Hanford, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of: WILLIAM WARMERDAM, Individually and doing business as WARMERDAM PACKING CO., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 94-CE-177-VI 95-CE-34-VI 95-CE-40-VI 22 ALRB No. 13 (November 15, 1996)

DECISION AND ORDER

On January 3, 1996, Administrative Law Judge (ALJ) Douglas Gallop issued the attached decision in this matter. Thereafter, the Charging Party timely filed exceptions to the ALJ's Decision and Respondent filed a brief in response.

In considering the exceptions and responses of the parties in light of the ALJ's decision, and the similarity of a pivotal question in this and a different case decided by the Agricultural Labor Relations Board (ALRB or Board), Scheid Vineyards and Management Co., Inc. (Scheid) (1995) 21 ALRB No. 10), the Board invited the parties to present statements of position regarding the applicability of Scheid to matters herein.

The Board has considered the ALJ's decision in light of the record, the exceptions, response brief, and supplemental briefs of General Counsel, Respondent and Charging Party United Farm Workers of America, AFL-CIO (UFW or Union) and affirms the

rulings, findings and recommendations of the ALJ only to the extent consistent herewith. As will become apparent below, we find that Respondent violated section 1153 (e) and (a) of the Agricultural Labor Relations Act (ALRA or Act)[1] when it changed established hiring practices by engaging labor contractors to provide new unit employees beginning in November, 1994 and thereafter, without first affording the Union notice of the proposed changes and opportunity to bargain before implementing them.

The relevant facts, briefly summarized, are these. Respondent has produced nut crops as well as stone and other fruit commodities for 30 years with a work force comprised solely of employees who were directly hired, supervised and paid by the Company, including the occasional hiring of a crew supervised by Salvador Cruz who normally worked as a crew boss for a neighboring grower. Cruz worked only during the month of May, when free of his regular duties, and did so in the spring pruning of 1991, 1992 and 1993 and the spring harvest of 1992 and 1994. According to Respondent, Cruz worked directly for the Company as an hourly employee, as did his crew members. He joined Respondent's permanent work force as a crew foreman in 1995.

On May 18, 1994, for the first time by Respondent's own account, the Company engaged the services of a bona fide labor contractor to provide temporary employees. Approximately three

[1]Unless otherwise specified, all section references herein are to the California Labor Code, section 1140 et seq.

weeks later, on June 9, 1994, the UFW filed a petition for certification seeking to represent all of Respondent's field workers. The ALRB conducted an election on June 16, 1994 and certified the UFW on August 4, 1994 as the exclusive representative of all of Respondent's agricultural employees in the State of California for purposes of collective bargaining. The Union immediately invited Respondent to commence negotiations towards a comprehensive collective bargaining agreement, submitting its initial bargaining proposals, including language on the use of labor contractors, in late November, 1994. The parties commenced negotiating in January, 1995, and thereafter met almost monthly, but without resolution, until the start of the hearing in this proceeding in October, 1995.

In early October, 1994, Respondent again utilized labor contractors, admittedly without notice to and bargaining with its employees' exclusive representative. The UFW reacted on October 11 with the filing of an unfair labor practice charge in which it alleged that Respondent had unilaterally altered established recall practices, a reference to the use of labor contractors, in violation of section 1153(c) (discrimination in employment) and section 1153(e) (failure to notify and bargain before implementing changes in terms and conditions of employment).[2]

[2]In its answer to the complaint, Respondent admitted that its employees visibly demonstrated their support for the UFW "since May, 1994." That concession, however, does not establish the element of employer knowledge necessary to find that

Respondent testified that between certification and the hearing, labor contractors provided employees for various tasks beginning in early October, 1994 and continuing through the week of September 13, 1995. Acknowledging Respondent's concession that it never advised the Union that it had engaged the contractors, either before or after they were hired, the ALJ found that Respondent had no duty in that regard because such hirings were consistent with Respondent's past practice, as demonstrated by its hiring of temporary employees by means of the pre-election engagement of a labor contractor in conjunction with the occasional hiring of Cruz. He noted that although Cruz was not technically a labor contractor, he operated as one insofar as he provided Respondent with temporary employees, as did the labor contractors.

In the event the Board were ultimately to disagree and find that Respondent had indeed effectuated bargainable changes in practice, the ALJ examined different defenses which otherwise could serve to excuse Respondent's failure to notify and bargain. He concluded that even if Respondent had unilaterally effectuated changes, the changes were not unlawful because (1) with regard only to the hiring of contractors for the October, 1994 apple harvest, exigent circumstances were such that the need to act

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Respondent's decision to hire contractor labor effective May 18 was made prior to the time it became aware of the UFW s organizational efforts. Accordingly, we affirm the ALJ's finding regarding an absence of evidence necessary to make the causal connection that Respondent hired new employees as a response to the support of its established work force for unionization.

quickly excused the failure to notify and bargain, and (2) the subsequent use of labor contractors was not unlawful because the Union had notice of Respondent's intention in that regard, but failed to exercise its opportunity to bargain. As will be discussed more fully below, we agree only with the ALJ's finding of circumstances sufficient to excuse the failure to notify and bargain prior to hiring labor contractors for the apple harvest in the week ending October 12, 1994.

The touchstone in cases such as this is Benne Katz, et al. v. National Labor Relations Board (Katz) (1962) 369 U.S. 736 [50 LRRM 2177] which holds that a party who changes mandatory terms and conditions of employment without first notifying and affording the employees' representative an opportunity to bargain engages in a per se violation of the Act.[3] The court viewed such unilateral conduct as "so pernicious to the collective-bargaining process" that the statutory duty to bargain may be violated without a showing of subjective bad faith as "there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact [that is] 'to meet...and confer' about any mandatory subject. (Katz, 369 U.S. 736, 743.)[4]

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[3]There should be no dispute that the hiring of employees, as well as their wages, hours and other terms and conditions of employment, comprise mandatory subjects of bargaining.

[4]Since a major issue in Katz concerned the granting of merit increases, many employers have since argued that the case should be limited to such issues. That notion was disposed of in The Daily News of Los Angeles (1994) 315 NLRB 1236, 1237 [148 LRRM 1137] wherein the National Labor Relations Board (NLRB or national board) stated that " [a] 1 though the [U.S .Supreme] court's

As explained in NLRB v. Do than Eagle. Inc. (5th Cir. 1970) 434 F.2d 93 [75 LRRM 2531], the appropriate standard following Katz merely examines,

> whether a change has been implemented in conditions of employment... It neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

Katz, however, also sanctions a "longstanding practice" exception which holds that changes in terms and conditions of employment need not be bargained if they are "a mere continuation of the status quo." (369 U.S. 736, 746} Whether a change meets this exception depends on the degree of employer discretion involved. (See, e.g., Aaron Brothers Co. v. NLRB (9th Cir. 1981) 661 F. 2d 750 [108 LRRM 3062]; Our Lady of Lourdes Health Center (1992) 306 NLRB 337 [139 LRRM 1392].) In Local 512. Warehouse & Office Workers v. NLRB (9th Cir. 1986) 795 F.2d 705, 711 [122 LRRM 3113] the Ninth Circuit explained that, in the Aaron Brothers case, "we emphasized that the 'long standing practice exception' suggested in Katz placed a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change."

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opinion. . .suggests that the holding of Katz is limited by its facts, i.e., the unilateral continuance of a merit wage program, neither the Board nor the courts have given such a narrow reading to Katz in subsequent decisions. Thus, the Board and courts have applied Katz to enjoin unilateral conduct by employers in a wide variety of contexts. . . ".

Following the authorities set forth above, this Board found that the Employer in the Scheid case had implemented two hiring changes which could not be defended on the grounds that either of them was of long standing as well as devoid of employer discretion in their implementation in order to be deemed an automatic extension of prior practice. We found first that Scheid hired new employees locally rather than, as it had previously, recalling former employees by classification seniority. We also found that Scheid engaged in an additional and impermissible change when it hired employees through a labor contractor whereas it had not done so for two prior seasons. Due to the considerable exercise of discretion in the criteria for selecting new employees as well as the manner in which they were hired, we concluded that the Company had thereby forfeited the benefit of the Katz past practice defense.

In light of Katz and Scheid. therefore, the principal question here is whether Respondent's post-certification hiring of employees through labor contractors was immune from the bargaining obligation because such hirings were consistent with past practice and absent discretion.

Respondent presented an array of defenses to justify its failure to offer the Union notice or opportunity to bargain before engaging labor contractors following certification. The Company asserts generally that there was no such duty because (l) there was no change in hiring practices as the utilization of labor contractors as a source of short-term labor was consistent

with past practice, (2) the October, 1994 hiring of labor contractors was a management decision dictated by an emergency situation in which discretion could not be a factor, (3) the hiring of employees through labor contractors had no adverse impact on permanent employees, and (4) even assuming Respondent had a duty to notify the Union and afford it an opportunity to bargain before engaging contractors, that duty was negated by the Union's having learned of the hiring of contract crews from sources other than Respondent and failing to act on that knowledge. All of the defenses are discussed seriatim below. As will appear from the discussion which follows, we find merit only in the first post-certification hiring of employees through labor contractors in October of 1994 on the basis of demonstrated exigent circumstances which, in that instance only, obviated the normal requirement of prior notice and bargaining before implementing changes in employees' working conditions.

Past practice

Respondent contends that the indirect hiring of employees through labor contractors was a long-standing practice. In Respondent's own words, however, it hired a labor contractor to provide and supervise temporary employees for the first time just three weeks before the representation election which gave rise to Respondent's bargaining obligation.

Although the Cruz crew had also satisfied short term employment needs, Cruz had been directly hired and paid by Respondent, as had all of Respondent's permanent employees.

Here, however, there is a pivotal difference with regard to employees supplied by labor contractors. As to them, Respondent neither supervised their hiring nor their work and thus could not recount how the wages they received or any other term and condition of their employment may have compared to those of employees directly hired, paid and supervised by the Company for similar job duties.

In Aaron Bros. Co. v. NLRB, supra. 661 F.2d 750, cited with approval in Scheid, the court held that the existence of an established formula (i.e., a defined policy) must be considered in addition to how long an employer's practice had been in effect. (See, also, Queen Mary Restaurants Corp. v. NLRB (9th Cir. 1977) 560 F. 2d 403 [96 LRRM 2456](a single prior wage increase could not establish the requisite long-standing practice or defined policy the court requires in analyzing the past practice defense in unilateral change cases); NLRB v. Nello Pistoresi & Son. Inc. (9th Cir. 1974) 500 F. 2d 399 [86 LRRM 2936] (the combination of short history and indefinite nature of the alleged past practice is fatal to the defense.)

Even assuming, however, that the hiring of Cruz, in conjunction with the sole pre-election hiring of a labor contractor, points to a long standing practice, the question ultimately is whether, when hiring employees through contractors in the relevant post-certification period, the employer exercised discretion as to, for example, the timing or size of such hirings. Or, to paraphrase the court in Acme Die Casting v.

NLRB (D.C.Cir. 1994) 26 F.3d 162 [146 LRRM 2736], were the post-certification hirings of employees indirectly through labor contractors "a deviation from accepted prior practice and from the expectations of the employees, as things stood prior to the election?"

Through a labor contractor, Respondent hired 15 crews to work two days and an additional crew for one day in the May, 1994 cherry harvest. Following certification, one contract crew was hired for three days in early October, 1994 to harvest apples. Another contractor provided three crews to prune and thin from mid-November, 1994 through late January, 1995. Contract crews were hired again in the spring of 1995 to thin and harvest apples as well as to harvest cherries. During the summer of 1995, labor contractors were hired to work in the week ending July 26 and for about five weeks thereafter through the week ending August 23 . Two contractors were hired for two days each on September 12 and 13, 1995.

Respondent has not demonstrated that the use of contract crews followed a general plan or policy which was predictable and on that basis could be viewed as automatic. Rather, the "unprecedented and irregular nature of the changes suggest that they were the 'product of an ad hoc decision-making process rather than a continuation of an established company policy.'" (City Cab Co. of Orlando. Inc. v. NLRB (llth Cir. 1986) 787 F. 2d

1475 [122 LRRM 2392];[5] David Vaino, et al. (1988) 289 NLRB 1376 [131 LRRM 1135].[6]

Accordingly, under this record, and in particular in light of the standard endorsed by the Ninth Circuit, as discussed above, Respondent has not successfully met its burden of demonstrating that the post-certification reliance on labor contractors was the result of a long-standing fixed practice devoid of discretion and based on "pre-established guidelines embodied within a policy which the company intended to continue indefinitely." (Hyatt Corp. v. NLRB (9th Cir. 1991) 939 F.2d 361 [138 LRRM 2115]; Scheid.)

In light of the particular facts of this case, it may

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[5]The court observed that City Cab changed cab rental rates at frequent and irregular intervals over a two year period and observed that one driver testified that the "drivers never knew what to expect." In response to City Cab's contention that certain factors beyond its control necessitated the changes, including consumer demand and the amount of fares allowed by the city, and therefore the changes were merely an automatic response to these factors, the court stated as follows: "Whatever the origin of these factors, the changes City Cab instituted were not the 'automatic' changes contemplated by the authority upon which it relies. In fact, the record is replete with admissions that City Cab's response to these changes was instead based upon a delicate and sophisticated analysis of a number of economic factors, such that the company exercised an impermissible degree of discretion for purposes of the Act." The court then concluded that "if City Cab had any practice at all, it was simply one of constant change." (City Cab Co.Inc. supra. 787 F, .2d 1475, 1479.)

[6]The trial examiner in that case relied on the distinction drawn by Katz between "the simple implementation of previously determined business decisions" and the "implementation of management decisions about which there was a large measure of discretion" and concluded that since the decision was not yet fixed, the employer was obliged to notify and offer to bargain with the union before finalizing the change.

be useful to point out that there is nothing in the labor laws which would have precluded Respondent from at any time deciding to augment its work force in order to carry on operations. The Board only requires that once employees are represented, the employer has an obligation to notify the representative and offer to bargain about, as in this instance, the change in hiring practices as well as the hours and wages of new employees as they also are subject to representation by the union. Indeed, under our Act, all employees of the employer, whether permanent or temporary, whether hired directly or through contractors, are employees of the employer within the single bargaining unit.

Hirings based on Exigent Circumstances

Respondent contends next that it engaged labor contractors in early October, 1994 only when it became apparent that the Fuji apple crop would be lost due to substantial rain damage unless additional harvest workers were secured immediately and only after the Company tried without success to augment existing crews. Respondent made no attempt to contact the Union, relying on its belief that it had no duty to do so because it was merely exercising a management prerogative in the running of its business.

Initially, the question is whether, even when confronted by business necessity, must an employer notify and bargain with the union before implementing changes in working conditions? No matter how salutary the employer's hiring needs may be, it nevertheless has a duty to notify the union and

bargain about, any proposed changes and its failure to do so, with limited exception, constitutes a violation of the Act. The NLRB's decision in Awrey Bakeries, Inc. (1975) 217 NLRB 1307 [89 LRRM 1224] is particularly instructive on that point because the employer in that case, as here, defended its changes in working conditions primarily on management rights. The national board said:

> The argument here seems to be that so long as a business change that affects conditions of employment is economically advantageous to the employer, the statutory duty to bargain with the employees' representative is inapplicable. It is a mistaken notion, and has been rejected too often to justify precedent citation. Neither the statute nor this complaint suggests that the Respondent, or any employer, is not free to discharge people, to change their pay, to alter their conditions of employment for economic reasons. All section 8 (a) (5) [correspondingly ALRA section 1153(e)] requires, and all this complaint complains about, is that the employer is obligated, whenever, as here, there is" an exclusive bargaining agent, to discuss the proposed change with the union. There was nothing to prevent this company from making the change when it did, and in a manner perfectly consistent with the statute. All it had to do was respond cooperatively to the Union's [request to bargain] ...and talk with union agents about the proposed change. That is all collective bargaining is about.

The general rule, therefore, is that when, as here, parties are engaged in negotiations for a comprehensive collective bargaining agreement, an employer must bargain to impasse prior to implementing unilateral changes in working conditions unless the unilateral action is justified by extenuating circumstances. (Winn-Dixie Stores, Inc. (1979) 243 NLRB 972, 974 [101 LRRM 1534].) Absent circumstances which could

excuse unilateral changes during contract negotiations, the employer has not only an obligation to give notice and opportunity to bargain about the proposed changes, but, with two limited exceptions discussed below, must refrain from implementing them at all "unless and until an overall impasse has been reached on bargaining for the agreement as a whole." (Master Window Cleaning. Inc., d/b/a/ Bottom Line Enterprises (1991) 302 NLRB 373, 374 [137 LRRM 1301].) The exceptions are (1) [w] hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining (M&M Building & Electrical Contractors, Inc.
(1982) 262 NLRB 1472 [110 LRRM 1512] , citing to AAA Motor Lines, Inc. (1974) 215 NLRB 793 [88 LRRM 1253] and (2) when prompt action is dictated by extenuating circumstances (Winn-Dixie, supra. 243 NLRB 972, 974.

That having been said, we turn now to the case at hand in order to examine whether the failure to notify and bargain before engaging contractors was justified on other grounds, perhaps by "extraordinary events which are 'an unforseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" (Hankins Lumber Co. (1995) 316 NLRB 837, 838 [150 LRRM 1298], quoting from Angelica Healthcare Services (1987) 284 NLRB 844, 852-853 [125 LRRM 2832].)

In the recent case of RBE Electronics of S.D., Inc.
(1995) 320 NLRB 1, 3 [151 LRRM 1329], the national board further

defined extenuating circumstance as one in "in which time is of the essence and which, demand[s] prompt action." Moreover, an employer claiming such an exemption has a heavy burden in demonstrating the need for prompt implementation of the employment action and, further, must show that the changes were compelled, were dictated by external events, were beyond the employer's control, or were not reasonably foreseeable. (RBE Electronics, supra, 320 NLRB 1, 3.)[7]

On the basis of the record evidence set forth above, and in light of the standard set forth in RBE Electronics, supra, we conclude that exigent circumstances excused what otherwise would have been a duty to notify and bargain with the Union before engaging labor contractors in October, 1994.[8] We agree with the ALJ who found no record evidence of similar circumstances that even arguably could serve to excuse the failure to notify and bargain before the subsequent hiring of employees

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[7]Following NLRB precedents, the Board will carefully scrutinize unbargained changes where extenuating circumstances are asserted as a defense and will evaluate each case on a case by case basis and require bargaining to the extent that the situation permits. (Cardinal Distributing Co. v. Agricultural Labor Relations Board (1984) 159 Cal.App.3d 758 [205 Cal.Rptr.860].) The national board has cautioned that "business necessity" is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially." (Farina Corp. (1993) 310 NLRB 318, 321 [143 LRRM 1159].)

[8]Member Frick would also note that the record reveals no bargainable effects of the decision to utilize a labor contractor in these circumstances.

through labor contractors.

Absence of harm to either employees or Union

In its third argument, Respondent proposes that since no permanent employees lost work or wages, there could be no change that would require bargaining. Respondent misperceives the teachings of the Katz doctrine, under which harm is not an element of the prima facie case. An employer who unilaterally implements changes in mandatory terms and conditions of employment, such as hiring practices, engages in a per se violation of the Act. Neither the employer's motivation nor the effect of the change is relevant, as the "vice" which Katz prohibits is unilateral modifications in the existing conditions of employment. (NLRB v. Dothan Eagle, supra, 434 F.2d 93,98.) In such cases, General Counsel is not required to demonstrate that any employee was harmed economically by the change as the matter of harm, if any, and the extent thereof, is reserved to the compliance phase of the Board's bifurcated unfair labor practice process.

Respondent's related contention, that the Union has no cause to complain because it was not adversely affected by the failure to bargain, is equally irrelevant. As noted previously, once employees selected a bargaining representative, "[r]espondent could no longer continue unilaterally to exercise its discretion with respect" to mandatory subjects of bargaining. (Adair Standish Corn. (1989) 292 NLRB 890 [130 LRRM 1345]. The inevitable result when this principal is violated is harm to the collective bargaining process "for it is a circumvention of the

duty to negotiate which frustrates the objectives of [the statutory duty to bargain] much as does a flat refusal." This is so even if the change is beneficial to employees, because, if, for example, "an employer could increase insurance benefits at its own discretion while bargaining with a union for a collective bargaining agreement, it would undermine the union's position in the eyes of its members, and cause them to wonder if they really needed a union." (Plymouth Locomotive Works (1982) 261 NLRB 595, 599 [110 LRRM 1155] .) A similar view was expressed in NLRB v. McClatchy Newspapers (CA DC, 1992) 964 F.2d 1153, 1163 {140 LRRM 2249]:

> ...unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

Respondent proposes nevertheless that even if there was some harm, it was "de minimus" and therefore not actionable. In Columbian Chemicals Company (1992) 307 NLRB 592 [140 LRRM 1311], in addressing a similar contention, the NLRB rejected the notion that unilateral changes are unlawful only if they are "material, substantial, and significant." The only test is whether there was a change, not the nature or scope or effect of the change. Waiver of Right to Bargain

Finally, Respondent asserts that even if a notification and bargaining obligation existed on its part, the UFW failed to act after being informed by sources other than Respondent that new employees had been hired through labor contractors and thus

deliberately waived any right to bargain over the issue. Respondent believes that such independent knowledge would serve to overcome any duty of notification Respondent might otherwise have had.

As waiver is not lightly inferred and " [o] nly clear and unmistakable language will warrant a conclusion that waiver was intended" (General Electric Co. v. NLRB (4th Cir. 1969) 414 F.2d 918 [71 LRRM 2562]) , we have carefully reviewed all record evidence. There is a paucity of evidence relevant to this matter. What little there is was proffered in the main by the Union's negotiator and was essentially uncontroverted. On that basis, we find that Respondent has failed to make a clear and unmistakable showing that the UFW relinquished its right to bargain about changes in existing hiring practices.

On November 22, 1994, shortly following certification, the UFW submitted its initial bargaining proposals, including one concerning the use of labor contractors, and submitted additional proposals on May 18 and June 20, 1995. Respondent's proposals included language on "subcontractors/labor contractors"[9] and

[9]Although it appears that the proposals were intended to address the use of labor contractors, they refer to the contracting out of unit work rather than the enlargement of the bargaining unit by an infusion of new employees supplied by labor contractors. Under the Agricultural Labor Relations Act (ALRA or Act), labor contractors are not employers. Workers they provide are employees of the employer who contracts for their services. In this instance, all temporary or short-term employees obtained in this manner became Respondent's own employees and, as such, became part of the certified unit entitled to representation by the UFW in the same manner as Respondent's permanent year-round employees. This basic misconception by Respondent of the

were submitted on January 30, May 24, July 13, and September 26. The parties commenced negotiations on January 30, 1995 and stipulated on the record that additional bargaining sessions were held in 1995 on February 14, March 21, April 4, April 18, May 26, June 20, July 13, September 7, perhaps also on September 26, and October 3. (The hearing in this proceeding was held on October 24, 1995.) During that initial meeting, Respondent proposed to use "subcontractors" at its discretion. It appears, however, that the Union's concern about the use of contract labor was not formally discussed at the bargaining table until the March 21 meeting when the Union sought Respondent's position regarding the future use of contract crews. In response, Respondent revealed plans to use about 10 permanent crews and an equal number of temporary crews, but also declared the matter not bargainable on the grounds that it had previously used contract crews.[10] The

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distinction between acquiring employees through labor contractors and the contracting out of unit work to independent employers (i.e., "subcontracting," as that term is used under the national act) infused the whole of the bargaining process and is demonstrated by a review of the contract language Respondent submitted on September 26, 1995 under the heading of "Subcontracting." Respondent proposed that, to the extent that it has done so in the past, the Company would have the right to continue to subcontract such work and, in addition, would retain "the right to subcontract bargaining unit work that has not been previously subcontracted out when the Company determines that it is cost efficient and in the best interest of the Company to do so and when all Company crews are working." The same proposal also provides that workers provided by subcontractors are not Respondent's employees.

[10]Sometime in March, in an apparently unrelated matter, the Union persuaded Respondent that permanent employees believed they were being discriminatorily denied opportunities to work in the pruning season. To allay their concerns, the parties developed a

negotiator quoted Respondent's representative as stating "we need them [contractors], we are going to use them." The Union negotiator took this response to mean Respondent was not willing to discuss the matter further.

The June meeting represented the first post-March bargaining session in which the parties again discussed the use of labor contractors, with the Union proposing a procedure for the use of labor contractors which apparently was not acted upon. The Union negotiator testified further that he could not recall any subsequent discussions between the parties concerning labor contractors. He testified that the Union's only response to the Company's follow-up proposals of July 13 and September 26, 1995 was noting that Respondent's position regarding hiring labor contractors was basically unchanged since June 20. Respondent's counsel stated at hearing that Respondent has never taken the position that the parties were at impasse.

An employer who defends a failure or refusal to bargain on grounds of waiver bears a heavy burden of demonstrating first that it "formally and fully" apprised the union of its intent to take action which will effect some change in existing employment terms or conditions within the range of mandatory bargaining and that the union thereafter declined an opportunity to bargain over

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temporary hiring procedure which permitted permanent employees to sign up for work by a date certain in order assure that they would be called for work when work became available. When the parties met on June 20, the Union advised Respondent it was satisfied that all employees who sought work in the 1995 thinning/harvest operations had been hired.

the matter. YHA, Inc, (1992) 307 NLRB 782 [140 LRRM 1123]; Triplex Oil Refinery (1971) 194 NLRB 500 [78 LRRM 1711].) Moreover, " [m] ere suspicion or conjecture cannot take the place of notice where notice is required" and will not be sufficient to support a finding of waiver. (Local 512, Warehouse & Office Workers v. NLRB (9th Cir. 1986) 795 F.2d 705, 711 [122 LRRM 3113] (quoting ILGWU v. NLRB (D.C.Cir. 1972) 463 F.2d 907, 918 [80 LRRM 2716].) It follows therefore that neither plant gossip nor rumors of actions affecting employees will substitute for formal notice from the employer setting forth with some specificity the nature of planned employment actions. (NLRB v. Rapid Bindery, Inc. (2d Cir. 1961) 293 F.2d 170, 176 [48 LRRM 2658].) Accordingly, Respondent's threshold defense, based on its contention that, under the circumstances here, it had no duty to notify and bargain prior to implementing the unilateral change is wholly lacking in merit. Respondent's only testimony with regard to negotiations was that the Company never gave the Union notice, either in writing or orally, of its reliance on labor contractors, either before or after they were utilized.

Equally lacking in merit is the implication that, once having acquired knowledge of the use of contract labor, the Union forfeited its bargaining rights by failing to object more vigorously to the use of labor contractors. Even if the Union had been silent on the matter, waiver may not be inferred from silence. (Timken Roller Bearing Co. v. NLRB (6th Cir. 1963) 325 F.2d 746, 751 [54 LRRM 2785] cert. den. (1964) 376 U.S. 971 [55

LRRM 2878].) Moreover, "[a] union's past practice of permitting unilateral changes...does not constitute a waiver of the union's right to bargain over such changes... as Board precedent makes clear, a union's acquiescence in previous unilateral conduct does not necessarily operate in futuro as a waiver of its statutory rights under Section 3(a)(5) [correspondingly, ALRA section 1153 (e]. " (E.R.Steubner. Inc. (1993) 313 NLRB 459 [145 LRRM 1101], citing to NLRB v. Miller Brewing Co. (9th Cir. 1969) 408 F. 2d 12 [70 LRRM 2907]; Owens-Corning Fiberglass (1987) 282 NLRB 609 [124 LRRM 1105].) The Ninth Circuit would agree, having held that an employer's unilateral change in the health care benefits of its employees constituted a unilateral refusal to bargain despite the fact that "the parties talked about" this issue. (Clear Pine Moldings. Inc. v. NLRB (9th Cir. 1980) 632 F.2d 721 [105 LRRM 2132].)

We find the authorities discussed above controlling. The unilateral decision to continue using labor contractors post-certification was essentially made irrevocable prior to any notice, direct or indirect, the Union may have had of such practice and was announced as a matter on which the employer will not bargain. (Michigan Ladder Co. (1987) 286 NLRB 21 [127 LRRM 1092]; Kav Fries. Inc. (1982) 265 NLRB 1077 [112 LRRM 1377].) As was the case here, "no genuine bargaining... can be conducted where the decision has already been made and implemented." (NLRB v. Henry Voght Machinery Company (6th cir. 1983) 718 F.2d 802

[114 LRRM 2893], and cases cited therein.)

Conclusion

We find that between November, 1994 and September, 1995, Respondent unilaterally changed its pre-certification method of hiring employees without the requisite prior notice to the Union and opportunity to bargain before engaging labor contractors and thereby breached its obligation to bargain in violation of section 1153 (e) and (a) . It is necessary that we fashion an appropriate remedy for the violation of the Act.

When the Board finds that an employer has violated its duty to bargain by unilaterally altering conditions of employment, we typically order a restoration of the status quo ante running from, the date of the violation until such future time as the parties negotiate in good faith to agreement or a bona fide impasse. (NLRB v. Cauthorne (D.C.Cir. 1982) 691 F.2d 1023, 1025 [111 LRRM 2698].) Accordingly, in order to remedy Respondent's failure to timely notify and bargain with the Union before implementing the hiring change, and to effectuate the policies of the Act, we shall order Respondent to cease and desist from such failure and to rescind its policy concerning the use of labor contractors should the Union so request. We shall further order Respondent to compensate any permanent employees who may have suffered economic loss as a result of Respondent's

unilateral action.[11]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent William Warmerdam, individually and doing business as Warmerdam Packing Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in labor Code section 1155.2(a), upon request, with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of Respondent's agricultural employees.

(b) Unilaterally implementing any changes in hiring practices or any other term and condition of employment of its agricultural employees without first notifying and affording the" UFW a reasonable opportunity to bargain with Respondent concerning such changes.

(c) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor

[11]Although the UFW urges the Board to award a bargaining makewhole remedy, the Board has never considered such a remedy appropriate for a discrete unilateral change in working conditions. Rather, the bargaining makewhole remedy has traditionally been reserved for situations in which there is on the record an extensive bargaining history so that the remedy may be evaluated in terms of the totality of circumstances.

Relations Act (ALRA or Act).

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

(a) Upon request of the UFW, rescind the unilateral change in hiring policy;

(b) Upon request of the UFW, meet and bargain collectively in good faith with the Union as the certified exclusive collective bargaining representative of its agricultural employees concerning the changes in hiring practices resulting from the use of labor contractors to provide temporary employees to perform bargaining unit work.

(c) Make whole all permanent employees who may have lost work they otherwise would have performed, but for the use of contract labor, between November, 1994 and September, 1995, for all losses in wages and other economic losses they may have suffered, until such time as Respondent negotiates to agreement or impasse with the UFW, or the UFW fails to timely request bargaining, plus interest to be computed in the manner set forth in E.W.Merritt Farms (1988) 14 ALRB No. 5.

(d) 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 backpay due in order to make employees whole under the terms of this Order.

(e) Sign the attached Notice to Agricultural Employees, and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from November 1, 1994, until October 31, 1995.

(g) Post copies of the attached Notice, in all appropriate languages, for sixty days, in conspicuous placed 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.

(h) Arrange for a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent 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 employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer

period.

(i) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order, until full compliance is achieved.

DATED: November 15, 1996

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Board Member

LINDA A. FRICK, Board Member

WILLIAM WARMEKDAM, Individually and doing business as WARMERDAM PACKING COMPANY. (UFW)

22 ALRB No. 13
Case No. 94-CE-177-VI, et al.

Decision of the Acnricultural Labor Relations Board (ALRB or Board)

The Board found that Respondent's single pre-certification hiring of labor contractors was insufficient to meet the "long-standing past practice exception" which would have permitted Respondent to continue to hire labor contractors without prior notification and bargaining. Moreover, the decision to use labor contractors was not automatic as it involved considerable discretion. Therefore the post-certification use of contractors constituted a change in hiring practices which required Respondent to notify and bargain with the Union before again hiring contractors. On that basis, the Board found that Respondent had violated its duty to bargain with the newly certified Union when it engaged contractors between November, 1994 and September, 1995. The Board, however, in agreement with the ALJ, excused the hiring of contractors in early October, 1994 without prior notification and bargaining on the grounds of "exigent circumstances" which required Respondent to act quickly in order to attempt to overcome unseasonal rains which threatened an apple harvest.

Remedy

Having found that Respondent engaged in unlawful unilateral changes in violation of the duty to bargain, the Board invoked the standard remedy in such cases which will require Respondent, if the Union so requests, to rescind the change in hiring policy and negotiate in good faith concerning the hiring of temporary employees through labor contractors. Respondent was also ordered to make whole any permanent employees who may have lost work as a result of the unlawful unilateral change in method of hiring.

* * * * * * * *

CASE SUMMARY

WILLIAM WASMEBDAM, Individually and doing business as WABMERDAM PACKING COMPANY. (UFW)

22 ALRB No. 13
Case No. 94-CE-177-VI, et al.

Background

Warmerdam Packing Company (Respondent) is a grower of a variety of fruit crops, including nuts, stone fruits, and apples, on several parcels in the southern San Joaquin Valley. In May, 1994, the United Farm Workers of America, AFL-CIO (UFW or Union) began organizing Respondent's field employees and, on June 9, 1994, filed a petition for an election which was held one week later, on June 16. On August 4, 1994, the Agricultural Labor Relations Board (ALRB or Board) certified the UFW as the exclusive representative of all of Respondent's agricultural employees and the Union immediately invited Respondent to commence negotiations towards a comprehensive collective bargaining agreement. In January, 1995, and continuing to the start of the hearing in this proceeding on October 24, 1995, the parties held monthly bargaining sessions and exchanged a series of bargaining proposals including those addressing the hiring of labor contractors to provide temporary employees, but without resolution.

During the month preceding the election, for the first time in its nearly 30 years of operations, Respondent engaged the services of a labor contractor to provide temporary employees and continued this practice following certification. The UFW filed unfair labor practice charges in which it alleged that the post-certification utilization of the contractors was a change in established working conditions which required Respondent to notify and bargain with the Union before implementing such hiring practices.

Decision of the Administrative Law Judge (ALJ)

The ALJ found that since the post-certification engagement of labor contractors was consistent with Respondent's pre-certification use of contract labor, there was no change in established working conditions. In the event, however, that the Board should ultimately determine otherwise, the ALJ examined other defenses which might be available to excuse the hiring of contractors without first notifying and bargaining with the Union and found certain defenses that would serve to exonerate Respondent's actions (for example, he found that the UFW had notice of Respondent's use of contractors during some point in the negotiations process, but waived its opportunity to bargain).

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the Visalia Regional Office of the Agricultural Labor Relations Board (Board) by the United Farm Workers of America, AFL-CIO (UFW or Union), the General Counsel of the Board issued a complaint which alleged that we had violated the Agricultural Labor Relations Act (Act). After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Act by changing some of our hiring policies without first notifying and bargaining with the UFW, as your representative, about the hiring of new employees. The Board has told us to post and publish this Notice, and to mail it to those who have worked for us between November 15, 1994 and November 15, 1995. 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 a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you, or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative 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.

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

WE WILL NOT make any changes in our method of hiring employees without first notifying the UFW and giving it an opportunity to bargain about such changes, including the use of labor contractors to furnish temporary employees.

WE WILL, if the UFW requests, rescind our policy of hiring employees through labor contractors until we have negotiated those policies with the Union.

DATED:

WILLIAM WARMERDAM, Individually, and doing business as WARMERDAM PACKING Co.

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 711 North Court Street, Suite H, Visalia, California 93291-3636. The telephone number is (209) 627-0995.

DO NOT REMOVE OR MUTILATE THIS NOTICE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In tne Matter of:	
WILLIAM WARMERDAM, Individually, and doing business as, WARMERDAM PACKING CO.,	Case No. 94-CE-177-VI 95-CE-34-VI 95-CE-40-VI
Respondent,	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Appearances:

Sarah A. Wolfe
Thomas E. Campagne & Associates
Fresno, California
for Respondent

Carlos Perez
Marcos Camaciio A Law Corporation
Keene, California
for the Intervenor, United Farm Workers of America, AFL-CIO

Freddie A. Capuyan
Visalia ALRB Regional Office
Visalia, California
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This case was heard by me on October 24, 1995, in Fresno, California. It is based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter Union) alleging that William Warmerdam, Individually, and doing business as Warmerdam Packing Co. (hereinafter Respondent) has engaged in conduct violating provisions of the Agricultural Labor Relations Act (Act). The Union has intervened in these proceedings. The General Counsel of the Agricultural Labor Relations Board (hereinafter "ALRB" or "Board") issued a complaint, which has been amended.[1] Prior to the hearing, General Counsel moved to withdraw paragraphs 14 and 18 of the complaint, which was partially opposed by the Union. At the hearing, the unopposed portion of the requested withdrawal was approved. The remainder of the allegations were severed from this proceeding, and remanded to General Counsel for further investigation.

What remains are allegations that Respondent violated section 1353 (a), (c) and (e) by unilaterally engaging contractors to perform bargaining unit work, commencing with the apple harvest in October 1994. In its answer, Respondent denies that its conduct violated the Act, and asserts various affirmative defenses. Upon the testimony of the witnesses, documentary

[1]The complaint also contained allegations from charges filed by the Union in Case Nos. 94-CE-61-VI and 94-CE-80-VI, which were resolved prior to the hearing in a bilateral settlement agreement. At the hearing, General Counsel's unopposed motion to consolidate related charges filed by the Union in Case Nos. 95-CE-34-VI and- 95-CE-40-VI was granted.

evidence received at the hearing[2] and the briefs filed by the parties, I hereby make the following findings of fact and conclusions of law.

JURISDICTION

Respondent produces various fruits and is an agricultural employer within the meaning of §1140 (a) and (c) of the Act. The Union is a labor organization within the meaning of §1140 (d). The employees who work in Respondent's field operations are agricultural employees within the meaning of §1140 (b).[3]

FINDINGS OF FACT[4]

Respondent is a sole proprietorship owned by William Warmerdam, who has been engaged in farming since 1965. Until 1985, Respondent farmed peaches, plums and nectarines. Commencing in that year, Respondent began planting apple trees, and in 1990, cherry trees. Respondent essentially divides its operations into two seasons: dormant pruning, which lasts approximately from November through February, and thinning/harvest, which lasts approximately from late March

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[2] Respondent's motion to add two pages to its Exhibit 3, which has been administratively assigned for ruling by the Executive Secretary to the undersigned, is granted.

[3] Respondent also operates a packing shed, at which both its own and other growers' fruit are packed. Those employees are considered non-agricultural and are not affected by this decision.

[4] These facts are based on the parties' stipulations, the documentary evidence and the mostly unrebutted testimony of the witnesses.

through October, or into November. Due to the varieties of fruit produced, seasons frequently overlap.

Respondent has generally hired employees on a permanent, year-round basis. During slack periods, Respondent apportions the reduced hours as equally as possible, and employees who desire more hours may leave to work for other employers. Prior to May 1994, Respondent had not engaged labor contractors for its field operations, but as its workload increased, had sometimes hired a crew led by Salvador Cruz, who normally worked for another grower, to work on a temporary basis when Respondent could not obtain enough other employees to do the work. In 1995, Cruz and his crew were hired permanently by Respondent.

In May 1994, Respondent was experiencing a huge cherry crop. At the same time, thinning operations for apples and other fruit were continuing. Respondent promoted three employees to be crew bosses and hired additional employees, including Cruz's crew. Respondent's operations were also hindered by heavy rains during the cherry harvest. As the result, Respondent engaged a contractor, who sent 16 crews to work for two days in May 1994 (one crew worked a third day), performing tree thinning duties. No employees were laid off during this, or subsequent periods in which Respondent has used contractors. Even with this help, some of the thinning was late, and adversely affected the next crop.[5]

[5]Although there was hearsay evidence that the May 1994 contracting took place after the Union's organizing campaign began, there was no evidence showing Respondent was aware of the

On June 9, 1994, the Union filed a petition to represent Respondent's agricultural employees. The Union won an election conducted on June 16, and was certified as the collective bargaining representative on August 4, in Case No. (1994) 20 ALRB No. 12.

The fall and winter of 1994-1995 produced unprecedented rain. This adversely affected the apple crop, deforming much of it, and leaving it subject to early decay. In the end, less than one-quarter of the crop could be packed, with the rest put to less profitable uses. Respondent first ordered its crew bosses to take on additional workers. When they could not meet Respondent's labor needs, Respondent engaged one contractor whose single crew assisted in the harvest on October 7, 8, and 10, 1994, for a total of 50 hours. Respondent did not notify the Union of this action.[6]

Respondent next used labor contractors during the 1994-1995 pruning season. Its records show that one contractor provided three crews during the period, mid-November 1994 to late-January 1995, working in excess of SOO hours. Respondent did this because its maturing trees required more thinning than in previous years, and had to be completed before pesticide spraying began. No employees were laid off as the result of this

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organizing at that time, or engaged the contractor to retaliate General Counsel does not contend the May 1994 contracting was unlawful.

[6]Salvador Cruz was not used at this time, probably because his crew was working for the other grower, although this is not directly established by the record.

action. Again, Respondent gave no notice to the Union.

Respondent also used labor contractors for apple tree thinning in the spring of 1995. Respondent did this because of a heavy crop arising from mild weather and heavy rains. The rains also reduced the available work days for the cherry harvest, which overlapped the apple tree thinning. Respondent further wished to avoid another reduced apple crop such as that which resulted from the late thinning in the previous year.

Respondent and the Union had been meeting in collective bargaining negotiations, roughly once each month, commencing January 30, 1995 and had exchanged proposals concerning the use of labor contractors. Respondent's proposal of January 30 contained language which would essentially permit it to use labor contractors any time it chose to do so. At a negotiating session on March 21, 1995, Tanis Ybarra, a Regional Manager for the Union, asked Respondent's representatives if Respondent intended to use labor contractors for the upcoming thinning season. Respondent's attorney answered affirmatively, and explained there would be 10 of Respondent's crews, and 10 from the labor contractors. A heated exchange followed as to whether Respondent had used contractors prior to the Union's organizing campaign, at which point, James Myers, Respondent's Assistant Field Manager, stated Respondent needed the contractors and was going to use them. Ybarra assumed the subject was closed and did not pursue

it any further at the meeting.[7] The parties have continued to exchange proposals regarding the use of labor contractors, although little progress has been made in reaching agreement. According to Ybarra, the only significant discussion of the issue after March 21, 1995, took place at a negotiating session in June.

Contractor crews began apple tree thinning work during the week ending April 12, 1995. A total of three contractors were used, with a number of crews. While most of these crews had left Respondent's fields by June 14, two crews continued working significant hours, with few breaks, until late August.

Respondent next used contractors during the 1995 apple harvest. The parties stipulated that this was done because Respondent did not have special apple picking bags needed to avoid bruising the fruit,[8] but Warmerdam and Meyers testified the action was taken because Respondent did not have enough employees to complete the harvest in a timely manner.[9] The Gala apple crop was three times normal and other fruit was being harvested at the same time. In order to be suitable for cold storage, the apples had to be harvested at a specific time.

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[7]This account is based on Ybarra's testimony, which was not directly disputed by Warmerdam or Myers.

[8]Respondent subsequently purchased special picking bags for its own employees. The parties stipulated that Warmerdam would have testified that the special bags were needed because the apples were harvested late, and thus were more easily subject to bruising.

[9]The sworn testimony of these witnesses is credited over the parties' stipulation.

Based on the records, the contractor crews appear to have included the two who began during the thinning season, a third which began in late May, and several others that' started in or after early July. All of these crews ceased Gala apple harvest work in late August 1995. Respondent also hired new employees for the apple harvest, until August 10, but stopped doing this, because it believed work would soon slacken, and did not want to have a large number of employees working only a few hours.

Finally, Respondent used two labor contractor crews for two days each in September 1995 to complete the Granny Smith apple harvest. Respondent had lost many employees who left to harvest grapes for other employers, and the apples needed to be harvested at a specific time to be suitable for cold storage.

Respondent's witnesses further contended that even if additional employees could have been hired during these periods, it did not have qualified crew bosses to supervise them. The evidence fails to disclose any significant differences in wages, hours or fringe benefits between the contractor's employees and those on Respondent's payroll, although the contractor's employees are hired and are subject to discipline by the contractor, rather than by Respondent. The contractors also set the wages and fringe benefits for their workers.

ANALYSIS AND CONCLUSIONS OF LAW

General Counsel contends that Respondent's unilateral contracting actions constitute per se violations of §1353 (a) and

(e) of the Act.[10] Respondent's primary argument is that the decision to engage contractors is a management prerogative, because no unit employee was impacted. Respondent also contends that the conduct was consistent with its past practice, the Union did have prior notice, and the engagement of contractors, even without notice, was excused by necessity.

The Board has repeatedly held that where an agricultural employer unilaterally changes its hiring practices by engaging labor contractors, it violates §1153 (a) and (e) . Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85; Tex-Cal Land Management, Inc., et al. (1986) 12 ALRB No. 26; Roberts Farms, Inc. (1987) 13 ALRB No. 14; Scheid Vineyards and Management Company. Inc. (1995) 21 ALRB No. 10, at ALJD pages 27-29.[11] Respondent cites various decisions of the National Labor Relations Board (NLR3) and the courts finding that subcontracting decisions which have no impact on unit employees, such as diminution of unit work, do not require prior notice or bargaining. The ALRB, however, does not require a showing that

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[10]No evidence showing a §1353 (c) violation was produced, and said allegations will be dismissed.

[11]These cases are based on the United States Supreme Court's decision in Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], enforcing (1962) 138 NLRB 550 [51 LRRM 1101]. This and subsequent cases have held that the bargaining obligation required by such decisions does not necessarily require an impasse prior to implementation, but such bargaining as is practical under the circumstances. See also NLRB v. Hondo Drilling Co. (CA 5, 1976) 525 F2d 864, at page 867 [91 LRRM 2133]; District 50, United Mine Workers of America, Local 13_942 v. NLRB (CA 5, 1966) 358 F2d 234 [61 LRRM 2632],- Bruce Church. Inc. (1991) 17 ALRB No. 1.

work was lost by virtue of the contracting decision, since the change still affects terms and conditions of employment for unit members. Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85; Albert Valdora. Inc., et al. (1984) 10 ALRB No. 3, at ALJD pages 5-14. In responding to similar arguments regarding adverse impact made in Tex-Cal, the Board stated:

> Respondent fails to recognize that a unilateral change of an employer's hiring or subcontracting practice affects the terms and conditions of employment of the bargaining unit employees, regardless of whether bargaining unit members were actually displaced or suffered loss of employment or diminished income as a result of the change.

Pursuant to section 1140.4(c) of the Act, Respondent is the employer of the employees of labor contractors it engages to provide agricultural work. Those employees are members of the bargaining unit while so employed, and the manner in which they are hired and disciplined, as well as who determines their wages, hours and fringe benefits all constitute mandatory subjects of bargaining. As the collective bargaining representative of these employees, the Union is entitled to notice of the use of contractors, so it may fulfill its statutory duty to represent them. Thus, there is a fundamental difference between the impact of subcontracting out unit work, discussed in the NLRB and related court cases, and the addition of unit members, which is the statutory result of engaging contractors under the Act. Therefore, even though the record fails to establish an adverse impact on the non-contractor unit employees, if Respondent's actions are not excused on other grounds, they did impact the

contractors' employees as members of the unit.

There remains, however, the issue of whether the actions taken by Respondent commencing in October 1994 constituted a change in practice. It is well established that an employer is not obligated to give notice or the opportunity to bargain concerning practices which existed prior to the conduct complained of.[12] Sam Andrews' Sons (1985) 11 ALR3 No. 14; Sunnyside Nurseries (1980) 6 ALRB No. 52, at ALJD pages 22-24; Haddon Craftsmen. Inc. (1989) 297 NLRB 462 [133 LRRM 1081]. This is true even where the complained-of practice began shortly before the arrival of the union. Care Ambulance, Inc. (1981) 255 NLRB 417, at page 422 (written warnings) [107 LRRM 1043].

The record herein establishes that Respondent, prior to the Union's certification, had used its own permanent employees first, but when it could not hire enough additional employees and/or supervisors to timely complete its operations, hired the Cruz crew on a temporary basis. In the one instance where these measures failed to satisfy Respondent's manpower requirements, it had engaged a labor contractor. General Counsel and the Union contend that this history is insufficient to establish a past practice. Nevertheless, it is clear that Respondent had historically used the Cruz crew on a short-term basis, or the labor contractor, rather than hiring additional employees and

[12]This does not mean that a union condones unilateral changes merely by failing to object to a related previous change of which it had knowledge. In the context of this case, the issue is whether Respondent changed its practice from what existed prior to the Union's certification.

foramen on a short-term basis. It is also noted that Respondent's past practice, with the exception of Cruz and his crew, was not to hire employees on a temporary basis, and while Cruz was technically not a contractor, Respondent used him in an almost identical fashion. Under these circumstances, it is concluded that the use of contractors after the Union's certification did not constitute a new practice, but the continuation of one that already existed.

Both the Board and the NLRB permit some alterations in pre-existing practices, without finding a change in practice. The issue is whether the practice, as continued, has been so altered in quantity and kind as to become a new practice. Sam Andrews' Sons, supra; Outboard Marine Corp. (1992) 307 NLRB 1333, at pages 1338-1339 [140 LRRM 1265]; Wabash Transformer Corp. (1974) 215 NLRB 546, at page 547 [88 LRRM 1511]; Rust Craft Broadcasting of New York, Inc. (1976) 225 NLRB 327 [92 LRRM 1576]; UNC Nuclear Industries (1984) 268 NLRB 841, at pages 847-848 [115 LRRM 1111]; Care Ambulance, Inc., supra. Although Respondent used labor contractors for different job functions after the Union's certification, they primarily related to the apple crop. It is also notable that the work was not performed at a new location or on a new product. Most significant, however, is that the contractor employees were used, as previously, where Respondent could not supply enough of its own labor and/or supervision to perform the tasks. Accordingly, it is concluded that the use of labor contractors after

certification did not so alter tiie kind of pre-existing practice to the point of establishing a new practice.

The use of labor contractors for the October 1994 apple harvest and for the 1995 Granny Smith apple harvest resemble the pre-certification use of a contractor for tree thinning duties in scope, although the specific type of work performed was different. The other instances of contracting were clearly greater in scope than the May 1994 tree thinning. Whether the expanded scope of Respondent's use of labor contractors was so great as to create a new practice presents a close issue.[13] In some respects, this case resembles the NLRB's decisions in Howmet Corp. (1972) 197 NLR3 471 [80 LRRM 1555], enforced (CA 7, 1974) 495 F2d 1375 [86 LRRM 2572] and Daniel Construction Co. (1977) 229 NLRB 93 [95 LRRM 1442]. In both cases, the NLRB found the expanded use of subcontractors constituted changes in practice requiring notice and bargaining. In those cases, however, the later subcontracting resulted in layoffs, failures to recall and/or the reassignment of job duties of unit employees. The subcontracting in the NLRB cases also took place in the context of other serious unfair labor practices, and the subcontracting itself was also found retaliatory.

While Respondent may have approached impermissibly expanding its prior practice, it is concluded it did not do so.

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[13]This assumes that the NLRB test of "quantity and kind" can be read in the disjunctive, so as to permit the finding of a violation where the contracting is similar in kind, but not in quantity.

Although more labor contractor employees worked for longer periods of time, they were still clearly temporary workers hired for specific duties. The longest period any crew worked in Respondent's operations was less than five months, and portions of those periods involved only a few hours weekly per worker. To meet its labor requirements, even assuming Respondent would have been able to hire enough employees and supervisors directly, Respondent would have changed its general policy of not hiring employees on a temporary basis. See Outboard Marine Corp., supra; Puerto Rico Telephone Co. v. NLRB (CA 1, 1966) 359 F2d 983, at page 988 [62 LRRM 2069]. Under these circumstances, it is concluded that Respondent did not so change its past practice as to require notice or bargaining. Accordingly, the complaint will be dismissed.

ALTERNATIVE ANALYSIS AND CONCLUSIONS

Should Respondent's conduct be determined to constitute a change in practice, it becomes necessary to examine Respondent's other defenses. First, there is the issue of whether the Union was given notice and the opportunity to bargain for any of the decisions to engage labor contractors. Clearly, no notice was given concerning the October 1994 apple harvest and the 1994-1995 pruning season. The Union, however, became aware that Respondent was using labor contractor employees by October 10, 1994, the date it served the charge in Case No. 94-CE-177-VI. As noted above, on January 30, 1995, the Employer proposed using contractors when it felt they were needed, and the Union was told

contractors would be engaged for the tree thinning season in collective bargaining on March 21, 1995. At that meeting, Myers further informed the Union that Respondent needed the contractors, and would use them.

It is concluded that the Union, by the time contractor employees began tree thinning work on April 12, 1995, had ample notice that Respondent intended to engage labor contractors for its operations, at least when it was unable to meet its staffing demands by hiring additional employees and supervisors. It knew Respondent had done this before, and intended to continue the practice. While general negotiations on the issue of contracting will not suffice for notice and the opportunity to bargain specific instances of contracting, this is one factor considered in determining whether a unilateral change has taken place. Westinghouse Electric Corp., (1965) 153 NLRB 443, at page 448 [59 LRRM 1355] cf. Daniel Construction Co., supra. The ALRB has held that a bargaining proposal covering the new practice may, under certain circumstances, constitute notice thereof. Bruce Church. Inc. (1991) 17 ALRB No. 1. While five days' prior notice was found insufficient in Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], enforcing (1962) 138 NLRB 550 [51 LRRM 1101], the Union in this case was advised of the planned use of contractors for tree thinning 22 days before the work began, and had the other information concerning Respondent's use of contractors set forth above. Under these circumstances, it is concluded that the Union had sufficient notice of the use of

contractor employees for the 1995 tree thinning season, and thereafter.

General Counsel and the Union, nevertheless, contend that irrespective of notice, the Union was not afforded the opportunity to negotiate, based on Respondent's intransigent position. Indeed, in light of Respondent's prior use of labor contractors without notice and Myers' statement that Respondent was going to continue using them, it is arguable that Respondent presented the Union with a fait accompli not subject to negotiations. There is no evidence, however, that had the Union pursued the issue further at the time, Respondent would have refused to negotiate the matter, and in fact, when the Union brought up the subject later in negotiations, there were further discussions. That Respondent has taken a hard stand on its position, in itself, does not establish a refusal to bargain. Therefore, assuming Respondent's use of labor contractors did amount to a change in policy, those allegations commencing with the engagement of contractors for the 1995 tree thinning season would be dismissed based on adequate notice and the opportunity to bargain.

Respondent also contends the use of contractors was excused by circumstances beyond its control. "Necessity" may excuse a failure to give advance notice of a change in terms of employment. The defense of "necessity," however, does not mean economic advantage. Rather, it permits an employer to act in exigent circumstances threatening its business, where there is

insufficient time to notify the collective bargaining representative. Exigent circumstances do not necessarily suspend all bargaining requirements. Rather, notice and bargaining are still required to the extent possible. Joe Macrgio, Inc., et al. (1982) 8 ALRB No. 72, at pages 25-32.

The Board examines this defense on a case-by-case basis. In one case, the use of labor contractors in a strike situation without notice was permitted, where a labor shortage threatened the employer's crop, and the problem was not reasonably foreseeable. Charles Malovich (1983) 9 ALRB No, 64, at ALJD pages 24-27. The use of the labor contractor for a brief period during the October 1994 apple harvest will be excused by this defense, inasmuch as that action was undertaken to save crops, with little opportunity to give notice to the Union. Although Respondent, unlike the employer in Charles Malovich. did 'not give the Union notice of its action after it was taken, little if any bargaining could have taken place, given the short duration of the contractor's presence.

On the other hand, the necessity defense is not sustained as to the other post-certification uses of labor contractors. The circumstances leading to those uses were far more foreseeable, and it is questionable whether any of-them represented exigent circumstances precluding prior notice to the Union. In any event, Respondent had ample time to give the Union notice after those contracting decisions were made (other than the use of a contractor for the 1995 Granny Smith apple harvest).

Thus, the exigent circumstances, to the extent they existed, would not, in those instances, have prevented such notice at a time which would have still permitted negotiations.

ORDER

The complaint is dismissed in its entirety.

Dated: January 3, 1996

DOUGLAS GALLOP
Administrative Law Judge