Thermal, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRIGHTON FARMING CO., INC., A California Corporation, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 89-CE-59-EC 90-CE-14-EC 90-CE-32-EC 90-CE-33-EC
	)	18 ALRB No. 4
	)	June 5, 1992

DECISION AND ORDER

On January 21, 1992, following an evidentiary hearing, Administrative Law Judge (ALJ) James Wolpman issued the attached Decision and Recommended Order. The ALJ dismissed allegations that Brighton Farming Company, Inc. (Brighton) made unlawful unilateral changes in pruning methods and sustained allegations that Brighton unlawfully discharged two crews, one on January 2, 1990 and one on April 2, 1990, for walking off the job to protest existing piece rates and quotas.

Brighton timely filed exceptions to the ALJ's Decision, along with a supporting brief, and the General Counsel filed a brief in response. Specifically, Brighton excepts to the ALJ's conclusion that the crews were engaging in protected activity when they walked off the job. In addition, though Brighton agrees with the dismissal of the unilateral change allegations, it asserts that the ALJ erred in finding that it had a duty to bargain the decision to change pruning methods, as opposed to a

duty to bargain only the effects of the change upon wages, hours, and other terms and conditions of employment.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the attached decision of the ALJ in light of the exceptions and briefs filed by the parties and has decided to adopt the findings, rulings, and conclusions of the ALJ, to the extent consistent herewith, and to adopt his Recommended Order. Specifically, the Board agrees with Brighton that only an effects bargaining obligation attached to the change in pruning methods, but adopts the ALJ's decision in all other respects.

DISCUSSION

Decision vs. Effects Bargaining

Brighton does not, of course, challenge the ALJ's dismissal of the bargaining allegations, and excepts only to the ALJ's conclusion that there was an obligation to bargain over the decision to change pruning methods.[1] Though the ALJ concluded that Brighton satisfied its bargaining obligation regardless of whether the obligation was to bargain the decision or just the effects, the Board finds that determining the nature of the obligation will serve to provide helpful guidance to not only the parties involved here, but also to all parties subject to the

[1]The only change in pruning methods that the ALJ found to be established by the record was a change in the number of canes left on the vines.

Board's jurisdiction.[2]

The ALJ relied chiefly on First National Maintenance Corp. v. National Labor Relations Board (1981) 452 U.S. 666 [101 S.Ct. 2573], where the United States Supreme Court held that a partial closing of a business was a managerial prerogative not subject to decision bargaining because of its characterization as a change in the "scope and direction of the enterprise." Consequently, the ALJ concluded that effects bargaining pertains only to changes in the "scope and direction of an enterprise" which have a potential effect upon continued employment. Since the change in pruning methods involved here was not a change of that nature and had a direct effect upon a mandatory subject (wages), the ALJ concluded that the decision itself was subject to bargaining.

The ALJ also viewed the change in pruning methods as analogous to changes found fully bargainable in two earlier cases. In Steak-Mate. Inc. (1983) 9 ALRB No. 11, the Board found that a decision to change the picking order of mushroom beds was bargainable because it potentially affected piece rates. In Mike O'Connor Chevrolet (1974) 209 NLRB 701 [85 LRRM 1419], the National Labor Relations Board (NLRB) held that a decision to increase the number of cars salesmen must sell was negotiable.

While it is true that effects bargaining first arose in the context of decisions affecting the "scope and direction of

[2]As there was no exception filed to the ALJ's determination that Brighton satisfied its obligation to bargain, we adopt that finding pro forma.

the enterprise," such as plant closings, we believe that the underlying principles may also apply to less fundamental decisions. Such decisions are sometimes referred to as those lying within the "core of entrepreneurial control."[3] While this Board has found actions akin to partial closures not to be subject to decision bargaining,[4] the Board has also found only an effects bargaining obligation with regard to more minor matters that do not appear to involve a change in the "scope and direction of the enterprise." (Paul W. Bertuccio (1983) 9 ALRB No. 61 (decision to sell garlic crop for seed not negotiable); Tex-Cal Land Management. Inc. (1985) 11 ALRB No. 31 (discontinuance of use of own swamping trucks and decision to convert vineyards from table grape to raisin production not subject to decision bargaining); Tex-Cal Land Management, Inc. (1986) 12 ALRB No. 26 (decision on when to prune a managerial right subject only to effects bargaining).)

We also agree with Brighton that the cases cited by the ALJ are distinguishable. In Steak-Mate. Inc., supra, the change involved only the order in which mushroom beds were picked, and did not involve a change in growing methods or any other matter

[3]This phrase was first used by Justice Stewart in his concurring opinion in Fibreboard Paper Products Corp, v. NLRB (1964) 379 U.S. 203, 204 [85 S.Ct. 398,409], where he sought to explain the limits of the Court's holding in that case that subcontracting was negotiable.

[4]Cardinal Distributing Co. (1984) 159 Cal.App.3d 758 [205 Cal.Rptr. 860] (decision to discontinue growing of certain crops and leasing of land not negotiable); Highland Ranch (1981) 29 Cal.3d 848 [176 Cal.Rptr. 753] (effects of sale of business negotiable).

central to the operation of the business. Similarly, the change in Mike O'Connor Chevrolet, supra, involved only an increase in a sales quota, which did not touch upon the owner's right to control how the business operated. Here, in contrast, the change was based on a determination that leaving more canes on the vines would increase yields. Moreover, it was not the change in pruning methods itself that was of concern to employees, but merely the effects thereof upon wage rates. Consequently, we conclude that the change in the number of canes left on the vines lies within "the core of entrepreneurial control" and therefore was not subject to decision bargaining.

The January 2. 1990 Walkout

Unauthorized strike activity may be unprotected if it is inconsistent with the positions or policies of the union, because such activity is in derogation of the union's exclusive representative status. (See e.g., AAL, Inc. (1985) 275 NLRB 84 [118 LRRM 1610].) However, even unauthorized strike activity will be protected if it is in support of the union and its previous actions or demands. (Ibid; Energy Coal Income Partnership (1984) 269 NLRB 770 [116 LRRM 1019].) Our dissenting colleague asserts that the January 2, 1990 walkout was unprotected because the crew members sought to negotiate directly with Brighton supervisors and made demands contrary to what the United Farm Workers of America, AFL-CIO (UFW or Union) had already agreed to. The record does not support that view of events.

While the crew members clearly asserted that they wanted a lower quota, they did not actually seek to negotiate right there in the fields. Crew member Arturo Espinosa credibly denied that the workers sought to negotiate directly with Brighton and he claimed to have told Personnel Manager Gonzalo Estrada that the matter should be negotiated with the Union. Once the workers made their complaints known and were told by the foremen and personnel manager that they could not provide immediate relief from the quotas, the workers left to seek the assistance of the UFW. Rather than undermining the role of the Union, the purpose of the walkout was to involve the Union in the dispute. The testimony of Vincente Rios cited by our dissenting colleague is not to the contrary.

Moreover, at the time the crew members walked off the job, the UFW had neither agreed to nor waived the right to bargain further over the quotas. The parties negotiated over the quotas on December 29, 1989. Brighton agreed to some modification in the quotas and the UFW negotiator responded by saying that he would have to check with the workers. As the ALJ properly concluded, this response served to reserve the workers' right to disagree. No agreed upon deadline was set within which the UFW was to check with the workers and report back to Brighton.

---

[5]A waiver of bargaining rights must be "clear and unmistakable." (NLRB v. Southern California Edison Co. (9th Cir, 1981) 646 F.2d 1352, 1364; Cardinal Distributing Co. v. ALRB supra.)

Since December 29 fell on a Friday and the walkout occurred on January 2, with the intervening three days consisting of a weekend and a holiday, the UFW could not be deemed to have agreed to the quotas or waived the right to further bargaining by the time of the walkout.[6] Consequently, it cannot be concluded that the workers' demands on January 2 were contrary to the position of their union. Put most simply, the UFW had not yet taken a firm position. The UFW's failure to later request further bargaining is immaterial in light of the lack of any other indication that it disapproved of the walkout at the time it took place.[7] The UFW did immediately contact Brighton on the workers' behalf. When Brighton insisted that they were fired, the UFW subsequently filed the unfair labor practice charges which are the subject of this proceeding.

In sum, the January 2 walkout, like the April 2 walkout, was not in derogation of the statutory role of the UFW as exclusive representative. It was therefore protected activity. To find otherwise is to misconstrue the nature of the rule set out AAL. Inc. and Energy Coal Income Partnership, supra. To be in derogation of the role of the union, conduct must by its

---

[6]It appears from the record that the crew in question worked on Saturday, December 30, but did not work again until the morning of January 2 when the walkout occurred.

[7]The facts of the case cited by our dissenting colleague stand in stark contrast to those involved here. In AAL. Inc., supra, two nurses walked off the job in protest of the number of nurses aides on duty. This was contrary to the stated position of their union in negotiations and they were immediately admonished by the union president that their actions violated union policy.

nature seek to supplant or undermine the union as the exclusive representative. Here, the employees expressed complaints that were not contrary to any stated position of their union and, when told by supervisors that they could not remedy those complaints, engaged in a walkout for the purpose of seeking the Union's assistance. Such circumstances are manifestly inadequate to establish that the UFW's role as exclusive representative was undermined.

ORDER

Pursuant to Labor Code section 1160.3, Respondent Brighton Farming Company, Inc., its officers, agents, successors[8] and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering

[8]During the Hearing, the parties stipulated that, should compliance proceedings be required in this matter: "Neither Mark W. Burrell, Receiver nor Feliz Vineyard, Inc. will object to any allegations that they are successors to Brighton Farming Company, Inc. . . . based upon lack of their inclusion as Respondents in the underlying unfair labor practice proceedings or any other failure of the General Counsel to litigate the successorship issues at the unfair labor practice proceedings;" and '[b]y the instant stipulation, neither Mark W. Burrell, Receiver nor Feliz Vineyards, Inc. waives any other substantive defenses that they may have to any potential allegations that they are successors to Brighton Farming Company, Inc., including any defenses based upon the law of receivership."

with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer Norma J. Castro, Rosaura Arguello, Florinda Montoya, Juliana Alverez, Arturo Espinoza, Juan Almanza, Manuela Almanza, Norma Montoya, Julian Delgadillo, Santos Marin, Ernesto Garcia, Ruben Franco, Vicente Rios, Margarito Cortes, Jose M. Zuniga, Francisco Mazari, Jorge Enrique Valdez, Lourdes Dorame, Eliseo Moctezuma, Luz Maria Mazari, Lazaro Arriaga, Vincente Ruiz, Francisco Resales, Carlos Corella, Ramiro Mendoza, Antonio Ortiz, Jesus Corella, Yolanda Anguiano, and Antonia Mendoza immediate and full reinstatement to their former, or to substantially equivalent, positions, without prejudice to their seniority and other rights and privileges of employment; and reimburse them for all losses of pay and other economic losses they have suffered as a result of their being discharged, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms. (1988) 14 ALRB No. 5.

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

backpay and interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purpose set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages and, within 30 days of issuance of this Order to all agricultural employees in its employ from January 1, 1990 to December 31, 1990.

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

(f) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end, in addition to informing the Regional Director of the anticipated dates of the next peak season.

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property

at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time lost at the reading and question-and-answer period.

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

DATED: June 5, 1992

BRUCE J. JANIGIAN, Chairman[9]

JIM ELLIS, Member

[9]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 RAMOS RICHARDSON, Dissenting in Part and Concurring in Part:

I dissent from the majority's finding that the employees who walked off the job on January 2, 1990, were engaged in activity protected by the Agricultural Labor Relations Act (ALRA or Act).

The record herein demonstrates that both Brighton Farming Co., Inc. (Employer) and the United Farm Workers of America, AFL-CIO, (UFW or Union) recognized that because of variations in factors such as the variety of grape, the age of the vines and the condition of the field, a reasonable piece rate or quota for one location at one time might not be reasonable for other locations at other times. Further, the parties realized that reasonable rates and quotas are difficult to establish beforehand, rather than after the workers have actually begun to perform the operation and can see how long it takes. Recognizing

these difficulties, Brighton proposed that they be solved by establishing an initial rate and quota for each operation for each variety of grape. The figures would be given to the Union shortly before the operation began, and it would have a few days to consider them. If they objected, a meeting would be scheduled to resolve the matter; if not, the reestablished rate and quota would remain in effect.

This was the procedure which the Union and the Company had worked out to deal with the wage issues which arose while the contract was being negotiated. During the year which the contract was under negotiation, that procedure was followed. The Employer would notify the Union of its intentions beforehand and the Union would either schedule a meeting to discuss the matter or it might wait until the work had begun before asking to meet. Both sides would then gather the relevant performance information and meet to discuss the rate and quota which had been established. If Brighton was convinced that a higher rate was justified, it would be increased and earnings would be adjusted retroactively; if it felt that the quota was too high, it would be lowered.

On December 1, 1989, Respondent's negotiator Thomas Slovak notified Union negotiator Arturo Gonzales that pruning would begin on December 12, and proposed piece rates identical to those of the previous year. He also stated that workers would be expected to meet a pruning quota sufficient to equal a base wage of at least $5.70 per hour. On December 11, Slovak followed up

with a letter modifying the quotas downward and spelling them out in greater detail.

The parties met on December 14. During the meeting, the Union confined itself to discussing Respondent's final offer. Although Slovak spent some time going over the procedure for setting piece rates, the Union made no attempt to discuss the actual quotas and piece rates which had been announced for pruning. On December 29 Slovak and other company representatives met with Gustavo Romero, manager of the UFW's local office, and members of the Ranch Committee. The employees were unhappy with the rates and quotas, since they believed more was being asked of them than in previous years. Slovak was eventually convinced that changes in pruning methods had slowed the workers down, and he therefore offered to increase the piece rates retroactively and to lower the quota. In response to Romero's question, "Are you willing to do anything more?", Slovak answered that the company had gone as far as it could. Romero responded, "Well, okay," and indicated he would talk to the workers.

Slovak testified that Romero's response was the typical form of assent from UFW negotiators, who always left themselves "this little out" of having to talk to the employees. The parties did not have a practice of formally signing off on agreements. However, if there was no further response from the Union, as it was in this case, then the company would proceed to implement what it viewed as an agreement between the parties.

On January 2, 1990, a crew working under foreman Arnulfo Rodriguez started pruning about 6:00 a.m. About three hours later, some of the crew members approached the foreman and complained that they were having difficulty meeting their quotas, Rodriguez explained there was nothing he could do, so the crew members next spoke with foreman Juan Alvarez, who was present checking the crew's work. On cross-examination by Mr. Slovak, crew member Vicente Rios testified to the following:

Slovak: Q: When Mr. Alvarez arrived, you were the one that did most of the talking in the crew, correct?

A. Yes.

Q. And you, on behalf of the people in the crew, asked Mr. Alvarez to lower the quota, correct?

A. Yes.

Q. And you asked him to reduce it, correct?

A. Uh-huh. Yes.

Q. And he told you that he couldn't. Isn't that true?

A. Yes.[1]

Alvarez then called the Company's personnel manager, Gonzalo Estrada, who came to the field to talk to the workers. Crew member Rios' testimony on cross-examination continued as follows:

Slovak: Q: After Mr. Estrada told you that he was not going to do what you asked him to do, did you tell him that you were going to go to the union at that time?

A. No. We didn't tell him.

---

[1]Transcripts, Vol. I, pages 120-121,

Q. And nobody in the crowd said, "Let's go to the union," when Mr. Estrada was there?

A. No.

Q. And it ended, basically, with him telling you to go back to work?

A. Yes.[2]

Fifteen crew members refused to do so and went instead to the Union office to complain.

Under clearly established National Labor Relations Board (NLRB) precedent, unauthorized strike activity by bargaining unit employees in support of demands which are not consistent with their union's demands is not protected by the law because it is in derogation of the union's representative status. (AAL, Inc. (1985) 275 NLRB 84 [118 LRRM 1610].) In AAL, Inc., two employees walked off their jobs in protest of over the employer's refusal to increase staffing levels. Their union had considered but decided against offering a contract proposal for specific staffing numbers, and instead the parties' contract called only for joint employer and union monitoring of staffing levels. The NLRB held that the walkout had occurred without prior union knowledge or authorization, and that the employees' dissident action was unprotected because it interfered with the statutory system of bargaining by imposing a secondary bargaining front on the employer and undermining the status of the exclusive bargaining agent. (Id., 275 NLRB at 86.)

---

[2]Transcripts, Vol. I, page 123

Here, the employees walked off the job when Brighton management refused to negotiate directly with them over piece rates and quotas which the Union had agreed upon. On December 29, the pruning changes and their effect on earnings and quotas were fully discussed, and the rates and quotas were readjusted and agreed to by the Union subject to their checking promptly with the employees. The employees' actions on January 2 clearly demonstrate that they were attempting to bargain directly with Brighton management, in derogation of the Union's representative status. The employees complained to management personnel about the quotas their Union had already agreed to, and walked off the job when the supervisors refused to negotiate directly with the workers. I find it significant that the Union, following this incident, failed to request further negotiations and thus never, even after the fact, took a position in support of the workers' demands for lower quotas. This failure indicates that the Union well understood that it had already agreed to the negotiated quotas. Even if the Union had not finally agreed to the quotas being applied on January 2, 1990, I would find the employees' attempt to negotiate a rate change directly with their Employer to be unprotected activity in derogation of their Union's role as exclusive bargaining representative.

I would conclude that the crew's action in walking off the job on January 2 when the Employer refused to negotiate directly with them thus constituted unprotected activity.

Therefore, Brighton's discharge of those employees did not constitute an unfair labor practice.

However, I concur in the majority's holding that the April 2 walkout constituted protected activity. On March 12th, Slovak notified the Union that leafing would begin on March 16 and proposed an initial rate and quota. Negotiations were requested and after several meetings held in mid-March, the Employer proposed a piece rate for fields where the leafing was light and a higher one where it was heavier. No further meetings were held between the Union and the Employer. On March 31, a crew working under foreman Leo Mazari was assigned to perform leafing in a "heavy" field. Although it is not clear whether this was the first time that the crew had leafed in a heavy field, the work was different enough that the foreman felt it necessary to begin the day with a brief training session on how it was to be performed.

After two hours, crew members began complaining that the piece rate was too low. Personnel Manager Gonzalo Estrada had arrived and told the crew that he would talk to the Union, and in the meantime he convinced them to go back to work. However, by April 2 Estrada had not been able to contact the UFW, and crew members were still not satisfied. On this occasion, however, the crew did not attempt to negotiate a new rate with management. Jorge Enrique Valdez, a crew member, testified to the following:

Cardenas: Q: After Leo Mazari told the truth that there was going to be no change, what, if anything, did the crew do?

A. We told him that we wanted a change with regards to that, and he said that the union was in agreement with the company as to what it was doing with the workers.

Q. After Leo said that, did you say anything?

A. Yes. I told him that there was no way the union could be in agreement with the company in regards to that work.

Q. Did you say anything else?

A. Yes.

Q. What did you say?

A. We asked him for permission to go to the union to find out whether what he was saying was true.

Q. What did Leo Mazari say in response?

A. Nothing. Chepa was the one who spoke.

Q. Did the forelady, Chepa Mazari, say anything?

A. Yes.

Q. What did she say?

A. That, if we left, we were fired.

Q. Now, was the crew present during this conversation?

A. Yes.

Q. Did you say anything in response to what Forelady Mazari said?

A. Yes.

Q. What did you say?

A. That we were not abandoning our jobs; that we were asking the foreman for permission to go see if what he was saying was true.[3]

---

[3]Transcripts, Vol. II, pages 163-164.

Subsequently, 14 members of the crew left to go speak with Gustavo Romero at the Union office. The UFW met with Brighton a few days later and the rate was increased retroactively. Thus, unlike the January 2 walkout, the April 2 walkout was an attempt by the employees to have their Union renegotiate rates which had not yet been finally established by the Employer and the Union. Since the crew on this occasion was attempting to work through their certified bargaining representative, rather than in derogation of it, I agree with the majority that their walkout constituted activity protected by the ALRA, and that Brighton therefore violated the Act by discharging them for that activity.

Dated: June 4, 1992

IVONNE RAMOS RICHARDSON, Member

CASE SUMMARY

BRIGHTON FARMING CO., INC.
(UFW)

18 ALRB No. 4
Case Nos. 89-CE-59-EC
90-CE-14-EC
90-CE-32-EC
90-CE-33-EC

Background

This matter involves allegations that Brighton Farming Co., Inc. (Brighton) changed various pruning methods without first providing notice and an opportunity to bargain to the United Farm Workers of America, AFL-CIO (UFW) and unlawfully discharged two crews, one on January 2, 1990 and one on April 2, 1990, for walking off the job in protest of existing piece rates and quotas. On January 21, 1992, Administrative Law Judge James Wolpman (ALJ) issued a decision in which he dismissed the refusal to bargain allegations and sustained those dealing with the discharge of the two crews.

The ALJ found that the only alleged change in pruning methods that was demonstrated on the record was an increase in the number of canes left on the vines. He concluded that while Brighton had a duty to bargain about the change, that duty was satisfied by the bargaining that took place two weeks after the change was implemented. The ALJ found that the UFW did not seek to rescind the changes, but merely to have piece rates and quotas adjusted to account for the changes, which Brighton agreed to do. Further, the ALJ found that it was the UFW's fault, not Brighton's, that the negotiations took place two weeks after implementation. The General Counsel did not file exceptions to the ALJ's dismissal of the bargaining allegations. Brighton did file an exception on this issue, agreeing with the result but arguing that only the effects of the pruning changes, not the decision itself, were negotiable.

It is undisputed that the two crews were discharged for walking off the job. The ALJ found the discharges unlawful because he rejected Brighton's claim that the walkouts were unprotected either because they violated an oral no-strike clause or because the employees were acting contrary to the policies and objectives of their union. Instead, he found that there was insufficient evidence of a no-strike agreement and that the UFW had not agreed to rates or quotas that were contrary to the strikers demands. Further, the ALJ found that the strikers did not seek to negotiate directly with Brighton and walked out for the express purpose of seeking the UFW's assistance.

The Board's Decision

The Board agreed with Brighton that the change in pruning methods was subject only to an effects bargaining obligation.

Citing several of its earlier decisions (see Bd. Dec., p. 4), the Board disagreed with the ALJ that effects bargaining pertains only to changes in the "scope and direction" of an enterprise. Finding that the change in the number of canes left on the vines lies within the "core of entrepreneurial control," the Board concluded that it was not subject to decision bargaining.

The Board affirmed the ALJ's finding that the crew members-who walked off the job on April 2, 1990 were unlawfully discharged. A majority of the Board also affirmed the finding that the Discharge of those who walked out on January 2, 1990 was also unlawful. The majority agreed with the ALJ that the evidence showed that the crew members did not attempt to negotiate to the exclusion of their exclusive representative and that the walkout was for the express purpose of involving the UFW in the dispute over quotas. Further, the majority rejected the claim that the crew members' demands were contrary to what the UFW had previously agreed. The majority found that at a December 29 bargaining session the UFW's negotiator reserved the workers' right to disagree with Brighton's latest proposal on quotas by saying that he would have to check with the workers. Since the walkout occurred on the morning of January 2, only the second workday after December 29 for the crew, and presumably the first workday for the UFW and for Brighton's negotiator, the UFW could not be deemed to have waived the right to bargain further at the time of the walkout.

The Concurrence and Dissent

Member Ramos Richardson concurred with the majority on all issues except the protected nature of the January 2 walkout, which she would find to have been unprotected because it was in derogation of the UFW's role as exclusive bargaining representative. In her view, the record supports a finding that the crew members attempted to negotiate directly with Brighton representatives in the fields. Further, she would find that the crew members' demands were contrary to the position of the UFW because the UFW had already agreed to Brighton's latest quota proposal by waiving the right to further bargaining by failing to promptly notify Brighton that the quotas established on December 29 were not satisfactory.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
BRIGHTON FARMING COMPANY, INC., A California Corporation,	)	Case Nos. 89-CE-59-EC
	)	90-CE-14-EC
Respondent,	)	90-CE-32-EC
	)	90-CE-33-EC
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Basil T. Chapman
Thomas S. Slovak
Best, Best, & Krieger
Palm Springs, California
for the Respondent

Eugene E. Cardenas
El Centro Regional Office
El Centro, California
for the General Counsel

January 21, 1992

DECISION OF THE ADMINISTRATIVE LAW JUDGE

JAMES WOLPMAN: This case was heard by me in El Centro, California, on July 9, 10 and 11, 1991.

It is based on a complaint, issued August 24, 1990, which alleged that the Respondent violated the Act by changing the method and manner in which grapes were to be pruned without first notifying and bargaining with the United Farm Workers as the certified bargaining representative of its employees. It further alleged that one crew was illegally discharged on January 2, 1990, for striking to protest the effect of those changes on their earnings and work and that another crew was likewise discharged on April 2, 1990, for engaging in a similar protest.

The Respondent answered denying that there had been any significant changes in pruning methods or that it was obligated to bargain over such changes as were made, and contending that, in setting wage rates and quotas, it had followed procedures to which the Charging Party had previously assented; it also argued that the Union had agreed to certain of the rates and quotas and had waived bargaining over the changes in horticultural practices. With respect to the discharges, Respondent contended that the strikes were not protected because the union had agreed that there would be no strikes and because the employees were acting contrary to the policies and objectives of their union.

The Charging Party neither appeared nor intervened. Both the General Counsel and the Respondent filed post hearing briefs.

Upon the entire record, including my observation of the witnesses, and after careful consideration of the arguments and

briefs submitted, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

Brighton Farming Company, Inc. is an agricultural employer within the meaning of §1140.4(c) of the Act. At the Pre-Hearing Conference it acknowledged that it was the legal successor to the David Freedman Co., Inc. and, as such, inherited Freedman's obligation to bargain with the United Farm Workers as the exclusive bargaining representative of its employees. Brighton's non-supervisory farming employees are agricultural employees within the meaning of §1140.4(b).[1] The United Farm Workers of America is a labor organization within the meaning of §1140.4(f).

II.

Brighton Farming grows grapes in the Cochella Valley. In December 1988, when it took over the operations of the David Freedman Company, its attorney, Thomas Slovak, informed the UFW that it was ready to enter into negotiations for a labor agreement and that he would be its spokesman.

The Union initially designated Ben Haddock as its negotiator. Several sessions were held in January 1989, but those scheduled for February were canceled when the Union informed Slovak that Maddock was unavailable; later, he learned that Maddock was no longer with the Union. No new negotiator was

---

[1]The parties stipulated to the names of the employees who were discharged for engaging in work stoppages on January 2 and April 2, 1990. (Joint Ex. A.)

designated until late March when Ken Schroeder took over. Negotiations proceeded slowly, with no substantial agreements being reached, until June 1989, when Schroeder canceled the meetings which had been scheduled. Despite letters requesting a resumption of negotiations, Slovak heard nothing more from Schroeder, and it was not until September 1989 that the Union appointed a third negotiator, Arturo Gonzales.[2] Gonzales met with Slovak on September 14th and 15th, but then canceled the meeting set for September 27th without scheduling another. When Gonzales called in October to complain that Brighton was using outsiders to perform bargaining unit work, Slovak took the opportunity to express his exasperation "with this pattern of endless negotiations to no point" and told Gonzales that he planned to make a "last, best and final offer". (G.C. Ex. H.) On November 3rd, that offer was presented in the form of a proposed contract (G.C. Ex. I) along with an invitation to meet "one last time to have explained any of its terms." (G.C. Ex. H.)

Gonzales wrote protesting the last, best and final offer, asserting that there was no impasse which would permit its implementation, and asking to discuss the offer. (G.C. Ex. J.)[3] Slovak replied by letter dated November 16th, offering to meet on November 20th, 27th, 28th or 29th to explain its terms. (G.C.

---

[2]During the period from June to September, Mr. Slovak met with Delores Huerta of the UFW to resolve specific problems which had arisen at Brighton, but they did not engage in contractual negotiations.

[3]This letter was dated November 9th, but was apparently not posted until November 13th. (See G.C. Ex. K.)

Ex. K.) Receiving no response to his letter or to a subsequent telephone call to the Union office, he again wrote to Gonzales on November 20th, informing him that the Company planned to implement its offer on December 1st to coincide with the onset of the 1990 growing season. (Resp. Ex. 1.)

On November 29th, Gustavo Romero, the manager of the UFW's local office,[4] called on Gonzales' behalf to set up a meeting for mid-December. December 14th was agreed upon, but Slovak made it clear that Brighton planned to proceed with the implementation of its final offer on December 1st.

III.

The two meetings which occurred in December--especially the one which took place on the 29th--are important, but to appreciate their significance, it is helpful first to describe Brighton's basic approach to negotiations and to say something of the procedures which the Union and the Company had worked out to deal the wages issues which arose while the contract was being negotiated.

Brighton's approach was to pay above average wages; its basic hourly rate in 1989/1990 was $5.70, compared to the area average of $5.23. In return, it expected its workers to be both productive and quality conscious. That is why, unlike its predecessor, it utilized piece rates whenever possible and, along

[4]Romero had called Slovak a few days earlier to complain that the Brighton was using outside tractor drivers for land preparation and planting. (Resp. Ex. 2.)

with those rates, instituted a system of production quotas.[5] Workers who failed to meet the quotas could be suspended or discharged.[6]

But all vineyards are not the same; and, even within the same vineyard, the time it takes to perform a given operation varies from parcel to parcel and from year to year, depending on such things as the variety of grape, the age of the vine, the condition of the field, and so on. Because of this, a reasonable piece rate or quota for one location at one time may not be reasonable for other locations at other times. Moreover, reasonable rates and quotas are difficult to establish beforehand; it is much easier to actually perform the operation and see how long it takes.

Brighton recognized these difficulties and proposed that they be solved by establishing an initial rate and quota for each operation for each variety of grape. Those figures would be given to the Union shortly before the operation began, and it would have a few days to consider them. If it objected, a meeting would be scheduled to resolve the matter; if not, the established rate and quota would remain in effect, and the union

---

[5]The company sought to structure these quotas so that the established piece rate multiplied by the quota would yield the basic rate of $5.70/hr.

[6]As a result of complaints about the harshness of this practice, the company agreed that warning tickets would be given for the failure to meet quotas, but no disciplinary action would be taken until the third ticket, at which point the worker would be suspended for three days. A fourth ticket would result in termination. It was also understood that workers who achieved over 90% of the quota would not be ticketed.

would be deemed to have waived its right to bargain over the issue. A formal statement of the procedure is to be found in Appendix A of Brighton's final offer. (G.C. Ex. I, pp. 52-53.) During the year which the contract was under negotiation, that procedure was followed, but with less formality. Brighton would notify the UFW of its intentions beforehand and the Union would either schedule a meeting to discuss the matter or it might wait until the work had begun before asking to meet. Both sides would then gather the relevant performance information and meet to discuss the rate and the quota which had been established. If Brighton was convinced that a higher rate was justified, it would be increased and earnings would be adjusted retroactively; if it felt that the quota was too high, it would be lowered.

On December 1st, Slovak notified Gonzales that pruning would begin on December 12th and proposed piece rates identical to those of the previous year--35¢ per vine for Perletts, 44¢ for Thompsons, and 30¢ for Flames, Blackbeauties and Exotics. (Resp. Ex. 4; see also Resp. Ex. 5.) He also indicated that workers would be "expected to prune enough vines to meet at least the equivalent of the base wage of $5.70 per hour." This was followed by another letter on December 11th, modifying the quotas downward and spelling them out in more detail--96 vines per 8 hour day for Thompsons, 85 for Perletts and Exotics, and 105 for Flames and Blackbeauties. (Resp. Ex. 6.) At the same time, he indicated that union's failure to object to the rates set forth in his previous letter constituted, under the terms of his Last,

Best and Final Offer, "a waiver by the UFW of the right to negotiate over rates in pruning."

Pruning on the Perlettes began on December 12th. On December 14th, Slovak and other Company representatives met with Gonzales and members of the Ranch Committee. During the meeting the Union confined itself to discussing Brighton's final offer. Although Slovak spent some time going over the procedure for setting piece rates,[7] the Union made ho attempt to discuss the actual quotas and piece rates which had been announced for pruning; in fact, when a member of the Ranch Committee attempted to bring them up, Gonzales silenced him, saying that other non-economic issues needed to be addressed first.

Pruning on the Thompsons began on December 23rd or 24th; on the 26th, Romero telephoned Slovak and asked for a meeting to discuss the piece rate.[8] On December 29th Slovak and other company representatives met with Romero and members of the Ranch Committee. The workers were unhappy with the rates and quotas established for the Thompsons and, to a lesser extent, for the Perlettes. They explained that more was being asked of them than in previous years and that, as a result, there were having

---

[7]Gonzales denied that the procedure was discussed, but I credit Slovak's assertion that it was; his recollection, unlike that of Gonzales, was clear and detailed on this point, and I found it more believable.

[8]Although Gonzales had nothing more to do with the negotiations after December 14th, he testified that Gustavo Romero was not designated to take his place until March 1990. In the meantime, Romero appears to have functioned on an ad hoc basis as the Union representative for the workers.

difficulty meeting their quotas and earning a fair wage.[9] The workers brought up a number of differences between what was now expected of them and what had been required in the past.[10] The Company acknowledged that some changes had been made--primarily an increase in the number of canes to be left on the vine from 8 in 1989 to 16 in 1990[11]--but denied that others represented a departure from previous years. Slovak took the position that Brighton was not obligated to bargain over the changes which had been made, but only over their effect on wages and quotas. He was eventually convinced that more was being required of workers than in the previous season, and therefore offered to increase the piece rate for Thompsons, retroactively, from for 44¢ to 47¢ per vine and to lower the quota from 96 to 90 per 8 hour shift. At that point, Romero asked:

---

[9]It appears that most workers were able to meet their quotas, but there is considerable testimony that, in order to do so, they had to work through their breaks and lunch hours.

[10]A11 of the changes alleged in ¶13 of the complaint were discussed: (1) cutting the vines and branches and piling them in the middle of the row; (2) cutting vines which extended over the wires supporting the stakes; (3) removing dry buds; (4) cutting and removing half dried trunks and vines; (5) leaving 16, rather than 8 canes, on the Perlette vines; (6) removing vines which did not produce fruit; (7) removing green leaves from the vines; and (8) removing "widow" vines.

[11]Slovak testified that initially he did not understand how leaving more canes on the plant would make pruning slower, but he eventually agreed that it would.

> "Are you willing to do anything more?" I [Slovak] said, "No. I think we've really come as far as we can go, Gustavo." And he says "Well, okay." He says, "I want to -- okay. Let me talk to the people."....
>
> So....We left. I remember making a little "okay" on my little notes. And we...raised the rate, reduced the minimum, paid the retro.... (Tr. 271.)

When Slovak was asked whether the Union came back with a clear yes or no to his proposed increase in the piece rate reduction in the quota, he responded:

> The union would always leave it with a little twist on these things -- almost always. They...would negotiate with me and get as much as they could. I would say, "Look. This is far as we go. It's fine. Okay? We're not going any further. We got a deal" -- things like that. (Tr. 272.)

To which the UFW representative would reply:

> "Well, okay, but we really need to talk to the people." [T]he negotiator always left himself this little out. So, did they sign off? No. Did we have a practice of signing off? No. (Id.)

In this case, as in previous cases, there would be no further response from the union, and the Company would proceed to implement its last offer. (Tr. 271, 272.)

IV.

On January 2, 1990, a crew working under foreman Arnulfo Rodriguez started pruning at about 6 a.m. The crew consisted of approximately 25 workers and had begun pruning Thompsons a week or so earlier. Another foreman, Juan Alvarez, was present checking the crew's work, and he ordered some of it to be redone. About 9 a.m., one of the crew members, Vincente Rios, summoned his fellow workers out of the rows in which they were working and approached foreman Rodriquez, complaining that they

were being unduly pressured and were having difficulty meeting their quotas. Rodriquez explained that there was nothing he could to do; he, too, had been under pressure from the Company to work faster and planned to quit. He suggested that those who exceeded their quotas allow those who were below quota to receive credit for their excess production. They next spoke with foreman Alvarez who also told them that there was nothing he could do. When Rios asked to speak with another representative, Alvarez called the Company's personnel manager, Gonzalo Estrada. When he arrived, Rios and Arturo Espinosa, who had been present at the meeting on December 29th, explained that the crew could not continue working under such pressure. Estrada said that no changes would be made and told the crew that, if they wanted to keep their jobs, they should return to work. He gave them five minutes to decide. Fifteen crew members refused to do so and went instead to the Union office where they spoke to Gustavo Romero.[12] Romero called Estrada and was told that the workers had been terminated and would not be reinstated.

V.

On March 12th, Slovak notified the Union that "leafing" would begin on March 16th and proposed a piece rate of 20$ per vine and a quota of 228 vines per 8 hour day. (Resp. Ex. 14.) He left open the possibility of a later modification of the rate and

[12]The fifteen were: Norma J. Castro, Rosaura Arguello, Florinda Montoya, Juliana Alvarez, Arturo Espinoza, Juan Almanza, Manuela Almanza, Norma Montoya, Julian Delgadillo, Santos Marin, Ernesto Garcia, Ruben Franco, Vicente Rios, Margarito Cortes, and Jose M. Zuniga. All were discharged. (Joint Ex. A, ¶ 1.)

quota because "it is somewhat difficult to estimate precisely in advance the appropriate levels." And he went on to say that, under the terms of the final offer, a failure to promptly request negotiations would be deemed a waiver of the right to bargain over the proposed rate and quota. Negotiations were requested and Slovak and other company representatives had several meetings with Romero and the Ranch Committee in mid-March in which actual production figures were reviewed and discussed. Eventually, the Company offered to pay 22$ for fields where the leafing was light and 28$ where it was heavier.[13] Brighton may also have offered to reduce the quota from 228 to 200.[14] The last meeting before the walkout occurred on March 21st. It ended the same way previous rate and quota negotiations had ended, with Romero saying, "I've got to talk to my people now." Slovak said, "OK." (Tr. 318.) And there were no further communications prior to the events which led to the walkout on April 2nd. (Tr. 318.)

VI

On Saturday, March 31, 1991, a crew working under foreman Leo Mazari and consisting of 40 to 50 workers was assigned to

---

[13]It is unclear from the record whether the "heavy" vs. "light" distinction was tied to the variety of grape. (See Tr. 323.) For our purposes, it does not matter since all agreed that the leafing done on March 31st and April 2nd occurred in a "heavy" field (Tr. 192) where the rate was to be 28$ per vine. (Tr. 132, 134, 161, 247.)

[14]It is not entirely clear whether there were to be different minimums for heavy and light fields—200 for one and 228 the other. (Tr. 324-329.) For our purposes, it does not matter because the dispute which began in March 31st and culminated April 2nd concerned the rate, not the quota. (Tr. 243.)

perform leafing in a "heavy" field. Mazari wife, Josepha (known to the workers as "Chepa"), was acting as Assistant Foreman. It is not clear whether this was the first time that the crew had leafed in a heavy field, but the work was different enough so that Mazari felt it necessary to begin the day with a brief training session on how it was to be performed. (Tr. 194-195.)

Work went slowly during the first two hours and a number of crew members began complaining to each other and to Mazari that piece rate was too low. There was some talk of stopping. Personnel Manager Estrada arrived about that time and indicated that, although the 28¢ rate had already been agreed to, he was willing to contact the Union about increasing it; in the meantime, he wanted the crew to continue leafing so that he would have an opportunity to see what the actual production figures were and then discuss them with the Union. He promised to have an answer by the following Monday; however, it is unclear whether he meant first thing Monday morning or later on during the day. (Compare Tr. 177-178 with Tr. 232.) The workers agreed to go along with his proposal and returned to work.

On the following Monday, April 2nd, Mazari planned to begin the day with a brief training session on safety, but almost immediately, Enrique Valdez asked if the piece rate was going to be the same. Mazari told him that Estrada had been unable to contact the Union, but that:

> ...maybe, towards the end of the day, he would have an answer, and then, as soon as he gave me the answer, I was going to convey it or relay it to them. And in case there would be a retroactive pay coming towards the

workers, that that was going to be done. (Tr. 205.) Meanwhile, the 28$ rate previously agreed to would remain in effect. The workers were not satisfied, and Valdez spoke up and said that they wanted go to the Union to find out what the situation was. Mazari warned them that if they left before the end of the shift they would be considered to have abandoned their jobs. After more heated discussion and further warnings of the consequences, fourteen members of the crew left for the Union office.[15] There they spoke with Romero, who called the Company and was told that they had been terminated.

A few days later, the Union did meet with Brighton. As a result the rate was increased, retroactively, from 28¢ to 35¢ or 36¢ per vine (Tr. 207-208), but the crew members who had left their jobs were not reinstated.

ANALYSIS, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

I. THE CHANGES IN PRUNING PROCEDURES

The General Counsel alleged in the Complaint and offered testimony from workers that, in December 1989, Brighton made a number of changes in pruning procedures without first notifying the UFW and affording it an opportunity to bargain. (G.C. Ex. E, 1 13, Tr. 52-57, 87-89, 114.) In response, Brighton presented testimony from its Ranch Superintendent, Jose Gomez, that--with

[15]The fourteen were: Francisco Mazari (Leo's bother), Jorge Enrigue Valdez, Lourdes Dorame, Eliseo Moctezuma, Luz Maria Mazari, Lazaro Arriaga, Vincente Ruiz, Francisco Resales, Carlos Corella, Ramiro Mendoza, Antonio Ortiz, Jesus Corella, Yolanda Anguiano, and Antonia Mendoza. All were discharged. (Joint Ex. A, ¶ 2.)

the exception an increase in the number of canes to be left on the vines (Tr. 351-352)--nothing was asked of the crew in 1989-90 that had not been asked in previous years. According to Gomez, two of the alleged changes--cutting and removing half dried trunks and removing non-producing vines--continued to be performed, as they always had, by separate crews (Tr. 350-351); the other alleged changes--cutting vines and branches and piling them in the middle of the row, removing dry buds, removing green leaves, and removing "widow" vines--were normal procedures which crew members had performed in previous years. (Tr. 348-350; 352-354.)[16]

On this record, I am unable to determine whether there were any changes other than an increase in the number of canes to be left on each vine. Given the posture of this case, such a determination is probably unnecessary; for, while both sides disagree over the nature of the changes, they agree that more was expected of the pruning crew in 1989-1990 than in previous years and, therefore, that some kind of bargaining obligation did accrue.

Brighton takes the position that its obligation was only to bargain over the "effects" of the increased workload, and not over the change(s) which led to the increase. It argues that it satisfied that obligation when it followed the accepted practice of notifying the union beforehand of its willingness to meet and

[16]Gomez testified that he was unable to make any sense of one of the alleged changes--cutting vines which extended over the wires supporting the stakes. (Tr. 349.)

bargain over piece rates and quotas. It points out that the Union initially failed to request a meeting and then, when the meeting did occur on December 14th, avoided the issue. It was not until December 29th that Union finally got around to the problem; and, when it did, the Company not only bargained the matter out, but agreed to increase the piece rate and lower the quota.

While I disagree with Brighton's characterization of its bargaining obligation, I nevertheless conclude that it did satisfy that obligation.

In First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), the Supreme Court distinguished the three kinds of management decisions and their attendant bargaining obligations;

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. (Id. at 676-677.)

Over those, a union has no right to insist on bargaining.

> Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. (Id.)

Over those, a union has the right to bargain fully. The third type of management decision:

> Involv[es] a change in the scope and direction of the enterprise [and] is akin to the decision whether to be in business at all....[while] at the same time this decision touches on a matter of central and pressing concern to the possibility of continued employment and the retention of the employees' very jobs. (Id.)

A union has the right to bargain over the effects of such

decisions, but not over the decisions themselves.

The management decision to leave sixteen, rather than eight, canes on the vine is not a change in the scope and direction of the Brighton's "enterprise".[17] (See Bruce Church, Inc. (1985) 11 ALRB No. 9, ALJD pp. 18-19.) It is, therefore, outside the ambit of what the Supreme Court and the NLRB mean when they speak of "effects" bargaining. (See Otis Elevator Co. (1984) 269 NLRB 891 (Otis Elevator II).) Rather, it falls squarely within the second category of management decision because it has--as both sides acknowledge--a significant impact upon earnings and production quotas. In Steak-Mate, Inc. (1983) 9 ALRB No. 11, the employer changed the order in which mushroom beds were to be picked in a way which forced its piece rate workers to begin picking in less plentiful locations, thereby creating the possibility that they would earn less. (ALJD, pp. 50-51.) The Board affirmed its Administrative Law Judge's conclusion that the employer violated §1153(e) of the Act by "unilaterally changing its picking procedures...without providing notice and an opportunity to bargain about them to the Union."[18] (See Slip Opn. pp. 2, 9; ALJD, pp. 112-113; see also Mike O'Connor Chevrolet (1974) 209 NLRB 701, 703-704 (increase in number of cars salesmen must sell).) I therefore conclude that the change made by Brighton was fully bargainable.

---

[17]And the same is true of the other alleged changes in pruning methods.

[18]A related change, which created a risk of injury, was likewise found bargainable. (ALJD, pp. 50-51, 112-113.)

However, in the circumstances here presented, I do not believe that Brighton's mischaracterization of its bargaining obligation prejudiced negotiations. On December 29th, the entire issue--both the changes and their effect on earnings and quotas--was fully discussed, and both the Union and the Ranch Committee made it clear that their primary interest was not in changing the procedures, but in having rates and quotas readjusted to take them into account. Brighton agreed and offered to increase the rate and lower the quota. That the matter was not discussed until two weeks after the fact was the Union's fault, not Brighton's.[19]

I therefore recommend the dismissal of those portions of the Complaint which allege that Brighton failed to bargain over those changes which were made in December 1989. (G.C. Ex. E, ¶s 13, 14, 22, and the applicable portion of ¶ 23.)

II. THE WALKOUTS ON JANUARY 2ND AND APRIL 2ND

Both the conduct of the 15 members of Arnulfo Rodriquez' crew on January 2nd in refusing to return to work because they believed that the amount of pruning expected of them was unfair and the conduct of the 14 members of Leo Mazari's crew in leaving work to go to the Union to determine what had been done to about

---

[19]It could, I suppose, be argued that Brighton should have contacted the Union beforehand to explain the change[s] it planned. But the only change which the Company conceded--leaving more canes on the vine--was one where the adverse effect on pruning speed was not at all self-evident. Slovak testified that he did not realize that it would slow the pruning rate. Under those circumstances, the Company was not obligated to bargain until it became clear what the effect of the change was.

increasing the piece rate they were receiving for leafing appear, on the face of it, to be protected by § 1152 of the Act. In Steak-Mate, Inc., supra, the Board sustained its Administrative Law Judge's determination that a spontaneous work stoppage to protest a change in the manner in which mushrooms were to be picked was protected (Slip Opn. p. 2, ALJD p.101); and in Giumarra Vineyards. Inc. (1981) 7 ALRB No. 7, the Board held that a spontaneous walkout by members of a crew who "were having difficulty in performing their work to the standards set by the Respondent" (Id. p. 2) was "clearly a protected activity" (Id. p. 4.), citing Air Surrey (1977) 229 NLRB 1064, Resetar Farms (1977) 3 ALRB No. 18, and Tenneco West, Inc. (1980) 6 ALRB No. 53. (See also NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9.) In Bruce Church, Inc. (1979) 5 ALRB No. 45, the Board found that, in the absence of a contractual no-strike provision, loaders who left a field after telling their supervisor "that they intended to inform their Teamsters Union representative of the change in operations" would have been engaged in "concerted activit[y] protected by Section 1152 of the Act." (Id. p. 2-3.).

Discharging workers who are engaged in such protected activity would, of course, constitute a violation of the Act. However, Brighton raises several defenses which, if accepted, would render their conduct unprotected and justify their discharge. It is to those defenses which I now turn.

A. The Existence of an Oral No-Strike Provision

In the Bruce Church case cited above the Board went on to

hold that the existence of a broad no-strike provision operated as a waiver of the right to engage in a work stoppage which would otherwise have been protected, and permitted the discharge of those who participated. (5 ALRB No. 45, pp. 3-4.) Brighton makes the same argument. The difference is that it relies on the existence of an oral no-strike agreement.

While it is certainly possible to have such an oral agreement (see Tex-Cal Land Management, Inc. v. ALRB (1982) 135 Cal.App.3d 906, 915), the National Labor Relations Board--in denying a similar claim--made it clear that:

> Self-denial of the right to strike guaranteed by the Act cannot be lightly presumed. Moreover, it is the very essence of a no-strike agreement that it substitute, completely and unreservedly collective bargaining in place of strike and lockout. (Consolidated Frame Company (1950) 91 NLRB 1295, 1297.)

This is in accordance with the basic rule that relinquishment of the right to bargain over a mandatory subject of bargaining will only be found where the waiver is "clear and unmistakable". (Tenneco Chemical (1980) 249 NLRB 1176.) In American Distributing Co., Inc. v. NLRB (1983) 715 F.2d 446, 449-450, the 9th Circuit explained:

> In collective bargaining, a union may waive a right that is protected by the Act. NLRB v. C & C Plywood Corp. 385 U.S. 421, 430-31 (1967). A waiver must generally be clear and unmistakable. NLRB v. Southern California Edison Co. 646 F.2d 1352, 1364 (9th Cir. 1981). Waivers occur by express contractual provision, by bargaining history, or by a combination of the two. Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (2nd Cir. 1982). The bargaining history establishes relinquishment of a mandatory bargaining subject only if past negotiations reveal that the subject was "fully discussed or consciously explored" and the Union "consciously yielded" its interest in the

> matter. Tocco Division of Park-Ohio Industries, Inc v. NLRB 702 F.2d 624, 628 (6th Cir. 1983).

In Roberts Farms, Inc. (1987) 13 ALRB No. 14, the Board held that the burden of proving a waiver of bargaining rights is on the party alleging it.

Brighton's chief negotiator, Thomas Slovak, testified that at a meeting held on January, 5, 1989, he made it clear to Ben Maddock that, if problems arose, "We would negotiate them with the Union". (Tr. 305.) "We were not going to have people negotiate directly with foremen." (Id.) "We didn't want that to happen because we knew we would get hit with ULP's." (Id.)

Brighton's Counsel then asked: "[D]id you and Mr. Maddock reach an agreement that the union would not sanction walkouts in the field?" To which Slovak replied:

> In essence, yes. And when I say, "in essence," Mr. Maddock, in my opinion, agreed with that approach. I said, "You don't want me to negotiate with workers now. I'll negotiate when you are UFW (sic)." He says, "Fine." He said, "We will meet with you promptly...."
>
> So, I said, "I don't want to have any problems like I've had in the past." He says, "You won't have any problems with me." I said, "Fine."
>
> [I said,] "As long as you're available, we won't have problems" and he said, "You don't worry about you, but you don't worry about me" (sic) -- you know -- "You worry about you."
>
> And I said, "That's fine. That's fair."
>
> (Tr. 306-307.)

Apparently, Slovak's "opinion" that he "in essence" had obtained a no-strike commitment is based on Maddock's statement, "You won't have any problems with me." But the problems they were talking about concerned workers trying to "negotiate directly

with their foremen," not strikes or walkouts--those apparently came later.[20] Nor can it be said that the clear and unmistakable meaning of the words, "You won't have any problems with me," is that, "You won't have any problems with walkouts or with terminating workers who walkout." Finally, Slovak, as an experienced negotiator (Tr. 253-255), would have been well aware of the importance of a no-strike pledge and the need to be able to document it; yet his notes of the meeting say nothing about any such agreement. (Tr. 340-341.)

Later in 1989, there was a walkout involving a thinning crew, after which Slovak met with Ken Schroeder, who had taken over for Maddock. In agreeing to reinstate the crew, Slovak told Schroeder:

> [T]his was the last time it was ever going to happen. No more breaks. I negotiate with the union. This was not going to happen -- you know -- "You take care of your bargaining unit, but this is never happening again, Ken." (Tr. 307-308.)

There is nothing to indicate that Schroeder made any response and no indication that he promised "never to let it happen again." Nor is there any indication that a no-strike pledge was the quid pro quo for the reinstatement of the crew members; on the contrary, it appears to have come unilaterally, as a gesture of "good faith". (Tr. 307.)

---

[20]In its brief Respondent asserts that a walkout had just taken place during "the pruning season of 1988-89" (Resp. Post Hearing Brief, p.. 21, citing Tr. 307:7-13). The cited testimony refers to "thinning", not pruning, an operation which had not yet occurred on January 5th. When Slovak was asked whether there had been a walk out prior to his conversation with Maddock, he said that he couldn't remember. (Tr. 305:9-11.)

I therefore conclude that Brighton has failed to establish the existence of an oral no-strike agreement which waived the right of its employees to engage in concerted activity which would otherwise be protected. (Consolidated Frame Company, supra.)[21]

B. Whether Employees Acted in Derogation of the UFW's Representative Status

Brighton's second defense is that the walkouts were outside the protection of the Act because they were aimed at achieving goals inconsistent with the role of the UFW as the exclusive bargaining representative and with understandings which had already been reached between Brighton and the Union.

In AAL, Inc. (1985) 275 NLRB 84, 86, the National Labor Relations Board stated the legal principle involved:

> It is well established that unauthorized strike activity by unit employees in support of demands which are inconsistent with those of the union is outside the protection of Section 7 of the Act because it is in derogation of the Union's representative status. An exception to that principle in which such separate employee action is found to be protected occurs when such action is in support of, rather than "in criticism of, or opposition to, the policies and actions theretofore taken by the [Union]." NLRB v. R.C. Can Co., 328 F.2d 974, 979 (5th Cir. 1964), enfg. 140 NLRB 588 (1963).

And, in Energy Coal Income Partnership (1984) 269 NLRB 770, the NLRB explained:

---

[21]For the same reasons, I conclude that the allusion to Article 4, No-Strike, No-Lockout found in the portion Brigton's final offer dealing with the manner in which piece rates were to be negotiated (G.C. Ex. I, p. 53) was no part of the informal procedure adhered to by the UFW during the course of negotiations.

> The recognized exception is dissident activity which is in support of, and does not seek to usurp or replace, the certified bargaining representative. The question, then, is whether "the action of the individuals or a small group [is] in criticism of, or opposition to, the policies and actions theretofore taken by the organization[.] Or, to the contrary, is it more nearly in support of the things which the union is trying to accomplish? If it is the former, then such divisive, dissident action is not protected....If, on the other hand, it seeks to generate support for and an acceptance of the demands put forth by the union, it is protected...." NLRB v. R.C. Can Co., supra.

(See also Emporium Capwell Co. v. Community Org. (1975) 420 U.S. 50.)

Brighton contends that the actions of the crew members on January 2nd and April 2nd undermined the collective bargaining relationship in two ways: First, crew members sought to bargain directly with Brighton rather than working through their exclusive bargaining representative; and, second, they were seeking concessions on piece rates and production quotas which went beyond the rates and quotas to which the Union had already agreed.

The first contention--that the crew was trying to negotiate directly with Brighton--is not supported by the evidence. The workers testified that the purpose of the January 2nd walkout was to protest the pressure that was being put upon them (Tr. 281-282, 288-289) and that they told Management that they wanted a lower quota. (Tr. 103, 121.) Arturo Espinosa, the only worker who was asked if the crew actually sought to enter into negotiations on the issue directly with Brighton--rather than simply stating what it was that they wanted--explained that he

was aware that resolution of the issue would require a meeting involving Brighton, the Ranch Committee and the Union, and that he said so to the Company's personnel manager. (Tr. 62, 67.)[22] Hermelinda Marin, the sole witness called by Brighton concerning the events of that day, said nothing which would contradict Espinosa's testimony. (Tr. 281-283, 286, 288-290.) I therefore conclude that members of the crew made known their position with respect to the existing quota before they left, but that they did not seek to negotiate a new quota while they were there in the field.

As for the April 2nd walkout, everyone who testified--both workers and supervisors--agreed that the crew members left did so to find out from the Union what the situation was. (Tr. 135-136, 163, 180, 205, 243, 247.) Far from attempting to circumvent their bargaining agent, they were looking to it.

Brighton's second contention--that the protest was aimed at repudiating understandings to which the Union had already agreed--raises the question of whether the UFW ever actually accepted the proposed rates and quotas or simply let them go into effect without seeking further negotiations, thereby waiving its right to bargain, but never really assenting to them as the most to which workers were entitled.

Sections III and V of the Findings of Fact (supra, pp. 9-10

[22]To the extent there may be any conflict between the testimony of Estrada, on the one hand, and Montoya and Rios, on the other, about the matter, I accept Estrada's. His testimony was more complete and detailed, and was not simply a reply to a leading question. (Compare Tr. 62, with Tr. 103, 121.)

and 11-12) describe the negotiations on December 29th and March 21st in which Brighton sought agreement upon the rates and quotas it was proposing. On both occasions, "The [Union] negotiator always left himself this little out." (Tr. 272.) "He would say, "Well, okay, but we really need to talk to the people," and then there would be no further response from the Union. (Tr. 271-272, 318.)

By taking that "little out", the Union forfeited its right to bargain further on rates and quotas, and--more importantly from the Company's standpoint--forfeited the ability to claim that Brighton had violated the Act by failing to bargain about the changes it needed in order to retain its skilled workforce and achieve the level of production it required.[23] When the Union negotiator told Slovak that he "needed to talk to his people", he was reserving their right to disagree. That they chose to express their disagreement by engaging in concerted action is permissible and protected under §1152 of the Act. It would only have been forbidden them if there were a valid no-strike agreement in affect, but there was none.

I therefore conclude that when the workers engaged in "dissident activity" on January 2nd to protest the pressure put upon them and on April 2nd to determine whether the Union had

---

[23]Having concluded that the Union was unlikely to sign a contract, Slovak--in his letters, during negotiations, and in his proposals--sought to protect his client from unfair labor practice charges by securing explicit or implicit waivers from the Union of its right to bargain about the rates and quotas which applied while the contract negotiations were in progress. (G.C. Exs. H, I, pp. 52-53; Resp. Exs. 3, 4, 6; Tr,. 261.)

agreed to the Company's proposals, they were not seeking to "usurp", "replace", or "oppose" their certified bargaining representative (see Energy Coal Income Partnership, supra; NLRB v. R.C. Can Co., supra.); and, hence, they were engaged in activity protected by the Act.

It should be pointed out that Brighton was not without recourse. In Royal Packing Company (1982) 8 ALRB No. 16, the Board held that a walkout to protest piece rates was tantamount to an economic strike, and:

> When confronted with an economic strike, an employer is free to hire other workers to replace the striking employees at any time prior to an unconditional request by the strikers for reinstatement. [Citations omitted.] However, an employer commits an unfair labor practice by discharging, laying off, or otherwise discriminating against employees for engaging in an economic strike. [Citations omitted.] Here, credited testimony establishes that foreman Villalobos and Supervisor Solario told the employees, in response to their protected work stoppage, that they were "fired." By so discharging these workers, Respondent violated §1153(a) of the Act. (Id. p. 3; see also Superior Farming Company (1982) 8 ALRB No. 77, ALJD, pp. 13-15.)

Here, Brighton--like the respondents in Royal Packing and Superior Farming--fired, rather than replaced, its protesting workers. By doing so, it, too, has violated §1153(a) of the Act.

REMEDY

Having found that Respondent violated §1153(a) of the Act by the discharging members of Arnulfo Rodriquez' crew on January 2, 1990 and members of Leo Mazari's crew on April 2, 1990, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act. In fashioning the affirmative relief delineated in the following

order, I have taken into account the entire record of these proceedings, the character of the violations found, the nature of Respondent's operations, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management, Inc. (1977) 3 ALRB No. 14.

Upon the basis of the entire record, the findings of fact and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent Brighton Farming Company, Inc., its officers, agents, labor contractors, successors[24] and assigns, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, any agricultural employee with regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in concerted activity protected by §1152 of the Act.

(b) In any like or related manner interfering with,

[24]During the Hearing the parties stipulated that, should compliance proceedings be required in this matter: "Neither Mark W. Burrell, Receiver nor Feliz Vineyard, Inc. will object to any allegations that they are successors to Brighton Farming Company, Inc....based upon lack of their inclusion as Respondents in the underlying unfair labor practice proceedings or any other failure of the General Counsel to litigate the successorship issues at the unfair labor practice proceedings;" and "[b]y the instant stipulation, neither mark W. Burrell, Receiver nor Feliz Vineyards, Inc. waives any other substantive defenses that they may have to any potential allegations that they are successors to Brighton Farming Company, Inc., including any defenses based upon the law of receivership." (Joint Ex. B.)

restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Act.

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

(a) Offer Norma J. Castro, Rosaura Arguello, Florinda Montoya, Juliana Alvarez, Arturo Espinoza, Juan Almanza, Manuela Almanza, Norma Montoya, Julian Delgadillo, Santos Marin, Ernesto Garcia, Ruben Franco, Vicente Rios, Margarito Cortes, Jose M. Zuniga, Francisco Mazari, Jorge Enrique Valdez, Lourdes Dorame, Eliseo Moctezuma, Luz Maria Mazari, Lazaro Arriaga, Vincente Ruiz, Francisco Resales, Carlos Corella, Ramiro Mendoza, Antonio Ortiz, Jesus Corella, Yolanda Anguiano, and Antonia Mendoza full reinstatement to their former or to substantially equivalent positions, without prejudice to their seniority an other rights and privileges of employment; and reimburse them for all losses of pay and other economic losses they have suffered as a result of their being discharged, the amounts to be computed in accordance with established Board precedents, plus interest computed in accordance with the Board's decision in E. W. Merritt Farms. (1988) 14 ALRB No. 5.

(b) Preserve and, upon request, make available to the Board and its agents, for examination, photocopying and otherwise copying, all payroll and social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of back pay and

interest due under the terms of this Order.

(c) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, make sufficient copies in each language for the purpose set forth in this Order.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days of issuance of this order to all agricultural employees in its employ from January 1, 1990 to December 31, 1990.

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

(f) Upon request of the Regional Director or his designated Board agent, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time the Regional Director requests peak season dates, inform the Regional Director of when the present peak season began and when it is anticipated to end, in addition to informing the Regional Director of the anticipated dates of the next peak season.

(g) Arrange for a representative or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its employees on company time and property

at time(s) and places(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine the reasonable rate of compensation to be paid by Respondent to all piece-rate employees in order to compensate them for time

lost at the reading and question-and-answer period.

(h) Notify the Regional Director in writing, with 30 days of the issuance of this Order, of the steps it has taken to comply with its terms, and make further reports at the request of the Regional Director, until full compliance is achieved.

DATED: January 21, 1992

JAMES WOLPMAN
Chief Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office of the Agricultural Labor Relations Board by the United Farm Workers of America, the General Counsel of the ALRB issued a complaint which alleged that we, Brighton Farming Company, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we violated the law by the discharging members of Arnulfo Rodriguez' crew on January 2, 1990 and members of Leo Mazari's crew on April 2, 1990, and that this was due to the fact that crew members had been involved in protesting certain terms of their employment. 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 you to know that the Agricultural Labor Relations Act is a law that give you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, and 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 you have these rights, we promise that:

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

WE WILL NOT discharge or otherwise discriminate against any agricultural employee because he or she has acted together with other employees to protest the terms and conditions of their employment.

WE WILL restore to Norma J. Castro, Rosaura Arguello, Florinda Montoya, Juliana Alvarez, Arturo Espinoza, Juan Almanza, Manuela Almanza, Norma Montoya, Julian Delgadillo, Santos Marin, Ernesto Garcia, Ruben Franco, Vicente Rios, Margarito Cortes, Jose M. Zuniga, Francisco Mazari, Jorge Enrique Valdez, Lourdes Dorame, Eliseo Moctezuma, Luz Maria Mazari, Lazaro Arriaga, Vincente Ruiz, Francisco Resales, Carlos Corella, Ramiro Mendoza, Antonio Ortiz, Jesus Corella, Yolanda Anguiano, and Antonia Mendoza to their former positions and we will reimburse them with interest for any loss in pay or other economic losses they suffered because we discharged an refused to rehire them.

DATED: BRIGHTON FARMING COMPANY, INC.

By: _____
Representative Title

If you have questions about your rights as a farm worker 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, CA 92243. The telephone number is (619) 353-2130

DO NOT REMOVE OR MUTILATE