1982 season that boxes harvested by the Varela crew did not meet the requisite standard. He said he saw similar shortcomings again in the then current season and had spoken to Varela about the matter several times. Cuen corroborated Medrano's testimony in that regard, explaining that Varela had received complaints about the crew's performance in the past and had, in turn, cautioned Cuen on several occasions to pay more attention to his work.

Medrano said he was not confident that Varela could correct the situation because of his close friendship with Cuen and, therefore, the supervisor decided to step in and replace Cuen with another checker, Rudolfo Castillo. Cuen continued working in the crew but as a cutter. Although Medrano asserted that he had advised Varela of the change before it was implemented, Varela believed that his authority over checker assignments had been usurped by the supervisor. The ALJ relied on the testimony of crew foreman Fernando Flores who stated that it was customary for crew foremen to select their own checkers and on that basis concluded that Cuen was demoted for discriminatory reasons.

Although Cuen's demotion may indeed be said to constitute discrimination in the sense that his assignment may have been treated differently from that of checkers in other crews, the action does not constitute discrimination in violation of section 1153(c) and(a) of the Act absent some showing that the demotion was effectuated as reprisal for union activities. There is no showing in the record of union or other protected concerted activity by Cuen following the strike four years earlier. Thus, we find no

causal connection between any union activity Cuen may have been involved in and his subsequent reassignment. Therefore, we cannot conclude that General Counsel has established by a preponderance of the evidence that Respondents would not have changed Cuen's assignment in the absence of his prior union activity.

B. Alleged Improper Assigning of Castillo to Checker Duties

Varela's crew found Rodolfo Castillo to be an unreasonable taskmaster because, as Varela explained, he began immediately to exhort the employees to increase the number of asparagus spears they were then packing in each box. Unlike his predecessor, Castillo went into the fields to check on the work of individual crew members rather than, as had Cuen, wait to check the boxes after they had been moved to the edge of the field. This caused crew members to complain to both Castillo and Varela.

The ALJ's only basis for criticizing Castillo's performance was Cuen's description of a checker's duties as entailing only the counting of finished boxes "and not to go into the fields and supervise cutter." The ALJ noted that Respondent failed to present any evidence to rebut Cuen's testimony in that regard. We disagree. According to both Medrano and Castillo, the packing shed had complained that boxes from the Varela crew were not consistently filled and that the contents were not cut to the same length or properly stacked. It would appear, therefore, that the problem was one of field work, and not the mere counting of finished boxes after they had been removed from the field. We can only conclude that Castillo approached his task in a more zealous manner than had Cuen and we fail to see how, under the

circumstances, there was a "change" in working conditions sufficient to support the ALJ's finding that the crew was mistreated for discriminatory reasons.

C. Alleged Discriminatory Assignment to Low-Yield Field

Varela worked throughout the remainder of the 1983 asparagus season, finishing at the same time as did all other crews. In early March, Respondent reassigned the Varela crew to what the ALJ characterized as an inferior low-yield field and found that the overall earnings of the Varela crew were significantly less than those of the other crews.

Our perception of the evidence differs from that of the ALJ. For the reasons discussed below, we simply find it inconclusive and therefore we are not persuaded that it preponderates in favor of General Counsel's case on this question.

We note at the outset that we approach the available payroll data with caution. At the hearing, Respondent proposed that General Counsel's reliance on the overall summary of earnings by the crew was misleading, absent information as to the daily size and number of hours worked for each crew. Respondent pointed out that since the normal practice is to assign a crew to the same field for the duration of the harvest season, and since the same field is harvested repeatedly, a foreman who anticipates a low-yield day might choose to assemble a smaller crew in order to allocate the available work among fewer employees and thus enhance the earnings potential of each of them. A large crew on a low-yield day would realize lower average earnings by comparison.

We have nevertheless compared the overall earnings of the Varela crew for the pertinent time period with those of five other representative crews, excluding a seventh crew whose size and assignments were not typical for reasons immaterial to the question here. It is our view that the payroll records do not reveal a disparity in the average daily piece rate earning between the various crews sufficient to infer disparate treatment of the Varela crew. The crew-by-crew summaries are listed below in descending order of total earnings:

Crew (By Foreman)	Number of Days Worked (2/28/83 - 3/27/83)	Daily Crew Averages (Dollar Earnings)
Plores	24	40
Fokenan	25	33
Serna	26	30
Varela	25	30
Janurequi	27	28
Montejano	17	28

Varela testified that he felt he should have been assigned to the field which eventually was given to Serna. If it is valid to judge the relative productivity of various fields according to the comparative wage yields of the crews assigned to those fields, the lack of meaningful difference in number of days worked and daily employee averages between the Serna and Varela crews is self-evident.

As to the photographic evidence admitted at hearing, we find it clearly not competent. Varela crew member Raul Cuen testified with reference to the first set of photographs (GC

Exhibits 22, 23 and 24) that he was with a Board agent when the latter took the photographs. The Board agent did not testify. Cuen stated that the pictures were taken in early April in order to demonstrate the extent of the weed growth in that particular field at that time. But, he also stated that he did not know the condition of other fields with respect to the prevalence of weeds during the same time period. Cuen said he was also present when the same Board agent took a second set of photographs (GC Exhibits 25, 26 and 27). He identified the field as one which both the Varela and Flores crews had worked, but only on an hourly rate schedule. Although the crews did not commence working on a piece rate basis until February 28, 1983, or a few days later, Cuen testified that the pictures were taken sometime in February. As the first of the unfair labor practice charges in this case was not filed until March 1, 1983, we find it highly unlikely that a Board agent could have occasion to collect photographic documentation prior to that time. Aside from the unreliability of Cuen's testimony as to when the pictures were taken, they are not useful absent comparison photos of other fields taken on the same day. Moreover, in response to a question from the ALJ, Cuen stated that one (unspecified) set of the photographs was taken immediately after the field had been harvested. Therefore, they could not serve to depict the productivity of the asparagus crop in that particular field, either standing alone or in comparison to other fields.

Lastly, while the ALJ relied in part on the fact that the allegedly inferior field assigned to Varela on a piece rate

basis was disced under at the end of the season, which, in his view, added substance to the allegation, Varela himself conceded that several fields were similarly abandoned.

We cannot conclude from the foregoing that the Varela crew was given an inferior field or that such assignment was made for reasons proscribed by the Act.

D. Supervisor's Alleged Threats and Coercive Statements

It is alleged that certain comments and epithets which Supervisor Alfredo Medrano addressed to various members of the Varela crew constituted a violation of section 1153(a) of our Act. That section prohibits an employer from interfering with, restraining or coercing agricultural employees in the exercise of rights guaranteed in section 1152.

At the end of each day, Varela crew members approached Medrano's pickup truck one-by-one to receive cash payment for their day's piece work. Crew member Roberto Medina testified that he had contact with Medrano only during those times and that the supervisor "cusses at us and he humiliates us . . . he calls us Chavistas, sons-of-bitches" and "he's mistreated us this way" ever since 1980. Medina testified further that Medrano had many times stated that "the Union didn't mean very much to him."

Medrano testified that Roberto Gomez, also a member of the Varela crew, always wore UFW buttons on his hat and would thrust his head through the open window of the pickup in order "to taunt me, make sure I saw [the] buttons." Medrano described how he "would act like I was really frightened" of the Union and "Gomez would laugh, try to make fun of me." According to Gomez,

Medrano asked him daily to "take those things off" and once asked "what are you doing with those f . . . . . things -- the Union is not worth a damn." Medina once overheard Gomez tell the supervisor he would continue to wear them because "he respected the Union's buttons."

The ALJ found Medrano's approach devoid of any humor whatsoever, and expressly discredited the supervisor's assertions that his comments were not intended to be taken seriously. He concluded that Medrano had mistreated the crew, in violation of the Act, in an effort to discourage it from continuing to work for 7 Respondents.[19/]

Although we deplore the derogatory statements and epithets which supervisor Medrano directed to the members of the Varela crew, we find that those remarks contain no threats of force or reprisal, nor promises of benefit, and are thus within the protection of section 1155 of our Act and cannot be used to prove interference, restraint or coercion under the provisions of section 1153(a).[20/]

[19/] The ALJ also found that Roberto Medina and Robert Gomez complained to Medrano about the "low wages" Respondent was paying, and implied that their actions constituted concerted activity within the meaning of section 1152. We find only that on one occasion, during the 1983 asparagus harvest, Medina complained to Medrano that the supervisor had shorted the wages actually due him for that day. In response, Medrano told him he would pay him only what he had earned. As Medina had reference only to a personal situation, his complaint would not constitute concerted activity within the meaning of section 1152.

[20/] Since we thus have no occasion to apply the interference, restraint, or coercion standard of Section 1153(a), we do not inquire as to the objective effect of the words actually employed by Medrano.

Section 1155 of our Act, patterned after section 8(c) of the national act, exists to protect both the employer's and the union's free speech interests under the First Amendment of the U.S. Constitution.[21/] In words nearly identical to Section 8(c) of the national act, our Section 1155 provides that "The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice under the provisions of this part, if such expression contains no threat of reprisal or force, or promise of benefit." Employer statements that contain no threats of force or reprisal nor promise of benefit are protected under Section 1155, and therefore do not violate Section 1153(a). (Morris, The Developing Labor Law (2d ed. 1983), at p. 84, addressing Section 8(c) of the national act.) The effect of the language of Section 8(c) and Section 1155 is

> "to make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice." (2 Legislative History of the Labor Management Relations Act of 1947, p. 1624.)

Thus, in an unfair labor practice context such as the present proceeding, an employer's expressions of antiunion

---

21/ Cf. NLRB v. Gissel, (1969) 395 U.S. 575, 617 [71 LRRM 2481] (Section 8(c) implements the First Amendment); see also Abatti Farms, Inc. v. ALRB (1980) 107 Cal.App.3d 317, 327 (Section 1155 specifically establishes an employer's freedom of speech unless he expresses threats of reprisal or force, or promises of benefit); Merrill Farms v. ALRB (1980) 113 Cal.App.3d 176, 183 (Section 1155 acknowledges right of employers to express antiunion views and at the same time acknowledges that threats of reprisals can form a basis for unfair labor practice charges.)

animus, whether directed at a labor organization or at particular employee adherents or supporters, must first be scrutinized for the presence of proscribed threats or promises before the restraint, coercion, or interference standard of Section 1153(a) (or Section 8(a)(1) of the national act) may be applied.[22/]

(See, e.g., NLRB v. TRW-Semiconductors, Inc. (9th Cir. 1967) 385 F.2d 753, 759 [66 LRRM 2702]: "[T]he broadi, language of section 8(a)(l) [equivalent of §1153(a) of our Act] is not the test of whether election propaganda violates the Act. It must first be found that the challenged material contains a threat of force or reprisal or promise of benefit by the employer.")

[22/]It appears that, when employer speech is under scrutiny, confusion has arisen over whether to apply the threat or promise standard of section 1155 or the interference, restraint, or coercion standard of section 1153(a). The reason for this is that the issue is most frequently encountered in the context of elections and/or organizational drives. An election can be set aside as a result of an employer's speech when that same speech will not, and cannot, support the finding of an unfair labor practice in the absence of actual threats "of force or reprisal or promises of benefit. (General Shoe Corp. (1948) 77 NLRB 124 [21 LRRM 133.7].) Cases do exist, unfortunately, where the election set-aside standard is incorrectly applied in the unfair labor practice context. This often happens when election objections are consolidated with unfair labor practice proceedings. When this consolidation occurs, an ALJ may find an unfair labor practice and set aside an election without considering the effect of Labor Code section 1155 (section 8(c) of the NLRA) on the employer's speech. This is precisely what happened in EDM of Texas Div., Chromalloy American Corp. (1979) 245 NLRB 934 [102 LRRM 1405], which the dissent frequently cites. When, however, the proper standard is applied, even in the organizational/election setting, an employer's epithets directed at union organizers/members that do not contain procribed threats or promises are protected. (See, e.g., Carrom Division, Affiliated Hospital Products, Inc. (1979) 245 NLRB 703, 707 [102 LRRM 1462]: employer's reference to employees as "clowns" for supporting union protected under section 8(c) of the NLRA due to absence of threats.)

Supervisor Medrano's statements and epithets demonstrate an unreasoning disdain for that mutual respect and tolerance we view as essential to harmonious relations between agricultural employers and employees under our Act. Unpalatable and offensive as they are to us, those remarks nevertheless contain no proscribed language. Neither the epithets, nor the characterization of union buttons, nor the statement that the union was "not worth a damn" contains the forbidden threats of force or reprisal. The circumstances surrounding the utterances also indicate that no implied threat was concealed in the comments or epithets. We have found no discriminatory treatment of the Varela crew. The credited accounts of Medina and Gomez indicate that they and Medrano engaged in a give-and-take over a long period of time. It would also appear that Gomez was not deterred from wearing union buttons or repeatedly calling them to Medrano's attention in order to draw an anticipated and predictable response from the supervisor. Moreover, the evidence indicates that the comments were isolated and directed at Medina and Gomez in one-to-one exchanges with Medrano. Under these circumstances, we find no implied threats concealed in the facially protected language.

We do not, however, wish to be misunderstood as saying that such statements and epithets as these would never constitute a violation of section 1153(a) of our Act. We will review most carefully, as we have done here, the totality of the circumstances surrounding such utterances for indications of implied threats or promises. The inquiry will always be "what

did the speaker intend and the listener understand." (A. Cox, Law and the National Labor Policy (1960) at p. 44.) Employers and supervisors should be extremely wary of using language such as that found in the instant case as there is a very fine line between protected free speech and coercive speech which would constitute an unfair labor practice.

III. Discharge of Varela on May 8, 1983

The hearing in this proceeding was held in May 1983, after completion of the asparagus harvest but at a time when two crews (Flores and Vadillo) were harvesting onions and the Varela crew planted asparagus in the fields which recently had been plowed under. Planting was completed on May 7, and the Varela crew was laid off. The two onion crews were laid off a few days later. Varela went to Medrano's house on May 8, to learn if more work might be available for his crew. The ALJ found that Medrano told Varela not to expect any more work because the crew was giving him problems and, in particular, because "Varela would not comply with [Medrano's] request to get rid of Gomez, Medina and Ochoa." Medrano insisted that he told Varela only that there was no more work at that time and, although Medrano denied that Varela was other than laid off due to a lack of work, and Rochester testified that Medrano did not have authority to fire a crew, the ALJ concluded that Varela was led to believe that he had been discharged.

We reject as unlikely the ALJ's finding that Medrano made reference to the three crew members who presumably had been the more active of the union supporters in the Varela crew.

Varela was specifically asked on cross-examination whether he was told by Medrano during the 1983 season that the supervisor did not want Gomez and Medina working for Respondent. No mention was made of Ochoa. The crew foreman replied, "No . . . . he never told me that."

It is apparent that the ALJ's findings are premised not on the record in the present proceeding but on the record in an earlier unfair labor practice proceeding involving Respondent herein. In his Decision in the instant case, at page 61, the ALJ states as follows:

> In April 1981 Varela testified as Respondent's witness at an ALRB hearing and admitted that Medrano had instructed him not to recall two of his crew members because of their union activities.

Of the three crew members whom the ALJ found that Medrano named on May 8, 1983, only Ochoa was a discriminatee in the 1981 proceeding. See Gourmet Harvesting & Packing Co. and Gourmet Farms (1982) 8 ALRB No. 67, wherein the Board affirmed without comment the ALJ's finding that Medrano had suggested to Varela at the start of the 1980 asparagus season that he attempt to exclude Ochoa from the crew. Although Medrano apparently did not volunteer to Varela a reason for the request, Varela only presumed that it was because Ochoa had been active in the 1979 strike. Work for the 1980 harvest became available on January 9, but Varela was not given authorization by Medrano to hire Ochoa until January 17. The ALJ in that case only speculated that Medrano "recanted his order-- apparently so that the company could avoid any [future] problems."

(8 ALRB No. 67, ALJD, p. 17.) We find no basis in that case for the ultimate finding of the ALJ here that "Medrano . . . told Varela not to rehire Ochoa since the company did not want any problems." (ALJD, p. 72, fn. 79.) We note, parenthetically, that when Varela sought work from Medrano at the start of the 1983 asparagus season, and was promptly assured of work, he had brought two crew members with him, one of whom was Ochoa.

Of the six crews employed during the asparagus harvest, only three, including Varela's, were retained for work in subsequent weeks. As there normally would be no work between completion of the spring onion/garlic harvests and the beginning of the fall weed/thin in October, Varela presumably sought onion or garlic work when he contacted Medrano on May 8, to no avail. Varela was neither rehired nor assured of work at that time because the limited work that was available had already been assigned to the Flores and Vadillo crews, which, in any event, were also laid off a few days later for lack of work. As General Counsel has made no showing to the contrary, there was no unlawful failure or refusal to hire Varela on May 8.

Under these circumstances, we are not persuaded that General Counsel has proven by a preponderance of the evidence that Respondent did not hire Varela on May 8, 1983, or would not hire him in subsequent seasons, for reasons proscribed by the Act.

IV. Alleged Continuing "Violations"

Although the earliest of the unfair labor practice charges concerning the Varela crew was filed on March 1, 1983, the

ALJ nevertheless found that Respondents had implemented unlawful unilateral changes in violation of section 1153(e) and (a) by failing to recall or rehire Varela according to seniority since 1980. He acknowledged that Respondents had timely asserted the six-month limitations proviso of section 1160.2 but held the defense not applicable here because the conduct in question is in the nature of a continuing violation. As he explained:

> It appears that the ALRB and the NLRB consider such unilateral changes and their continuing implementation without notification [to] the collective bargaining representative as a continuing violation of the Act.

We disagree.

A continuing violation is one which is shown to have continued into the six-month period prior to the filing of the charges; that is, "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices." (Local Lodge No. 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212].) We find no failure to recall or rehire Varela within the six-month period immediately preceding the filing of the relevant charge on March 1, 1983.

Moreover, the unfair labor practice charge alleges a failure to recall the Varela crew in retaliation for union and other protected concerted activity in violation of section 1153(c) and (a). Thus, the conduct alleged therein, even if found to be a violation of section 1153(c) (discrimination in employment), would not constitute unilateral changes within the meaning of section 1153(e)'s failure of the duty to bargain unless supported by a

timely filed, independent unfair labor practice charge expressly alleging a violation of section 1153(e). Under the NLRA, a section 8(a)(5) (correspondingly, ALRA section 1153(e)) charge alleging a refusal to bargain is timely filed so long as the respondent has unlawfully refused to bargain, upon request, within the six-month period prior to the filing of the charge, even if the initial refusal to bargain was made outside, the NLRA section 10(b) (correspondingly, ALRA section 1160.2) period. (The Pulitzer Publishing Co. (1979) 242 NLRB 35 [101 LRRM 1101], enf. den. on other grounds (8th Cir. 1980) [103 LRRM 3115], cert. den. 444 U.S. 875 [105 LRRM 2657]; Ocean System, Inc. (1977) 227 NLRB 1593 [94 LRRM 1396], enf. (5th Cir. 1978) 571 F.2d 589 [98 LRRM 2271], cert. den. 439 U.S. 893.)

Conclusion

We affirm the ALJ's finding that Gourmet Farms is a successor employer to Gourmet Harvesting and Packing, Inc., and is thereby obligated to bargain with the UFW concerning its employees' wages and other terms and conditions of employment pursuant to section 1155.2 of the Act. We also find the successor liable for its own failure to provide the Union with relevant information upon request as well as for the predecessor employer's failure to bargain over the effects of its closure. We do not find, however, a general failure by the successor to bargain in good faith within the meaning of section 1155.2. Nor do we find any evidence to support the numerous allegations of discrimination against the Varela crew.

ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (ALRA or Act), the Agricultural Labor Relations Board (ALRB or Board) hereby orders that Respondents, Gourmet Farms and Gourmet Harvesting and Packing Company, Inc. and their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to provide the UFW with all relevant information requested in the course of collective bargaining negotiations.

(b) Failing or refusing to timely give notice and offer to bargain with the UFW over the effects of the cessation of operations at Gourmet Harvesting & Packing, Inc.

(c) In any like or related manner, interfere with, restrain or coerce any agricultural employee in the exercise of the rights guaranteed by Labor Code section 1152.

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

(a) Provide the UFW with all relevant information requested in the course of collective bargaining negotiations.

(b) Upon request, meet and bargain collectively with the UFW concerning the effects of the closure of Gourmet Harvesting & Packing, Inc. in accordance with the Decision herein.

(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 employees employed by Respondent at any time during the period from September 1, 1979 to September 1, 1980.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be 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 its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' 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 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 collective bargaining representative of Gourmet Harvesting and Packing, be amended to also name Gourmet Farms as the employer.

IT IS FURTHER ORDERED that the allegations of the Complaint with respect to which no violation of the Act was proved be dismissed.

DATED: August 19, 1988

BEN DAVIDIAN, Chairman[23/]

[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. Member Smith did not participate in the consideration of this matter.

MEMBER GONOT, Concurring:

I agree with the findings and conclusions of the majority opinion, but I believe that further elaboration on the basic flaws in Member Ramos Richardson's dissenting opinion is required.[1/]

The dissent is predicated on three "criteria" for successorship which it derives from the recent Supreme Court decision in Fall River Dyeing and Finishing Corp. v. NLRB (1987) __ U.S. __, 107 S.Ct. 2225 [125 LRRM 2441] (Fall River):

> ...[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. (Id. at 2236.)

[1/] References to "the dissent" in this concurring opinion pertain solely to the dissent of Member Ramos Richardson and not to that of Member McCarthy.

These criteria, however, are merely a distillation of the seven factors which the National Labor Relations Board (NLRB) has traditionally looked to in resolving the essential question of whether the "employing enterprise" remains substantially the same.[2/] Such is evident from the citations which follow the language in question since they specifically refer to those factors.

In the process of providing a thumbnail sketch of the factors used by the NLRB, the court translates "substantial continuity of the same business operations" as "whether the business of both employers is essentially the same." Unfortunately, this rather loose translation by the Supreme Court as been taken literally by my dissenting colleague, who

---

[2/] The seven criteria are whether "(1) there has been a substantial continuity of the same business operations; (2) the new employer uses the same plant; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment and methods of production are used; and (7) the same product is manufactured or the same services offered." Border Steel Rolling Mills, Inc. 204 NLRB 814, [815, 83 LRRM 1606, 1610] (1973).

The Court has not eschewed application of these factors in favor of some new sets of rules. The "three rules" to which the Court refers, 125 LRRM at 2447, simply form the analytical framework for dealing with questions of successorship. They require that there be: (1) a substantial continuity between the enterprises (i.e. - whether successorship can arise), (2) a substantial and representative complement of employees (i.e. - when successorship can arise), and (3) a continuing demand for bargaining (i.e. - what triggers successorship when the substantial and representative complement has been achieved). (Note that the Court, in accord with prior rulings, has elevated one of the seven factors, workforce continuity, to the status of one of the three rules.) It would appear that the dissent has confused the court's reference to the "three rules" for successorship with the court's abbreviated listing of the factors used in addressing rule number 1.

apparently reads the language as establishing a requirement that the business entity, or portion thereof, which is taken over, must have been engaged in the same overall type of business activity as that of the alleged successor. In reality, the focus of the NLRB and the courts is on the operation that is taken over and whether it remains the same basic type of business operation as it was before the takeover. Thus, in Food and Commercial Workers Local 152 v. NLRB (1985) 768 F.2d at 1463 [119 LRRM 3473], (Spencer Foods, Inc.), the Circuit Court for the District of Columbia stated that the appropriate analysis focuses:

> . . . not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. (768 F.2d at 1470.)

Similarly, in NLRB v. Cablevision (1982) 671 F.2d 737 [109 LRRM 3102], the Court of Appeals for the Second Circuit noted that the "overall business of [the alleged successor] is quite different from that of the [predecessor]", but reasoned that the relevant comparison pertained to the operation in question, as it existed before and then after the transfer, and held that this operation was essentially the same after the alleged successor took it over as it had been under the predecessor.

That the NLRB and the courts are only concerned with what happens to the affected operation, and not with the types of business in which the two interacting companies are engaged, can be found in the emphasis that they place on the perspective of the employees in that operation and on the continued appropriateness of the relevant bargaining unit. The Supreme Court itself

in Fall River stated that,

> In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." [Citations omitted.] This emphasis on the employees' perspective furthers the Act's policy of industrial peace. . . . (125 LRRM at 2447.)

In reaching its finding of successorship, the high court noted that it was "[o]f particular significance . . . that, from the perspective of the employees, their jobs did not change." (Id. at 2448.)

In an earlier case upon which Fall River relies heavily, NLRB v. Burns International Security Services, Inc. (1972) 406 U.S. 272 [80 LRRM 2225], the Supreme Court took pains to point out that differences between the nature of each company's overall business do not come into play unless those differences have created a significant impact on the relevant bargaining unit.

> It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockhead bargaining unit was no longer an appropriate one. . . But, where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent, there is little basis for faulting the Board's . . . ordering the employer to bargain with the incumbent union. (406 U.S. at 280-281.)

It should also be pointed out that the NLRB generally has no need to consider the entire line of business of either the alleged successor or its predecessor because single plant and single craft units are permissible, and in fact are commonplace, under the National Labor Relations Act (NLRA). This is yet another indication that NLRB precedent in the area of

successorship is keyed to changes in the specific operation that is being taken over. As long as the affected bargaining unit remains appropriate after the takeover, it is of little consequence that the alleged successor differs greatly from the company which ran the operation in question.

Under the Agricultural Labor Relations Act (ALRA), a unit is supposed to be employer-wide, unless the employer's operations are in "two or more non-contiguous geographical areas." (Labor Code section 1156.2.) However, that does not mean that we are required to compare the entire business of the alleged successor to the operation being taken over.[3/] Here, as in Burns, the bargaining unit remained viable after the takeover: all remaining members of the unit wound up working for one employer, their jobs stayed the same, and they continued working as part of a single work force. The fact that the unit may have undergone some shrinkage is not considered to present a serious obstacle to a finding of successorship. (See Morris, The Developing Labor Law, Vol. I, p. 729.) As for Farm's non-unionized work force of 50 irrigators, they can be said to have been accreted into the unit here in question: The unit contained a substantially larger number of employees than Farm's work force, the two groups were compatible as they both consisted of agricultural employees, and

---

[3/] If that were the case, a conglomerate or other diversified agricultural entity could never become the successor to any specialized agricultural operation. Such does not comport with the situation that exists in the industrial setting and would be inimical to the stability in labor relations which our Act seeks to promote.

the operations of the business entities were apparently integrated after the takeover. (See NLRB v. Security Columbian Banknote Co. (1976) 541 F.2d 135, [93 LRRM 2049].)

All of the foregoing clearly points to the fact that the dissent errs in relying on the nature of the overall business of Gourmet Farms versus that of Gourmet Harvesting and Packing for a determination of successorship. Rather, it is the changes, if any, that the "employing enterprise" and the affected bargaining unit have undergone which determine whether successorship arises in any given situation. For the reasons pointed out in the majority opinion, the relevant changes in this case were not of enough significance to overcome the rebuttable presumption that the union maintains its status as certified collective bargaining representative for the employees in the affected unit. Put another way, the inquiry has not shown that "the changes in the nature of the employment relationship are sufficiently substantial to vitiate the employee's original choice of bargaining representative." (NLRB v. Security-Columbian Banknote Co., supra, 541 F.2d at 139.)

In addition to the dissent's faulty approach to successorship determinations, I also take issue with its assertion that because an agricultural employer, unlike an employer under the NLRA, can neither express a good faith doubt about the union's continuing majority status nor petition for a new certification election, an "especially vigorous examination of factors said to demonstrate successorship should be the norm." (Dissenting opinion, p. 9, fn. 8.) What this assertion overlooks is the

fact that, because of the "wall-to-wall" and employer-wide certifications that prevail under the ALRA, the takeover of a unionized agricultural operation by a non-unionized operation will often result in the dissolution of the bargaining unit because the represented unit will likely have been absorbed into a larger group of non-unionized agricultural employees and thereby lose its identity as an appropriate bargaining unit. (As previously noted, pursuant to section 1156.2, all agricultural employees of the employer must be placed in the same unit unless the employer's operations are in two or more non-contiguous areas.) Under these circumstances, an agricultural employer who seeks to take over another operation will have an even greater opportunity for avoiding successorship than will his or her counterpart in the industrial setting, where the multiplicity of bargaining units tends to make the requisite finding of an appropriate unit easier to achieve.

Far from engaging in an "impressionist approach", as claimed by the dissent, the majority is simply cognizant of the various factors which would or would not be considered relevant by the courts and the NLRB in making successorship determinations. In finding successorship here, the majority has properly viewed the totality of circumstances as mandated by applicable NLRB precedent.[4/] The dissent on the other hand, has misread the

---

[4/] "This approach, which is primarily factual in nature and is based upon the totality of circumstances of a given situation, requires that the Board focus on whether the new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.[1]" (Fall River Dyeing and Finishing v. NLRB, supra, 125 LRRM at 2447.)

Fall River case and has overlooked key differences between our Act and the NLRA.

Dated: August 19, 1988

GREGORY L. GONOT, Member

MEMBER McCARTHY, Concurring and Dissenting:

I would affirm the Administrative Law Judge's (ALJ) finding that Respondents, Gourmet Harvesting & Packing, Inc., and Gourmet Farms, unlawfully harassed the Varela crew because of crew members' participation in union activities, and I therefore dissent from the majority's reversal of that finding.

The majority has incorrectly analyzed Medrano's comments under section 1155[1/] of the Agricultural Labor Relations Act (ALRA or Act) which protects the expression of views, arguments, or opinions if they contain no threat of reprisal or force or promise of benefits. The mere expression of views is not equivalent to employer harassment of particular employees -- whether through speech or other means -- that tends to interfere with employees' protected activities. The majority's citation to NLRB v. TRW - Semiconductors, Inc. (9th Cir. 1967) 385 P.2d 753 [66 LRRM 2707]

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

is inappropriate, as that case concerns election propaganda consisting of the employer's predictions of what might happen to employee wages, benefits and other working conditions in the event of a union victory. The propaganda was found not to constitute an unfair labor practice because it did not contain a threat of force or reprisal or promise of benefits by the employer. However, no threat of force or reprisal or promise of benefits need be shown in order to prove that an employer has violated section 1153(a) by interfering with the free exercise of employee rights protected under the Act. By harassing employees because of their union activities, an employer is not merely expressing an opinion about the union, but is treating employees in a discriminatory manner because of their protected conduct. The National Labor Relations Board (NLRB or national board) cases cited in this dissent clearly demonstrate that name-calling, deprecatory comments, and other expressions of hostility directed to and about employees because of their union or other protected activities are not protected by employer "free speech" rights.

Both the Agricultural Labor Relations Board (ALRB or Board) and the NLRB apply an objective test in determining whether an employer's speech or other conduct tends to interfere with, restrain or coerce employees in the exercise of their statutorily protected rights. (Lawrence Scarrone (1981) 7 ALRB No. 13; American Freiqhtways Co. (1959) 124 NLRB 146 [44 LRRM 1302].) Thus, the General Counsel need not prove that the Employer's conduct herein had an actual effect on the employees toward whom

the harassment was directed.[2/] Rather, the test is whether, by an objective standard, "the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." (American Freightways Co., supra, at p. 147.)

Varela crew members credibly testified that Medrano had continuously harassed and cursed at them ever since the strike. Crew member Raul Cuen testified that Medrano was always calling them "Lousy Chavistas, sons of bitches," and that sometimes when they were waiting for their pay, all Medrano had to do was see their crew before he would say, "Here comes the sons of bitches, Chavistas." Cuen also testified that in 1982 after the asparagus harvest, when he asked Medrano when work would resume, Medrano replied that they would not be working, "because we [the Varela crew] were ....ers." When he asked Medrano why he had called the crew members "....ers," Medrano responded that it was because they were Chavistas.

Varela crew member Roberto Medina testified that when Medrano was paying them he would cuss at them and humiliate them, calling them sons-of-bitches and Chavistas. Medina stated that Medrano had "mistreated us this way" ever since 1980. On one occasion when Medina asked Medrano for a pay receipt for immigration status purposes, Medrano told him, "I wish all you son

---

[2/]"[I]nterference, restraint, and coercion under Section 8(a)(l) of the Act [comparable to section 1153(a) of the Agricultural Labor Relations Act (ALRA or Act)] does not turn on the employer's motive or on whether the coercion succeeded or failed." (American Freiqhtways Co., supra, 124 NLRB 146, 147.)

of a bitches get your green cards taken away." Medina stated that during the 1983 asparagus harvest, Medrano was constantly yelling profanities at them, such as, "Asshole Chavistas." At one point, Medina testified, the crew members brought a tape recorder to work and attempted to record the way Medrano was mistreating them.

Crew member Roberto Gomez testified that he wore a union button on his cap, and that Medrano told him, "Get that . . . . ing thing off you," adding, "What are you doing with those . . . . ing things? The Union is not worth a damn." When Gomez asked him for a pay receipt to prove he had worked, Medrano gave him the receipt and said, "There you have it. All I want is for your MICA, your green card, to be lifted, anyway."

The ALJ expressly discredited Medrano's claim that his comments about employees' immigration status were uttered jokingly. Moreover, the ALJ found that the Varela crew members who testified were believable witnesses who testified in a straightforward and consistent manner about Medrano's treatment of them.[3/]

NLRB cases have made an important distinction between insults, name-calling and other derogatory comments as directed at a party and such comments as directed at an employee. Thus, exaggerations, inaccuracies, half-truths and name-calling directed at the opposing party in an election will not constitute grounds

[3/]Even if we were to credit Medrano's claim that Gomez "provoked" his reaction to the union button on Gomez' cap by poking his head inside the truck window, there is no claim -- and no basis for finding -- that Medrano's persistent cursing, name-calling and humiliation of the crew were "provoked" by anything other than the crew members' protected activity.

for setting aside the election. (Chromalloy American Corp., EDM of Texas Div. (1979) 245 NLRB 934 [102 LRRM 1405].) Medrano's comment herein that the Union was "not worth a damn" would thus fall into the category of party-directed comments not violative of employee rights.[4/] However,

> Where an employer engages in name calling of, or deprecatory comments, directed to, employees based on their support for or failure to support a labor organization, such remarks are measured by a different standard. (Chromalloy American Corp., supra, 245 NLRB at 936.)

Such comments, as directed to employees,

> . . . are an indication to the employees that engaging in such protected activity has "place[d] [those employees who do so] in an unfavorable light with the Employer in contrast to those employees who refrained from exercising their statutory rights." (Chromalloy American Corp., supra, 245 NLRB at 936, quoting N.L.R.B. v. A. Lasaponara & Sons, Inc. (3d Cir. 1976) 541 F.2d 992, 997 [93 LRRM 2314].)

Therefore,

> . . . it is well settled that statements or questions implying that the employer does not look with favor upon employees engaging in protected activities are coercive because they discourage employees from engaging in protected activities guaranteed them by . . . the Act. (The Berry Schools (1979) 239 NLRB 1160, 1162 [100 LRRM 1115].)

Thus, in Doral Hotel and Country Club (1979) 240 NLRB 1112 [100 LRRM 1392], the NLRB issued a cease and desist order against an employer for harassing an employee by calling her a "bitch" because of her union activities. In Ethyl Corp. (1977) 231 NLRB 431 [97 LRRM 1465], the national board found unlawful coercion in the conduct of a supervisor who, upon asking an

[4/] Such a comment is also protected under the "expression of views" provisions of section 1155.

employee why he was wearing a union button, and receiving the reply, "I don't know. I'm wearing them because everybody else is," responded, "I'll be damned if y'all can't . . . up a wet dream." In Chromalloy American Corp., supra, the NLRB found that the employer had unlawfully engaged in coercive conduct by telling a union supporter than anyone who wanted a union was a "no-good son-of-a-bitch" and was not "worth a shit," thereby "'convey[ing] to the listener that [union supporters] are looked upon with disfavor or hostility by management'" because of their protected activity. (Chromalloy American Corp., supra, 245 NLRB at 936, quoting The Timken Company (1978) 236 NLRB 757, 759, fn. 5 [98 LRRM 1267].)[5/]

As in the above-cited NLRB decisions finding violations

[5/] The NLRB cases cited by the majority do not support its contention that no 1153(a) violation may be found unless a finding is first made that the employer's statement constitutes a threat or a promise. In Carrom Division, Affiliated Hospital Products, Inc. (1979) 245 NLRB 703 [102 LRRM 1462], cited in Footnote 22 of the majority opinion, a company vice-president sent a letter to all employees in which he referred to "a couple of employees" who wore union T-shirts as "clowns." The NLRB noted that the parties were engaged in a hotly contested election campaign, and that the union, in its campaign flyers, had referred to the vice-president's "lying" and "cheating" and had compared him to Hitler. The national board concluded that, under all the circumstances, the vice-president's letter was not coercive.

Moreover, the NLRB cases cited in this concurrence/ dissent do not exhibit any confusion over whether employer speech adequate to set aside an election is sufficient, in the absence of a threat or promise, to find a violation of 8(a)(1) [or 1153(a)]. Doral Hotel and Country Club, supra, and Ethyl Corp., supra, for example, both find employer coercion of employees sufficient to constitute 8(a)(1). violations, although the employers' conduct did not contain threats or promises. Since neither of these unfair labor practice cases were consolidated with election objections proceedings, they could not have involved the "confusion" the majority purports to find in consolidation cases.

of section 8(a)(l) of the National Labor Relations Act (NLRA), the statements Medrano made herein were not merely an expression of his opinion about the Union (with the exception of the statement that the Union was "not worth a damn"), but, rather, were insulting, derogatory comments addressed to employees because of their union support. It is not significant whether other employees besides the Varela crew heard or were affected by Medrano's statements, nor whether the Varela crew members themselves changed their behavior in response to his statements, because the law requires us to measure such conduct by an objective, not a subjective, standard.[6/]

I find Medrano's remarks indistinguishable from the kind of remarks held to constitute violations of the national act in NLRB decisions. Therefore, I would hold that Medrano's persistent verbal abuse of the Varela crew reasonably tended to intimidate, restrain or coerce employees in the exercise of their right to engage in union activities, and would issue an appropriate cease and desist order.

Dated: August 19, 1988

JOHN P. McCARTHY, Member

[6/]In attaching significance to the facts that (1) Medina and Gomez had engaged in a give-and-take with Medrano over a long period of time, (2) Gomez was not deterred by Medrano's remarks from wearing union buttons, and (3) Medrano's comments to Medina and Gomez were "isolated" in a one-to-one exchange -- the majority improperly applies a subjective test to the Employer's conduct. See, e.g., Ethyl Corp., supra, 231 NLRB 431, wherein the NLRB found a violation of an employee's rights even though the employee himself and his coworkers laughed at the supervisor's disparaging remarks addressed to the employee for wearing a union button.

MEMBER RAMOS RICHARDSON, Concurring and Dissenting:

I concur in the majority's finding of no violation with regard to Varela and his crew but I dissent from the Board's finding that Gourmet Farms is a successor employer to Gourmet Harvesting and Packing Company, Inc. (Gourmet Harvesting and Packing) and therefore from the findings of legal obligation flowing from that successorship.

As has been observed more than once in this context, "the doctrine of 'successor' employer in the field of labor law is 'shrouded in somewhat impressionist approaches.'" (NLRB v. Burns International Security Services (1972) 406 U.S. 272, 299 [80 LRRM 2225]; Rehnquist, J., concurring and dissenting.) I believe that the Agricultural Labor Relations Board (ALRB or Board) has strayed into just such impressionist approaches in making the successorship finding in this case. Rather, on the totality of the circumstances test which we are mandated to use in making a successorship determination (see, e.g., Fall River Dyeing

& Finishing Corp. v. NLRB (1987) __ U.S. ___ [107 S.Ct. 2225; 125 LRRM 2441, 2447]), it is evident that Gourmet Farms is not a successor to Gourmet Harvesting and Packing. The facts of this case, as will be set forth below, bear out this result.—

The development of the successor employer concept shows a steady, if uneven, development of the requisites for a successorship finding. In John Wiley & Sons v. Livingston (1964) 376 U.S. 543 [55 LRRM 2769], the Supreme Court noted that a successorship determination would not be inappropriate upon a showing of "substantial continuity of identity in the business enterprise before and after a change." (Id. at p. 551.) In NLRB v. Burns International Security Services, supra, 406 U.S. 272, the court refined and expanded the successorship criterion by stating, based on its understanding of accumulated precedent from the National Labor Relations Board (NLRB or national board), that:

> [I]t has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. (Id. at p. 279.)

—The successorship question requires above all else a close following of the facts if "impressionist" results are to be avoided. As the Supreme Court stated in Howard Johnson Co. v. Detroit Joint Board (1974) 417 U.S. 249 [86 LRRM 2449]:

> Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case is especially appropriate. (Id. at p. 256.)

In Howard Johnson Co. v. Detroit Joint Board, supra, 417 U.S. 249, the court further refined its successorship doctrine by observing that simplistic characterizations of successorship were to be avoided. (See id. at p. 262, n. 9.) "There is," the court stated, "and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." (Ibid.)

Finally, in Fall River Dyeing & Finishing Corp. v. NLRB, (1987) supra, ___ U.S. ___, 107 S.Ct. 2225 [125 LRRM 2441] (Fall River), the court's latest pronouncement on the successorship doctrine, it has given its most complete and conceptually coherent statement of the requirements for a finding of successorship. First, the court indicated the requisites for imposing a bargaining obligation on a new employer. The court determined that:

> [T]he new employer has an obligation to bargain with that union [i.e., the union with a rebuttable presumption of majority status with the preceding employer] so long as the new employer is in fact a sutfcesaoesaij the old employer and the majority of its employees were employed by its predecessor. (Id. at p. 2447; footnote omitted.)

Second, to make this determination, a primarily factual inquiry based on the totality of the circumstances (ibid.), the Board must ask whether the new company has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." (Ibid.) Third, to answer the preceding question, the Board must apply a number of

related factors: (1) whether the business of both employers is essentially the same; (2) whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the new entity has the same production processes, produces the same products, and basically has the same body of customers. (Ibid.) Applying these criteria to the facts of this case compels the conclusion that Gourmet Farms is not a successor to Gourmet Harvesting and Packing.[2/]

First and foremost, it is simply unavoidable that Gourmet Farms and Gourmet Harvesting and Packing were, and so far as the record before us shows, still are in completely different lines of business. Gourmet Farms was founded in 1973 as a growing company. As such it provided no services to other growers. Its line of business was the production of agricultural commodities. Its

[2/]The dissent believes that the majority failed to utilize the analysis provided in Fall River, and that its finding that NLRB v. Cablevision Systems Development Co. (2d Cir. 1982) 671 F.2d 737 is dispositive of the successorship issue in this case is erroneous. Subsequent cases decided under the national act cite Fall River on the successorship question (see, e.g., NLRB v. Marin Operating, Inc. (9th Cir. 1987) 822 F.2d 890; Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc. (9th Cir. 1987) 823 F.2d 289 [125 LRM 3442]; NLRB v. Cutter Dodge, Inc. (9th Cir. 1987) 825 F.2d 1375) [126 LRRM 2215], yet the majority does not. Cablevision, supra, 671 F.2d 737, while fitting well with the majority's approach, must be viewed as an extreme articulation of successorship law that reduces the inquiry to the single question of "whether operations, as they impinge on union members, remain essentially the same after the transfer." (Id. at p. 739, citing IUEW v. NLRB (B.C. Cir. 1979) 604 F.2d 689, 694 [101 LRRM 2864].) This approach is consistent neither with Fall River nor the earlier 7-factor test from Contee Sand & Gravel Co., Inc. (1985) 274 NLRB 574 [118 LRRM 1479] upon which the majority places explicit reliance. Moreover, Cablevision is distinguishable on the facts since, as is demonstrated in the text infra, Gourmet Farms never contracted out harvesting services as part of its growing business, then subsequently "recaptured" those same services as part of its continuing operations. (Cf. Cablevision at p. 739.) Cablevision is inapposite.

principal crops were asparagus, lettuce, onions, garlic, alfalfa, and melons. Its customers would have been, as is appropriate for a growing company, agricultural wholesalers or other institutional buyers of its produce. Gourmet Harvesting and Packing, on the other hand, was founded in 1974 to compete in a completely different line of business. Gourmet Harvesting and Packing was an enterprise offering general farming services. It was in the business of providing weeding and thinning, harvesting, packing, marketing, and shipping services for other independent growers such as Gourmet Farms.[3/] It did not grow crops, and did not engage in any direct farming activities on its own behalf. Its customers were agricultural crop producers, such as Gourmet Farms, for whom it provided the above services. Under the first factor from Fall River, supra, it seems clear that Gourmet Farms and Gourmet Harvesting & Packing were not in essentially the same business.[4/] (Cf. Georgetown Stainless Mfg. Corp. (1972) 198 NLRB 234 C80 LRRM 1615] [no successorship because business different where earlier employer manufactured high-quality sinks and

---

[3/]Gourmet Farms was, in fact, a customer of Gourmet Harvesting and Packing. It seems clear that only extremely rarely will companies furnishing products and/or services to each other be in the same overall business. I am unaware of any national board precedent in which an existing customer of a business has subsequently been found the successor of that business.

[4/]The simplest description of the relationship between Gourmet Farms and Gourmet Harvesting and Packing is that when Gourmet Harvesting and Packing ceased active operations in August 1979, Gourmet Farms utilized those resources from Gourmet Harvesting and Packing's operations that it could not easily, readily, or economically acquire elsewhere. Gourmet Harvesting and Packing did not become a growing company. Gourmet Farms did not become a services company. The products and customers of each remained distinct and different.

custom-produced plastic products while new employer made cheap sinks and did not manufacture custom plastic products]; Radiant Fashions, Inc. (1973) 202 NLRB 938 [82 LRRM 1742] [no successorship because business different where earlier employer manufactured ladies' brassieres and sold them under its own label to retail outlets while new employer was merely sewing subcontractor, performing prearranged sewing operations on materials supplied by customers, and did not work on brassieres]; and Mine Workers, District 23 (1984) 271 NLRB 461 [116 LRRM 1487] [no successorship because businesses different where earlier employer engaged solely in transloading of coal while new employer engaged in both blending and transloading of coal].)

The majority points to several factors that arguably satisfy the second prong of the Fall River inquiry, viz., whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors. The majority reasonably assumes that the harvesting conditions previously obtaining among Gourmet Harvesting and Packing's employees while working at Gourmet Farms should also obtain when those same employees perform the same operations directly for Gourmet Farms. The majority also notes that Gourmet Harvesting and Packing's operations manager, field supervisor, and at least one foreman performed the same services for Gourmet Farms, and that Gourmet Farms maintained the same job classifications and followed other terms and conditions of employment that were

negotiated at Gourmet Harvesting and Packing.[5/]

These factors, however, are simply not dispositive. Where other factors of continuity are not present, or the facts and totality of circumstances indicate that an unbalanced reliance on work force continuity would be inappropriate, successorship will not be found despite satisfaction of this prong. (Cf., e.g., Georgetown Stainless Mfg. Corp., supra, 198 NLRB 234; Radiant Fashions, Inc., supra, 202 NLRB 938; Lincoln Private Police (1971) 189 NLRB 717 [76 LRRM 1727]; and Norton Precision, Inc. (1972) 199 NLRB 1003 [81 LRRM 15851].)[6/]

[5/] The majority, however, in its desire to establish similarities in operations after Gourmet Farms began to supply its own harvesting services, overlooks significant dissimilarities in those operations from the pre-transfer operations of Gourmet Harvesting & Packing. Gourmet Harvesting & Packing's employees worked at many different locations, as many locations as furnished by Gourmet Harvesting & Packing's total number of grower customers, not merely the single location provided by Gourmet Farms. Moreover, prior to the transfer, the Gourmet Harvesting & Packing employees were part of a unit at least 2½ times as large as the surviving contingent at Gourmet Farms. It is difficult to believe that such dramatic changes in working conditions would not have some perceptible impact on employees' expectations.

[6/]The majority's reliance on an overemphasized continuity in the workforce is likewise misplaced. While no single factor has determinative significance in resolving the successorship question, the keystone is not work force continuity, but substantial continuity of the employing industry. (Premium Foods, Inc. (1982) 260 NLRB 708, 714 [109 LRRM 1328] enforced (9th Cir. 1983) 709 F.2d 623 [113 LRRM 3261].) Thus, while the majority places great reliance on the fact that 190 out of Gourmet Farms' 240 employees were previously part of the certified unit at Gourmet Harvesting and Packing, this fact is not of controlling significance. In Lincoln Private Police, supra, all the new employer's employees at one time had worked for the previous unionized employer. (76 LRRM at.p. 1728.) Yet, on the totality of the circumstances, the national board found no successorship.

The final Fall River factor, whether the new entity has the same products and basically has the same body of customers, weighs heavily against a finding of successorship in this case. As noted above in conjunction with the first Fall River factor, Gourmet Farms and Gourmet Harvesting and Packing have neither the same products nor the same customers. Gourmet Farms produces agricultural crops while Gourmet Harvesting and Packing furnishes various agricultural services to growers like Gourmet Farms. Gourmet Farms sells its products to agricultural wholesalers and institutional produce buyers while Gourmet Harvesting and Packing sold its product, agricultural services, to growers like Gourmet Farms. Under circumstances where either both product and customers of previous and subsequent employer differ, or the product and customers separately differ, the national board will find an absence of successorship. (See Lincoln Private Police, supra, 189 NLRB 717; Georgetown Stainless Mfg. Corp., supra, 198 NLRB 234; Radiant Fashions, Inc., supra, 202 NLRB 938; Norton Precision, Inc., supra, 199 NLRB 1003; Caqles, Inc. (1975) 218 NLRB 603 [89 LRRM 1337], and Mine Workers, District 23, supra, 271 NLRB 461.)[7/]

[7/]The majority's failure to apply Fall River is especially noteworthy on this point. Immediately after observing that the employees' perceptions of working conditions would have remained constant under the new company, the Supreme Court observed that over half the volume of the new company's business was provided by former customers of the previous entity. (Id. at p. 2231.) There are no facts to show that Gourmet Farms drew any of its customers for agricultural produce from Gourmet Harvesting & Packing's service customers. While the presence of this factor was deemed worthy of comment by the Supreme Court, its absence is not noted by the majority.

Thus, two out of the three Fall River factors weigh against a finding of successorship in this case. The third factor is inconclusive in isolation, but national board precedent has found against successorship where this factor is outweighed by countervailing factors also present in this case. (See Lincoln Private Police, supra, 189 NLRB 717.) I therefore would not have found Gourmet Farms to be the successor of Gourmet Harvesting and Packing.[8/]

It remains to note that having found no successorship, I would also find no duty to bargain in Gourmet Farms, and derivatively no violation for failure to furnish requested information. I concur in the Administrative Law Judge's finding

---

[8/] Having considered continuity of business operations, working conditions as perceived by the employees, and the impact of continuity or lack of same in products and customers, I cannot agree with the majority that this analysis fails to consider the totality of the circumstances and relies merely on differences in the line of business carried on by Gourmet Farms and Gourmet Harvesting & Packing, significant as those differences are. Nor can I accept the majority's suggestion that a closer reading of the national board's underlying decision in Fall River would change my conclusions. The national board explicitly noted that there were no differences in services or products between the old and new employing entities. (See Fall River Dyeing & Finishing Corp. (1984) 272 NLRB 839, 840.) It also considered the importance of continuity in customers between the predecessor and successor entities. (Ibid.) Based on the continuity of customers, the national board found that "a substantial part of Respondent's business is linked with [the predecessor firm]." (Ibid.) While on the facts I reach *a* different conclusion from that reached by the national board and Supreme Court in Fall River, my analysis tracks with both the Court's and the board's. An agricultural employer under our Act has neither of the options for contesting inappropriate assertions of successorshin available under the national act; he may neither express a good faith doubt in the union's continuing majority status, nor may he petition for a new certification election. (Cf. Fall River, supra, 107 S.Ct. at p. 2235, n. 8.) Under these conditions, I believe especially rigorous examination of factors said to demonstrate successorship should be the norm.

of no alter ego or single integrated employer as well. In the event Gourmet Farms' conduct regarding the United Farm Workers of America, AFL-CIO's information request were found sufficient to raise an estoppel against denial of a duty to supply the information, I would merely order the information to be produced. Gourmet Farms is also under no duty to effects bargain the dormancy of Gourmet Harvesting and Packing. Were such a duty shown on any basis, I would find waiver based on the Union's express refusal of Gourmet Farms' offer to so bargain.

Dated: August 19, 1988

IVONNE RAMOS RICHARDSON, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Gourmet Harvesting & Packing, Inc. and Gourmet Farms, 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 failing to notify and bargain with the United Farm Workers of America, AFL-CIO, our employees' exclusive bargaining representative, over the effects on them which may have resulted from Packing's going out of business and failing to provide the OFW with information which the Union requested. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

WE WILL NOT do anything, in the future, which restrains or coerces you or any other farm worker from doing or refraining from doing, any of the things listed above.

WE WILL NOT fail to provide the Union with relevant information upon request.

WE WILL offer to bargain with the Union about the effects of Packing's closure on our employees

Dated: GOURMET HARVESTING & PACKING, INC.,
GOURMET FARMS

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

Gourmet Harvesting & Packing, Inc.
and Gourmet Farms
UFW

14 ALRB No. 9
Case Nos. 81-CE-2-EC
81-CE-94-EC
82-CE-18-EC
83-CE-55-EC
83-CE-60-EC
83-CE-62-EC
83-CE-90-EC
83-CE-103-EC

Background

Gourmet Harvesting and Packing, Inc. (Packing) was organized in 1974 by essentially the same parties who had founded Gourmet Farms (Farms) one year earlier. Farms is a growing company of various agricultural commodities including alfalfa and asparagus. Packing came into being in order to provide general labor, harvesting, marketing and shipping services for independent growers on contract. Farms was one such customer of Packing's. Packing's field and harvest employees had been represented by the United Farm Workers of America, AFL-CIO (UFW or Union) whereas Farm's own work force of year-round tractor drivers and irrigators had never been the subject of representation proceedings. After economic circumstances forced Packing to cease all operations in 1979, Farms assumed direct responsibility for harvest and packing services which it had previously contracted out to Packing. Accordingly, Farms took back certain facilities which it had theretofore leased to Packing, assumed leases on other facilities used by Packing, and purchased or took over certain equipment from Packing. In addition, Farms hired Packing's former general manager to perform for Farms essentially the same services as had been provided by Packing and hired the same supervisor, crew foremen, and employees whom Packing had assigned to Farms' operations in prior years.

ALJ's Decision

Following a full evidentiary hearing based on unfair labor practice charges which the UFW filed against both Packing and Farms, in which numerous violations of the Agricultural Labor Relations Act (ALRA or Act) were alleged, the Administrative Law Judge (ALJ) found that Packing had violated its duty to bargain by going out of business without timely notifying and offering to bargain with the UFW over the effects of its closure on employees. He also found that Farms became a successor employer to Packing and thereby assumed but failed to properly carry out Packing's obligation to bargain with the UFW, including a failure to provide the Union with relevant information when so requested. In addition, the ALJ found that Farms had engaged in a pattern of harassment and discrimination, including failure to timely recall and/or denial of work, against the crew of Abelardo Varela over a period of years in retaliation for the crew's participation in a 1979 strike.

Board's Decision

The Board affirmed the ALJ's finding of successorship and a failure of the duty to bargain by conduct including (1) Packing's failure to effects bargain and (2) Farm's failure to provide information upon request. The Board, however, did not find that Farms, following its successorship, failed to bargain in good faith with the UFW. With regard to the allegations concerning the Varela crew, the Board found no violations of the Act and reversed the ALJ's finding in that regard. The Board directed Respondents to bargain over the effects of Packing's closure, to provide the Union with relevant information upon request, and to post, distribute, and read to employees the standard notice summarizing the Board's disposition of this matter.

Concurring Opinion

Member Gonot agrees with the finding of successorship but writes a separate opinion to elaborate further on the flaws which he and the majority opinion perceive in Member Richardson's dissenting analysis of the successorship issue. Contending that the dissent has misread the Fall River case, he points out that the NLRB and the courts are only concerned with what happens to the affected operation, and not with the types of business in which the two interacting companies are engaged, and that as long as the affected bargaining unit remains appropriate after the takeover, it is of little consequence that the alleged successor differs greatly from the company which ran the operation in question. Finding that the bargaining unit remained viable after the takeover, he concludes that the dissent has erred in relying on the nature of the overall business of Gourmet Farms versus that of Gourmet Harvesting and Packing for a determination of successorship. He also takes issue with the dissent's assertion that a more rigorous approach to successorship is required under the ALRA, noting that, in this regard, the dissent has overlooked key differences between the ALRA and the NLRA.

Dissenting and Concurring Opinion

Member McCarthy would affirm the ALJ's finding that the Employer unlawfully harassed the Varela crew because of crew members' participation in union activities. While employers are generally free to express their views, arguments and opinions about unions, they violate the law by engaging in name-calling, insults and other derogatory comments directed at employees if the comments, as those uttered by foreman Medrano herein, tend to interfere with employees' protected concerted activities.

Dissenting and Concurring Opinion

Member Ramos Richardson dissented from the majority's finding of successorship in Gourmet Farms. Using the analysis of

the United States Supreme Court in Fall River Dyeing and Finishing Corp. v. NLRB (1987) ___ U.S. ___ [107 S.Ct. 2225], she would have found the lines of business, products, customers, and working conditions of employees sufficiently different to prevent a successorship finding. She would therefore have found no duty in Gourmet Farms to furnish information or to effects bargain with the union. She concurred with the majority in finding no violations of Labor Code sections 1153(c) and (a).

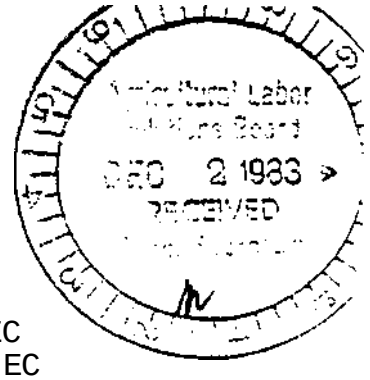
* * *

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:		
GOURMET HARVESTING AND PACKING COMPANY, INC., and GOURMET FARMS, alter ego and/or successor,	Case Nos.	81-CE-2-EC 81-CE-94-EC 82-CE-18-EC 83-CE-55-EC 83-CE-60-EC 83-CE-62-EC 83-CE-90-SC 83-CE-103-EC
Respondent,		
and		
UNITED FARM WORKERS OF AMERICA, AFL-CIO,		
Charging Party.		

Appearances:

Jose Antonio Barbosa, Esq.
Jorge Vargas, Esq.
for the General Counsel

Larry A. Dawson, Esq.
Dressier, Quesenbery, Laws & Barsamian

Clare M. McGinnis, Legal Assistant
for the Charging Party

Before: Arie Schoorl
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARIE SCHOORL, Administrative Law Officer:

This case was heard before me on May 4, 5, 6, 9, 10, II, 12; 13, 14, 26, and 27, in El Centro. The original complaint which issued on October 6, 1982, based on three charges (81-CE-2-EC, 81-CE-94-EC and 81-CE-18-EC) filed by the United Farm Workers of America, AFL-CIO (hereinafter referred to as the UFW) against Gourmet Harvesting and Packing, Inc. and Gourmet Farms (hereinafter referred to as Respondent or GHP and GF) alleged that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referrred to as the ALRA or the Act). On April 27, 1983, a first amended consolidated complaint, based on four additional charges (83-CE-55-EC, 83-CE-60-EC, 83-CE-62-EC and 83-CE-90-EC) and duly served on Respondent, alleged that Respondent committed additional violations of the ALRA. During the hearing General Counsel amended the complaint alleging an additional violation of the ALRA, based on an additional charge (83-CE-103-EC) which was duly served on Respondent.

General Counsel, Respondent and Charging Party appeared at the hearing and General Counsel, Respondent and Charging Party filed post-hearing briefs.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments and briefs made by the parties, I make the follows:

FINDINGS OF FACT

I. Jurisdiction

Respondent has admitted and I so find that Respondent is an agricultural employer within the meaning of section 1140.4(c) of the

Act and that the UFW, the charging party herein, is a labor organization within the meaning of section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

Respondent is alleged to have violated its duty to bargain in good faith (Section 1153(e) of the Act) from December 1979 to the present by continuing to bargain in bad faith with no intention to agree to a collective bargaining contract as manifested by the totality of its conduct, including but not limited to the following acts and omissions:

(a) Respondent failed and refused to provide information requested by the union which was necessary to the union's performance of its function as the exclusive bargaining representative of Respondent's employees.

(b) Respondent has grossly delayed negotiations by taking no action over a year to meet with the UFW.

(c) Respondent has engaged in dilatory tactics to stifle opportunities for productive discussion by unreasonably delaying in making timely or adequate proposals or counterproposals.

(d) Respondent has failed to provide a negotiator who is knowledgeable and supplied with adequate information regarding Respondent's operations so that fruitful negotiations could result.

(e) Respondent has made a mockery and a sham of negotiations by its conduct, including but not limited to the following:

(1) Failure to inform the union that GHP had already ceased to employ any agricultural employees while maintaining the appearance that it was still in operation.

(2) Proposing a wage increase for its agricultural employees on September 1979 and in January 1981 while failing to notify the union that it had already ceased to employ agricultural employees.

GHP is further alleged to have violated section 1153(c) of the Act in March 1979 by transferring and diverting its harvesting operation and bargaining work to GF, its alter ego, successor and/or single integrated employer without bargaining with the UFW regarding the decision and effect of this transfer, in order to enable GHP to avoid its bargaining obligations with the UFW and to discourage participation in the UFW.

Respondent is further alleged to have violated sections 1153(c), (d) and (e) of the Act since October 1981 by unilaterally and discriminatorily refusing and failing to timely recall the Abelardo Varela crew (crew #1) for Respondent's weeding and thinning and harvest seasons because of the crew members' support for the acts on behalf of the UFW and because of various crew members and the foreman's participation in ALRB processes. It is further alleged in this respect that Respondent's failure and refusal to recall Crew No. 1 was done without notice to or bargaining with the UFW.

It is further alleged upon the return to work of the members of Crew No. 1, that Respondent by and through its agents Alfredo Medrano and Rodolfo Castillo engaged in numerous acts of intimidation and harassment directed against the crew members in order to discourage their support for the union, in retaliation for their participation in a 1979 strike and in an attempt to rid itself

of union supporters. These acts of harassment and intimidation include but are not limited to the following:

(a) On February 20, 1983, Respondent through its agent Alfredo Medrano laid off Crew No. 1 despite the fact that it was the senior crew and other crews continued to work.

(b) In March 1983 Respondent through its agent General Foreman Alfredo Medrano discriminatorily refused to reappoint agricultural employee Raul Cuen to the checker position in Crew No. 1 in order to discourage Crew No. 1 from participating in union and protected activities.

(c) Since August 1982 and continuing to the present Respondent had consistently assigned Crew No. 1 to very low yielding fields and provided it with fewer hours work which has resulted in lower wages earned.

(d) Since on or about February 1983 Respondent through its agent Medrano assigned Rodolfo Castillo to the "checker" position in Crew No. 1 in order to harass the crew by such acts, including but not limited to, unreasonably requiring Crew No. 1 to overfill asparagas boxes contrary to Respondent's past practice.

(e) On numerous occasions Alfredo Medrano has made threatening and coercive statements directed to the returning strikers referring to their prior participation in a 1979 strike and their supporting the union in an attempt to create an atmosphere of intimidation.

Respondent is further alleged on May 5, 1983, during the hearing of the instant case, through Medrano to have discriminatorily discharged or laid off Crew No. 1 because of the

participation of some of its members in ALRB procedings and in concerted and union activities. It is further alleged in this respect that Respondent in discharging or laying off members of Crew No. 1 violated Section 1153(e) of the Act by not complying with its own seniority practices without notice to or bargaining with the UFW.

III. The Question of Alter Ego, Successorship or Single Integrated Enterprise

A. Facts

Jim Enis, his brother, Richard Enis, Jim Beauchamp and John Jackson founded Gourmet Farms in 1973. Its purpose was the growing of certain crops on land it owned and leased in the Imperial Valley. The next year Jim Enis, Richard Enis, Harold Rochester, John Jackson, Jim Beauchamp and Robert Beauchamp founded GHP. Its purpose was to harvest, pack and market the crops raised by GF and other growers in the Imperial Valley. Harold Rochester was the general manager of GHP and was in charge of the daily operations and conferred periodically with Richard Enis on the management of the business. John Jackson was in charge of Gourmet Farms but in 1976 Jim Enis took over the management of GF's operations.

The principal crops at Gourmet Farms were alfalfa, lettuce, asparagus, onions, garlic and cantaloupe. The lettuce harvest season ran from November through January, the asparagus harvest season January through March or April, the onion harvest April through June, the garlic harvest June and July. There was little or no work in August and September. In October and November, the cantaloupe harvest took place and there was weeding and thinning to be done with other crops. GHP performed all of the harvesting,

packing, thinning and weeding and marketing of those crops.[1/] Harold Rochester was the general manager and Alfredo "Chassis" Medrano was the general foreman. Medrano hired the agricultural workers through the individual foreman who would travel to Calexico on a daily basis and pick up the workers at a central meeting point and transport them in buses to GHP's work sites. There was a large turnover in agricultural workers especially during the asparagus season. In 1978 GHP hired approximately 600 employees per day which added up to 15,000 different persons that worked in one asparagus harvest season. GHP employed 300, 150 and 100 workers overall in the onion, garlic and cantaloupe harvesting season respectively. There was no individual employee seniority system utilized at GHP but rather a foreman seniority system. The practice was to recall the foremen and their respective crews according to a foreman's length of service at GHP and in Harold Rochester's employ before GHP was founded.[2/]

On March 22, 1977, GHP agricultural employees elected the United Farm Workers (UFW) to be their collective bargaining representative. The Board certified the UFW as such on March 29, 1978. The Board found that GF was a separate entity so that its employees were not included in the GHP employee bargaining unit.

GHP and the UFW entered into a collective bargaining contract which was in effect from July 10, 1978 to January 1, 1979.

---

1. Gourmet Harvesting and Packing provided these same service to other growers but 33% of its work was exclusively with Gourmet Farms.

2. Harold Rochester owned and operated a custom harvest business before joining GHP.

In October the UFW contacted GHP and requested the initiation of negotiations for a new contract. On November 27, 1978, GHP along with other vegetable growers and harvesters began bargaining talks with the UFW. By January 19, 1979, no agreement had been reached and the UFW went out on strike against all of the vegetable growers and harvesters including GHP.

During January and February because of the strike GHP incurred great difficulties in recruiting workers since the strikers engaged in mass picketing, physical and verbal abuse of the nonstriking and replacement workers, etc. On February 21, 1979, GHP and the other vegetable growers and harvesters made a final contract offer to the UFW on a take-it-of-leave-it basis. On February 28, the union responded rejecting the industry's offer and presented its own complete contract proposal. The employers rejected the union's offer and declared an impasse.[3/] However, GHP met with the UFW on March 7 and 8 to see whether the two parties might reach an agreement on an interim wage settlement. However their efforts were in vain. On June 5, GHP withdrew from the industrial group and so notified the UFW.[4/]

The strike had a devastating effect on the GHP operations.

---

3. In the Admiral Packing (1981 7 ALRB No. 43) case which included all of the vegetable growers and harvesters as Respondents, the Board found that the employers had bargained in bad faith, that it was a false impasse and the strike had been converted into an unfair labor practice strike.

4. After the founding of the two Gourmet entities there had been several changes of ownership so by June 1979, the owners of GHP were Jim Enis 45%, Richard Enis 18%, Harold Rochester 10%, Jim Beauchamp 9% and Gourmet Farms 18%. The owners of Gourmet Farms were Jim Enis 78.6% and Jim Beauchamp 21.3%.

Because of the picketing and general intimidation of the non-striking and replacement workers it was very difficult to recruit asparagus harvest workers so that GHP had only 300 asparagus harvesters employed at any one time. Since one half the asparagus crop was not harvested, Respondent GHP and GF lost three million dollars and GHP found itself in serious financial straits. In June 1979 GHP was unable to secure additional financing and so as Harold Rochester testified without money or workers Jim Enis, Richard Enis and he decided to cease operations, at least temporarily. The Enis brothers consulted with Harold Rochester about the future of GHP and decided that GF would take over the GHP operations in respect to the Gourmet Farms' crops. So in August Rochester began to work as the general manager for GF and he in turn hired Alfredo Medrano as the general foreman and all the other foremen who had worked at GHP.

Gourmet Farms continued the same method of hiring employees, through the foremen, as had been utilized by GHP. From August 1979 until the present Gourmet Farms continued to manage the GHP operation regarding its own crops. In this respect GF continued to weed, thin, harvest, pack, and market the same crops GHP had done before the 1979 changeover. GF continued to utilize, as GHP had before, the same supervisory personnel, much of the same equipment,[5/] the same personnel policy, the same hiring system, the same packing shed locations,[6/] the same job classifications, the

5. GF leased most of GHP's harvesting equipment, buses, trucks, etc.

6. Before the takeover GHP leased 4 packing sheds including one from GF. Afterwards, GF operated the one it previously had leased to the GHP and leased one of the packing sheds GHP used to lease.

same wages, the same fringe benefits, the same hiring procedure, the same seniority system, the same employee transportation system (Calixico-work site-Calexico), the same number of harvesting and packing employees, and with the same pattern of 70% of the harvest employees returning each year.

Neither GF or GHP ever informed the GHP employees that GF had taken over the GHP operations. In October 1980 GHP resumed collective bargaining sessions with the UFW. The UFW learned about the takeover in April 1981 when GHP's general manager Harold Rochester mentioned the fact at an ALRB hearing with respect to charges which had been filed against another agricultural grower. After that date GH met with the UFW in bargaining sessions and stated that they would sign a collective bargaining contract with the UFW if a court of competent jurisdiction established that GF was the successor of GHP. GF and the UFW broke off negotiations in November 1982 as the UFW filed a 1153(e) charge with the Board with one of its purposes being to secure an ALRB ruling on the issue of successorship.

GH employed between 30 to 50 agricultural employees before the take over and approximately the same amount afterwards that is in the growing of its crops in counterdistinction to the harvesting, etc. Most of these employees were year round tractor drivers and irrigators.

In September 1982 James Enis became the sole owner of GF. In September 1982 James Enis became the owner of 72% of the partnership interest of GHP, Richard Enis 18% and Harold Rochester 10%. In March 1983 James Enis became the sole owner of GHP.

B. Analysis and Conclusion

It is necessary to determine whether GF is the alter ego or the successor of GHP or that the two entities are a single integrated enterprise. If GF is any one of the three, it will have succeeded to GHP's duty to bargain and will have the obligation to continue to bargain in good faith with the UFW.

The ALRB has followed NLRB precedent concerning the criteria to determine whether entities are alter egos, successors or single integrated enterprises.[7/]

In John Elmore, et al. (1982) 8 ALRB No. 20, the ALRB has pointed out that the difference between an "alter ego" and a "successor".

> The term 'successor' is ordinarily used to describe a business entity which takes over the operations of another entity in a bonafide business transaction, such as a merger, consolidation, or purchase or assets. See Golden State Bottling Co. v. N.L.R.B. (1973) 414 U.S. 168, 182-3, n. 5 (84 LRRM 2839). The term 'alter ego[1], on the other hand, 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 identify of the employing entity, frequently to avoid the effects of the labor laws, without any change in the ownership of management. (Howard Johnson, Inc. v. Detroit LOG. Jt. Ex. Bd., Etc. (1974) 417 U.S. 249, 260 [86 LRRM 2449].)

It is clear in the instant case that if any of the three categories i.e. alter ego, successor or single integrated enterprise would apply, GF would be the successor of GHP rather than either of the other two. In my opinion a business entity GF took over the operations of another business entity in a bona fide business

---

7. Highland Farms (1979) 5 ALRB No. 54; Rivcom Corporation (1979) 5 ALRB No. 55; and Abatti Farms (1977) 3 ALRB No. 83.

transaction. The bona fide business transaction in the instant case was a merger of the GHP operations with those of GF.[8/]

The cases which involve an alter ego have to do with a business entity which continues to operate the same business but with a mere technical change in the structure or identity of the employing entity. Although GF continued to operate its farming operation as before, it took on an additional and different operation the harvesting, packing, etc. of crops, albeit its own. The ALRB had already decided that the two entities were separate and distinct and were not a single employer and that the GF employees were not part of the bargaining unit composed of GHP employees.

Now that I have determined that if there were an obligation on the part of GF to bargain with the UFW, it would be as a successor not as an alter ego, a review of the characteristics of a successor is now in order.

Both the ALRB and NLRB precedents consider an employer who takes over a business to be a successor to the previous employer's collective bargaining obligation when there is a substantial continuity of the enterprise.

The ALRB has determined that the most important factors to be taken into consideration in determining successorship are:

---

8. Furthermore, although the ownership of the two entities were similar, I find that the changeover was not done to avoid the effects of labor law, i.e. the obligation to bargain with union on the part of the GHP. In the summer of 1979, GHP found itself in serious financial straits unable to continue to function without adequate financing. The decision by James Enis, Harold Rochester and Richard Enis to have GF take over GHP's operations was a reasonable business decision. James Enis credibly testified that the banks would no longer lend funds to GHP but would provide only GF with credit for the harvesting, packing, etc. of its own crops.

substantial continuity of the business operations, similarity of plant and machinery, similarity of products or services, similarity of working conditions and continuity of the work force.[9/]

In the instant case GF continued performing the same services as GHP the harvesting, the packing, etc. of the same crops (although on a smaller scale since it no longer harvested crops belonging to other growers). It continued to utilize the same supervisory personnel, the same working conditions (wages, fringe benefits, etc.) and the same system of recruiting its work force.[10/] It also continued to utilize the same equipment and the same plant e.g., the packing houses as its predecessor GHP.

Accordingly based on the above-mentioned factors, I find that GF is a successor to GHP.

Respondent argues that GF is a farming company that grows crops and its agricultural employees have never been a part of the GHP bargaining unit and have not voted for the UFW. GF points out that placing the GF employees in the same unit as the GHP employees deprives the GF employees of the right to independently choose whether they wished to be represented by a bargaining agent and if so which one.

However, there is NLRB and ALRB precedent for employees

---

9. The NLRB utilizes the same criteria but it places primary importance on the continuity of the work force. Nevertheless, because of the high mobility of the California agricultural labor force the ALRB does not place the same primary importance on this factor but considers it along with the other factors.

10. Approximately 70% of the previous years harvest employees return every year.

being included in a bargaining unit when they have not had an opportunity to vote. In a vast majority of the successor cases, the employees who are newly hired by the successor employer have never voted for the union but are included in the bargaining unit.

Furthermore, the NLRB precedent with respect to accretion of new employees to an already existing bargaining unit also includes employees who have not voted in a unit within which they are included. The accretion doctrine ordinarily applies to new employees who have common interests with members of an existing bargaining unit and who would have been included in the certified unit or are covered by a current collective bargaining contract.[11/] If an election took place at Respondents after the successorship occurred, the GF pre-successorship employees, who are mainly irrigators and tractor drivers, would have been included in the bargaining unit, since under the ALRA all of the employees of an agricultural employer are included in a unit. Because of this latter ALRA provision the ALRB does not have to decide whether new employees have common interest with members of an existing bargaining unit because under ALRA it is assumed that all of employees of an agricultural employer have interests in common. One of the factors that the NLRB takes into consideration in accretion cases is the ratio of the number of new employees to the number of employees in an already existing bargaining unit and in the instant case the new employees are a very small percentage of the number of the employees in the older existing bargaining unit.

---

11. See, N.L.R.B. v. Renaissance Center (1979) 239 NLRB 1247 [100 LRRM 1121].

IV. The Question of Respondent Not Informing the UFW of GHP's Dormancy and GF's Takeover of its own Harvesting Operation 12/

A. Facts

In the fall of 1979 GF continued the GHP operations without variations as the same supervisory personnel and workers performed the same duties as they had at GHP. Harold Rochester and Jim Enis admitted that no one representing GF or GHP notified the UFW of GHP's going dormant and the GF takeover in the summer of 1979. Furthermore, they testified that at no time did they inform Charles Stoll, GHP's negotiator to notify the union about the dormancy, etc.

In September Stoll wrote a letter to Richard Chavez of the UFW inquiring whether the union would agree to an interim wage increase. The UFW failed to reply. Both Rochester and Jim Enis testified that they know nothing of this action by Stoll.

Rochester informed Stoll in September or October 1979 that GF had taken over the GHP operations.[13/] Rochester testified that he and the other principals discussed on various occasions about notifying the UFW and they decided not to do so without their

---

12. This section which treats the question of the lack of notification about GHP's dormancy involved the following allegations in the complaint herein: Respondent has made a mockery and sham of the negotiations by (1) failure to inform the union of the GHP dormancy and the GF takeover; (2) proposing wage increases for GHP employees when GHP had ceased operations. Respondent failed to provide a negotiator knowledgeable of GHP's operations and violated Sections 1153(e) and (c) of the Act by transferring the harvesting operations to GF without negotiating with the union in order to avoid its bargaining obligations with the UFW and to discourage participation in the UFW.

13. Rochester testified to so informing Stoll. Respondent never called Stoll as a witness to refute Rochester's testimony in this respect and Barsamian testified that when he called Stoll the evening of April 27, Stoll indicated he already knew about it.

attorney's advice.

Jim Enis testified that he never discussed the question of dormancy with Stoll since he was concentrating on managing GF's operations and not the negotiations with the UFW because that was the concern of his brother Richard Enis and Harold Rochester.

Charles Stoll continued to represent GHP as a negotiator until December 15, 1980, the date on which he attended his last negotiating session. Consequently he represented Respondent for approximately 16 months after GHP went dormant in the summer of 1979. During this period he failed to inform the UFW of the fact that GHP had gone dormant and that GH had taken over GHP's operations with respect to its own crops.

Barsamian testified that neither GHP's principals or Charles Stoll ever told him of the dormancy and that he first heard of it the day, April 27, 1981, Harold Rochester testified about it at the ALRB hearing. Barsamian contended that until that date he had just heard rumors of a GF takeover of GHP.[14/]

---

14. Rochester first testified that he had told Barsamian about the takeover in the latter part of 1979 or the early part of 1980. he later testified that he told him prior to a bargaining session while talking to him about the preparations. So it would have had to be after January 1981 when Barsamian took over as GHP negotiator. Even later Rochester testified that he did not know whether it was just prior to or during a negotiation session. Barsamian denied having knowledge until the day Rochester mentioned at the ALRB hearing. I find Barsamian's version and Rochester's latest testimony on this point of Barsamian's knowledge to be the more worthy of belief. I believe that Rochester made a sincere effort to remember as accurately as possible when he told Barsamian about the dormancy and therefore his last version would be the most trustworthy. I also found Barsamian's testimony on this point to be credible since I believe his surprise was genuine upon learning of GHP's dormancy at the April 27 negotiations meeting.

Nevertheless, it is beyond dispute that no one representing GHP or GF ever informed the UFW that GHP had gone dormant.

On April 27, 1981, David Martinez, the UFW negotiator and Ron Barsamian were in the midst of negotiation talks when they simultaneously received telephone calls: Martinez a call from David Arismendi, an ALRB field examiner and Barsamian a call from Sarah Wolfe, one of his law partners. They informed Martinez and Barsamian respectively that Rochester had just testified at an ALRB hearing that the GF had taken over the GHP operations in 1979. Needless to say, Martinez demanded to know from Barsamian whether the news that they had both just received was true. Barsamian, with obvious embarrassment, said that he did not know although he had heard rumors about the dormancy and takeover.

Martinez demanded to know what would be Barsamian's next step to clarify the situation and the latter asked for a couple of weeks to investigate and then report back to Martinez. Martinez consented. Martinez added that the union would file charges and that it represented at least the harvest employees working at GF. At the April 30th meeting the union delivered a letter to Barsamian setting forth its position that it considered GF to be the successor and therefore with a duty to bargain with the UFW and the union would pursue its legal remedies to protect its statutory rights.

At the May 5 meeting, Barsamian responded to the letter and said that he would put GHP's position in writing at the next meeting May 18. At the May 18 session, Barsamian orally informed Martinez that the GF position was that it was not the successor or alter ego of GHP but it was willing to continue to bargain with the union so

that in the event a court of competent jurisdiction found that it was the successor or alter ego it would have complied with its duty to bargain. He added that as the representative of GHP he stated that GHP was willing to negotiate the effects of the takeover by GF.[15/]

The parties continued to negotiate a contract and at some of the meetings the subject of the successorship would come up. The parties would reiterate their respective positions and return to the negotiations.[16/] At the February 16, 1982 meeting David Martinez stated that the negotiations were a waste of time without agreeing on a contract and Barsamian agreed. Barsamian suggested at the February 1982 meeting to put the effects bargaining into abeyance and Martinez answered that "We'll think about it".

The parties scheduled meetings in May for both GF and GHP negotiations. They were to meet in the morning to negotiate GHP and the effects of the closure and in the afternoon to negotiate GF and contract. However David Martinez was unavailable for the meetings and they were cancelled by mutual agreement.

In June Mendoza replaced Martinez as the UFW negotiator and in July he contacted Barsamian and they agreed to have a meeting on August 3. At the meeting, Mendoza promised to prepare a three year collective bargaining proposal for Respondent. On August 9

---

15. Barsamian never put in writing Respondent's position regarding the duty to bargain for a contract and/or effects of closure until the Spring of 1982.

16. The meetings took place in June and July 1981. There was a interval of six months during which the parties did not meet. In 1982 meetings took place in January, February and August.

Barsamian sent Martinez two letters on behalf of GF and GHP respectively. In the first letter he contended that the UFW was not the certified bargaining representative of GF employees but that GF was willing to negotiate with the union for the purpose of agreeing to a collective bargaining agreement which GF would accept and sign in the event of a court of competent jurisdiction held that GF was the successor to GHP. In the second letter Barsamian informed the union that he was awaiting a communication from the union about its position, proposals and scheduling regarding the effects of GHP's closure.

On August 12 Martinez sent a letter to Barsamian in which he requested that GF admit it was the successor to GHP and commence negotiations. Martinez added that if GF failed to do so the UFW would have to resort to court action to resolve the issue of successorship.

On November 15 Martinez sent a letter to Barsamian stating that he had not yet received a reply to his August 12 letter but sent him a new contract proposal and suggested same meeting dates.

B. Analysis and Conclusion

There are two possible effects of Respondent's concealment of the fact that GF had taken over the GHP operations. First, there would be the effect of depriving the UFW of the opportunity to bargain over the effects of Respondent's decision to close the GHP's operations and turn them over to GF. Secondly, there would be the effect on the collective bargaining negotiations with the UFW.

General Counsel has alleged that the effects of the concealment have been to make a mockery and a sham of the

negotiations and Respondent engaged in such secrecy to avoid its obligation to bargain with the UFW and to discourage participation in the UFW.

The initial impression of what has occurred seems to coincide with General Counsel's allegations but a careful review of the facts reveals that the effects of the concealment are minimal and of little or no advantage to Respondent.

Since the UFW did not learn of the GF takeover of GHP's operations for almost two years, it was deprived of the opportunity to bargain with Respondent over the effects of the takeover. However, the effects of such takeover were minimal since all of the GHP employees who worked on GF's crops continued to do so with the same wages, same fringe benefits, same supervisors, same working conditions, etc. as before. Incidentally, General Counsel proved all those facts in his presentation of his case to show that GF was the successor to GHP. So even if the UFW had known about the takeover in 1979, there were hardly any effects to negotiate about.[17/]

Furthermore, the effects of the concealment on the bargaining process were also minimal. Respondent resumed negotiations with the UFW in October 1980 and continued to meet with the UFW at the bargaining table until the autumn of 1982.

---

17. The only exception would be the GHP employees who worked exclusively on farms other than GF. General Counsel failed to present any evidence that such employees existed.

It can be argued that Respondent's concealment of this fact delayed the bargaining process in that the UFW had to halt the bargaining process and recur to the ALRB to determine the question of successorship. However, that delay was not caused by the concealment but rather by Respondent's refusal to assume GHP's duty to bargain as the successor. The fact that the ALRB action in respect to successorship is taking place in 1983 rather than in 1979 when the succession took place is due to a combination of factors including the union not learning of the dormancy until April 1981, the union refraining from recurring to the ALRB until 1982 for a clarification of GF's status as successor (due partly to Respondent's continual participation in the collective bargaing process) etc.

So it appears that there were virtually no adverse effects of the concealment and no advantage to Respondent. Rather than being an advantage to Respondent, the concealment has turned into a detriment because it reveals Respondent's animus towards the UFW which is a factor to be considered in the determination whether the Respondent bargained in good or bad faith with the union. In particular, the concealment reveals in a very graphic form the attitude of Jim Enis, the main principal of the two entities, GHP and GF, towards the UFW.

It was quite evident at the hearing from Enis' demeanor in answering questions about the union that he placed complete responsibility of GHP's financial troubles and loss of 3 million dollars on the union. He testified that before the union gave him an opportunity to bargain about a new contract, it called a strike

and made it impossible for him to harvest the asparagus crop.[18/] According to his testimony the lettuce growers were able to still make a profit during the strike because they harvested less but sold at a higher price. He, on the other hand, since he was dealing with asparagus, could not do the same because of the peculiar nature of harvesting asparagus. It was evident his rancor toward the UFW as he testified how their conduct not only caused him to lose three million dollars but also the same amount of loss for the workers.

So after GF took over GHP, Jim Enis' general attitude toward the union was to comply with the duty to bargain to a certain degree but according to his criterion it was none of the union's business what financial and other arrangements he had achieved to keep his farming and harvesting operations afloat.[19/] It seems the fact that attorney Charles Stoll knew about the dormancy and the takeover had no effect on Enis' reluctance to inform the UFW about this changeover. However, Stoll's advice about the continuing duty to bargain with the UFW on either the part of the GHP and/or GF was important enough to Enis and the other principals to authorize resuming negotiations with the UFW. Accordingly, I shall take into consideration, in determining Respondent's good or bad faith in bargaining, Jim Enis attitude of rancor toward the UFW, that is union animus, as revealed by his concealment of GHP's dormancy and

---

18. I am not passing judgment on the truth or falsity of Enis[1] testimony in this respect. The important aspect of his testimony is that it clearly reveals his beliefs and feelings regarding the UFW.

19. Jim Enis was the majority owner and I can safely infer that he had the most weight in deciding policy.

his statements about the UFW during his testimony at the hearing.

It is clear from my analysis of Jim Ennis' motive that it was not his intent in concealing the fact of dormancy from the union to discourage employee participation in the UFW. Nor do I think Respondent transferred the harvesting operations from GHP to GF to avoid its duty to bargain with the UFW since the GHP was in serious financial straits and Jim Enis could only obtain credit for GF but not for GHP in respect to harvesting GF crops.

General Counsel's arguments that the purpose of Respondent requesting wage increases in 1979 and 1981[20/] was to conceal the dormancy and to avoid its obligation to bargain is defective. The actual purpose for Respondent to request a wage increase was to maintain its competitiveness with other Imperial Valley growers and harvesters so it would attract sufficient employees to harvest its crops. If the union had agreed to a wage increase, no doubt GF would have put it into effect for the GHP employees working for GF.

I also disagree with the allegation that Respondent failed to provide a negotiator with knowledge of Respondent's operations. I assume General Counsel did not present any argument in this respect in its post-hearing brief, because the proof of this allegation was that Barsamian did not learn of the dormancy until April 27, 1981, and so up to that time he did not have sufficient knowledge to effectively carry out the bargaining. However, General Counsel has tried to prove the opposite that Barsamian had knowledge of the dormancy and therefore knowingly concealed the truth about

---

20. Incidentially, Respondent did not put into effect the wage increases it had proposed to the UFW.

the dormancy from the union and also tried to mislead the union regarding the dormancy.

Although I have found that Barsamian did not have knowledge on this particular point, he did have sufficient knowledge on Respondent's operations and his lack of knowledge on this one point had no adverse effect on the negotiations.

Incidentally, General Counsel had requested no additional remedy for Respondent's failure to inform the union about GHP's dormancy and the GF takeover over and above what he had requested in respect to Respondent's alleged bad faith bargaining. Furthermore, General Counsel failed to present proof of the existence of any GHF employees who had worked exclusively on farms other than GF's so consequently I shall not recommend an order to compel Respondent to bargain with the UFW regarding the effects of dormancy.[21/]

---

21. The Charging Party has requested an award for negotiator and attorney fees because the UFW allegedly incurred unnecessary expenses due to Respondent's concealment of the dormancy of GHP and GF's refusal to accept the duty to bargain as the successor of GHP.

I will not recommend such fees because I find that the UFW did not incur additional expenses for its negotiator due to such concealment because it would have still employed a negotiator during the bargaining sessions even if Respondent had informed it of the dormancy. Furthermore, I find that the UFW is not entitled to attorney fees or litigation expenses because Respondent's defense that GF was not the successor to GHP was not frivolous.

V. Respondent's Alleged Bad Faith in Negotiations and Refusal to Provide the Union with Requested Information [22/]

A. Facts

In the fall of 1980 Ann Smith, UFW negotiator, contacted Charles Stoll about renewing negotiations with respect to Gourmet and two other Imperial Valley employers Mario Saikhon and Lu-Ette Farms.[23/] The parties met on October 30, 1980, with Charles Stoll and Ron Barsamian representating the three employers and Ann Smith the UFW. Smith made an oral request for information regarding the approximate number and the names of the current employees, the number of acres, the projected crops and the location of company operations.[24/] Stoll queried Smith about her reason for such a request and she replied that, as the bargaining representative of Respondent's employees, she was entitled to them. To Stall's

---

22. This section which deals with the totality of Respondent's conduct during the negotiations involves the following allegations: Respondent has continued to bargain in bad faith with the UFW as manifested by the totality of its conduct. Respondent has engaged in dilatory tactics to stifle opportunities for productive discussion by unreasonably delay in making proposals or counterproposals. Respondent has grossly delayed negotiations by taking no action for over a year to meet with the UFW. Respondent has failed and refused to provide information requested by the union which was necessary for the union's performance of its function as the exclusive bargaining agent of Respondent's employees.

23. The negotiations would be carried on in unison but the parties would sign separate contracts.

24. The exact language was: (1) Current and projected crop programs of the company, including the number of acres of each crop grown and/or harvested by the company; (2) Location of Company operation by canal and road names; (3) Number of employees employed and/or expected to be employed in each job classification. Whether the company employs labor contractors to perform bargaining unit work; (4) Current rates of pay for each job classification; (5) Names, addresses and Social Security numbers of current employees and those to be recalled.

specific question about her need for the employees addresses, Smith responded "in order to visit them".

Both parties maintained their positions as reflected by their contract proposals in February 1979. The one exception was that the UFW changed the employer's contribution to the RFK health plan to 36C an hour. Smith also made a pitch for a provision in its contract proposal whereby an employee would be compensated by the employer for the entire time he or she spent on union business.

Two days later Smith sent a letter to Respondent requesting the same items of information that she had asked for orally at the negotiations meeting.

December 15, 1980 Meeting

The parties met again on December 15 with Charles Stoll and Ron Barsamian representing GHP and Ann Smith representing the UFW. Stoll broached the subject of interim wages but Smith retorted that the union wanted an entire contract and would treat any wage increases initiated by GHP as an unfair labor practice. Stoll mentioned that GHP did not intend to furnish any data requested by the UFW at the October 30 meeting or in its November 1 letter. Stoll gave as a reason for Respondent's reluctance to provide information concerning the names and addresses of employees and the location of operations, the UFW's continuing harassment of nonstrikers and replacement workers and damage to equipment.[25/] Stoll once again asked Smith why she needed the information about the number of acres and she replied that it would be useful in the

---

25. All strike activity had stopped at GHP by September 1979.

preparation of proposals. Stoll told Ann Smith that there was no change in the company's offer of February 21, 1979. Stoll informed Smith that he was leaving the Western Growers' Association to go into private practice and Ron Barsamian would replace him as GHP's negotiator.

December 15, 1980 to March 31, 1981 Interim

The first week of January, Barsamian conversed with Smith and promised her that he would prepare two drafts (1) a list of the articles that they had previously agreed to (identical language in the parties' last proposals in February 1979) and a comprehensive article-by-article proposal for a three-year contract. Barsamian added that in order to prepare the drafts, he would have to review all his files. Smith replied it would be a good idea.

In January and February Barsamian and Smith frequently conversed about negotiations between the UFW and the three agricultural employers GHP, Saikhon and Lu-Ette plus other companies represented by Barsamian. During these conversations Smith mentioned that she was ill and furthermore that she had a very busy schedule. Neither of the two mentioned anything about another negotiations meeting regarding Respondent, Saikhon or Lu-Ette.

During January, February and that 1st days of March, Barsamian reviewed the proposals the parties had made to each other in 1979 but according to his testimony it was time consuming since Stoll had left the negotiating material mixed in with the Admiral Packing litigation materials. He completed the review of the articles but did not prepare a complete proposal as he had promised.

In any event, on March 12, Barsamian sent a letter to Smith

suggesting a meeting to review proposals so they could determine the articles they had already agreed to. However, he made no mention in the letter about his earlier promise to prepare a complete three-year contract proposal. Before Smith received Barsamian's letter, she sent him a letter pointing out that she was waiting for the proposal that he had promised two months before. Furthermore, she questioned him about GHP's intention to provide the information previously requested by they UFW and about his thinking regarding the medical plan and the paid union representative proposed by the UFW.

On March 18, Barsamian telephoned Smith and they conversed about their two letters that had crossed in the mail. They agreed to meet and exchange position papers. Smith informed Barsamian that David Martinez would replace her. Before the next meeting Smith spent a day with Martinez reviewing with him the latest contract proposals of the two parties.

March 31, 1981 Meeting

At this meeting Ron Barsamian represented the GHP and David Martinez the UFW. They reviewed and discussed each parties' contract proposal article by article.[26/] Barsamian explained that after all the strife of the 1979 strike GHP was desirous of a three-year contract. The UFW preferred a 16 or 18 month agreement as it would expire on the same date as the other vegetable industry

---

26. Barsamian led the discussion since he had brought a set of each parties' proposals which Martinez had failed to do so. Respondent argues that this fact indicated that Martinez was not adequately prepared for the meeting. Martinez failure to bring sets of each party's proposals is an unimportant detail because it did not in the least way hamper negotiations.

contracts. Barsamian responded that such an expiration date was not realistic as there was a minimum of activity in the Imperial Valley at that time of the year. He added that he was opposed to any contract the UFW had with any Salinas vegetable grower or harvester since conditions in the Imperial Valley were different.

Barsamian asserted that the GHP would accept the NLRB language in respect to union security but not the ALRB "good standing" language.[27/] The previous contract between the two parties contained the "good standing" language the union was currently requesting. Barsamian pointed out that the UFW had consented to NLRB language for union security in contracts with two other growers. Martinez expressed that the UFW desired to have a hiring hall operated by the union and Barsamian stated that GHP did not need a hiring hall and besides it was an emotional issue. Martinez replied that the UFW would be willing to discuss a modification that would fit Respondent's needs.

Martinez emphasized that the hiring hall and the ALRA good standing union security were important to the UFW. Barsamian mentioned the need for a flat crop differential (a lower rate of pay for tractor drivers and irrigators who work on flat crops i.e., wheat barley, etc., rather than row crops, i.e., lettuce, asparagus, etc.) Martinez explained how well the system of a paid union representative was functioning at other agricultural establishments.

---

27. By "ALRA-good standing," is meant the power of the union to cause an employee's discharge for breach of any "reasonable term and condition of union membership". The NLRB union security only permits the union to cause a discharge for the failure to pay dues and fees.

Barsamian replied that that may be true but it was more money that his principals were willing to pay.

Martinez renewed the request for the information from the union that had been asked for in Ann Smith's letter of November 1, 1980. Barsamian responded that there was no lettuce crop at that time and that the cantaloupe work was about to start and he would try to accommodate the union's request, regarding that crop.[28/] Barsamian asked Martinez the reason that the union needed the names of the employees and the location of the crops. Martinez answered for "bargaining". Barsamian responded that he would endeavor to obtain data regarding the number of employees, amount of acres under cultivation and Respondent's anticipated needs of employees.

Martinez testified that Barsamian promised him to send a complete contract proposal by mail before the next meeting. Barsamian denied such a promise. He contended that it was his custom to send some articles of a wage package by mail but never a complete proposal.

The parties agreed that they would first work on the language of the non-economic articles and subsequently resolved their economic differences. Barsamian testified that they agreed not to deal with package proposals but Martinez testified that that agreement only applied to an entire contract proposal and not a smaller group of articles.

---

28. At the end of March, the asparagas harvest was winding down but was still in process and the onion harvest was to commence in April.

Meeting of April 15

Barsamian delivered a complete contract proposal [29/] to Martinez and they reviewed it article by article. Barsamian stated that GHP maintained its position with respect to the NLRB union security clause, no hiring hall or paid union representative, a probationary period for new employees and no higher medical plan costs. He voiced GHP's insistence that it would have the right to seek injunction relief in case of an illegal strike, the requirement that leaves of absence by in writing be applicable to only those leaves longer than 3 days, that the appeal time for grievances be 30 rather than 60 days, that warning notices not be submitted to the grievance procedure, that it would not have to bargain over a decision to mechanize but only the effects thereof, and that its supervisors be able to do pusher work.[30/]

Martinez expressed the union's outright opposition to most of these positions. In addition, Martinez provided detailed costs of the fringe benefits requested by the Respondent. The parties further stated their differences in respect to the articles on Health and Safety, Holidays, Jury Duty and Successorship.

The parties came on an agreement on the following

---

29. Respondent made few modifications from its February 1979 impasse proposal and no modification of the major articles.

30. Pusher work consists of supervisors or harvest workers following behind the asparagus cutting crews to assure that the crews keep up a certain pace in their work.

provisions: Rest Period,[31/], Bereavement,[32/], Management Rights, Union Label,[33/], operations, Bulletin Boards, Family Housing, No Discrimination, Subcontracting,[34/], Grower-Shippers,[35/], Locations, Modifications, Recognition,[36/] Access, Credit Union and Savings Clause.

However, ten of the articles agreed upon came about because the parties had identical language in their respective proposals. So they actually negotiated and came to accord on only six items.

After Barsamian and Martinez reviewed all the articles and either came to an agreement or stated their positions in respect thereto, Martinez presented to Barsamian a package consisting of 11 articles. The most important aspect of the package was the following: the union's agreement to GHP's proposal of a NLRB union shop, and a five-day probationary period but insistence on a union hiring hall, all leaves of absence in writing, employees to be

---

31. GHP had offered a ten minute rest period during any four hour period and the UFW had asked for 20 mintues, so they compromised at 15 mintues.

32. The union wanted two additional days of pay for those employees traveling more than 300 miles and the GHP agreed to one additional day.

33. The UFW wished the GHP to provide it with additional information about the destination of its products so the union would not unknowingly boycott vegetables harvested by its own members. GHP objected and the union conceded.

34. The union proposed more restrictions on the employer's right to subcontract but dropped the proposal and agreed to retain the same language as was in the previous contract.

35. The UFW wanted to modify language in the previous contract that permitted GHP to subcontract work and take work away from the bargaining unit. GHP objected and the union dropped its request for the change.

36. The parties agreed on basically the same language that was in the previous collective bargaining contract.

discharged only for just cause,[37/] and 60 days rather than 30 days for a second step grievance appeal. Other subjects included in the package offer were Worker Security (the right to cross picket lines without being subject to dismissal by the employer), Maintenance of Standards, Health and Safety, Income Tax, Withholding, Camp Housing, Records and Pay Periods and a Labor Management Relations Committee.

Martinez admitted in his testimony that his offer of a partial package in the middle of a day's negotiations was unusual. He explained though that if Respondent rejected it, it would still be useful since the parties could discuss each article within the package. Barsamian testified that he was surprised and upset and called Martinez attention to their previous agreement about no package offers which he claimed they had reached at the March 31 session. Martinez replied that he believed that the agreement only applied to complete package proposals. Barsamian rejected the package and Martinez suggested that Barsamian could review it article by article and inform him what was right and what was wrong with each article and perhaps they could reach agreement on some of the articles in the package separately.

Barsamian testified that Martinez was supposed to prepare a supplementary agreement on seniority but he had failed to do so. However, Martinez credibly testified that the parties had agreed to leave the issue of seniority and supplements thereon and other local subjects until the end of the negotiations and besides it would have

---

37. GHP proposed to change the provision in the previous contract from the general "or just cause" to a listing of specific grounds for discharge of an employee.

been difficult for him to prepare a seniority supplement since Respondent had not provided him with the necessary information such as the names and addresses of the employees, seniority list, etc.

April 27, 1981 Meeting

Since Barsamian had rejected the union's partial package proposal, Martinez suggested that they review each article in their respective overall proposals which they proceeded to do. Barsamian pointed out that GHP did not need a hiring hall. Martinez responded that he was worried about discrimination in hiring and Barsamian asked him to point out any particular occurrences in that respect. Martinez commented that he could see it would be difficult to secure a hiring hall from GHP. They reviewed their differences on the grounds for discharge without any resolution. The UFW wanted to retain the language in the previous contract and the GHP wanted to change the contract language from "just cause" to a listing of specific grounds for the discharge of an employee. Barsamian failed to tell Martinez why GHP wanted the change.

Barsamian reiterated the reason the GHP wanted the probation period was because it wanted to obtain competent employees. Martinez pointed out that the previous contract did not contain such a provision. Martinez made no new proposals and the parties maintained their positions on the remaining articles.

Martinez renewed his request for information and Barsamian replied that he was still "getting the stuff" but commented that the information that Ann Smith requested would not help Martinez. Martinez answered that he needed the information so the union could fulfill its duty to duly represent the employees and that he needed

their names, addresses and social security numbers. Barsamian repeated as a reason for not supplying the information the picketing and harassing by the strikers and added that he might provide the union with a list of coded names of the employees.[38/] Martinez said such a list was useless. Barsamian pointed out that the union could reach the employees by posting on the bulletin board.[39/]

May *4*, 1981 Meeting

Martinez requested that Barsamian comply with Ann Smith's information request both orally and in a letter (GCX-7) that he delivered to Barsamian at the meeting, Barsamian had no information to give Martinez.

Barsamian brought up the subject of supervisors being able to do the work of the "pushers". Martinez replied that he did not like the idea of "pushers" but would be willing to discuss the matter with Barsamian. It was agreed that the latter would check with GHP (Harold Rochester) about the details of this practice.

Martinez delivered to Barsamian a written summary of the union's position on each article including the union package offer of April 15. Martinez informed Barsamian that the union had returned to UFW's original (1979) proposal for the RFK medical plan (6½ percent of wages) thus dropping the modification[40/] made by Ann

---

38. There had been no strike activity or picketing at Respondent's since September 1979.

39. At the April 15 meeting the parties had agreed that the UFW could use GHP bulletin boards on the premises for notices to employees.

40. The 6½ percent of wages was less money than the previous requested 36¢ per hour.

Smith at the first negotiation session in October 1980. Barsamian commented that it was still a lot of money.

Barsamian once again expressed his opposition to the union proposal for a union-management committee and Martinez said that he was not serious about it and agreed to drop it. The parties reviewed the remaining articles. Barsamian and Martinez reached an agreement on two articles: Maintenance of Standards and Camp Housing by utilizing the compromise language from the Sunharvest contract.[41/]

May 5, 1981 Meeting

Victoriano Ochoa, a harvest employee, attended the meeting, since he had suffered some ill effects from pesticide that had been used in Respondent's fields. Barsamian and Martinez discussed the Health and Safety article in this respect and other paragraphs in such article.

Martinez ceded on a complete ban on mechanization and said the union was interested in solely obliging the employer to bargain on any prospective mechanization.

Barsamian stated that he realized that a compromise was in order for the mechanization article and he would present a proposal at the next meeting. Barsamian explained the difficulties GHP had in respect to indicating on the pay checks the accumulated earnings and the union dropped its request. The two parties agreed to Sun

---

41. In the summer of 1979, the UFW signed a collective bargaining agreement with Sun Harvest, a Salinas based vegetable grower. Virtually all the articles in the agreement represented a compromise between the two parties. So when the UFW presented Sun Harvest language in its offer, the UFW argues it already had made movement from its initial offer.

Harvest language in respect to the successorship clause[42/] and jury duty.

May 18, 1981 Meeting

Barsamian and Martinez worked extensively on compromise language for the Health and Safety article and agreed on five paragraphs (80%) of the article. The union insisted that Respondent pay an hourly rate to the piece rate workers during the time they were traveling between work sites as it did the hourly employees. Barsamian objected and pointed out that it is traditional for piece rate workers to be paid for the amount they harvest and besides an hourly rate based on their piece rate would add up to $15 an hour. The union agreed to Respondent's proposal regarding employees' authorization forms for income tax withholding in light of the fact that the lettuce and asparagus seasons overlap into two years (December, January, February, etc.)

Barsamian failed to present a counter-proposal on the subject of mechanization. He mentioned something about advising the union ahead of time about the company's intention to introduce mechanization. The UFW had agreed with another grower six months previously to just a six-month ban on mechanization rather than a year ban. Martinez testified that the reason the union did not revise its proposal downward in this respect, e.g., one year to six

---

42. However the Sun Harvest language in respect to the successorship clause was the same as in the previous GHP contract. The union had requested more than just the old language. It had wanted the successor to be obliged to notify the pension plan trustees and the medical plan trustees of the change of ownership. So when the union agreed to the Sun Harvest language, it had made some movement.

months, was because he was waiting for a counter offer from Barsamian and did want to bargain against himself. Barsamian told Martinez that he did not see arbitration as a solution to the mechanization problem since the arbitrator might decide against Respondent installing mechanization while competitive growers and harvesters might move right ahead with the latest machinery. Barsamian maintained that Respondent opposed the supervisor's acticle because it wanted supervisors to be able to do bargaining unit work while pushing the asparagas cutters. Martinez requested additional information about this practice and Barsamian repled that he would have Harold Rochester attend a session so the problem could be solved.[43/]

June 30, 1981 Meeting

Martinez presented another partial package proposal to Barsamian. Once again the union would agree to the NLRB union security clause and a five day probation period that Respondent wanted but still held fast to a union hiring hall. On the remaining articles in the package Seniority, Grievance and Arbitration, Leave of Absence and No Strike, the union would agree to Sun Harvest language.[44/] Barsamian rejected the package even though he admitted

43. Barsamian failed to bring Rochester to a negotiations meeting so the latter could provide details of how the pusher system functioned.

44. Except the language in the articles that the parties had already agreed to.

Martinez had given a lot. Although Respondent obtained the union security clause and the probation period it wanted, it still objected to the union hiring hall, the 60 day appeal period and no injunction relief for illegal strikes in the Grievance and Arbitration article, the requirement for a writing for all leaves of absence and the wording in the Seniority article.

As Barsamian had rejected the union's package offer, he decided to propose his own and with that purpose he and Martinez reviewed all the articles still not resolved.

Barsamian's package consisted of Respondent's own position on Union Security, Seniority, Grievance and Arbitration and Discipline and Discharge, a Health and Safety clause practically agreed to already by the parties, compromise language on the Leave of Absence Clause (extend leaves of absence of 3 days to steady employees for union business but limited to 10% of such crew at any one time) and a one year postponement of a hiring clause. It is obvious that such a package had no concession by Respondent on any major issue.

Barsamian pointed out that the hiring hall was still a major item to be settled. He suggested to Martinez that they might reserve that subject until the end of the first year of the contract. Barsamian told Martinez that since the latter had failed to submit a draft on a supplementary clause, it was impossible for him to agree to that article until he knew the contents of the supplement. Barsamian offered to agree to no more severe punishment for the leaders of an illegal work stoppage if the UFW would agree to the injunction provision in the Arbitration and Grievance

article. Barsamian still objected to the warning notice being part of the grievance systems.[45/]

The parties agreed to some changes in the Leave of Absence section so that employees could not take leaves during critical periods. The previous contract had not contained this restriction.

Barsamian asked whether the UFW still needed information and Martinez answered in the affirmative.[46/] Barsamian answered that the cantaloupe season was approaching and there would be no lettuce for a while so he had provided all the information he had available. The parties continued to work on the Health and Safety

---

45. If a warning notice were made part of the grievance system, an employee could appeal it through the different grievance levels and Respondent wanted to avoid putting the whole grievance machinery into operation for just one warning notice.

46. Barsamian testified that a short time after the April 27th meeting, at which time the UFW had learned of the dormancy, he and Martinez engaged in an off the record discussion during which Barsamian told Martinez he was expecting information requests on both "effects" bargaining for GHP and "contract" bargaining for GF and subsequently he had never received any information requests. He further testified that he considered the union's request for GHP information inapplicable to GF and therefore the question of a duty to provide information per Ann Smith's letter and subsequent requests about GHP operations was moot, However, additional testimony by Martinez and Barsamian makes this particular testimony by Barsamian suspect.

Martinez testified that at the June 30 meeting, Barsamian asked him whether he still needed information and he, Martinez, answered in the affirmative. Barsamian testified that at "the third meeting" he asked Martinez whether the union needed more information than was in Ann Smith's letter and Martinez answered in the negative. I find Martinez' testimony more credible not only as to the affirmative answer but also as to the date of the conversation. Martinez admitting that Barsamian manifested a spirit of cooperation by testifying that he inquired about the need for information makes his statement more trustworthy than Barsamian's self-serving remark. Moveover Martinez had noted down in his negotiation notes what was evidently Barsamian's comment at the June 30 meeting, "Information slowing us down, let us know if we need".

article and were coming very close to agreement.

July 21, 1981 Meeting

Martinez offered a new partial package (7 articles) proposal to Barsamian. it was similar to the previous two packages. The new feature was the union's abandonment of a hiring hall in its proposals and the substitution thereof of a field hiring system with application forms administered by Respondent but with advance notice of the UFW about prospective employment. Respondent would still secure a NLRB union shop and a probationary period and the UFW would prevail with respect to all leaves of absence in writing, no employer right to an injunction, a 60-day grievance appeal period, the warning notice part of the grievance system, and its own seniority provision. Martinez testified that the union was willing to cede on these three items in order to salvage some of the Sun Harvest and the previous contract language, and moreover, the parties would remove the language items from the agenda and they could then move forward to settling the economic matters. In connection with this latter purpose, Martinez offered an economic package based on Sun Harvest amounts but excluding wages.

Barsamian discussed both packages. He also did not think the newly proposed hiring procedure would work. Barsamian testified that with the new hiring procedure in the package, he was glad that Martinez had moved off dead center on that issue. He proceeded to explain to Martinez the reasons the new system would not work, e.g., the logistics of a high daily turnover would not fit in with a system of applications in the field. Barsamian did not outrightly reject the two packages but indicated he would not give a response

and in fact would prepare a complete counter-proposal.

Meanwhile the parties finished their negotiations on the Health and Safety article and signed off the language on such.

July 1982 - January 1983 Interval

There was no negotiations meeting until the following January. David Martinez was involved in a lengthy ALRB hearing, negotiations with other companies and he was expecting a counter-proposal from Barsamian all during these months as Barsamian had promised him at the July meeting. At the beginning of January, Martinez telephoned Barsamian and they scheduled the next bargaining session for January 12.

The January 12, 1982 Meeting

At the beginning of the meeting Barsamian pointed out to Martinez that he had not received a wage proposal from the UFW to go along with the two package proposals either at the previous July meeting or since. Martinez agreed and said that he would put it all together. Barsamian still had not accepted either of the two UFW package proposals.[47/] Barsamian delivered a written counterproposal of a contract to Martinez and they reviewed it together. Respondent maintained the same position on all the articles except two. Barsamian suggested that a warning slip would not be subject of the grievance but the warned employee could place his contentions in his personnel file. Barsamian also agreed that the life of a warning notice would only be effective for nine months rather than a year.

---

47. In the union's economic proposals, it had moved from its original 1979 stance to the compromise Sun Harvest figures while Respondent was still at its original 1979 position.

However, Martinez would still not agree to that as he wanted a shorter period of time. Barsamian suggested that if the UFW would consent to the right of the Respondent to obtain an injunction in respect to an illegal strike, he would agreed to a provision whereby the leaders of such a strike would not be more severely treated as other participants in the strike. There was still disagreements on the same provisions, e.g. leaves of absence in writing, injunction,[48/] 60 days appeal, etc.

Barsamian pointed out how the new hiring system proposed by the UFW was unworkable for the harvest workers but it could be for the steady workers. He suggested that in lieu of it GHP could provide the UFW with a list of the new employees within a week of hire, inform them of their obligation to join the union, and advise the union two weeks before a season starts. However, this signified a small concession on the part of GHP since Respondent had the duty to provide the union with a list of the newly hired employees according to the old contract and to notify these same employees of their obligation to join the union according to Respondent's impasse proposal. Barsamian reminded Martinez he wanted the seniority system in the body of the contract and not in a supplement and Martinez said he would attempt to do so. Martinez told Barsamian that he would be willing to consider a special rate for employees working on flat crops.

---

48. Martinez pointed out to Barsamian that GHP was entitled to an injunction by law. Barsamian agreed but said he wanted clear language to that effect in the contract.

The February 16, 1982 Meeting

Martinez read a proposal consisting of 25 articles both on economic and non-economic items including wages, emphasized the fact that it was not a package. He explained that since GHP had rejected the packages and was unwilling to accept previous contract or Sun Harvest language despite the union's major concessions, the union decided to utilize an alternative tack. The new proposal provided for the UFW to retain the union security clause with the ALRA definition of good standing and eliminate the probationary period in the Discharge and Discipline article. Martinez added that since they did not have the information for a wage offer as requested by Ann Smith, the union salary proposal was based on the economic provisions in the union's contracts with vegetable growers in the Salinas and Calexico areas. The union offer however retained the Limonaria language in respect to a hiring hall.

Barsamian pointed out to Martinez that the union had made no movement on union security since the NLRB language had only been offered in packages. Barsamian added that the UFW had never responded article by article to GHP's proposals. He also mentioned that due to the UFWs insistence on a September 1983 termination date, they were actually bargaining for a six month contract. Martinez replied that the union had already signed contracts with a duration of 6, 8 or 10 months. Barsamian asked Martinez whether he would be willing to accept a three-year proposal. Martinez said yes and Barsamian suggested that they end the meeting so he, Barsamian, could draw up a three-year contract proposal. Martinez agreed and the meeting ended.

The Interval Between the February 1982 and August 1982 Meetings

A few weeks after the February meeting Barsamian ran the union's latest proposal past Respondent's principals and they were not interested so Barsamian began to prepare a counterproposal.

On April 12, 1982, Martinez wrote a letter to Barsamian and pointed out to him that it had been two months since Barsamian had said he would prepare a three-year contract proposal and Martinez had not heard from him. In response to the letter, Barsamian contacted Martinez and they agreed to a negotiations meeting on May 11 or 12. However, Martinez had to postpone the meeting because the union president assigned him to attend negotiation meetings with a company the union had been boycotting for three years. He so notified Barsamian and they decided to meet May 18. However, Martinez had to cancel the meeting since he had to travel to Texas because his father was gravely ill. Upon his return, Martinez turned over the negotiation chores to Arturo Mendoza and notified Barsamian of the changeover. In July, Barsamian wrote a letter to Mendoza acknowledging the notification. Barsamian testified that when he learned of the new negotiator he thought that what he had planned with Martinez was pretty much "out the window". He had intended to get back to Martinez and reach a short duration agreement at least on the language with an economic reopener one year hence so that they would not have to negotiate a whole new contract.

August 3, 1982 Meeting

Barsamian and Martinez reviewed each party's respective proposals to determine which articles had been agreed on and which

had not. Barsamian admitted to Mendoza that he owed him a proposal. However, Mendoza advised Barsamian not to make any counterproposals based on Martinez' proposals. Mendoza explained to Barsamian that he had not yet met with the employees, but that he would do so in a couple of weeks. At that time he would send in a new request for information and a new proposal. Barsamian testified that he assumed the new proposal would be based on the language the UFW had agreed to in its new contract with Sun Harvest. Mendoza explained to Barsamian that since quite a bit of time had elapsed since the last UFW offer, that he would have to make some changes in the proposals. Barsamian became upset and asked Mendeoza whether that meant Mendoaz would reneg on articles that Martinez had already agreed to. Mendoza assured Barsamian that he did not intend to.

In respect to Martinez saying he planned to send a new request for information, Barsamian reminded Mendoza that it was summer and the secretaries were on vacation so that it would take several months to compile the information. The meeting ended.

The Events Posterior to the August 3, 1982 Meeting

On August 9, 1982, Barsamian sent a letter on behalf of GF to Mendoza which confirmed the negotiation session of August third and listed the names of the articles agreed to and not agreed to. In his letter Barsamian expressed his apprehensions about Mendoza considering to reopen articles already agreed to and strongly advised Mendoza against such action and in effect warned Mendoza that if he attempted to do so, such attempts would be met by unfair labor practice charges and any other action deemed necessary to cause the union to negotiate in good faith.

On August 9 Barsamian sent another letter on behalf of GHP offering to negotiate on the effects of the closure.

On August 12 Mendoza sent a letter to Barsamian requesting the latter to clear up the question of successorship and informed Barsamian that the Union was hopeful that GF would agree that it was the successor so the parties might enter into meaningful negotiations. Mendoza added that if GF would not so agree that the union would have to initiate legal action.

On November 18, 1982, Mendoza sent a complete contract proposal to Barsamian which consisted of a few changes in the union's previous February 16, 1982 proposal. The changes had to do with articles: Grievance and Arbitration, RFK Medical Plan, JDLC Pension Plan, Submitting Reports, Dues and Contributions, Cost of living, Duration and Wages.[49/] In describing the February 16 proposal, Mendoza in a adjective clause wrote "which you have not responded to yet".

In his November 23, 1982 reply letter, Barsamian picked up on that remark and treated it as if it were an accusation of intentional delay on his part. He pointed out to Mendoza that he need not remind him of the changed dates and cancelled meetings caused by Dave's personal situation. He went on to say that he found it quite perplexing that Mendoza was expecting a counterproposal to the union's February 16th proposal because Dave

---

49. The most salient features of the new proposals were the increase in the employer's contributions to the fringe benefit funds and the loser to pay the arbitrator's fees. Mendoza explained to Barsamian the reason for the increase in contribution was because with the passage of time since the last proposal the costs had risen for the benefit plan.

Martinez had asked for a contract proposal with a specific duration that would expire in September 1982. Barsamian reminded Mendoza that he had stated quite clearly at the August meeting that he, Mendoza, would make a proposal around the first of September and he had failed to do so. There was no response to the UFW's proposal or request for bargaining session dates, although Barsamian said he would contact Mendoza about future scheduling.

Barsamian failed to follow up on his comment in the letter that he would be contacting Mendoza about future bargaining sessions.

On February 4, 1983 Mendoza met with Barsamian to negotiate contracts for Saikhon, Lu-Ette and Pricola. Mendoza queried Barsamian, "What are we doing on GF?" Barsamian replied he would let Mendoza know in 2 weeks. Mendoza did not hear from Barsamian until April 4, 1983 when the latter telephoned him, mentioned the imminent hearing in the instant case and wanted to discuss the question of successorship.

ANALYSIS AND CONCLUSION

Although negotiations commenced on October 30, 1980 and continued through a total of 12 bargaining sessions until August 3, 1982, they proved fruitless.

When, as here, the employer engaged in a lengthy series of negotiation meetings, which achieved only agreement on matters of lesser importance, 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.

Respondent's position is that it bargained in good faith since it periodically met with the union and discussed in detail contract articles and reached agreement on many of them. However, I find that Respondent only reached an accord with the union on relatively unimportant issues and steadfastedly refused to vary its position on any of the important items as its actual purpose in participating in periodic negotiations was to engage in the forms of collective bargaining but without the substance or a sincere desire to reach an agreement.

An overall assessment of the bargaining process over a *2* ½ year period clearly indicates that the union was making the movements, demonstrating flexibility and providing alternative proposals while Respondent literally sat back and played it cool by agreeing through time consuming compromises on relatively unimportant items but steadfastly holding firm on the important issues without suggesting any alternatives. Regardless of Barsamian's alleged aversion to package deals, it was the union that was offering a number of variations on the substantial issues while Respondent remained static on every one of the important items be it hiring hall, union security, probation period, etc. Of course during the seemingly heavy bargaining in the Spring and Summer of 1981 Respondent and the union were agreeing and signing off numerous articles; but they were on subjects of lesser importance, many of them because of the original language of the respective 1979 proposals were identical and virtually all the rest because the

union conceded to something Respondent insisted on. There were only a few instances where an agreement was reached by mutual compromise and there was virtually no instance where Respondent gave in completely on an article.

At the April 15 meeting, the UFW offered a package that would concede to Respondent the NLRB version of a union shop and a five-day probationary period for new employees but retained a union hiring hall with compromise Sun Harvest language on the remaining 8 articles. Respondent rejected it and failed to offer a different variation or any movement on any of its positions in respect to the subjects included in the package.

At the June 30, 1981 meeting the UFW offered another package proposal similar to the April 15 offer regarding the union shop, probationary period and hiring hall, but with another variation of the remaining articles. Respondent rejected this offer.

Then on July 21 the UFW presented a package that even Barsamian admitted "they were ceding a lot". The union went along with Respondent on the latter's version of the union shop and a five-day probationary period but it abandoned its insistence on a hiring hall and offered a hiring system operated by the employer but with some union input. Included in the new package were additional articles upon which the union offered compromise Sun Harvest language. Barsamian rejected the package and specifically the new hiring system because as he explained to Martinez at the negotiation session it would not work at Respondent's . Barsamian made no counterproposals at the meeting but as the meeting ended he said

that he owed the union a proposal and promised to submit one. Six months passed with no meetings and no proposal forthcoming from Barsamian.

Respondent's rejection of all three of the UFWs package proposals, its failure to offer any alternatives and its delay for six months in presenting a counterproposal is eloquent proof of its negative attitude toward negotiating with the UFW. The concessions in the three package offers, in the Spring and Summer of 1981, clearly indicated that the union was very favorably disposed to reach a contract on reasonable terms and the Respondent declined to capitalize on such a state of affairs. Rather, it turned the offers down and then prolonged its response for 6 months.

In his January 1982 response Barsamian virtually repeated Respondent's 1979 position on the articles left to be decided. Barsamian did provide an alternative to the hiring system however it signified very little movement by Respondent since it was virtually the same provisions as in the parties' previous contract and Respondent's impasse proposal. He had two other suggestions but they were of a minor order.[50/]

At the next meeting in February 1982 the union changed its tack and made two separate proposals, one non-economic and the other economic. Neither of the two was a package, so the union changed its positions on some articles, i.e., union security because without the advantage of a trade off provided by the package approach, the

---

50. A warning notice would not trigger the grievance procedure but an employee could place his version of what happened in his personnel file and the leaders of an illegal strike would not be more severely punished than other strike participants.

union was unwilling to concede on each issue individually. Nevertheless on the major issue, the hiring system, it continued to offer Limoneira language (the employer in charge of hiring with same safeguards for the union against descrimination in hiring.)

Barsamian made no counter offer but rather pointed out the union's shortcomings is not responding article by article to Respondent's proposals and that in reality the union had made no move on union security because because it had only offered NLRB language in packages. Since the UFWs proposed termination date was only 6 months away, Martinez indicated to Barsamian that he would be willing to accept a three-year contract and so it was decided to end the meeting so Barsamian could draw up a three-year contract.

Barsamian did not submit the promised three-year proposal. In April the UFW contacted Barsamian about the proposal and a meeting. The parties agreed to meetings in May but they were postponed because of the unavailability of Martinez, the UFW negotiator. In June Mendoza replaced Martinez and in July contacted Barsamian about a meeting and they decided to meet in July in the first part of August. During the entire interim period, Barsamian failed to present the three-year contract proposal that he had promised at the February 16 meeting.

The August 3 meeting took place and Barsamian still had not presented the three-year contract. Barsamian and Mendoza reviewed the parties' respective positions. Mendoza suggested that since so much time had passed since the UFW's last proposals that he, rather than Barsamian, would prepare a three-year contract proposal.

At the August 3 meeting and later in an August 8 letter

Barsamian warned Mendoza against reneging on any articles already agreed upon because any attempts to do so would be met with the filing of unfair labor practice charges.

On November 18 Martinez sent a complete contract proposal to Barsamian which was by and large the same as its February 16 1982 proposal in many respects. In the cover letter, Mendoza referred to the February 16 proposal and in describing it added an adjective clause "which you have not responded to".[51/]

Barsamian in his response to the UFW's complete proposal and the cover letter made no response to the union's suggested dates of the week of November 30 or December 6 for the next bargaining session other than commenting that he would contact Mendoza about future scheduling. In the letter, he mainly defended himself with respect to Martinez' comment that he had not responded to the UFW's February 16 proposal.

I find Respondent's behavior from January 1982 to the date of the hearing a continuation of the same surface bargaining and dilatory tactics as previously found.

Once again Respondent made no counteroffers on any important subject, remained steadfast to virtually all of its positions of 1979 and promised a complete counterproposal which it never produced. To this array it added another tactic of diversionary antics such as criticizing the union for bargaining

---

51. Mendoza admitted in his testimony that it was a mistake for him to have added the clause because its contents did not reflect the true situation at the time since the UFW's February 16 proposal had been long superseded by subsequent negotiations between the parties.

shortcomings with little or no support in fact: the union not responding to the Respondent's January 1982 proposal (virtually the same 1979 stance), the union not making any real movement on union security (highly ironic considering the employer never made any major movement on any article, including union security, where in fact the employer had agreed to the ALRA good standing union security clause in the previous contract) the union attempting to make changes in articles already agreed upon, and the union representative unfairly accusing its representative Barsamian of intentionally delaying the bargaining process.

There is a duty on the part of the employer and the union to engage in bargaining with a "sincere" purpose to find a basis of agreement".[52/] There is no necessary inconsistency between hard bargaining and an effort to reach an agreement. Nevertheless, "the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all".[53/] The hard bargainer, while firm, not only will discuss but will vary the terms of its proposals so long as it doesn't undermine his lawful objectives. In the instant case the Respondent descussed but rarely varied the terms of its proposals. The only understandings Respondent agreed to during the over two years of negotiations were with respect to minor subjects. Those agreements do not indicate

---

52. See N.L.R.B. v. Herman Sausage Company, Inc. (1958) 122 NLRB 168 [43 LRRM 1090], (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2929].

53. Kayser Roth Hosiery Company, Inc. v. N.L.R.B. (6th Cir. 1970) 430 F.2d 703.

any spirit of compromise or desire to resolve differences.

It was not necessary for Respondent to consent to a hiring hall; it was not necessary for it to agree to improvements in fringe benefits, it was not necessary for it to agree to the union's version of "Discipline and Discharge" but where as here Respondent offered virtually nothing whatsoever that was attractive to the union, steadfastly held to its positions on the major issues and prolonged the intervals between bargaining sessions for months on end by not producing complete contract proposals as it had promised, it is evident that it was not seeking to reach an accord on a collective bargaining agreement with the union.[54/] The ALRA imposes an obligation on an agricultural employer to make some reasonable effort to reach an agreement with the Union. The negotiations here were essentially meaningless. Respondent's approach to the

---

54. In January 1981 Barsamian promised a complete contract proposal to Ann Smith. When the parties resumed negotiations on March 31, 1981, he had prepared no proposal as promised in the interim. At the end of the negotiations in July 1981, he promised a complete contract proposal. When the parties resumed negotiations in January 1982, he had prepared a proposal but did not deliver it to the UFW until the day negotiations resumed. At the end of negotiations in February 1982, he promised a complete contract proposal. When the parties resumed negotiations in August 1982, he had prepared no proposal as promised in the interim. In view of Barsamian's promised counterproposal, it is understandable why the UFW would not be contacting Barsamian for future negotiation meetings since they considered that the next move would be his. On each occasion after some months had passed, it was the union who contacted Barsamian to resume negotiations. (The one exception was in March 1981 when his and Ann Smith's letters crossed in the mail.) Accordingly, I find that Respondent was responsible for the delays and thus these periods of time are included in the overall period of bad faith bargaining. Also, see M. H. Ritzwoller Company v. N.L.R.B. (7th Cir. 1940) 114 F.2d 432 (6 LRRM 894) which states that even though the law places the burden on the union to initiate the bargaining process with a request to the employer, the latter cannot sit passively by and force the union to continually renew its requests to meet and to move bargaining forward.

negotiations was to reduce its obligation to bargain in good faith to a mere formality and to the observance of procedural requirements.

Surface bargaining is the antithesis of collective bargaining and is contrary to the Act's fundamental tenet of "encouraging the practice and procedure of collective bargaining". Respondent's unlawful conduct in this regard was aggravated by its refusal to furnish the union, upon its request, information which was relevant and necessary in order for the Union to engage in effective negotiations. Further unlawful conduct on the part of Respondent was its delaying tactic of spending an inordinate amount of time to reach agreement on minor issues and to engage in unfounded criticism of the union's conduct of the negotiations. Underlying Respondent's attitude towards the negotiations was an intention to discourage the employees in their expectations that they would receive improvements in the terms and conditions of their employment through the representation of the Union. This attitude toward the union was eloquently manifested by Respondent's cavalier treatment of the union in regard to its failure to inform the union representatives that GHP had gone dormant some months before and to carry on negotiations in the name of a firm that was no longer functioning. I find that by engaging in surface bargaining, by unreasonably delaying in making timely or adequate proposals or counterproposals, respondent has violated Section 8(a)(l) and (5) of the Act.

It has been alleged in the complaint and litigated at the hearing that the period of Respondent's bad faith bargain continued

after the December 7, 1979 date before which the Board has already found Respondent guilty of bad faith bargaining.[55/] Respondent must bear the responsability for the delay from December 7, 1979[56/] until the UFW contacted Respondent and suggested that the parties meet. Since Respondent has done nothing to break with its past unlawful conduct, I must find that it continued to bargain in bad faith during this period. Its conduct did not "represent a substantial break with its past unlawful conduct on the adoption of a course of good faith bargaining."[57/]

Now in respect to the allegations with regard to Respondent's per se violation of Section 1153(e) of the Act by not providing the union with the information it requested.

Even since the parties commenced to bargain in October 1980 the UFW has repeatedly requested certain basic information about Respondent's personnel and operations. Two years later in November 1982 when negotiations broke off Respondent still had not provided the union with the information requested.

Respondent contends that certain information requested by the UFW regarding projected crops and locations was not relevant for bargaining purposes. However, it has been a long standing rule with the NLRB that a union is entitled to information from an employer

---

55. The exact wording was that Respondent delayed bargaining for over a year.

56. Respondent has previously been found to have refused to bargain on a continuous basis from February 1979 to December 1979. (See Admiral Packing (1981), supra.)

57. See Joe Maggio, Inc., Vessey & Co., et al. (1982) 8 ALRB No. 72.

that it needs in order to prepare its bargaining proposals. In fact the ALRB, following the NLRB precedent ruled in the Lu-Ette Farms [58/] case that the identical information described in the same terms in Ann Smith's letter was needed by the union and therefore the employer had the duty to provide necessary information.

Respondent argues that it had a valid reason not to deliver the information about the names and addresses of its employees and the location of the fields because this data could be used to harm and intimidate its current employees at Respondent and disrupt the operations. However, Respondent to substantiate this reason could only point to the violence in the 1979 strike. To assert this reason for not turning over requested and needed information for bargaining in December 1980 and in March of 1981, [60/] when Respondent informed the union that this was its reason for its too remote in time to be *a* legitimate defense.

Respondent further argues that beginning in May 1981 neither of the two UFW negotiators, Martinez, or Mendoza renewed a request for information. However, not only did the union renew its request for information at the December 15, 1980 and March 31, 1981 meetings and by letter on March 14, [16/] but contrary to Respondent's assertions, at the May 4 and June 30 meetings. At the May 4 meeting

---

58. Lu-Ette Farms (1982) 8 ALRB No. 55.

59. Shell Oil Co. v. N.L.R.B. (9th Cir. 1972) 457 F.2d 615, 79 LRRM 2997. The court held that a valid defense must be based on a clear and present danger of violence.

60. Under section "A. Facts" I decided that the facts do not support Respondent's contention that the UFW only made requests to GHP for information and not to GF.

the UFW in addition to an oral request, also put it in writing. At the June 30 meeting, Barsamian asked Martinez whether he still needed information and Martinez answered in the affirmative.

Another argument by Respondent is that Respondent had no information available at the times of the union's request since it was between seasons. Of course, this is not a valid defense because the union's request for information applies not only to information that the employer presently possesses but to any information that comes into his possession subsequent to the request. Furthermore, in March 1981 Barsamian declined to provide information claiming there was not much activity at Respondent's. However, in March there was activity: i.e. the asparagus season would end in a week or two and the onion harvest would begin in April and the garlic harvest season in June.

There were no negotiation meetings between June 30, 1981 and January 11, 1982. The UFW failed to make any additional requests for information at the meetings in January and February 1982. At the next meeting in August 1982, the union negotiator Mendoza informed Barsamian that we would be making a request for information in the future. However, he failed to do so and sent Barsamian a complete contract proposal in November 1983 just before the negotiations broke off.

In light of the above I find that Respondent is guilty of a per se violation of the Section 1153(e) and (a) of the Labor Code by not providing the UFW with the requested information.

VII. Alleged Discrimination Against Crew No. 1

A. Facts

Abelardo Varela was the foreman with the most seniority at Respondent Gourmet Harvesting and Packing Co. and previous to its inception for Harold Rochester, when the latter was operating a custom harvesting business. Fernando Flores had also worked as a foreman for Harold Rochester and later for Gourmet Harvesting and Packing but had gone to work for Rochester later than Varela.

Harold Rochester and Alfredo Medrano both testified that Respondent had no formal seniority system with respect to foremen or harvest employees[61/] but they always gave preference to the foremen who had worked at Respondent's the longest with respect to recalls and layoffs. So in effect the only seniority benefits an individual employee would enjoy would be as a member of a crew whose foreman had a certain seniority.

In 1979, the UFW, the certified representative of Gourmet Harvesting and Packing agricultural employees called a strike and Abelardo Varela and his crew[62/] observed the strike and did not work at Respondent's during the entirety of 1979. The other crews under their respective foremen, including Fernando Flores, continued to work at Respondent throughout the strike. Varela testified that before the strike he and his crew had first priority with respect to recalls. According to Respondent's own records that preference ended

---

61. The reason for no seniority for individual employees is that there is a tremendous daily turnover of harvest employees.

62. The names of some of the employees in Varela's crew in 1979 were: Roberto Medina, Victoriano Ochoa, and Juan Partida.

with the 1979 strike.[63/]

The system utilized at Respondent's in respect to recalls was as follows: The foremen would come to Medrano's residence at the beginning of each season and find out the exact date Medrano would need them and their respective crews to report to work. The one exception was Abelardo Varela. At the start of each season Medrano would contact him by telephone or go personally to his house.

In the 1980 and 1981 asparagus and onion harvest seasons and the autumn thin and hoe seasons Respondent first recalled the Flores[64/] and the Vadillo crews and then the Varela crew with the exception of the 1981 onion harvest when the Varela crew was the eighth crew to be recalled but it was only 8 days after Flores and three other crews began to work.

In April 1981 Varela testified as Respondent's witness at an ALRB hearing and admitted that Medrano had instructed him not to recall two of his crew members because of their union activities. In August of the same year the Administrative Law judge issued a decision finding that Respondent had been guilty of an unfair labor practice based largely on Varela's testimony. Respondent appealed the decision to the Board.[65/]

---

63. G.C. Ex 82 indicates that after the 1979 strike, Respondent relegated Crew No. 1 to third place or an even lower priority in regards to recalls.

64. Flores testified that since the 1979 strike his crew was No. 1 in respect to recalls as Respondent appreciated his staying on the job during the 1979 strike.

65. On September 27, 1982 the Board issued its decision affirming the ALO decision. See 8 ALRB No. 67.

The Varela crew began the 1981 thin and weed season at the same time as the Flores crew but worked a shorter time.[66/]

In the 1982 asparagus harvest season Respondent recalled Varela's after Floras' and Vadillo's crews. Toward the end of the season, Medrano decided to switch Varela's crew, who had finished their assigned field for the season, over to a field where Vadillo's crew had been working during the season. Medrano stated to Mendez at the time and also in his testimony that his reason for doing so was to give Varela's crew more work as Varela had more seniority than Vadillo.

The following day Varela's crew replaced Vadillo's in the field where Vadillo's crew had heretofore worked. Before the switch Varela's crew had worked under one area supervisor and since Vadillo's crew's field was in another area the Varela crew came under the supervision of Fidel Mendez, an area supervisor, for the first time that season. During the day's work according to Mendez' testimony he observed on three occasions that Varela was standing some distance away from the edge of the fields shouting in a loud voice to the burrero's[67/] to call out to him the number of boxes picked and did not approach the boxes to inspect them personally to check on quality, quantity, etc. After the third time he notified Medrano of Varela's lack of diligence in his work. At the end of

---

66. Varela crew member Roberto Gomez credibly testified that Varela's crew only worked three weeks in the weed-and-thin crew season and were laid off while the Flores crew continued to work.

67. Each crew of approximately 25 to 35 harvesters is divided into "burros" of 5 or 6 smaller groups. The cutters place the asparagus in rows for the burrero who picks up the spears, places them into boxes, and takes them to the edge of the field.

the work day, Medrano, in a very angry manner, reprimanded Varela telling him that he was not inspecting the boxes; that the boxes were not being filled enough; that the asparagus were not packed properly and that he wanted corrective action. Varela replied that what Mendez had told Medrano were lies and if Medrano believed those things it would be better for him, Varela, not to return.

At the end of the day Medrano, Mendez, the foremen and crews in that area traveled to a meeting place just outside of the town of Heber where Medrano paid the daily wages to the crew members. En route in Crew No. 1's bus Varela explained to his crew that Medrano had criticized him very harshly for his supervision of the crew that day, so much so that he was not going to return the next day. The crew assured him that if he did not return to work, they would not either.

Medrano, Mendez and Vadillo all testified that after Medrano paid off the crew members at the meeting place, they overheard Varela say to his crew seated in the bus "We've been fired". Medrano and Mendez testified that they had not fired the Varela crew nor had they informed Varela that the crew had been fired. However, neither of them made any comment to Varela or any member of his crew that Varela's remark to the crew that he and the crew had been fired was incorrect.

Medrano told foreman Vadillo to check with him the next morning because according to Medrano's testimony he had doubts due to Varela's comment about being fired that the Varela or his crew would report for work. Vadillo checked with Medrano the next morning and since Varela nor his crew had shown up for work Medrano

assigned the Vadillo crew to their old field.

Respondent harvested its onion crop in April and May 1982 and its garlic crop in June with crews other than Varela's as Medrano did not contact Varela as in previous years about working those harvests. Medrano also failed to contact Varela for the thin and weed season in the fall of 1982[68/] but some of Varela's crew members secured employment on some of the other crews. Raul Cuen, one of the Varela crew members, who had secured employment at Respondent's during the thin and weed season asked Medrano when was he going to recall the Varela crew. Medrano answered that he would not do so since the Varela crew members were jokers and Chavistas. He added that he would hire the crew if Varela came to his place to ask for work but he would not go to Varela since to do so would give Varela an exaggerated sense of his importance.

During January 1983 Varela went with two crew members to Medrano's house and asked him for work in the asparagus harvest. Medrano told them to check back later. Approximately one week later Varela checked back with Medrano and since there was an opening for a new crew the latter put Varela and his crew to work the next day.

Varela's crew worked for approximately one month harvesting asparagus without incidents and were compensated on an hourly

---

68. Medrano testified that the reason he did not contact Varela regarding these seasons was because Varela had told him he did not want to return to work. However, my interpretation of the facts is that the only time Varela said anything of this nature to Medrano was when at the end of the last day his crew worked in the 1982 asparagus harvest Varela complained to Medrano about Mendez' and Medrano's harsh criticism of his supervisory work that day and it would be better for him not to return.

basis.[69/]

At the beginning of March Respondent switched the crews from an hourly to a piece rate. Medrano assigned a new checker, Rodolfo Castillo, to crew no. 1 and relegated the previous checker Haul Cuen to the position of a cutter. Medrano decided to make the change without consulting Varela but did inform him of his decision before implementing it. Medrano testified that the reason that he made the change of checker was because he did not like the work Cuen was doing in the 1982 season so he decided to replace him in the 1983 season. Flores credibly testified that it is the foreman who decides who his checker will be.[70/] Cuen testified that during the three years of his checker work neither Medrano nor any supervisor or foreman had criticized his work. He added though that in 1982 Varela had on several occasions pointed out to him that his work was not good and he should pay more attention.

Robert Medina credibly testified that on the first day of the piece rate work Medrano told him and his fellow crew members that he had really maltreated them by assigning them Castillo as a checker.

The new checker, Ruben Castillo, did not remain at the edge of the fields to check the boxes. He entered the field and constantly reprimanded the cutters about the cutting of the asparagus and the correct length and the burreros about the packing of the boxes. Many of the crew members complained to Varela about

---

69. Respondent paid crews time and a half for Sunday work.

70. Flores testified that he had designated his wife as his checker.

Castillo's conduct. Varela told them to bear with the new checker and to continue to work. When a few of the crew members complained to Castillo, he replied that he was just following Guzman's and Medrano's orders.

Cuen testified that it was not the checker's duty to go into the field and supervise the cutters. The checker's duties were to check the boxes for size, fullness, etc. and to only give directions to the burreros. Respondent failed to present any evidence to offset this testimony and in fact its witness foreman Flores confirmed it.

Jesus "El Perro" Guzman, the area supervisor spent an inordinate amount of time supervising Varela's crew.[71/] He criticized Varela about the size of the asparagas, so much so, that Varela brought a tape measure to the field to measure the asparagas in an attempt to convince Guzman they were the correct size.

Varela testified that ever since the strike, Medrano was very demanding regarding the crew's work and continually hassled him about the crews performance despite the fact the crew was doing its work correctly. Ever since Crew No. 1 returned to work in 1980, after the 1979 strike, Medrano has been treating its members with disrespect, mocking[72/] them and insulting them with contemptuous and

---

71. Not only did the crew members who only worked in Varela's crew testify to Guzman's near constant presence but also a Varela crew member Jorge Ocegueda who worked in Flores crew for one week testified that he noticed that Guzman, who had the same duty to supervise the Flores crew spent very little time with the Flores crew and was a constant visitor to the Varela crew.

72. Medrano testified that his so-called mocking comments were uttered in jest. I discredit this testimony as I found his comments, at best, to have been negative and sarcastic.

vulgar epithets. The verbal abuse occurred on a regular basis at the end of the work day when Medrano paid the daily wage to them.

During the 1983 asparagus harvest season Gomez taped some of Medrano's remarks to the workers on a cassette which he carried concealed in his shirt pocket. The words on the cassette were authenticated, played and translated at the hearing herein and they substantiated the testimony of the crew members about Medrano's vulgar language and his derisive attitude toward them but not the fact that Medrano would refer to the crew members as Chavistas. On one occasion during the 1983 asparagus season, Medrano told Roberto Gomez, who was wearing two UFW buttons on his cap, to take them off, and that the union was not worth a damn.

During the 1983 asparagus harvest Gomez and Medina protested to Medrano about paying very low wages. Medrano reacted by telling them to go to hell and added that he would pay them what they earned and they could do anything about it that they wanted. On another occasion when Gomez and Medino requested a pay receipt from Medrano for wages earned which they needed to show immigration authorities to maintain their immigration status current Medrano complied but told them that he hoped that they would be deported.[73/]

Foreman Abelardo Varela and checker Raul Cuen and crew member Roberto Gomez testified that Respondent assigned Crew #1 a below average field for the piece rate asparagas harvest work in 1983. They explained because of the abundant grass and weeds it was

---

73. Crew member Roberto Gomez testified in detail about Medrano's mistreatment of the crew members. I found him to be an excellent witness. I was favorably impressed by his sincere manner and his obvious effort to be accurate in all his testimony.

very difficult to harvest the asparagus and consequently the crew's earning were adversely affected. Rochester admitted that at the end of the harvest season Respondent disked the field under because a noxious weed had overrun it. Rochester testified that it was an exceptionally good field (only 4 years old, while the average life of an asparagus field is 10 years) but the noxious weed had reduced its production but only to the point that it yielded an average amount of asparagas. Varela testified that the previous year his crew had harvested two fields one of which was this year's field #46, on a piece rate basis. He added that in the current year Crew #1 had harvested two fields on an hourly basis #46 and #175 and the latter was a good field but Respondent did not want crew #1 to work it during the piece rate period of the harvest and let crew #1 just work field #46. The piece rate production records confirm Varela's and Cuen's testimony that #46 was an inferior field. During the piece rate work in March Flores' crew enjoyed the highest earnings 22 out of 24 days of the season and 2nd best the 2 other days while Varela's crew was second twice, third 6 time, fourth six times, fifth six times and sixth four times.[74/] Furthermore the photographs, GCX, 22 through 29, confirm Varela[1]s, Cuen's, and Gomez' descriptions of the fields.

Several members of Crew No. 1 testified that on Sunday February 20, 1983 Respondent laid them off and that another crew harvested the field that they had been harvesting before and after that date. On Saturday Crew No. 1 harvested asparagas in field #46

---

74. 74.During the first part of March, there were five crews doing piece-work and during the latter part 6 crews.

for three hours and in field #175 for 3½ hours. Flores' crew harvested in field #175 for 1 hour and 6 hours in three other fields. On Sunday February 20 no crew harvested field #46 and the Flores crew harvested field #175 for 3 hours and harvested other fields for 3½ additional hours on Sunday February 20. Two other crews worked for five hours and 5½ hours respectively harvesting in their customary fields and a fifth crew did not work at all. On Monday Crew No. 1 worked two hours in field #175 and 4½ hours in field #46. All the other crews continued working in their customary fields.

Medrano testified that the reason Respondent did not recall Varela and his crew sooner during the various seasons in 1980 and 1981 was because Varela was engaged in work elsewhere. Medrano was not clear in his testimony whether Varela was working at Respondent's in non-harvest work or traveled to Sonora and/or Coachella for work. According to Medrano, he would go to Varela's residence in Calexico to notify him about work but only to find that he was not at home.[75/]

Area supervisor Mendez testified that Varela told him that he, Varela, traveled to Sonora and to the Indio-Coachella area, that he had gone to work in Coachella and three years ago had moved to Coachella.

---

75. In his testimony Medrano did not provide any details as to the particular season he went to Varela's home. Moreover Varela credibly testified that during the time he was in Sonora or Coachella in 1982 his mother-in-law continued to live at his Calexico residence and she did not inform him that Medrano had come to the house looking for him.

Both Medrano and Mendez further testified that Varela would comment that he did not want to work too long because the more time he worked the higher would be his house payments.[76/]

Varela admitted that he traveled to Sonora and in fact went every summer and spent 45 to 60 days during July and August during a period when there was no work at Respondent's. In 1982 after the asparagus season, Varela not hearing from Medrano about the onion season, decided to seek work in Coachella harvesting grapes. He did not want to approach Medrano about returning to work at Respondent's because he resented the way Medrano had treated him at the end of the 1982 asparagus season. Varela worked in Coachella from June 1 to July 7. Varela also testified that he rented a house in Coachella and lived there in November and December 1982. He thought he would secure work in the area but he was unsuccessful.

Furthermore, foreman Fernando Flores, a witness for Respondent, testified that all he knew was that Varela went on his vacation to Sonora and once Varela told him that he had gone to Coachella to work in the grapes.[77/]

---

76. I have serious doubts about the veracity of Medrano's and Mendez' testimony on this point since Varela's crew worked in the onion and garlic seasons in 1980 and 1981 which follow the asparagus season so it would not make sense for Varela to want the season to end soon since his crew would return shortly for the onion and garlic season. Varela denied making any such statements to Medrano and Mendez and credibly testified that although he was making mortgage payments on his house, and they varied, the only time he had to submit information regarding his earnings was when he first purchased the property.

77. I credit Varela's version regarding his trip to Sonora, his work in Coachella, in every respect. Varela testified in a straightforward and sincere manner and readily admitted vacationing in Sonora and working and residing in Coachella. On the other hand, Mendez and Medrano were generally vacilating and vague in their testimony in this area.

During the hearing the Varela crew worked at Respondent's planting asparagus plants. During the same period of time, the Floras and Vadillo crews were working *at* Respondent's harvesting onions. On May 7, Medrano laid off the Varela crew as there was no more asparagus planting to be done. The Flores and Vadillo crew continued to work for a few additional days but then Respondent laid them off because of the drop in the market demand for onions. Medrano testified that in the event there was work for three crews.[78/]

Foreman Varela and Medina, Gomez, Cuen and Partida, all members of the Varela crew testified at the hearing herein on May 5. On May 8, the day after asparagus planting ended, Varela went to Medrano's house to see about more work for the crew. According to his testimony he asked Medrano whether the crew was going to work the following Monday and Medrano replied that he, Varela, could do whatever he wanted to from then on because there was no more work for them, the crew was giving the company problems and that is what he had been told at the company and the crew could go to hell. Medrano added that he hoped that he and Varela could continue to be friends.

Varela concluded from Medrano’s words that he and the crew had been fired. Varela further testified that Medrano told him that he had asked Varela many times to terminate Medina, Gomez and

78. From Medrano's testimony it is evident that at the time of the hearing herein he considered the Varela crew third in seniority following the Flores and Vadillo crew in that order.

Ochoa[79/] but that Varela did not comply and when he told Flores to let a worker go, Flores would do so immediately and there were no problems. Varela answered that he was leaving and would communicate the news to the crew the following day, which he did at the pickup point in Calexico. Medrano in his testimony denied ever making those comments to Varela and contended that he told Varela that the work had ended for the time being and he would be in contact with him in the future.

B. Analysis and Conclusion

General Counsel has presented evidence that demonstrates that since the 1979 strike Respondent has engaged in discriminatory treatment of the members of Crew No. 1 because of its union activities and participation in ALRB processes.[80/]

There have been various manifestations of disparate treatment over the years, some of them constant and some varying.

The most constant manifestation has been Respondent's demotion of Varela's crew from number one priority to a third position behind the Flores and Vadillo crews because of their participation in the 1979 strike. Respondent's conduct in this

---

79. In a previous case, the Board found that Medrano had instructed Varela not to rehire Ochoa because he was a union advocate and the union was giving them problems. A few days after giving these instructions, Medrano relented and told Varela to rehire Ochoa since the company did not want any problems.

80. I do not devote any lines to the listing of the factors of circumstantial evidence, as is usually found in discrimination cases, such as the employer's knowledge of union activities etc. because it is beyond dispute that Respondent knew that Varela's crew went out on strike in 1979, that Varela provided damaging evidence at the 1981 ALRB hearing, and that Gomez and Medina protested to Medrano about wages and/or working conditions to general foreman Medrano during the 1983 asparagus season.

regard is clear from the record as Respondent's own witness, foreman Fernando Flores testified that his crew enjoyed top priority after the 1979 strike because Respondent was greatful for him and his crew working throughout the strike. Respondent's records also confirm the fact that Varela's crew was relegated to third place in regards to recalls during the years 1980, 1981, 1982 and 1983.

Respondent's treatment of the Varela crew has varied from a mild form of harassment and mistreatment in the years 1979, 1980 and 1981 to an accentuated form of harassment and maltreatment during the 1983 asparagus season.

It is interesting to note that in April 1981 Abelardo Valera testified at an ALRB hearing and because of his testimony, admitting that General Supervisor Medrano had ordered him not to hire Victoriano Ochoa a union activist, an Administrative Law judge found Respondent guilty of an unfair labor practice in a decision that was issued in the fall of 1981. During the subsequent weed-and-thin season, Respondent laid off Varela's crew after only three weeks of work while Flores crew finished the season.

In 1982 Varela's crew did not work until the end of the asparagus season because Varela and his crew refused to continue to work because of Medrano's criticism of Varela's supervision of the crew's work. In fact, Varela's crew did not seek work[81/] or were they called back to work at Respondent's until the 1983 asparagus season when Varela requested to return.

---

81. Some of the members of Crew No. 1 sought and secured work on an individual basis at Respondent's during the 1982 fall weed-and-thin season and worked for other foremen.

Once again it is clear from the record evidence that during the 1983 asparagus harvest Respondent stepped up its discriminatory conduct against Varela's crew because of their union activities. The disparate treatment took the form of a campaign of harassment during the work day and at the end of the day at paytime and a reduction in their remuneration by the assignment of a low yield field.

During the work day, a new checker appointed by Medrano, entered the fields and reprimanded the workers cutters about their work. At the same time supervisor Guzman criticized Varela about the size of the asparagus being picked.

There is no dispute that Castillo, the new checker, reprimanded the cutters and that the normal duties of a checker is only to count the boxes and point out to the burreros not the cutters any problem about the packing of the asparagus, the fullness of the boxes, etc.[82/]

There is convincing evidence that supervisor Guzman spent an inordinate amount of time with the Varela crew and criticized him for not adequately controlling the size of the asparagus being

---

82. Another aspect which indicates that Castillo's interference with the cutters was part of Respondent's intentional harassment of the crew was the manner in which Castillo replaced Cuen, the crew's regular checker for the previous three years. Medrano testified he did not like Cuen's work as a checker in 1982 so he decided to replace him. However, he failed to inform either Cuen or Varela about this decision nor the reason for it. Furthermore, foreman Flores, a witness for Respondent, testified that foreman select their own checkers. Medrano merely informed Varela of the change in 1983 without first seeking his counsel.

Picked.

Another salient fact that points to a discriminatory motive behind the treatment of Varela and his crew in 1983, is that Varela was Rochester's and Respondent's oldest foremen in years of service and there is no record evidence that Varela's work as a foreman had ever been criticized by Rochester, Medrano or any other supervisor at Respondent's until that one day in March 1982 and now again in the spring of 1983. Medrano testified that Varela was too friendly with his crew members but there is no evidence that he ever treated his workers in any other manner than in a friendly way throughout the years.

Respondent's harassment of crew members continued at the end of each day upon receiving their daily wages from supervisor Medrano. Medrano generally mistreated them by insulting them with vulgar epithets and calling them Chavistas.[84/]

---

83. Oceguaga's, Valera's and the crew members' testimony clearly establish the fact that Guzman spent most of his time with Varela's crew and kept after Varela about the size of the asparagus to the extent that Varela had to resort to bringing a tape measure to work with him to counteract Guzman's criticism.

84. I found General Counsel's witnesses Gomez, Medina, Cuen and Partida believable witnesses as they testified in a straightforward and consistent manner. Their testimony about Medrano's treatment of them coincides and reinforces other credible evidence. Gomez and Medina testified that Medrano reacted in a very angry manner when they protested about low wages and later told them that he wished they would be deported. Varela confirmed Medrano's attitude toward the two Robertos when he described how Medrano wanted him to get rid of Gomez, Medina and the UFW crew representative Victoriano Ochoa. The recording on the cassette, although I do not depend upon it for my findings herein, confirms that fact that Medrano treated the Varela crew members in anything but a friendly fashion.

The other aspect of Respondent's campaign against Crew No. 1 was its assignment of a low-yield field No. 46 for the piece rate period of the 1983 harvest season. The daily crew averages clearly indicate that Varela's crews's average was a great deal lower than the Flores crew and in fact ranked fourth or below average since there were 5 crews and at times 6 crews at work. This documentary evidence plus the photographs of the conditions of the fields and that fact that it was disked under after the season ended confirms Varela's, Cuen's and Gomez' description of the inferior quality of the field.

It can be argued that Respondent had no duty to recall Crew No. 1 for the 1982 onion or garlic harvest or the 1982 weed-and-thin season or grant it a number one preference after it had returned to work in the 1983 asparagus harvest, because the crew failed to finish the 1982 asparagus harvest and in fact did not seek work as a crew until the 1983 asparagus harvest. However, I interpret the 1982 asparagus harvest incident and its denouement as further proof of Respondent's prejudiced attitude toward Crew No. 1 and its desire that such crew no longer work at Respondent's.

The only likely interpretation of Medrano's conduct with respect to Crew No. 1 was that he wanted the crew to no longer work at Respondent's. He fully realized that the reason that Varela and Crew No. 1 failed to return to work and finish out the 1982 asparagus season was because Varela was very upset at, what he considered to be, the unfair criticism of his supervisory work that

one day, and the crew's mistaken belief that they had been fired.[85/] Despite this knowledge, Medrano did nothing during the rest of 1982 to mollify Varela's reaction or dispell the crew's belief that they had been fired. I am convinced that if the crew had not been strikers and union activists, Medrano would have made amends with Varela, a highly capable foreman as attested by his many years of experience at Respondent's (he must be good to have had Medrano seek him out at his residence each season) and would have cleared up the misunderstanding with the crew that they had been fired since the crew consisted of Respondent's most experienced workers. For the rest of 1982 to make sure the crew would not have returned to work, Medrano did not go to Varela's residence, as he had for many years, to inform him that the onion, garlic and weed-and-thin seasons had begun. Shedding further light on Medrano's true motivation is his comment in the fall of 1982 to Raul Cuen, the crew's checker, that the reason that he would not recall the Varela crew was that the [86/] crew members were jokers and Chavistas.[86/]

However, I find that Respondent did not lay off Crew 41 on February 20 because of their union activities since Respondent had a legitimate business reason for so doing. On Saturday, February 19,

---

85. As I already stated in the "Facts" section, I discredit Medrano's testimony that he believed that the reason Varela did not finish out the 1982 asparagus season was because Varela wanted to travel to Coachella and work there.

86. Cuen also testified that Medrano added the reason that he had failed to go to Varela's house was because it would give Varela an exaggerated sense of his importance. I discount this alleged reason as being authentic since for more than ten years Medrano had gone to Varela's house to announce the beginning of each season.

Crew No. 1 had harvested field #46 and part of field #175. The Floras' crew had harvested the other half of field #175. On February 20, Respondent did not have any crew harvest field #46 and only Crew No. 1 also harvested field #175 for three hours. It used Flores' crew for this latter task which was this particular crew's "ormal work since they customarily worked this field.

Of course, Respondent could have had Crew No. 1 harvest field #175 that Sunday and consequently Varela's crew would have worked for only 3½ hours and Flores' crew for 3 hours. However, it seems logical for Respondent to have just one crew put in almost a full day rather than two crews put in a few hours each. It was logical to select the Flores crew for work that day because it worked on fields it customarily worked. Accordingly, I find that there was no violation by Respondent in laying off Crew No. 1 on February 20, 1983 and I recommend that the allegation be dismissed.

Furthermore, I find that on May 8, when varela conversed with Medrano about work for his crew, Medrano informed Varela that there was no more work for him and the crew and also pointed out to him that Varela would not comply with his request to get rid of Gomez, Medina and Ochoa as Flores would comply with a similar request. Although Medrano denies such a conversation, I credit Varela's version and not Medrano's because Varela impressed me as a very sincere person and a concientious and accurate witness while Medrano gave the impression that he answered questions with the first thing that would come to his mind which would suit Respondent's version of the pertinent facts in the case.

In view of the foregoing, I find that Respondent

unilaterally and discriminatorily refused to timely recall foreman Abelardo Varela and Crew No. 1 for the 1982 weed-and-thin season and the 1983 asparagus season because of the crew members' union activities and because the crew's foreman Abelardo Varela testified against Respondent's interests at an ALRB hearing and accordingly violated section 1153 (a), (c), (d)[87/] and (e) of the Act.

Furthermore, I find that Respondent engaged in numerous acts of intimidation and harassment of Crew No. 1 members during the 1983 asparagus and onion seasons because of the crew members' union activities and because the crew's foreman Abelardo Varela testified against Respondent's interests at an ALRB hearing and thereby violated section 1153(c) and (a) of the Act. In addition, I find that Respondent unilaterally and discriminatorily demoted Raul Cuen from his checker position and assigned Crew No. 1 a low yield field during the piece rate period of the 1983 asparagus season because of the crew members' union activities and because its foreman testified against Respondent's interests at an ALRB hearing and thereby violated sections 1153(a), (c), (d) and (e) of the Act.

Finally, I find that Respondent unilaterally and discriminatorily discharged foreman Abelardo Varela and Crew No. 1

---

87. The National Labor Relations Board stated in General Services Inc. (1977) 229 NLRB 940 that both it and the courts have recognized that if the Board is to perform its statutory function of remedying unfair labor practices, its procedures must be kept open to individuals who wish to initiate unfair labor practice proceedings, and protection must be accorded to individuals who participate in such proceedings. Therefore, it is not surprising that "the approach of section 8(a)(4) (the ALRB counterpart is section 1153(d)) generally has been a liberal one in order to fully effectuate the section's remedial purpose. Under this approach, the Board has included within its protections of 8(a)(4) job applicants, and employees of other employees as well as supervisors.

on May 8 because of the crew members' union activities and their testifying at an ALRB hearing and consequently violated section 1153(c), (d), (e) and (a) of the Act.

REMEDY

I will recommend that the members of Crew No. 1 receive the make-whole remedy for the weed-and-thin season and the 1983 asparagus harvest season until they returned to work in Crew No. 1. It is true that foreman Varela and the crew members failed to apply for work as Crew No. 1 for these two seasons.[88/] However, the reason is that they were effectively discharged by Respondent when its agents, general foreman Medrano and area supervisor Mendez, overheard Varela tell the workers they had been fired and did nothing to clear up this mistaken belief. In fact, Medrano confirmed the fact of discharge by failing to go to foreman Varela's house, as he had done for over 10 years, and inform Varela that a new season had begun and his crew could commence work.[89/] The fact that the testimony of foreman Varela and crew members indicate that the reason that Varela and the crew members did not return to seek work at Respondent's because of a belief they had been fired but rather in solidarity with Varela is not material because liability is determined by the employer's conduct from his point of view in a

88. Some members of Crew No. 1 worked during these seasons but as members of other crews.

89. In effect, Respondent changed its recall procedure with respect to Varela's crew because of a discriminatory reason.

section 1153(c) violation.[90/]

I will recommend a make-whole remedy for Crew No. 1 for the difference between their piece rate wages and those earned by members of the Flores crew during the 1983 asparagus harvest season. However, I will decline to do so for any difference there might be in the wages earned on an hourly basis. The reason is that General Counsel has failed to prove any such differences in regards to hourly based wages. General Counsel attempted to do so for only one day, e.g., February 20, when the Crew No. 1 did not work at all but I decided the Respondent had a legitimate business reason for the one day layoff and recommended that the allegation be dismissed.

Respondent has raised the issue of the Statute of Limitations in respect to the allegations of discriminatory conduct against the members of Crew No. 1. The charges in respect to those allegations were first filed on March 1, 1983 having been previously served on Respondent. Consequently, the six month statute of limitations began to run September 1, 1982. So I cannot order any remedy for Respondent due to it's not recalling the Varela crew for

---

90. It is well established by NLRB precedent that a section 8(a)(3) violation (the ALRB counterpart is section 1153(c)) violation is determined by the employer's motivation to act in a certain way whether or not his version of the actual facts are accurate or not. ALRB and NLRB precedent holds that information or belief concerning an employee's union activities or sympathies need not be accurate if that information or belief provided the motivation for discriminatory action. (See Miranda Mushroom Farm, Inc. and Ariel Mushroom (1980) 6 ALRB No. 22 and Riverfront Rest (1978) 235 NLRB 319, 97 LRRM 1525.) Although the motivation, in the instant case, was not based on inaccurate information or belief the employer did react in a discriminatory manner to what it believed the facts to be, i.e., Medrano overheard Varela inform the employees that they had been fired. Since the fact whether Varela actually told the crew members what Medrano claimed he overheard is irrelevant, I will not make a determination one way or the other.

the onion or garlic harvest in April 1982 nor for Respondent's delay in recalling the Varela crew in the 1980 through the 1982 seasons because the conduct by Respondent occurred before the six month statute of limitation began to run. However, I will be able to order a remedy for Respondent not recalling the Varela crew for the weed and thin work in the autumn of 1982 because the three crews that did perform that work were recalled in October and November 1982 well within the six month statute of limitations.[93/]

I will recommend an award of backpay and reinstatement to foreman Abelardo Varela. It is true as a general proposition that supervisors are not entitled to the protections of the Act. However, discriminatory conduct toward a supervisor may violate section 1153(a) in certain circumstances which are present here. In Pioneer Drilling Co., Inc. (1967) 162 NLRB 918 enf'd. in pertinent part 391 F.2d {10th Cir. 1968) the National Labor Relations Board found that the discharge of the supervisors to be a mechanism to effectuate the employer's efforts to rid itself of union adherents and to find it necessary to reinstate the supervisor and award him back pay, along with the employees, as an effective remedy. I find

---

91. General Counsel alleged that Respondent unilaterally and discriminatorily refused to timely recall Crew No. 1 since October 1981 and therefore has violated sections 1153(e) in addition to (c) and (d) of the Act. I have so determined but there is the question of the Statute of Limitations which has been plead by Respondent. Respondent has failed to timely recall Crew No. 1 since 1980 the year after the strike until and including the 1983 asparagus and onion seasons. It appears that the ALRB and NLRB consider such unilateral changes and their continuing implementation without notification of the collective bargaining representative as a continuing violation of the Act and therefore I find section 1160.2 of the Act inapplicable and that Respondent violated section 1153(e) of the Act in this respect.

that the circumstances of the Pioneer Drilling case to be strikingly similar to the circumstances of the instant case and to be controlling.

RECOMMENDED ORDER

By authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Gourmet Farms and Gourmet Harvesting and Packing Company and 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 and refusing to provide the UFW with all relevant information requested in the course of collective bargaining negotiations.

(c) Failing and refusing to give notice and bargain with the UFW over the decision to cease operations at GHP and to transfer those operations to GF.

(d) Failing and refusing to give notice and bargain with the UFW about changes in its crew seniority system.

(e) Assigning employees to low yield asparagus fields during harvesting seasons because of their union activity or participation in ALRB proceedings.

(f) Refusing to timely recall Crew No. 1 or otherwise failing to recognize their seniority rights because of their union activity or their participation in ALRB proceedings.

(g) Laying off, demoting, or discharging employees because of their strike activity or union activity or participation in ALRB proceedings.

(h) Harassing, and otherwise mistreating employees because of their union activity or participating in ALRB proceedings.

(i) In any like or related manner, interfere with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by Labor Code section 1152.

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

(a) 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 the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 3 ALRB No. 55. The make whole period shall extend from December 8, 1979 until the date on which Respondent commences good faith bargaining with the UFW which results in a contract or a bona fide impasse.

(b) Provide the UFW with all relevant information requested in the course of collective bargaining negotiations.

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

understanding is reach, embody such understanding in a signed agreement.

(d) Make whole members of Crew No. 1 for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to assign the crew to a field that was superior to or equal to the Flores crew average piece-rate earnings in March 1983, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(e) Make whole foreman Abelardo Varela and the members of Crew No. 1, for all economic losses they have suffered because of Respondent's failure and refusal to recall the crew for the thin-and-weed season of 1982, and failure and refusal to recall Crew No. 1 prior to recalling the other crews for the 1983 asparagus and onion harvest.

(f) Immediately offer to foreman Abelardo Varela and the members of Crew No. 1 full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority rights or other employment rights and privileges.

(g) Immediately offer to Raul Cuen, full reinstatement to his former job of checker or equivalent employment without prejudice to his seniority rights or other employment rights and privileges.

(h) Preserve and, upon request, make available to the 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 backpay period and the amount of the backpay due under the terras of this order.

(i) 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.

(j) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 1, 1982, until the date on which the said Notice is mailed.

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

(1) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' 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.

(m) 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 collective bargaining representative of Gourmet Harvesting and Packing be amended to also name Gourmet Farms, as the employer and that said certification be extended for one year from the date Respondent commences to bargain in good faith with the United Farm Workers.

IT IS FURTHER ORDERED that the allegations of the Complaint with respect to which no violation of the Act was proved be dismissed.

DATED: December 2, 1983

ARIE SCHOORL

Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centre Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by (1) refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW or Union), the certified representative of our employees; (2) refusing to provide the UFW with relevant information requested by it during negotiations; (3) refusing to give the UFW notice of its decision to cease operations at Gourmet harvesting and Packing (GHP) and the transfer of these operations to Gourmet Farms (GF); (4) assigning employees, namely Crew No. 1 to harvest low yield asparagus fields because of the crew members' union activities; (5) refusing to timely recall members of Crew No. 1 or otherwise failing to recognize their seniority rights because of the members' union activities; (6) laying off, demoting, or discharging employees because of their union activities or participation in ALRB proceedings; (7) harassing or otherwise mistreating employees because of their union activities; and (8) discriminating against employees because their foreman testified adversely to our interest in an ALRB hearing. 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 (Act) is a law that gives you and all farm workers in California these rights:

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

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

WE WILL NOT do anything in the future that forces you to do or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT refuse or fail to give the UFW Notice of any change in the operations in reference to GHP and/or GF.

WE WILL NOT refuse to provide the UFW with any relevant information it requests during negotiations.

WE WILL NOT refuse to timely recall a foreman and his crew because of the crew members' union activities or their participation in ALRB proceedings.

WE WILL NOT assign a crew to a low yield asparagus field because of the crew members' union activities or their participation in ALRB proceedings.

WE WILL NOT discharge members of a crew because the foreman and/or members of the crew testified at an ALRB hearing.

WE WILL NOT discharge or harass employees because of their union activities or participation in ALRB proceedings.

WE WILL make each of our employees whole for all loses of pay and other economic losses he or she has suffered because of our failure and our refusal to bargain in good faith with the UFW, our employees certified bargaining representative.

WE WILL make whole the foreman and each member of Crew No. 1 for any loss of pay or any other economic losses he or she has suffered because we did not timely recall Crew No. 1 for the 1982 onion and weed-and-thin season and the 1983 asparagus season and because we assigned Crew No. l a low-yield field and offer to reinstate the foreman and members of Crew No. 1 to their previous jobs, or to substantially equivalent jobs, without loss of seniority rights or privileges.

WE WILL offer to reinstate Raul Cuen to his previous job as a checker, or to a substantially equivalent job, without loss of seniority rights or previleges, and we will reimburse him for any loss of pay or other money losses he incurred because we demoted him from his position as a checker.

WE WILL meet and bargain in good faith with the respondent Gourmet Packing and/or Gourmet Harvesting and Packing.

GOURMET FARMS
GOURMET HARVESTING AND PACKING

By: _____
(Representative) (Title)

This is a notice of the Agricultural Labor Relations Board, an agency of the State of California. 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.

DO NOT REMOVE OR MUTILATE