Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PICTSWEET MUSHROOM FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 00-CE-332-EC(OX) 29 ALRB No. 1 (March 14, 2003)

DECISION AND ORDER

On June 19, 2002, Administrative Law Judge (ALJ) Nancy C. Smith issued the attached Recommended Decision in this matter. In her decision, the ALJ found that Pictsweet Mushroom Farms (Respondent) had violated sections 1153(a), (c), and (e) of the Agricultural Labor Relations Act (ALRA or Act) by failing to provide Charging Party United Farm Workers of America, AFL-CIO (the Union) with information concerning Respondent's profit sharing plan, by withholding biennial piece rate increases from its pickers, by laying employees off or failing to recall them following September 25, 2000,[1] in accordance with an agreement on terms of layoff and recall reached on that date, and by informing employee Solomon Martinez that his requested transfer to the maintenance

[1] All dates refer to calendar year 2000, unless otherwise indicated.

department would be granted if he signed a decertification petition, then failing to grant the transfer. The ALJ dismissed the complaint's allegations that layoffs of 10 pickers on September 5, the reduction of employees hours after September 25, and the "Employee Relations Philosophy" in Respondent's employee handbook violated section 1153(a) and (e) of the Act. She further found that Respondent's packing employees were not subject to the jurisdiction of the ALRA.

Respondent excepted to the ALJ's findings that it unlawfully failed to grant the pickers a biennial raise, failed to provide requested information relevant to bargaining, conditioned an employee's transfer on signing a decertification petition, failed to grant the transfer, and departed from the agreed order in certain layoffs and recalls following September 25. Respondent also excepted to the ALJ's rejection of its alternative defenses to the allegation that the September 5 layoff was unlawful.[2] The General Counsel excepted to the ALJ's findings that the Board did not have jurisdiction over Respondent's packing employees, that the September 5 layoff was lawful, and that the Employee Relations Philosophy in Respondent's employee handbook was lawful. The Union also excepted to the ALJ's findings concerning the employee handbook and the September 5 layoff, and to the ALJ's findings that the Union waived bargaining over reductions in hours following September 25.

[2] Respondent has excepted to many of the ALJ's credibility determinations. It is well established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) Where credibility determinations are based on considerations other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. Our review of the record in the instant case indicates that the ALJ's credibility determinations are well supported by the record as a whole.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties, and has decided to affirm the ALJ's rulings, findings, and conclusions, unless otherwise noted in this Decision, and to adopt her recommended order as modified.

I. Background

Respondent operates a mushroom farm in Ventura, California. The Union was certified in 1975, when the farm was operated by West Foods. The Union signed a collective bargaining agreement during the time West Foods owned the farm. Another owner bought the farm, but was unsuccessful. Respondent acquired the farm out of bankruptcy proceedings in 1989. Between 1989 and 1999, the Union made only two minor contacts with Respondent.

In December 1999, the Union contacted Respondent and requested that it bargain toward a contract. Respondent agreed to bargain. Negotiation meetings began in 2000. A total of six meetings were held during 2000, five in the first half of the year, the last on September 25.

On August 26, Respondent was notified that the Vons supermarket chain had decided to immediately cease all purchases from Respondent. Before this action, Vons purchased 21 percent of the mushrooms shipped from Respondent's farm. It was stipulated that Vons discontinued its purchases in response to the Union's demand that it boycott Respondent's products. On September 21, the Ralphs supermarket chain also discontinued its purchases of mushrooms in response to the Union's call for a boycott.

Ralphs had purchased 28 percent of Respondent's mushrooms before the boycott. Respondent had anticipated that Ralphs would join the boycott.

Respondent initiated a series of adjustments in its production that took several weeks to phase in. These adjustments first resulted in layoffs on September 5. Further layoffs and reductions in hours followed. A description of Respondent's operations as they relate to the layoff and reductions in hours on September 5 is set forth below in the section dealing with that allegation.

Before the boycott, the bargaining unit included about 365 employees, about 45 percent of whom were pickers who harvest the mushrooms. Another 45 were employed as packers. The packers put the mushrooms into the packages in which they were sold to the public. The remaining employees were divided into 19 other departments, each employing from five to 16 employees, the largest being the maintenance department. The great majority of pickers were paid on a piece rate. Some were paid on an hourly basis and others on an "incentive" basis, i.e., they were paid a predetermined daily rate and allowed to leave whenever their assigned tasks were finished, even if that was sooner than the end of a normal workday. The majority of departments other than picking and packing were paid on the incentive basis.

Two petitions to decertify the Union were filed between the time the complaint in this case issued and the date it came to hearing. The Board's Executive Secretary upheld the Regional Director's decisions that each petition was blocked by the pending complaints before the Board in this case.

II. Jurisdictional Issue: The ALJ's Finding That the Packers Were Non-agricultural Employees

Respondent's general manager Ruben Franco testified that Respondent purchased about 10,000 pounds of its pre-boycott average weekly shipments of 300,000-400,000 pounds of mushrooms from other farms. The packers are the only employees who had been included in the unit who came into contact with mushrooms not produced at Respondent's farm.

On the basis of Franco's testimony as to the ratio of outside produce the packers handled and the NLRB's decisions in *Camsco, Inc*. (1990) 297 NLRB 905 and *Campbell's Fresh* (1990) 298 NLRB 432, the ALJ found that the packers were not agricultural employees.

The Union did not oppose Respondent's motion to exclude the packers. General Counsel does not contest that the packers would be subject to NLRB jurisdiction under *Camsco* and *Campbell's Fresh*, but excepts to the exclusion of the packers on two bases: (1) that the issue should not be addressed in the "liability" phase of the proceeding but left to the compliance stage, and (2) that Respondent's position was supported primarily by Franco's oral testimony and not with business records. General Counsel cites *Sunny-Cal Eggs* (1988) 14 ALRB No. 14.

General Counsel's exceptions do not raise a basis for reversing the ALJ's finding that the packers are not agricultural workers. Sunny-Cal did not dispute that it had been subject to the Board's jurisdiction when it committed the violations, but

contended that it had ceased to be an agricultural employer during the time that would have been subject to a makewhole order. The Board noted that the makewhole order might have to be limited to the date the employer ceased to be an agricultural employer and expressed its concerns that employers could slip in and out of Board jurisdiction. The Board directed that the jurisdictional issue be taken up in the compliance hearing.

In this case, the evidence shows that under the criteria of current case law, the Board never had jurisdiction over the packers at any time material in this case. Therefore, there is no need to determine the terminal date of a remedial order. Nor is there any concern here that Respondent's entire operation could slip into and out of the Board's jurisdiction, since the jurisdictional issue affects only the packers. Therefore, the considerations that convinced the Board to defer final ruling in *Sunny-Cal* to the compliance stage are absent here, and the general rule that jurisdictional issues may be raised at any stage applies.

Nor do we find any merit in General Counsel's second contention. While records might reflect the amount of outside mushrooms packed more precisely than Franco's testimony, nothing in the record and none of parties contended that there was any reason to disbelieve Franco.

We therefore affirm the ALJ's finding that the packers are not subject to the Board's jurisdiction.

III. The September 5 Layoff

A. Background

The mushrooms are grown in small buildings. Each room produces a crop of mushrooms over a cycle of approximately 90 days from beginning to end. The first 50 to 60 days of the process are required to clear the room of the old crop and to prepare for and grow the new crop. Harvesting by the pickers goes on once a week for four weeks (each weekly harvesting is called a "break"). At the end of the harvest, any remaining mushrooms are killed by a process referred to as "steaming off." The room is then cleared, new bedding laid down, and a new crop of mushrooms is spawned.

In response to the boycott, Respondent implemented a facility-wide plan to gradually reduce production. The plan took several weeks to come fully into effect. Respondent states that its overall plan for reducing production was designed to minimize the impact on its workforce, so that the loss of Vons' business and the anticipated loss of Ralphs' would result in the early layoff of only 4 percent of its workforce. The step having the greatest immediate impact on individual workers was taken on August 30, when Respondent steamed off some of the rooms that would begin to be harvested on September 5. As found by the ALJ, Respondent's making the decision on August 29 to steam these rooms off on August 30 dictated that 10 pickers would be laid off on September 5.

Respondent never notified the Union specifically about the September 5 layoff, and made no effort to notify the Union directly, in even a general way, of the

layoffs and reductions in hours that its plan to adjust to the boycott would lead to until September 14, nine days after the September 5 layoff had been implemented and 16 days after the decision was made to steam of the rooms that would begin to be harvested on September 5. Respondent's chief negotiator's September 14 letter to the Union's negotiator Jorge Rivera clearly stated that the loss of Vons' business would result in layoffs and reductions in hours but still did not identify who had been or would be laid off and when.

Respondent posted notices to employees of the boycott at its facility on August 27.[3] No copy of the notice was sent to the Union. The notices stated that immediate layoffs would be necessary. Jessica Arciniega, a Union agent who was present at negotiations but who did not participate as a negotiator, obtained a copy of the notice to employees on August 29.[4] She faxed it to Rivera care of the Union's Parlier office, which she believed to be the best location to reach Rivera. The ALJ credited Rivera's testimony that the faxed notice did not come to his attention until shortly before the hearing, and that he did not know of the existence of the August 28 notice because it had become lost in his papers, which he kept in his vehicle as he traveled around the state as the Union's chief negotiator bargaining with most of the employers the Union had or

[3] They were posted on August 27 bearing the mistaken date of August 28, and referred to herein by the date that appears on them.

[4] Respondent attacks the ALJ's discrediting of Franco's testimony, denied by Arciniega, that he handed Arciniega copies of the notice on August 29. Among other reasons the ALJ cited for her credibility resolutions, the most important was that Franco did not mention giving the notice to Arciniega in his prehearing declaration while Arciniega's testimony was consistent with her declaration. The ALJ also discredited the testimony of two employee witnesses that they saw Arciniega reading the notices on August 29. Both of these issues are almost collateral to the main reason that the ALJ found this "actual notice" ineffective: Jorge Rivera was the Union's sole negotiator and Arciniega had no role in bargaining other than translating and maintaining contact with employees. The Union was therefore not on notice of the adjustment plan until Rivera was notified by Stang's letter dated September 14.

sought contracts with. Rivera testified that he did not know of the September 5 layoffs until shortly before the hearing.

B. General Duty to Bargain

Employers must give notice and bargain with the union representing their employees before implementing any change in "wages, hours, and other terms and conditions of employment,"[5] referred to generically as mandatory subjects of bargaining. In the words of the most prominent text in the labor relations field:

> Many topics that fall within the phrase "other terms and conditions of employment" are now so clearly recognized to be mandatory subjects of bargaining that no discussion is required. These include . . . layoffs and recalls . . .[6]

Changes made in employment terms that are mandatory subjects of bargaining without the required notice and opportunity for bargaining are referred to as unilateral changes.

The ALJ found that the September 5 layoff was not a unilateral change because it was a lawful response to the Union's use of an economic weapon, the boycott,[7] or because it was analogous to "stopgap" measures which employers have been recognized as privileged to adopt in response to a strike. The ALJ correctly pointed out that no case law from either the ALRB or the NLRB deals squarely with the issue of

[5] Labor Code section 1155.2 (section 8(d) of the NLRA).
[6] *The Developing Labor Law*, P. Hardin, (2001), p. 1200.
[7] Generally, consumer boycotts are protected under the ALRA. The framers of the ALRA intentionally drafted Labor Code section 1154(d) to allow unions to pursue boycotts, including picketing that appeals to consumers not to patronize retail outlets that sell products of an agricultural employer with whom the picketing union has a labor dispute, where the picketing union is certified to represent the employer's agricultural employees, as the Union was at Pictsweet. Such picketing activity was originally recognized as protected activity under the NLRA. In 1947, the Taft-Hartley amendments adding section 8(b)(4) prohibited consumer picketing. In the instant case, although the record contains no evidence as to what actions the Union took in pursuing the boycott, the Respondent has not raised any issues as to the character of the boycott, nor is the boycott's character critical to the analysis of the issues in this case.

whether an employer, when a union uses the economic weapon of a boycott, may respond by laying employees off without notice to or bargaining with a union as normally required. The ALJ found both the economic weapon and strike stopgap analogy measures applied to the September 5 layoff.

We find neither analogy appropriate.

The statutory right to collective bargaining representation from the employee viewpoint is essentially the right to be immune from employer unilateral changes in terms and conditions of employment, i.e., changes made without notice to and bargaining with the union to impasse or agreement.[8]

The entire structure of procedures and rights created by the National Labor Relations Act (NLRA, 29 U.S.C. sec. 141, et seq.) and the ALRA are aimed at allowing employers and employees, through unions, to collectively reach a comprehensive agreement setting terms and conditions of employment both will be bound by until the collective bargaining procedure of notice and bargaining to impasse or agreement required by both statutes has been followed.

Agreement or impasse, the exhaustion of efforts to reach agreement through the bargaining procedure, permits the employer to change a bargaining unit's established terms and conditions of employment. The limited exceptions recognized to this rule are

[8] Where a collective bargaining agreement is in effect, Labor Code section 1155.3 and NLRA section 8(d) both limit the use of economic weapons when a collective bargaining agreement is being terminated or modified. Both require that the agreement be maintained in effect until a notice to terminate or modify the agreement and notices to mediation services have been given, and prohibit strikes and lockouts for 60 days after the notice to terminate is given.

union waiver of bargaining over a subject, union efforts to delay bargaining, or situations presenting the employer with an economic exigency that requires prompt action.

The occurrence of a strike, even one that is totally effective, does not permit the employer to change the terms and conditions of employment applying to bargaining unit employees until impasse in bargaining is reached.[9] The strike is merely an "economic weapon" that one side can use to try to apply pressure on the other side to reach an agreement. The ALJ saw the September 5 layoffs as an economic weapon that Respondent was privileged to use in a contest of economic weapons.

C. Unilateral Changes in Terms and Conditions of Employment Subject to the Mandatory Duty to Bargain Are Not Permissible Economic Weapons

The United States Supreme Court, in *NLRB v. Insurance Agents* (1960) 361 U.S. 477, held that certain tactics used in labor negotiations should not be treated as unfair labor practices but permitted as economic weapons because they promote the process of collective bargaining by putting pressure on the other side to come to the table and engage in the mutual bargaining process of reaching new terms.

In *Insurance Agents,* the union engaged in harassing tactics short of a strike by employees leaving work at midday, not soliciting new business, and not completing forms that had been filled out before the dispute, in support of their union's economic demands in bargaining. The Court held that such tactics were not prohibited by the

[9] *Taft Broadcasting* (1967) 163 NLRB 475, aff'd. sub nom. *Television and Radio Artists v. NLRB* (D.C. Cir., 1968) 395 F.2d 622.

NLRA as unfair labor practices.[10] It was also recognized that employees using economic weapons were not protected by the NLRA from employer economic weapons such as lockouts.[11] While such tactics were disruptive in the short run during an active dispute, they are tolerated because their use puts pressure on the employer and the union to bring the bargaining process to a conclusion in either an agreement or an impasse. Only after agreement or impasse is change permitted in the established terms of employment.

The Supreme Court further expanded on the concept of economic weapons in the bargaining process in *American Ship Building v. NLRB* (1965) 380 U.S. 300 to allow an employer to lock out its employees to put pressure on the union to agree to the employer's terms. In *American Shipbuilding*, rather than waiting until the employer's busy season when the employees would have more leverage by going on strike, the employer locked its employees out at a time when a work stoppage would not harm the employer. The National Labor Relations Board had found that the lockout constituted discrimination against employees in violation of section 8(a)(3) of the (parallel to section 1153(c) of the ALRA) because of their union affiliation and union activity, the prospective strike. The Supreme Court reversed the finding of discrimination, holding

[10] Before *Insurance Agents*, the NLRB had held slowdowns and other partial withholdings of services to be union unilateral changes of mandatory terms and conditions of employment in violation of NLRA section 8(b)(3), which imposes the obligation to bargain collectively on labor organizations.

[11] After *Insurance Agents*, such on-the-job harassing tactics were not unlawful but unprotected, and therefore subject the employees engaging in them not only to employer economic weapons but also to discipline, including discharge. As discussed below, the consumer boycott activity in this case was protected activity, and therefore subject to economic weapons but not to disciplinary action.

that American Ship Building's lockout did not violate section 8(a)(3).[12] The lockout's impact on the bargaining obligation was not directly raised in *American Ship Building.*

The NLRB, in years immediately following *American Ship Building*, continued to view lockouts as unlawful not because they were discriminatory but because they were unilateral changes in terms of employment in violation of section 8(a)(5) of the NLRA. In *Laclede Gas Co.* (1970) 187 NLRB 243, on remand from 421 F. 2d 610 (8th Cir., 1970), the NLRB accepted the Eighth Circuit's view that because there was no duty to bargain about tactics in bargaining, such as the timing of lockouts and strikes, there could be no requirement of sufficient advance notice to allow bargaining before implementation of a lockout. Because the lockout lasted only until the end of the dispute, there was no real or permanent change in terms of employment. The temporary change in employment terms imposed by the lockout is allowed because it advances the bargaining process, unlike a unilateral change, which undercuts the process.

A consumer boycott is a union economic weapon that can be used to apply pressure on the employer to come to an agreement with the union. The ALJ found that Respondent's layoff of employees on September 5 was an economic weapon Respondent was entitled to use in response to the boycott and therefore not a unilateral change as alleged in the complaint. Because she found that the layoff was an economic weapon, the ALJ concluded that Respondent had no duty to bargain with the Union before implementing it.

[12] The Court used the terms "layoff" and "lockout" in referring to the employer's action in *American Ship Building* but definitively distinguished the lockout by its use as a bargaining tactic. As discussed below, the legal distinction between a layoff subject to the obligation to give notice and bargain and a lockout has become clearly delineated.

We conclude that the September 5 layoff was a unilateral change in a term of employment subject to the mandatory duty to bargain and not an economic weapon which should be permitted in response to the boycott. To hold otherwise would allow an employer to bypass the collective bargaining process at the same time the parties are engaged in collective bargaining, permitting the employer to skip the bargaining process and proceed directly to tampering with the package of terms and conditions of employment.

In *Daily News of Los Angeles* (1993) 315 NLRB 1236,[13] the NLRB reached the same conclusion. The NLRB held that unilateral changes could not be considered economic weapons that could be brought into play in the collective bargaining process:

> The second issue the Board was invited to consider on remand is whether unilateral discontinuance of the merit raise increases should be regarded as a lawful economic bargaining weapon in the same sense that the "harassing tactics" employed in . . . *Insurance Agents* . . . and the lockout invoked in *American Shipbuilding* . . . were found to be lawful economic weapons. For the reasons set forth below, we conclude that *such unilateral action* is not a lawful economic weapon. (Emphasis added.)

The centrality of the prohibition on unilateral changes to collective bargaining is embodied in the United States Supreme Court's *Katz*[14] decision. In *Daily News of Los Angeles*, the NLRB cited *Katz* as the basis for its rejection of unilateral changes as an appropriate part of the arsenal of economic weapons. *Katz* was the Supreme Court case that established that unilateral changes in mandatory terms and

[13] Supplementing 304 NLRB 521, remanded by 979 F.2d 1571 (D.C. Cir., 1992), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. den. 519 U.S. 1090 (1997).
[14] *Katz v. NLRB* (1962) 369 U.S. 736.

conditions of employment were contrary to the bargaining obligation of section 8(a) (5) of the NLRA (worded identically with Labor Code section 1153(e).) The NLRB rejected the dicta in *Insurance Agents* that unilateral changes were permissible economic weapons, stating:

> . . . [W]hile recalling that in *Insurance Agents* it found that the Board may not decide the legitimacy of economic pressure tactics in support of genuine negotiations, *Katz* made clear that the Board "is authorized to order the cessation of behavior which is in effect a refusal to negotiate."

The refusals to negotiate *Katz* condemned were unilateral changes. The NLRB separated unilateral changes and economic weapons into two mutually exclusive categories, treating unilateral changes as "refusal[s] to negotiate," not legitimate economic weapons.

We believe, in agreement with the NLRB, that unilateral changes are not appropriately employed as economic weapons because they cut off and bypass the bargaining process rather than promoting it. Most simply put, bargaining does not take place; changes are simply made. The central bulwark of the bargaining process is the prohibition of unilateral changes until impasse is reached, that is, until the bargaining process has been exhausted. Permitting unilateral changes erodes, undermines, and potentially leads to the collapse of that bulwark.

The prohibition of unilateral changes does not preclude economic weapons from having a temporary impact on bargaining unit employees' terms and conditions of employment. Locked out employees are denied employment, but only during the period of the dispute.

The prohibition of economic weapons affecting the bargaining unit's established terms and conditions of employment runs through the NLRB's case law. While an employer during a strike may hire replacement employees and set their terms of employment without bargaining with the union representing the strikers (*Detroit News Agency* (2002) 327 NLRB No. 164; *Service Electric, Inc.* (1987) 281 NLRB 633),[15] after the dispute is resolved, the employer must apply those terms to strike replacement employees who continue to work after the dispute ends (*Leveld Wholesale Electric* (1987) 281 NLRB 1344).[16] During a strike, the employer may not change the terms of any bargaining unit employees who do not join the strike and continue to work until impasse or agreement is reached, even if the same employer during the same period hires strike replacements at different terms and conditions. (*Fairhaven Properties* (1994) 314 NLRB 763).

In *Central Illinois Public Service*, the NLRB found a lockout lawful because the employer informed employees and the unions representing them that the lockout was used by the employer to resist the unions' "inside game,"[17] tactics and later

[15] The ALJ suggested that Respondent should be excused from bargaining with the Union over the September 5 layoff because the Union was subject to a conflict of interest similar to that recognized in these cases in a union representing strikers bargaining the terms and conditions of replacement employees. We do not find this analogy appropriate. The Union would have no conflict of interest with the employees to be represented in bargaining, the members of its own bargaining unit. To the extent that there is a conflict between the union and employee interest in stopping or minimizing the impact of the layoff and the employer interest in accomplishing it quickly, such conflict is inherent in the collective bargaining process. To the extent that the Union might attempt to stall bargaining, the economic exigency and business necessity exceptions allow the employer to shorten bargaining to the extent it can demonstrate that the shortening is required by the situation it faces.

[16] The one arguable exception to the rule against permanent changes in bargaining unit employees' terms and conditions beyond the term of the dispute is the employer's right to retain replacements who were promised permanent employment for accepting work during a strike. The right of employers to hire permanent replacements was recognized in almost a quarter of a century before the articulation of the economic weapons doctrine.

[17] On-the-job tactics similar to but less aggressive than those in *Insurance Agents, supra*.

informed them that the locked out employees would returned to work as soon as the dispute has been resolved.

An exception to these rules is provided to employers faced with business necessity or economic exigency, as Respondent was with the boycott, under the doctrines of "business necessity" and "economic exigency," discussed more fully below. These doctrines relax the notice and bargaining obligations in proportion to the demonstrated need for expedition in responding to the exigency.

D. The September 5 Layoff Was a Unilateral Change, Not a Lockout

For the September 5 layoff to be a recognized economic weapon, it would have to be possible to characterize it as a lockout. We find that the September 5 layoff did not have the distinguishing characteristics of a lockout. Respondent treated the rest of its adjustment program as subject to bargaining, giving the Union notice of layoffs and reductions in hours on September 14. Respondent gave no notice that the September 5 layoff was in fact a lockout. Finally, the effective period of the layoff did not depend on some responsive action by the Union in bargaining but was determined solely by a lack of work.

First, Respondent viewed the September 5 layoff as part of its overall plan of adjustment. It gave general notice that of the further layoffs and reductions in hours that the plan would cause in its September 14 letter to the Union. It willingly bargained over the decision to make further layoffs. Respondent had no duty to give notice or

bargain about the layoffs if they were not a layoff for lack of work but a lockout used as an economic weapon to respond to the boycott.

Second, as stated in *The Developing Labor Law*, "[a]n employer that intends to use a lockout to enforce its demands must make its intentions clear at the earliest opportunity."[18] A lockout's relationship to the dispute must be made reasonably clear its outset. (*Central Illinois, supra.*) In *Ancor Concepts, Inc.*[19] the NLRB stated that "an employer's conduct throughout the lockout must be consistent with the advancement of its legitimate bargaining position so that employees are able to "*knowingly reevaluate their position*." (Emphasis added.) In *Eads Transfer*,[20] the employer decided to lock the employees out on June 3, when they unconditionally offered to return to work, but did not tell the employees that they had been locked out until August 23. In *Eads*, this non-disclosure meant that the employees could not intelligently evaluate their positions because the employer did not tell them that they would be reinstated as soon as they yielded to the employer's bargaining demands.

While the instant case does not involve strikers, cases like *Ancor Concepts* and *Eads* suggest that to lock employees out lawfully, an employer must ensure that some notice of the relationship between the lockout and the advancement it seeks in the employer's position in bargaining is given. While *Ancor Concepts* and *Eads* involved alleged discrimination against strikers, the employers' failure to communicate to the employees that they were locked out impaired the employees' ability to intelligently

[18] P. Hardin, 4th ed., (2001) p. 1543.
[19] (1997) 323 NLRB 742.
[20] (1991) 304 NLRB 709.

assess the employers' positions, in effect, their ability to deal with the employer's position. The Union's statutorily protected bargaining interest, its ability to respond intelligently on the employees' behalf, i.e., to bargain, was impaired more directly by the lack of notice than was the striking employees' statutory right to be free of discrimination in *Eads* and *Ancor Concepts*. Respondent should not be excused for its failure to give the basic notice required of the layoff on the grounds that it was conducting a lockout when it failed to give any indication that the layoff was intended as an economic weapon.

As noted above, Respondent never gave the Union any notice specific to the pickers' layoff and only belatedly gave a general notice that unspecified layoffs and reductions in hours would be necessitated by the boycott. This failure to give notice precluded the September 5 layoff from advancing Respondent's position in bargaining, the rationale justifying toleration of economic weapons.

The absence of notice that the September 5 layoff was related to the Union's boycott tactic or position in bargaining confirms its character as a mere adjustment to a lack of work.

In *American Ship Building*, the Supreme Court distinguished a lockout from the more common economic layoff. A layoff occurs when an employer temporarily shuts down some or all of its operations "for lack of profitable work." The NLRB has noted[21] that *American Ship Building* held that a layoff cannot be equated with a lockout, which is used to "bring economic pressure to bear in support of the employer's

[21] *Challenge-Cook Brothers of Ohio* (1986) 282 NLRB 22, 25.

bargaining position." A layoff has an economic purpose divorced from union activity, while a lockout has a strategic objective in bargaining. *American Ship Building* noted that all employees were recalled as soon as the dispute was resolved with the settlement of contract terms.[22]

The decline in Respondent's business might have continued long after the boycott ended. Business could have increased after a short time even while the Union continued its boycott (e.g., Vons and Ralphs or new customers could have decided to defy the boycott). The September 5 layoff was dictated by a "lack of profitable work," and only connected indirectly to any action the Union could take. It was therefore a layoff, a unilateral change in terms of employment.

The scope of the September 5 layoff also confirms that it was an economic adjustment. It affected only 10 employees in a unit of about 365 employees, and was inherently too limited have any significant impact on the Union's bargaining. The impact was so limited that it escaped the Union's attention at the level responsible for its bargaining. Because of the limited impact of the layoff, Respondent's failure to communicate that there was any direct relation between the September 5 layoff and any desired change in the Union's tactics or position is even more telling against finding it was a lockout.

[22] *American Ship Building* did not expressly analyze the lockout as contrasted to a unilateral change, because American Ship's action was challenged only as discrimination under section 8(a)(3), not as a unilateral change under section 8(a)(5). In *Laclede* Gas, the NLRB accepted the Eighth Circuit's view that if a temporary separation from employment that would otherwise be a layoff and therefore a unilateral change was in fact a strategic move in bargaining, it was no longer a layoff in violation of seniority, a unilateral change, but a lockout, which required only that the union be on notice when the lockout was initiated.

That a layoff or any other unilateral change is undertaken in reaction to an economic weapon does not make that reaction an economic weapon. To be an economic weapon, it must be intended to and have the effect of putting bargaining pressure on the other side *and* be effective only during the term of the dispute, when it can affect the other side's bargaining position.

Terms and conditions of employment are the end result of bargaining; negotiations and, sometimes, the use of economic weapons, are the means. Allowing unilateral changes to be made a part of the bargaining process allows the means, the bargaining process, to swallow the end result, terms and conditions of employment.

In our view, it is impermissible to at the same time concede that the September 5 layoff was neither a lockout nor consciously intended to influence the Union's bargaining but nonetheless treat it as an economic weapon excusing notice and bargaining solely because it economically harmed bargaining unit employees and thereby put pressure on the Union when the Union negotiator was not even aware of the event that was to place pressure on its bargaining position. Because the layoff was done without notice to the Union and the Union's negotiators were not even aware that it had occurred, it contributed nothing to the bargaining process. Because advancement of the bargaining process is the sole rationale for allowing economic weapon to be used, the September 5 layoff could not be treated as an economic weapon.

Allowing unilateral changes as economic weapons under the fundamental precedent that insists that the scope of such weapons cannot be regulated would therefore

potentially inflict great harm on the collective bargaining process. Because the right to use economic weapons is not dependent upon the other side's first use of an economic weapon, employers could characterize not only all layoffs but any changes during bargaining as their exercise of an economic weapon. Because employers have it within their immediate power to control the wages paid, hours worked, and benefits provided, permitting unilateral changes in the bargaining unit's terms and conditions of employment without going through the bargaining process to impasse or agreement as an economic weapon would make the bargaining process meaningless.

The most critical distinction between a lockout (or any economic weapon) and a unilateral change is that the change that economic weapons bring may be maintained only during the period the dispute is going on. Once the dispute ends, the locked out employees must be brought back into their places, as was done in *Laclede Gas*.

Contrary to Respondent's argument that unilateral changes were permissible in this case because they were "proportionate" to the union's economic weapon, the boycott, the regulation of proportionality is alien to the theory of economic weapons. The Supreme Court in *Insurance Agents* emphasized that the relative potency of the economic weapons used in bargaining was not a proper concern of the Board and reviewing courts. Because the Board under *Insurance Agents* has no role in regulating the relative strength of economic weapons used by the parties, it follows that the Board

may not adjust bargaining obligations to equalize a disproportionality between the economic weapons available to one side or another in any particular case.[23]

Respondent's situation when confronted with the boycott is more appropriately addressed under the economic exigency rules, which allow a proportionate adjustment of the bargaining obligation than under economic weapons analysis. If a consumer boycott put the boycotted employer in a situation truly requiring immediate action, the employer would be permitted to make the changes and bargain about them later, or, in extreme cases, with no bargaining before or after the changes. (See Respondent's Alternate Defenses section below.)

E. Creation of a New Exception Allowing Unilateral Changes Is Unwarranted

Collective bargaining is the central purpose of the Act. Central and indispensable to the collective bargaining process is that the terms from which the parties start are kept in place by the Act until the bargaining process has reached agreement or impasse, the point at which the bargaining process has been exhausted and the possibilities for movement have been fully explored. The theory of economic weapons is that they will aid the process to the point where agreement or impasse has been reached.

In contrast to the statutory and decisional authority clearly rejecting unilateral changes as economic weapons, the authorities cited in the ALJ's Decision and

[23] Respondent's suggestion that it should be excused from its bargaining obligation because the boycott had a devastating impact on its business cannot give Respondent greater rights in economic weapons analysis any more than the economic distress that a locked out employee may experience can give the locked out employee greater rights against the employer. As noted above, to the extent that an employer can demonstrate that delay in making an adjustment to a difficult economic situation would have a severe impact on its business, it may shorten the bargaining process in proportion to the requested change's time urgency under the economic exigency exceptions discussed below.

by Respondent do not rise above the level of dicta or do not apply to unilateral changes. *F.W. Woolworth* (1992) 310 NLRB 1324, insofar as it concerned unilateral changes as a permissible response to a consumer boycott was admittedly purely a dictum. *Celotex Corporation* (1962) 146 NLRB 48, for the reasons discussed below, while frequently cited on other issues, has not been cited in any NLRB decision for the proposition that unilateral changes are a permissible response when a union uses an economic weapon.

Laclede Gas held that when a recognized economic weapon (a lockout) is utilized, because a lockout is considered to a bargaining tactic, not a change in a term of employment, no advance notice need be given. The lockout is a tactic in the bargaining process that may be used while bargaining is going on, unlike a layoff due to lack of work, which requires advance notice and an opportunity to bargain prior to implementation. In our view, *Laclede Gas* merely underlines the impregnable division that must be maintained between economic weapons and changes in the terms and conditions of employment of the bargaining unit.

In *Celotex*, the employer, faced with reduced production caused by its production workers slowing down and refusing overtime, without notice to or bargaining with the union, reduced their work schedules from four days to three days a week and changed its pay practices to eliminate pay for non-working time it had previously given the employees who loaded its products onto railroad cars. The NLRB's ALJ, applying essentially a pre-*Insurance Agents* analysis, found that the production workers' slowdown and refusals of overtime were unilateral changes in terms by the union in

violation of section 8(b)(3) of the NLRA and that the employer was therefore privileged to make its own unilateral changes in response. The ALJ also found that the slowdown and overtime refusals were the equivalent of a strike and that the employer's actions were analogous to temporary subcontracting during a strike. The slowdown and the employer's changes foreshadowed a full strike that followed the employer's changes by two days.[24]

Celotex itself does not address whether or not the changes were effective only during the period of the dispute, or were permanent. If *Celotex* is cited as authority that permanent changes in bargaining unit employees' terms and conditions of employment are lawful, it is inconsistent with the analytical structure that has developed since *Insurance Agents*. The employer has powerful alternatives to unilateral changes that do not destroy the bargaining process, including lock out or discipline for an unprotected slowdown. We find that it should not be applied to the instant case. *Celotex* would permit permanent unilateral changes, changes that could be kept in place long after the dispute had ended instead of encouraging the setting of these terms through bargaining.

Acceptance of the theory suggested in the ALJ's dictum in *Woolworth* that any unilateral change is outside the bargaining obligation merely because it is a reaction to a boycott would permit the uncontrolled spread of unilateral changes which would harm the bargaining process or preclude unions from ever using any economic weapon.

[24] It appears reasonable to assume that the rescheduling of the production employees' workweek was a short term response to the production employees' slowdown, and was in effect only for the two days between the time the employer implemented it and the day the strike began, and then disappeared when the dispute ended.

F. Stopgap Measures Permitted During a Strike Do Not by Analogy Permit Unilateral Changes in Response to a Boycott

The other analogy drawn to support the conclusion that the unilateral change was lawful was to stopgap measures which employers are allowed to take during a strike. We find this analogy also inapplicable.

A strike may present the employer with a genuine emergency. In recognition of employer's right to continue operations during a strike, the Supreme Court recognized a special economic weapon for employers, the right to hire temporary and permanent replacement of strikers, early in the history of the NLRA. (*Mackay Radio v. NLRB* (1938) 304 U.S. 333). The right to retain permanent replacements after the strike ended came into existence 24 years before the evolution of the economic weapons doctrine and has continued to exist freestanding from the general economic weapons doctrine.

Hawaii Meat Co. v. NLRB (9th Cir., 1963) 321 F.2d 397 is cited by Respondent for the proposition that an employer's permanently subcontracting struck bargaining unit work, that is, subcontracting of struck work that will continue after the strike ends, clearly a unilateral change, is lawful. This position was later recognized as invalid in what became the prevailing and accepted view of the law as it evolved. In *American Cyanamid Co.* (1978) 235 NLRB 1316, the NLRB held permanent subcontracting of bargaining unit work during a strike to be unlawful, a conclusion the Seventh Circuit upheld at 352 F.2d 356. The Seventh Circuit held that while an employer

could temporarily subcontract bargaining unit work during a strike emergency, permanent subcontracting of work during a strike was just as much an unlawful unilateral change as unilateral subcontracting of bargaining unit work when no strike was taking place.

The Seventh Circuit noted that *Hawaii Meat* was decided before the United States Supreme Court decision in *Fibreboard v. NLRB* (1965) 379 U.S. 203, which recognized subcontracting of bargaining unit work to be a unilateral change, and before the NLRB's decision in *Laidlaw Corp.* (1968) 171 NLRB 1366, enfd. 414 F.2d 99, cert. den. 397 U.S. 920, which changed prior law that striking workers had no more right to reemployment than any other applicant by holding that the strikers remained employees and had to be offered their jobs back when the replacement workers hired into their positions left. These cases therefore do not provide authority for the proposition that unilateral changes affecting non-striking bargaining unit employees are lawful.

In *Empire Terminal Warehouse* (1965) 152 NLRB 1162, the NLRB, reacting to the changes in law in *American Cyanamid, supra* and *Laidlaw, supra*, held that an employer may temporarily, i.e., for the duration of a strike or in anticipation of expansion of picketing to its delivery trucks in furtherance of a strike, subcontract struck work in order to maintain business relationships as a lawful strike stopgap measure.

The strike stopgap rationale also appears in *Celotex*. The ALJ in that case found that the change in the workweek and pay of Celotex' employees was analogous to temporary subcontracting during a strike. We do not find this analogy persuasive. There

was no strike or prospect of a strike at Pictsweet. While temporary subcontracting during a strike is a reasonable extension by analogy of the right to hire replacements for strikers, extending the striker replacement analogy to allow any change in terms and conditions of employment that an employer may find convenient would have the same destructive effect on collective bargaining as permitting unilateral changes as economic weapons. While Respondent argues that only minimal or proportional adjustments to a particular economic weapon, like the September 5 layoff, are allowed under the analogy, we find that this demonstrates that the September 5 action was no more than a layoff, and should be subject to the same bargaining obligations as all other layoffs.

The employer's obligation to bargain with the union to impasse or agreement before making changes applies regardless of whether or not there is a strike. While a struck employer may unilaterally change the terms and conditions of employees hired as strike replacements, it may not, prior to impasse in negotiations, change the terms and conditions of bargaining unit employees who do not join the strike but continue to work during the strike. In *Fairhaven Properties* (1994) 314 NLRB 763, when the union called a strike, some bargaining unit employees struck while others continued to work. The employer hired some replacement employees for the striking workers. The employer unilaterally changed the terms of employment of both the non-striking bargaining unit workers and the replacements. The NLRB affirmed the ALJ's decision finding the changes lawful as to the replacement employees but unlawful as to the non-striking bargaining unit employees.

The analogy between strike stopgap measures and an employer response to a boycott therefore breaks down because nothing in the stopgap doctrine allows a unilateral change in terms and conditions of employment of the bargaining unit employees. In this case the employees laid off on September 5 were in much the same position as the non-striking bargaining unit employees in *Fairhaven Properties.* Permitting Respondent's unilateral changes in its bargaining unit employees' terms of employment during the boycott allows Respondent to treat its bargaining unit employees' statutory right to representation in the same way that it may treat striker replacements rights to union representation during a strike. We find such an extension of the strike stopgap analogy to be unwarranted.

In *Empire Terminal Warehouse Co.* (1965) 165 NLRB 1359, the NLRB held temporary subcontracting of unit work during a strike or in the face of potential strike to be lawful. Respondent contends and the ALJ found that the layoff of employees in response to the boycott was analogous to Empire Terminal's subcontracting. To the extent that the September 5 layoff was a unilateral change, it was unlawful under the principle recognized in *Fairhaven Properties, supra*, and to the extent it was an economic weapon, it was unlawful under the principles recognized in *Los Angeles Daily News, supra.*

G. Economic Exigency and Business Necessity Exceptions Provide Appropriate Relief for Respondent

The law provides relief from the normal obligation to bargain to agreement or impasse on all mandatory subjects of bargaining where the employer is faced with an economic emergency or exigency. The scope of the relief depends primarily upon the level of legitimate urgency of the need to make changes.

Respondent contends that the boycott created an economic emergency that excused bargaining.

In situations where an employer is confronted with an economic emergency or exigency, NLRA and ALRA precedent recognizes an exception to the duty to bargain to impasse or agreement on all terms in dispute during overall contract negotiations before making changes terms of employment. This exception consists of three levels of flexibility accorded to employers. The flexibility is graduated according to the immediacy of the action required in response to the exigency.

Respondent's situation fell within the least permissive gradation in the continuum of three relaxations of the bargaining obligation permitted to an employer faced with economic stress. The first and second gradations of the exception, those most permissive toward employer unilateral changes, do not apply to Respondent's situation in responding to the boycott.

The first is referred to as "business necessity," and exists where an employer unexpectedly finds it that it is substantially unable operate its business without

immediate changes, as when its machinery is destroyed or seized by creditors. In *RBE Electronics Of S.D.* (1995) 320 NLRB 80, the NLRB recognized that some essential actions that were extremely time sensitive could excuse bargaining entirely. The employer in the business necessity situation can make whatever adjustments it needs to resume operations and will never be obligated to bargain with the union about these changes. Clearly the boycott did not prevent Respondent from operating its business, and therefore the business necessity exception does not apply.

The second gradation applies to situations less seriously impacting the employer's operations which may give rise to "economic exigency." In such situations, an employer may make prompt unilateral changes required to adjust to the exigency, but must give notice as soon as practicable and bargain about the changes and their effects. Respondent failed to show that the killing of the mushrooms on August 30 which the laid off employees would have harvested beginning on September 5 was compelled by the economic situation created by the boycott.

Respondent therefore falls into the third and least permissive gradation of this exception. The third gradation applies when the employer is under substantial pressure to take action but where the need for immediate action is not so overriding as to preclude any prior bargaining. Under these circumstances, the employer may give the union a short deadline to respond to its notice of intended change and insist on abbreviated bargaining addressing the requested change rather than the whole package of economic issues that may exist in the plenary contract negotiations. (*RBE Electronics,*

supra; *Angelica Health Care* (1989) 284 NLRB 844.) Much of Respondent's adjustment plan took weeks to come into effect. Respondent did not show that immediate layoff of the ten pickers was essential to its business. Respondent's difficulties arising from the boycott are appropriately accommodated by the foreshortened notice to and bargaining with the Union allowed by the economic exigency-business necessity exception before the implementation of the layoff.

Respondent chose not to take advantage of the expedited process of notice and bargaining allowed under this third gradation. If notice had been given immediately after the decision had been made, the Union would have been under a burden of responding promptly and making itself available for an early meeting and Respondent would have been entitled to go forward with its changes with a minimum of meetings. Therefore, the employer is not prohibited from making the changes until agreement on an entire contract is reached. It could have insisted that the Union promptly respond to the notice of the proposed change and declare impasse if no agreement was reached after abbreviated bargaining.

H. Balancing of Statutory Interests

Balancing the statutory interests or "hardships" in this case requires the Board to conclude that the September 5 layoffs were unlawful unilateral changes. The legal interpretation required to find them lawful would permit unlimited unilateral changes before impasse if a union ever used an economic weapon, a result that would essentially negate the central policy and purpose of the Act, the protection and promotion

of collective bargaining of terms and conditions of employment. Respondent had to show that burden of giving notice and bargaining briefly was so great that it was compelled to steam the mushrooms of August 30 without giving notice and being available for bargaining for a relatively brief time before implementing the part of its adjustment plan affecting the pickers laid off on September 5. This burden would appear to be particularly difficult where the rest of Respondent's overall plan for adjusting to the boycott was implemented over a period of many weeks.

For the foregoing reasons, we find that Respondent was required to give notice and engage in reasonable bargaining with the Union before laying off the 10 pickers and the one weighmaster on September 5. Accordingly, we will order Respondent to bargain with the Union and to make whole the employees affected by the September 5 layoff.

IV. Respondent's Alternative Defenses

The ALJ rejected all of Respondent's alternative defenses to the complaint's allegation that the September 5 layoff violated section 1153(e). Respondent contended that the ALJ should not have addressed its alternative defenses because the ALJ found the September 5 layoff to be lawful as either an economic weapon or an action analogous to a strike stopgap measure. In view of our disagreement with that holding, we will address Respondent's exceptions to the ALJ's findings on its alternative defenses.

The alternative defenses are addressed only as they apply to the layoff on September 5. All other layoffs the ALJ found to be unlawful took place after the parties

bargained about the decision to lay off and the criteria that were to govern the layoffs. Those violations were found on the basis that the criteria the parties had agreed to for the layoffs had not been followed. As of September 5, no criteria had been agreed to, unless certain of Respondent's alternative defenses based on implied agreement by the Union are accepted. We therefore turn to Respondent's alternative defenses.

A. Actual Notice

Respondent's actual notice defense is primarily a waiver argument. Waiver of bargaining rights will be found only by clear and unmistakable conduct, and the burden of establishing waiver falls on the party asserting it. (*Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693.) In *William Warmerdam* (1996) 22 ALRB No. 13, we reaffirmed the clear and unmistakable standard for establishing a waiver of bargaining.

Respondent's first alternative defense is that the Union had actual notice of the September 5 layoff because Jessie Arciniega, on August 29, obtained a copy of the notice to employees of the effect of the boycott that Respondent had posted. Arciniega attempted to forward the August 28 notice to the Union's chief negotiator, but he did not find it in his voluminous records until shortly before the hearing. No evidence contradicting Rivera's testimony that he did not receive the notice was presented.

The only variation of the notice theory offered by Respondent is based on discredited evidence, i.e., that Franco gave Arciniega a copy of the August 28 notice. The ALJ's credibility resolution was clearly well-supported, since Franco's declaration omitted the incident while Arciniega's declaration specifically denied it; even if Franco's

version were credited, the August 28 notification to employees did not give the Union any specific way to determine which employees would be laid off and when; much less that action dictating their layoffs would be taken on the third day following the posting of the notice.

In the cases cited by Respondent, actual notice was received by someone in the Union with sufficient authority to act in response to it. As in our case, in *American Diamond Tool* (1991) 306 NLRB 570, direct notice of the layoff was given only to the employees and not to the union. In *American Diamond Tool*, an employee succeeded in informing the union's chief negotiator of layoffs the same day the layoffs occurred. In this case, the evidence establishes that Rivera was the Union's sole negotiator, and that Arciniega did not succeed in communicating the news of the layoff to him. Respondent made no effort to give direct notice to the Union as opposed to the employees until Stang's September 14 letter. In our view, the risks of any internal Union failures to transmit the notice must fall on Respondent.

We reject Respondent's contention that the August 28 notice to employees was actual notice to the Union of the September 5 layoff. The August 28 notice states generally that layoffs will occur, but it does not identify which employees will be laid off and on what dates. It does not even indirectly refer to any specific actions, such as steaming off mushrooms, that would create conditions that would compel lay off of particular employees, much less give any indication how soon action such as steaming off the mushrooms would take place. While the August 28 notice stated that the layoffs

would be "immediate," because this information was not communicated to Rivera, and no effort was made to notify the Union negotiator directly, it put no burden on the Union to make an immediate inquiry.

We therefore conclude that Arciniega's obtaining the notice on August 29 did not give the Union actual notice that it would have to request bargaining about steaming off the mushrooms that day to or waive bargaining about Respondent's decision to steam off the mushrooms.

The fact that the Union may have caused the urgency does not excuse the duty to bargain about specific changes in terms of employment that the Respondent felt required to make: in a strike situation, the employer may have even greater demands placed upon it, but is not excused from bargaining obligations concerning the bargaining unit's terms and conditions of employment. Respondent's related argument that the Union should be charged with notice because it pursued efforts to induce a boycott is without merit. The record does give any indication that the Union had any actual knowledge as to the date a layoff would take place or of the number and classification of employees that it would affect.

We therefore find that no actual notice sufficient to warrant a conclusion that the Union waived bargaining as to the September 5 layoffs was given by Respondent or received by the Union.

B. Past Practice

The fact that Respondent repeatedly laid employees off without notifying the Union of layoffs during the years between 1989, when Respondent bought the mushroom farm, and when the Union first requested bargaining does not establish Union acquiescence. The Union could not be said to acquiesce in events it was unaware of because Respondent gave no notice they were occurring.

On the contrary, the general rule is that when a union begins to bargain, "[a] union's acquiescence in prior unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." (*Owens-Corning Fiberglas* (1991) 301 NLRB 609.)

Respondent argues that *Warmerdam Packing Company* (1996) 22 ALRB No. 13, cited by the ALJ in denying its defense, supports Respondent's contention that Respondent's past practice of laying off employees without notice to the Union had become an established condition of employment that it could implement without further bargaining with the Union.

In *Warmerdam*, the Board held that in order to excuse bargaining over a change over a matter otherwise subject to a mandatory obligation to bargain based on past practice defense, the past practice had to be so regular that employees knew to expect the change. In *Warmerdam*, the issue was the hiring of additional employees through farm labor contractors. We held that to establish a past practice defense, the employer had to show not only that it had such a clear past practice but also that the

change was automatic. The September 5 layoff was not part of an established practice but, as we said in *Warmerdam* "the unprecedented and irregular nature of the change[] suggest[s] that [it] was the product of an ad hoc decision-making process rather than a continuation of an established company policy." (*Warmerdam*, p. 10, quoting *City Cab of Orlando, Inc. v. NLRB* (11th Cir., 1986) 787 F. 2d 1475.)

Therefore, the fact that the parties had discussed criteria for selection of employees for layoff and recall earlier in the negotiations does not create a defense for Respondent. Neither does the fact that there had been a seasonal layoff during negotiations create a defense for Respondent. The decision to go forward with the September 5 layoff was a separate decision from any earlier seasonal layoff and the selection criteria for the September 5 layoff were open to bargaining. In this case, once it had notice of the further layoffs resulting from the boycott, the Union proposed that there be no layoff and that the hours of all employees be reduced instead.

Respondent offers another variation of waiver theory based on the unique facts of one case, *American Diamond Tool, supra*. In *American Diamond Tool*, the NLRB found from the peculiar combination of circumstances present in that case that the union had waived the employer's duty to bargain as to layoffs. In *American Diamond Tool*, the union's negotiator had been made aware of the layoffs, but did not ask to bargain about the layoffs or mention the layoffs in a bargaining session that had occurred shortly after they occurred; the union in this case requested bargaining about any action Respondent intended to take in response to the boycott as soon as it received notice from

Respondent. In *American Diamond Tool*, before the layoffs occurred, the union had proposed contract language giving the employer both the authority to decide upon layoffs in its sole discretion and that the selection criteria be the same ones the employer followed to carry out the layoff. In this case, in the September 25 bargaining session called to deal with Respondent's response to the boycott, the Union proposed that there be a general reduction in hours and no layoffs. Finally, *American Diamond Tool* has repeatedly been distinguished as being the result of the specific combination of factors in the union's conduct, none of which are present here. (*See, e.g., Eugene Iovine, Inc.* (1999) 328 NLRB 294, 295; *Odebrecht Contractors of California, Inc.* (1997) 324 NLRB 396, 404; *St. Anthony's Hospital Systems* (1995) 319 NLRB 46; *Exxon Research and Engineering Company* (1994) 317 NLRB 675, 688.)

C. Fait Accompli

The ALJ found that as to September 5 layoffs the Union was presented with a decision that had already been made, and that layoffs would proceed immediately. Where an intended change is presented as a fait accompli, the union is not under a duty to request bargaining. (*International Ladies Garment Workers Union v. NLRB* (D.C. Cir., 1972) 463 F.2d 907, 917; *Pontiac Osteopathic Hospital* (2000) 336 NLRB No. 101.)

The wording of the August 28 notice, stating that the layoffs would be "immediate," implied that the decision had already been made. As to the September 5 layoff, by the time Arciniega obtained a copy of the notice, the decision leading to the layoff, to steam off the mushrooms, had already been made. By the next day, August 30,

the steaming off had been carried out. Franco admitted that when the steaming off had been accomplished, in his mind, the decision to layoff pickers on September 5 had become final.

Respondent argues that a change is not a fait accompli unless it has been carried out. Intended changes however, have been treated as faits accompli when they have not been fully and finally accomplished. (*International Ladies Garment Workers, supra; Pontiac Osteopathic Hospital, supra.*)

Respondent argues that in these cases, the employer's announcement of the change included statements that the decisions were permanent and final. In our view, the September 5 layoffs were, in Respondent's mind, final by August 29, and, as to those layoffs, the statement in the notice to employees that layoffs would be immediate communicated that finality. In *Pontiac Osteopathic Hospital*, *supra*, the NLRB stated:

> The Board has long recognized that, when a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before the implementation or because the employer has no intention of changing its mind, the notice is nothing more than a fait accompli.

Here, even with Arciniega having acquired a copy of the August 28 notice, there was no notice to the Union specific to the pickers being laid off. Under Respondent's adjustment plan, the decision to steam off the mushrooms, which dictated the layoff of the pickers on September 5, had already been made on August 29, the day

Arciniega got a copy of the August 28 notice. Arciniega made reasonable efforts to notify Rivera, sending him a fax at his last known location. Because Respondent made no effort to notify the Union directly, it must bear the risk of any failure in the Union's internal transmission of the August 28 notice. The irreversibility of the action once steaming off had been decided upon by August 29 made the September 5 layoff a fait accompli, even if it is assumed that Arciniega's picking up the notice was notice to the Union. Where a unilateral change is a fait accompli, a union does not waive bargaining by failing to request it, even if the union knows of the change. In this case, the Union did not know of the decision to steam off the next day or that this would compel the layoff of the pickers.

We therefore affirm the ALJ's rejection of Respondent's alternative defenses to the September 5 layoffs.

V. Respondent Unilaterally Changed the September 25 Agreement on Layoffs and Recalls But Did Not Unilaterally Reduce Hours of Work

A. Background

The parties agreed at the September 25 bargaining meeting that all further layoffs and recalls would be in classification seniority order. With respect to layoffs and recalls after September 25, the ALJ found that several layoffs and two recalls had occurred out of classification seniority order. The improperly laid off or recalled employees were determined by comparing departmental seniority lists with payrolls showing which employees were working each day. The seniority lists were maintained

by each department's supervisor rather than by Respondent's Human Resources Department. They were produced at the hearing by Respondent at the insistence of the other parties and the ALJ.

B. Respondent's Due Process Contentions

Respondent contends that it was denied due process because layoffs are addressed only in paragraph 16, which alleges that Respondent violated section 1153(e) by its layoffs *since* September 5. Paragraph 16 makes no reference to whether the layoffs were in violation of the September 25 agreement. Only paragraph 22 of the Complaint refers to violations of the September 25 agreement. Paragraph 22 makes no reference to layoffs, alleging only that recalls were made out of seniority order.

Respondent contends that paragraph 22, viewed in the context of paragraph 16, fails to give it the notice required by due process that layoffs following September 25 were violations because neither paragraph alleges the violation found, layoffs in violation of the September 25 interim agreement. Respondent further contends that the Complaint does not in any way identify specific employees laid off or dates of alleged layoffs and failures to recall.[25]

[25] Respondent also contends, and General Counsel admitted, that the allegations concerning layoffs were included in the complaint which issued before Respondent had submitted a response to the layoff allegations. The ALJ found this was due to inadvertence and was not a ground for dismissing the allegations. Because, as explained below, we find that Respondent had the opportunity to present its evidence at the hearing on this issue and has not shown how it was prejudiced by the investigation's failure to request evidence from Respondent, this inadvertence does not provide a ground for dismissing this allegation of the Complaint.

Respondent also contends that General Counsel and the Union in the prehearing conference and the ALJ's prehearing conference order all indicated that no out-of-seniority layoffs were being alleged, only out of seniority order recalls.

The ALJ found that Respondent could identify the alleged violations of seniority in layoffs and recalls from the records that were produced at the hearing. Respondent admits that it successfully guessed the identity of some of the employees, all of whom were provided by farm labor contractors, who appear to have been laid off out of seniority. The ALJ points out that Respondent never requested a bill of particulars.

Respondent addresses the ALJ's finding that it could have determined which of its layoffs or recalls out of seniority order from its payroll and the supervisor's departmental seniority lists with the contention that it was not required to generate new documents that did not exist, citing *Yeshiva University* (1994) 315 NLRB 1245 and *Champ Corporation* (1989) 291 NLRB 803. For the reasons discussed below, Respondent's interpretation of *Yeshiva* and *Champ* was properly rejected.

The ALJ noted that the exact theory and the records that would be relevant to defend the violation were made clear to Respondent when she instructed Respondent what records were to be produced well before the hearing closed.

Respondent cites *J.R. Norton v. ALRB* (1987) 192 Cal.3d 874, 887-888, for the proposition that the Complaint did not provide adequate notice. In *Norton*, the complaint alleged that the layoff of a crew was violative, but the evidence at hearing showed that if there was a violation with respect to the crew, it was a failure to rehire it

months after the layoff alleged in the complaint. The Board found a prima facie case had been established concerning the failure to rehire and that Norton therefore had a *Wright Line* burden to rebut the unlawful motivation of the failure to rehire months later. The *Norton* court held that Norton had not been accorded due process by having the burden shifted to it without notice to rebut an allegation not made in the complaint. The court further held that in these circumstances, it would not find that Norton had consented to going forward on General Counsel's revised theory by fully litigating the recall. Respondent makes a related contention of improper shifting of burden to it, citing *J.R. Frudden v. ALRB* (1984) 153 Cal.3d 263.

We find that Respondent was given adequate notice that the layoffs following September 25 were alleged to be unilateral changes in violation of section 1153(e). The complaint at worst was ambiguous[26] about encompassing the layoffs out of seniority order after September 25 and Respondent did not pursue its opportunity to clarify the ambiguity by requesting a bill of particulars. The exact nature of the allegation and the relevant evidence was made clear to Respondent in sufficient time before the end of the hearing to allow Respondent to respond.

[26] Paragraph 16 could be read to encompass layoffs after September 25, because it alleged that Respondent had violated section 1153(e) "since" September 5. Respondent is not entitled to insist on the narrowest reading of paragraph 16, i.e., that it referred *only* to the layoffs that occurred *on* September 5 because paragraph 22 alleges only violations by out-of-seniority recalls seniority beginning *after* September 25. The most obvious reading of paragraph 16 is that it refers to all layoffs *since* September 5, including those following September 25. The allegation that recalls occurred after September 25 does not imply that no layoffs occurred, particularly where paragraph 16 alleges that layoffs constituted unilateral changes *since* September 5. Paragraph 16 could also be understood as referring to post-September 25 layoffs because the post-September 25 layoffs were part of a single course of conduct of adjusting to the boycott.

Finally, where the complaint is ambiguous, a respondent cannot rely on the ambiguity but must seek clarification through a bill of particulars, as noted by the ALJ. The NLRB has placed the burden on respondents who perceive an ambiguity in a complaint to request a bill of particulars. (*Trident Seafood* (1994) 318 NLRB 738, 739.) Respondent did not do so in this case.

The NLRB precedent is also clear that the lack of clarity in a complaint allegation before hearing is not an absolute defense to a respondent. The NLRB has repeatedly held that the statements at the opening of the hearing by counsel for the general counsel or other timely clarifications of the allegations can cure the complaint's deficiency. (*Miami Stage Employees Union (Greater Miami Opera Assn.)* (1991) 310 NLRB 763.) General Counsel, the Union, and the ALJ made the allegation clear well before the hearing ended. The NLRB's principal test is whether the allegation has been made sufficiently clear to enable respondent to present a defense. (*Acme Die Casting* (1992) 309 NLRB 1085.)

The clarification during the course of the hearing was sufficiently timely to enable Respondent to do so. Not only was the theory made clear, but the exact records required to present a defense to were specifically identified for Respondent by the ALJ. Further, the ALJ directed Respondent to produce them on Wednesday, sufficiently ahead of the last day of the hearing the following Monday for Respondent to have been able to assess whether it could present a defense. Respondent did not seek a continuance, or

otherwise indicate that it was unable to comply with the Judge's direction to present its evidence by the close of the hearing.

Finally, Respondent's contention that a burden was shifted to it without notice under *Norton* is without merit. In *Norton*, the employer was required to rebut evidence of unlawful motive[27] surrounding a violation that not only was not alleged in the complaint but which occurred several months after the violation that was alleged. In the instant case, the violation was alleged and clarified at hearing. Further, there was no shifting of burden, as General Counsel at all times retained the burden of showing that the order of layoffs and recalls had departed from the order of departmental seniority dates listed in Respondent's or its supervisors' records.

The contention that all individuals affected by a departure from seniority must be named in a pleading when records controlled by Respondent or its supervisors allow identification of the employees is without merit. (*Champ Corp., supra; Yeshiva University, supra.*) Respondent made no claim that its supervisors would not cooperate with it to address the evidence as clarified by the Judge, nor did it seek a continuance or other relief from the ambiguity.

We conclude that the Complaint's failure to spell out violation of the September 25 interim agreement as a separate theory or to name the individuals laid off

[27] Under *Wright Line* (1980) 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir., 1981), cert. den. 455 U.S. 989 (1982), the NLRB adopted a rule shifting the burden to respondents to rebut unlawful motive in discrimination cases once a prima facie case had been established.

or recalled out of seniority order after September 25 does not provide Respondent a due process defense to the ALJ's finding of violations.[28]

VI. Respondent Did Not Violate Section 1153(e) by Reducing Employee Hours after September 25

The Union excepted to the Judge's finding that it had failed to request bargaining over the reductions in hours following September 25. The Union characterizes the issue in burden allocation terms, contending that the ALJ incorrectly put the burden upon it to request bargaining concerning the reduction in hours.

In accordance with long established principles, a union is required to request bargaining when it is given notice that the employer intends to make a change in a term of employment that has not been made permanent by incorporation into an effective collective bargaining agreement. (*Pontiac Osteopathic Hospital, supra.*) Stang's September 14 letter clearly advised Rivera that Respondent intended to implement reductions in hours as well as layoffs in response to the boycott.

Rivera did seek to bargain about the layoffs in the September 25 meeting but did not raise the reductions in hours. Rivera testified that he proposed that all employees' hours be reduced to avoid a layoff and that Respondent rejected the proposal as impracticable because it could not reduce the hours of the incentive employees.

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[28] The identification of any employees whom the records indicate were laid off or recalled out of classification seniority order whose layoff or recall Respondent may be able to justify by further explanation of the operation of its sick leave and leave of absence policies may properly be left for the compliance stage. (*Champ Corp., supra.*)

Rivera testified that he understood from this position that Respondent could not reduce any employees' hours and therefore did not pursue bargaining concerning hours.

We find that the September 14 letter gave clear notice of the reduction in hours. We further find that Respondent's arguments concerning incentive employees did not apply to pickers, who made up almost half of the unit and were the classification most affected by layoffs and reductions in hours, and therefore did not reasonably mislead Rivera into believing that no reductions in hours would be proposed for any bargaining unit employees.

We therefore affirm the ALJ's dismissal of this allegation.

VII. The Union's Request for Information Relating to Respondent's Profit Sharing Plan

Respondent has maintained a profit-sharing plan since 1989. The plan paid 20 percent of Respondent's profits to employees. Respondent proposed to retain the profit sharing in its wage proposal to the Union.

On October 23, the Union requested the following information concerning the profit-sharing plan:

1. Audited income statements and balance sheets since 1996 with notes;
2. Income and balance sheets for year 2000 to date;
3. Monthly production levels and sales;
4. Capital expenditures and depreciation for the same periods;
5. Respondent's five largest competitors, ranked;

6. Labor costs for all management, supervisors and non-bargaining unit employees;

7. Total number of individuals and full time employees and total labor costs broken into wages, pensions or plans in lieu of pensions, health insurance premiums and other labor costs;

8. Profit sharing paid to each employee;

9. The education, qualifications, experience, and history of dealings with Respondent of the CPAs designated to arbitrate any disputes under the profit sharing plan;

10. All audit and work papers from CPAs mentioning or concerning profit sharing from 1996 to the time of the request;

11. Explanation of ascertainable measurement of Respondent's profit used in calculating profit sharing; and

12. Profit sharing verification and control measures.

By letter dated November 17, Respondent replied, providing limited information. Much of what was provided had not been requested by the Union. Respondent provided:

1. A summary of its plan's history; and

2. Information concerning the CPA firm named to arbitrate disputes under the plan.

Respondent had also provided a description of the auditor's statement. Although the Union had not requested the information, Respondent stated in its November 17 letter that the plan was non-qualified, included no trust indenture, group annuity or insurance contract, and that no IRS document referenced the plan. The information Respondent did provide had been found sufficient to lawfully satisfy the

union's request for information concerning a profit sharing plan in an NLRB decision, *Ironton Publications* (1990) 294 NLRB 853. Respondent also noted that it had provided other information, including the text of the plan itself, the history of payments made under the plan, and employee wages. It added that because of the boycott, it was not possible to forecast current or coming year distributions.

General Counsel and the Union contend that the information furnished was inadequate. The Union notes that the CPA firm information was the same as that on the CPA firm's website.

The ALJ found that the Union was entitled to all the information it had requested except Item 5, which requested Respondent's top five competitors, ranked. She found that *Ironton Publications* did not set an outer limit on a union's entitlement to information, and that in the facts of this case, the broader request was relevant information.

Respondent contends in its exceptions that the information it provided was fully responsive to the request to the extent that the Union's request was "bona fide," and was all the information it was required to provide to the Union's October 23 letter. Respondent also contends that the ALJ's finding that more information was required was wrong as a matter of law because Respondent had provided all the information required by *Ironton Publications* and because the Union had not made any claim that would give rise to union access to its core financial documents under *Truitt Manufacturing v. NLRB* (1956) 351 U.S. 149. The information provided by Respondent was substantially the

same as Ironton Publications had provided in response to a more narrowly drafted request in different circumstances.

Respondent's exceptions are based on *Ironton Publications* and on the view that the Supreme Court's decision in *Truitt Manufacturing* sets the outer limits on a union request for employer financial information and the minimum showing a union must make to be entitled to such information. In *Truitt*, the Court held that where an employer contends it cannot afford to pay the raises requested by a union in negotiations, it has opened the door for the union to have access to financial records sufficient to give a clear picture of the employer's financial condition.

Respondent also contends that because the profit sharing plan had been in effect since 1989, and that the Union had been the certified representative at all times since 1976, that a complaint alleging a violation in reference to the profit sharing plan is barred by the six-month statute of limitations in Labor Code section 1160.2 or, alternatively, that the Union waived bargaining about the profit sharing plan. The fact that term of employment has been in place for years does not preclude a union from seeking to bargain about it, and Respondent included the profit sharing plan in its own proposal. As the ALJ pointed out, under Respondent's proposal, the only provision for any potential increase in compensation was the profit sharing plan.

Generally, a union is entitled to get any information relevant to "wages, hours and other terms and conditions of employment," and the information that must be made available includes information that may lead to relevant information. (*Acme*

Industrial v. NLRB (1967) 385 U.S. 432.) Respondent included the profit sharing plan as part of its wage proposal to the Union. Wages are undeniably central to collective bargaining.

The information Respondent did produce could not give the Union any confidence that it understood the scope of Respondent's discretion to determine what payouts would be made under the profit sharing plan. Without such assurance, the Union could not assess the plan's value as part of the pay package or even be assured that the plan was not so flexible that Respondent could manipulate payments in a way that would make its value illusory. As the ALJ pointed out, where employer offers included profit sharing plans, and where flexibility in rules for determining payouts can make the value of the plan illusory, the NLRB has found unions entitled to general financial information and information about plan mechanisms for determining payouts. (*Circuit-Wise* (1991) 306 NLRB 766.)

Respondent's other argument, that the Union is not entitled to the information because Respondent had not said it could not afford to pay what the Union had demanded, is based on an implied contention that *Truitt* sets the outer limits of availability of financial information, and that the obligation to provide financial information only arises when the employer "pleads poverty" as a reason for not agreeing to the union's wage demands.

Here, the Union's claim is much stronger than in *Truitt*: Respondent, by including the profit sharing plan in its wage proposal, made the determination of its value

central to the negotiations. In *Truitt*, the requested information was needed to evaluate a mere argument or rationale for offers that were readily understandable because stated in definite terms, such as dollars per hour. In this case, the information is needed not just to enable the Union to approximate what the value of Respondent's offer *is,* but to determine if it has any value at all. The Union's only means to determine whether what it was being asked to accept as wages were real or illusory was to examine the information it had requested to attempt to determine Respondent's profitability and its latitude in administering the plan. While the request was broad, all of the information requested appears to be relevant to Respondent's profitability and the translation of profits into plan payouts.

The ALJ, in the absence of any showing by Respondent that any of the requested information was not relevant, correctly determined that the Union was entitled to the information it requested, except for Item 5. We therefore affirm the Judge's decision that Respondent violated section 1153(e) by not providing the information requested concerning the profit sharing plan.

VIII. Failure to Grant Pickers a Biennial Raise in Piece Rates

The ALJ found that Respondent had granted the pickers increases in their piece rate in 1992, 1994, 1996 and 1998. The raise was 1¢ a basket, except for 1998, when a 2¢ per basket increase was granted because of changes in picking procedures. The pickers' last raise was given in 1998, and no raise was granted them until 2002. The ALJ found that, by the year 2000 when no raise was given, the grant of raises in 1992,

1994, 1996, and 1998 had established a regular pattern of biennial raises to the pickers. As an established practice, the biennial raise was a term of employment and a mandatory subject of bargaining and could not be changed without notice to and bargaining with the Union. Since there had been no bargaining about the pickers' piece rate, the ALJ found that the failure to grant raises in 2000 was unlawful.

The ALJ also credited Union chief negotiator Jorge Rivera's testimony that, during bargaining, general manager Franco referred to a practice of granting employees a raise every two years. The ALJ further credited Rivera's testimony that Harry Stang, Respondent's counsel and chief negotiator, told Franco to shut up after Franco made this admission at the bargaining table.[29] Pickers also testified that they expected a raise every two years.

Respondent contends that the pickers' pattern of getting a raise every two years is too irregular to establish that withholding a raise in 2000 was a violation. It argues that the two year period has not been uniform, varying from 17 to 26 months. Respondent also argues that there is even less of a pattern if the timing of the other classifications receiving raises is considered, as Respondent argues they must be during bargaining. Finally, Respondent argues that because the amount of the raise has varied and was not based on an automatic criterion, it is not mandatory that it be granted unless otherwise agreed with the Union.

[29] In doing so, the ALJ stated that her observation of Stang in the hearing led her to believe he would have told Rivera to shut up. Respondent's counsel objects that his demeanor in the hearing had no bearing on and should not be considered in evaluating the conflict between Franco and Riveras' testimonies on this issue. We believe that attorney demeanor during a hearing should not be considered in evaluating the testimony of witnesses testifying in a hearing, but find that the evidence supports a finding of a violation even without considering the incident referred to.

Where a union begins bargaining on behalf of a work force, raises that have been given on a periodic basis in the years preceding bargaining must be continued. This is true even if the raise has been granted on a periodic basis, but the amount has varied. (*Daily News of Los Angeles* (1994) 315 NLRB 1236; *East Maine Medical Center v NLRB* (1st Cir., 1981) 658 F.2d 1.)

As the General Counsel and Union contend, the cases do not require perfectly uniform time periods between raises. It is sufficient if the employees have reason to expect the raises on some periodic basis, i.e., that they had an expectation of a raise in 2000, not on a particular date in 2000. The pickers had received raises every two years from 1992 through 1998 and therefore had an expectation of receiving one in 2000. That classifications other than pickers had no pattern of receiving raises on a regular basis and therefore had no expectation of biennial raises is irrelevant. If anything, the lack of regular raises to other classifications may have made the expectation of regular raises more important to the pickers.

The pickers had received an increase in piece rate every even numbered year preceding 2000 back at least to 1992. Even the amount has been almost unvarying, except when more demanding picking procedures led Respondent to grant a $.02 increase in piece rate in 1998. Therefore, the increase in piece rate was virtually automatic. In any event, whether the amount of the increase was fixed or automatic does not affect the lawfulness of discontinuing the biennial raises.

Respondent's contention that if there is any variation or discretion in the amount or timing of the increases that the employer is not required to grant the raise has been rejected by NLRB and court decisions. (*Daily News of Los Angeles, supra; East Maine Medical Center, supra.*) In *Daily News of Los Angeles*, the NLRB held, supported by a long history of circuit court decisions, that the annual merit review process in place before the certificator had to go forward because it was an established annual practice, even though the amounts awarded were discretionary. The discretionary elements of the annual merit increases, the amounts awarded, would be subject to bargaining or could proceed as they had before certification, if the union requested. In *Daily News of Los Angeles,* merit raises were given annually, but the amounts of the increases varied between employees and from year to year.

Respondent argues that it could not have granted the pickers' biennial wage increase in 2000 without bargaining with the Union unless the raise was non-discretionary both as to timing and amount under our decision in *Warmerdam Packing, Inc.* (1996) 22 ALRB No. 13 and the court's decision in *Cardinal Distributing v. ALRB* (1984) 156 Cal.App. 3d 758, 770-771. Neither *Warmerdam* nor *Cardinal Distributing* contradict the NLRB's holding in *Daily News of Los Angeles* that if the timing of a wage increase follows a pattern, it is a violation to unilaterally withhold the wage increase process. In *Cardinal*, the court held that for the employer to be free to unilaterally grant a wage increase, there had to be no discretion as to the timing or the amount of the increase. In *Warmerdam*, the Board held that to establish a defense to its unilateral hiring

of a labor contractor, the employer had to establish that its practice of hiring labor contractors was automatic so as not to invoke discretion in its implementation. It is completely consistent with *Warmerdam* and *Cardinal Distributing* to hold that where a pattern of timing of a wage increase *is* established, it is a unilateral change to withhold it.

The evidence in this case establishes a fixed pattern of raises being granted every even-numbered year, if not precisely on a 24 month interval. Clearly, once a pattern like the granting of raises to the pickers in even numbered years has been shown to have become a "non-discretionary," or established practice expected by employees, the existence of other elements of discretion within that pattern such as the exact date or amount of a raise does not excuse a failure to grant the raise.

Respondent's argument that all classifications must be considered to determine if there is a regular pattern to granting of raises and that there is no periodic pattern if all of its classifications are considered must also be rejected. The simple pattern of raises having been granted to the pickers in 1992, 1994, 1996, and 1998 establishes a pattern. Prior to the negotiations, the non-picker classifications had gone three years with no raise, and in the rest of the decade of the 1990s, the periods between raises had varied from one to three years.

Respondent argues that the appearance of regularity in the pickers' raises was an illusory accidental artifact of the random timing that all classifications were given raises, and that there really is no pattern. While it is true that the non-picker classifications have been granted raises on a much less regular basis than the pickers, the

testimony of Respondent's general manager Franco showed that Respondent's compensation system caused it to follow one pattern for raises granted to pickers and a different pattern for the other classifications. The other classifications were paid on an incentive or hourly basis for doing each one of the several steps required by the cycle of mushroom production other than picking. Franco explained that since most of the 19 non-picking departments had to operate as teams within and between departments, Respondent had chosen to give raises in the non-picking departments based on the overall productivity and profitability of the mushroom farm. The non-picking classifications were given raises based on a retrospective determination of the farm's performance, and therefore followed a pattern separate from the pickers, getting raises in good years but not in bad.

Respondent also argues that uncontradicted evidence, testimony by Franco, shows that the pickers were told not to expect a piece rate increase because they had received $.02 in 1998. Franco testified that he told the pickers not to expect an increase when everyone else got one. "Everyone else" was necessarily a reference to all other classifications. Because Respondent followed a totally different pattern in timing raises for all other classifications, Franco's statement would not put the pickers on notice that they would not be getting a normal piece rate increase under their almost decade-long pattern of biennial raises.

If Franco's testimony is to be understood as referring to the pickers not expecting a raise following their normal biennial pattern, his testimony was contradicted

by two pickers who testified that they did expect raises in even numbered years. The Judge credited the pickers' testimonies.[30]

Therefore, the Judge's decision that Respondent's failure to grant the biennial increase to the pickers in 2000 was a violation of sections 1153(a) and (e) is affirmed.

IX. Statement Conditioning Transfer of Solomon Martinez on Supporting Decertification of the Union and Failure to Grant the Transfer

The ALJ credited employee Solomon Martinez' testimony that in a conversation where only he and acting maintenance department leadman Benjamin Andrade were present, Martinez asked Andrade how he could obtain a transfer to the maintenance department. Martinez testified that Andrade told him that he had to sign a petition to decertify the Union as collective-bargaining representative.

Andrade denied that the conversation had occurred. Martinez was never transferred to maintenance. Based on this evidence, the ALJ found a violation of section 1153(a) and (c).

[30] Respondent contends that, on grounds of equity and due process, the two picker witnesses called by General Counsel who testified that they had an expectation of receiving a raise in 2000 must be discredited because they are prounion, and the ALJ, in discrediting two employee witnesses called by Respondent, noted the witnesses' admitted antiunion feelings as a consideration secondary to other grounds for discrediting them, i.e., their violation of the ALJ's instruction that they not discuss their testimony until after the hearing. Respondent's employee witnesses' testimony was contradicted by Arciniega. The General Counsel's employee witnesses' testimony was not only uncontradicted, but merely confirmed what Respondent's records of pay raises show, that the pickers had a reasonable expectation of a wage increase in 2000. Therefore, Respondent's argument that the two pickers must be discredited solely because of their pro-union sympathies, or that its witnesses were discredited solely because of their anti-union sympathies is without substance.

Respondent contends that Andrade was not a supervisor under Labor Code section 1140(j). Therefore, Respondent contends, even if Andrade had made the remark attributed to him by Martinez, neither a violation of section of 1153(a) because of the unlawful content of the statement itself nor an act of discrimination under section 1153(c) because of the failure to transfer Martinez was established.

Respondent's evidence that Andrade had no authority to effect a transfer of an employee into maintenance was undisputed. Also undisputed was Human Resources Manager Olmos' testimony that most of the maintenance classifications required experience that Martinez did not possess and that there were no openings in any of the classifications Martinez was qualified for in the six months following the conversation. Neither General Counsel nor the Union presented any evidence contradicting Olmos' testimony on these issues.

General Counsel presented evidence that when Andrade acted as leadman, he gave job assignments and orders to maintenance department employees. General Counsel also presented evidence that Andrade had several times acted as maintenance leadman for periods when no supervisor or leadman was employed in maintenance, and that some of these periods had lasted several months.

Based on this evidence, the ALJ found that Andrade was an agent of Respondent but not a supervisor under Labor Code section 1140.4(j). Respondent excepts to this finding.

Respondent also vigorously argues that the ALJ's credibility resolution in favor of Martinez must be reversed. The ALJ's credibility resolution goes both to her finding that Andrade was an agent and to Andrade's denial of the statement conditioning transfer on supporting the decertification. Respondent further contends that the dispute resolution is not demeanor-based (citing *David Freedman* (1989) 15 ALRB No. 13) and that the weight of the evidence is against a finding that the statement was made or that Martinez was denied a transfer.

Martinez testified that he hardly knew Andrade, then admitted that Andrade had repaired Martinez' car a few years before the incident. Andrade testified that he had worked on Martinez' car for free and that Martinez' children had a nickname for Andrade ("the dog's mustache").

The ALJ credited Martinez' testimony. We find the weight of the evidence is not against the ALJ's credibility resolution. Other than the contents of the alleged violative conversation, the most important issue was Andrade's role during the times when he was acting maintenance department leadman and no supervisor or leadman was designated to be in charge of the maintenance department. These periods, including the time before and after Andrade and Martinez spoke, lasted for months. Andrade, but also and more significantly, Franco, attempted to minimize Andrade's role during times when he was in charge of the maintenance department on an acting leadman basis as merely "helping out." Both used almost the same verbal formula in attempting to minimize Andrade's role. In our view, the ALJ correctly viewed these descriptions as attempts to

minimize Andrade's responsibilities and to avoid having to address the lengthy periods when Andrade was in charge of the maintenance department.

The ALJ found that a violation of section 1153(a) and (c) had been established by Respondent having conditioned the transfer on Martinez' signing the decertification petition.

Respondent contends that its uncontradicted evidence that no openings in maintenance that Martinez was qualified for occurred for months following the conversation precludes the finding of discrimination based on the failure to transfer Martinez. Respondent also argues on the basis of discredited evidence that because Andrade was just "helping out" in the absence of a regular supervisor or leadman, that Andrade was not even its agent. Therefore his statement, even if made, would not be a violation.

General Counsel excepts to the ALJ's failure to provide a remedy for the discrimination the ALJ found.

We find no merit in Respondent's argument that Andrade was not even an agent, and therefore even if Martinez' testimony is credited, there could be no violation of section 1153(a). It is undisputed that Andrade was acting leadman at the time the conversation occurred. While Andrade never had the formal title of supervisor, or even leadman, several times in the years before the conversation he had been the only person in charge of the maintenance department, which employed approximately 16 employees,

for periods of several months at a time. During these periods, no person holding the formal supervisor or leadman designations worked in the maintenance department.

Andrade's role was not that of a mere bargaining unit employee as contended by Respondent. Several times over a span of years preceding the conversation Andrade was the only representative of management for months at a time in a large department that performed skilled functions necessary to maintain Respondent's operations.

While Andrade did not have the authority to hire or transfer on his own, he necessarily communicated management's direction to the maintenance department. Therefore, as the ALJ noted, he was "in a strategic position to translate management's desires," which the NLRB has found sufficient to establish agent status. (*International Association of Machinists* (1992) 311 NLRB 72.) Employees in or interested in, positions in the maintenance department would be likely to view him to be able to at least speak with special insight into considerations management would take into account in staffing the maintenance department and to be passing on policies expressly communicated to him. We therefore find that the evidence is sufficient to establish Andrade's status as an agent of Respondent concerning maintenance department policies at the time of the conversation with Martinez.

The main thrust of Respondent's attack on the credibility resolution, that Martinez' denial of a past friendship with Andrade is at some points unconvincing, does not warrant reversing the ALJ's credibility resolution. The friendship is immaterial to the

issue of Andrade's role in the maintenance department, and if a friendship existed between Martinez and Andrade, it is not apparent how this would make Martinez' account of his conversation with Andrade less probable. Central to the issue is Andrade's role in maintenance, the exact subject as to which Andrade and, to a lesser extent, Franco, was evasive. We find, therefore, that the weight of evidence supports rather than opposes the ALJ's credibility resolution.

The ALJ found that Andrade was not a supervisor. She did find that he was an agent of Respondent. The evidence that Andrade oversaw the routine day-to-day running of the maintenance department, giving orders and assignments, is sufficient to establish his status as an agent of Respondent. Employees in or interested in employment in the maintenance department would view his communications concerning management's wishes as more than merely the expressions of a fellow employee and would be inclined to believe and be influenced by those statements. His statements would therefore be admissible against Respondent. *(Vista Verde v. ALRB* (1979) 29 Cal.3d 307; *Frank Foundries* (1974) 213 NLRB 391.)

We therefore affirm the finding of a violation of section 1153(a), as Andrade's statement interfered with Martinez' right to choose whether or not to support the Union.

We conclude, however, that the evidence is insufficient to establish that the subsequent failure to transfer Martinez to the maintenance department was a violation of section 1153(c). We find that the evidence failed to establish that Andrade himself had

the authority to make the transfer. More importantly, Respondent established that there were no openings in the maintenance department that Martinez qualified for under Respondent's criteria or that Respondent ever departed from its criteria. Some cases have found an 1153(c) violation and ordered a discrimination remedy based on a statement discriminatorily conditioning employment even though general counsel failed to provide evidence at the liability stage that an actual opening existed. The question of the existence of an opening is normally left to the compliance stage. In this case, Respondent preempted the compliance stage by providing uncontradicted evidence that no opening that Martinez qualified for existed within a reasonable time following the conversation with Andrade.

Respondent contends that Andrade's undisputed lack of full supervisory authority precludes crediting Martinez' testimony because if Andrade knew he did not have the authority to make the transfer himself, he would not have made any statements about the criteria for transfer. We find this argument not to be logically compelling. In his role in running the maintenance department for months at a time as a leadman, Andrade necessarily had to act as the voice expressing policies he did not himself make. Respondent's further argument that because no openings for positions that Martinez was qualified for occurred in the months following the conversation, that Andrade could not have said that supporting a decertification petition would be looked on with favor by management, similarly fails. When Andrade spoke to Martinez, Andrade could not have known what positions would become available in the maintenance department three or

six months after the conversation. An abundance of openings could have occurred in positions Martinez was qualified to fill.

We therefore affirm the finding of a violation of section 1153(a) but deny General Counsel's exception and reverse the ALJ's finding of a violation of section 1153(c).

X. Respondent's Employee Relations Philosophy

In 1996, Respondent distributed a new employee handbook to its employees.

The first page of the employee handbook is a receipt form for employees to sign acknowledging that they agree to observe all of its policies. The first page of the handbook following its table of contents is titled "Employee Relations Philosophy." General Counsel alleges that the philosophy, in the context of the handbook's discipline provisions and the receipt form, violates section 1153(a). The Employee Relations Philosophy states:

> Pictsweet prefers to deal directly with its employees rather than through a third party not familiar with what is happening in its plant. It is Pictsweet's objective to operate this facility in such a way that you will not need a third party to intervene for you. A third party did not get you your job, neither can a third party guarantee that you will keep your job. We must work together with mutual respect. By doing so we are all more secure in our jobs. From time to time, we will encounter problems. All of will be better off working things out among ourselves without outside intervention. Bring your questions and problems to your supervisor, your Human Resources Manager or your Farm Manager. We promise to listen and to give the best response we can. Use the complaint procedure outlined in this book if you wish. We accept our responsibility to provide you with working conditions, pay and benefits that are fair and equitable.

The handbook's complaint procedure does not include any participation by the Union.

The handbook's section on work rules provides that "[a]ny violation of Pictsweet policies, improper conduct or behavior or unsatisfactory conduct may warrant disciplinary action ranging from verbal warnings to immediate termination."

Franco testified that the handbook in its present form has been given to all new employees since 1996. The record does not specifically reflect that signed acknowledgment forms have been collected and placed in their personnel files.[31]

In a series of decisions,[32] the NLRB has addressed the specific issue of the lawfulness of employee handbooks stating the employer's preference that employees avoid involvement with a union or "outsiders" in dealing with grievances or complaints. The NLRB has found a violation when the handbook stated as employer policy a preference that employees not seek union or outsider representation if the handbook also provided that violation of any policy in the handbook was grounds for discipline, and made it clear to employees that they were bound by all the policies in the handbook.

We find that these NLRB decisions, not the court and NLRB decisions cited in the ALJ's recommended decision[33] dealing with employer rules that did not

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[31] The record does not establish a uniform practice of collecting and filing signed receipt forms but this does not affect our analysis. In *Matheson Fast Freight*, *Inc.* (1989) 297 NLRB 63; the NLRB found a similar handbook violated section 8(a)(1), even though several employees refused to sign the handbook's receipt form.

[32] *Heck's, Inc.* (1989) 293 NLRB 1111; *La Quinta Motor Inns, Inc.* (1989) 293 NLRB 57; *Matheson Fast Freight, supra; Leather Center, Inc.*, (1993) 312 NLRB 521; and *Noah's New York Bagels* (1999) 324 NLRB 266.

[33] The ALJ found the Employee Relations Philosophy to be lawful under *ADD Adtranz Daimler-Benz v. NLRB* (D.C. Cir., 1991). We find that *ADD Adtranz* does not apply to the Employee Relations Philosophy. *ADD Adtranz* involved a rule that made no specific reference to union activity but merely generally prohibited abusive or disrespectful language in the work place. The court found the rule reasonable and too remote from union activity to

expressly govern employee involvement with unions, to be dispositive of the complaint allegations concerning the Employee Relations Philosophy in Respondent's employee handbook.

In *Heck's, Inc*., a similar policy was found violative of section 8(a)(1) of the NLRA when incorporated into employee handbooks that required employees to sign a receipt form acknowledging and accepting all employer policies stated in the handbook and warning employees that violation of the handbook's policies would be grounds for discipline. In *Heck's*, the NLRB noted that employees were "requested" to sign forms promising in writing to be bound by the employer's antiunion policy that was supported by a rule that they could be disciplined for violating any company policy. In these circumstances, the NLRB found that the employees could reasonably assume that they were subject to discipline for violating the anti-union policy, and that Heck's handbook had "an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights" under the NLRA to form, join, or assist unions. In *Leather Center, supra*, the same result was reached on similar facts, quoting *Heck's*.

All of the elements in *Heck's* and *Leather Center* are present in this case.

While an expression of employer preference that employees not be represented by a union would be lawful under Labor Code section 1155 standing alone,

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make it facially invalid under the NLRA. Unlike the general rule of workplace conduct at issue in *ADD Adtranz*, the Employee Relations Philosophy is directed solely at its employees' union activities. The NLRB decisions discussed in the ALJ's Decision did not address any employer policy expressly governing employee union involvement but rather deal with rules concerning such matters as off-duty employees' access to employer premises, which might indirectly affect employee union activity. We do not find that the fact that the manual was issued in 1996 affects our determination of the lawfulness of its provisions. In *Matheson Fast Freight*, the NLRB disavowed the ALJ's consideration of timing as affecting the determination of the handbook's lawfulness.

section 1155 does not privilege Respondent's Employee Relations Philosophy. Labor Code section 1155 allows employers to communicate their views and preferences in labor relations matters to employees as long as the preferences are not communicated in conjunction with any coercive statement. Because the handbook informs employees that non-adherence to any policy stated in the handbook is cause for discipline, Respondent's statement of preference that employees avoid the involvement of outsiders in any disagreements is backed by potential discipline.[34]

We therefore reverse the ALJ's finding and instead find that the Employee Relations Philosophy in Respondent's handbook violated section 1153(a).

XI. Respondent's Contention that the Union Abandoned the Bargaining Unit

Respondent contends that because the Union did not seek to bargain with it from the time Respondent purchased the farm in 1989 until 1999 that it should be found to have abandoned its certification, even though Respondent agreed to recognize and bargain with the Union in 2000.

For the reasons stated in the ALJ's Decision, we reject this contention. Under the ALRA, union recognition must be established through receiving the majority of votes in a secret ballot election and being certified by the Board. A certified union can lose its status through decertification, certification of a rival union, or by disclaiming interest in representing the employees. (*Lu-ette Farms* (1982) 9 ALRB No. 91.)

[34] In *Noah's New York Bagels*, *supra*, no violation was found because the handbook's statement on union involvement expressly acknowledged the employees' right to seek union representation and the receipt did not make non-adherence to any of the policies in the handbook grounds for discipline.

The Board has recognized that a union could abandon a bargaining unit, but only if it is found that the union is unable or unwilling to represent the bargaining unit. (*Bruce Church, Inc.* (1991) 17 ALRB No. 1.)

Therefore, under the accepted definition, the Union has not disclaimed interest, become defunct, or abandoned the bargaining unit. Respondent recognized the Union as the certified representative of its employees at the end of 1999. The Union has been actively representing Respondent's employees since that time.

Based on the foregoing, we affirm the ALJ's rejection of Respondent's abandonment defense.

ORDER

By authority of California Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Pictsweet Mushroom Farms, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing and 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, as the certified representative of Respondent's agricultural employees.

(b) Laying off employees without first notifying and affording the Union a reasonable opportunity to bargain with Respondent concerning such change.

(c) Unilaterally instituting any changes in layoff and/or recall policies without first notifying and affording the Union a reasonable opportunity to bargain with Respondent concerning such changes.

(d) Unilaterally changing the terms and conditions of employment by eliminating Respondent's established past practice of giving wage increases to pickers every two years, without first notifying and affording the Union a reasonable opportunity to bargain with Respondent concerning such changes.

(e) Failing and refusing to provide information requested by the Union concerning Respondent's profit sharing plan.

(f) Telling any agricultural employee that their request for a transfer will be conditioned on their signing a decertification petition or refraining from engaging in union or other concerted activities protected under section 1152 of the Agricultural Labor Relations Act (Act).

(g) Maintaining a policy that employees are subject to discharge or other discipline if they seek the assistance of a union in dealing with Respondent.

(h) In any like or related matter interfering with, restraining, or coercing any agricultural employee(s) in the exercise of rights guaranteed them by Labor Code section 1152.

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

(a) Upon request, meet and bargain collectively in good faith with the Union as the certified exclusive collective bargaining representative of its agricultural employees with respect to its employees' wages, hours, and other terms and conditions of employment.

(b) Expunge the section titled "Employee Relations Philosophy" from Respondent's employee handbook or eliminate the policy that employees may be discharged or otherwise disciplined if they fail to adhere to Respondent's preference that they refrain from seeking union representation.

(c) Make whole the pickers who were not provided a wage increase in 2000 for all losses in wages and other economic losses, plus interest.

(d) Make whole for all losses in wages and other economic losses all agricultural employees who were laid off on September 5, 2000, plus interest to be computed in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(e) Make whole all for all losses in wages and other economic losses employees who were laid off or recalled out of seniority order between September 25, 2000, and March 1, 2001, plus interest to be computed in the manner set forth in *E.W. Merritt Farms* (1988) 14 ALRB No. 5.

(f) In order to facilitate the determination of lost wages for the period beginning January 1, 2000, 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 amounts of backpay and interest due under the terms of the Order. Upon request of the Regional Director, the payroll records shall be provided in electronic form if they are customarily maintained in that form.

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

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date this Order becomes final or when directed by the Regional Director, to all employees employed by Respondent during the period September 5, 2000 through September 5, 2001.

(i) Post copies of the attached Notice for 60 days at conspicuous locations on its premises, the places 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. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of copies of the attached Notice.

(j) Provide a copy of the attached Notice in all appropriate languages to each agricultural employee hired by Respondent during the 12-month period following the date this Order becomes final.

(k) Upon request of the Regional Director, provide the Regional Director with the dates of its next peak season. Should the peak season have already begun at the time Regional Director requests peak season dates, Respondent will 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.

(l) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time, at times and places to be determined by the Regional Director. Following any reading, Board agents shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and during the question and answer period.

(m) Notify the Regional Director in writing, within 30 days after the date this Order becomes final, of the steps Respondent has taken to comply with it.

Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing as to what further steps it has taken in compliance with the Order.

3. It is further ordered that all other allegations in the Complaint are hereby Dismissed.

Dated: March 14, 2003

GENEVIEVE A. SHIROMA, Chair

GLORIA A. BARRIOS, Member

CATHRYN RIVERA, Member

CASE SUMMARY

PICTSWEET MUSHROOM FARMS Case No. 00-CE-332-EC(OX)
(U.F.W., AFL-CIO) 29 ALRB No. 1

Background

The Union was certified to represent employees at a mushroom farm operated by predecessor employer. Respondent acquired the farm in 1989. The Union first requested that Respondent bargain collectively in 1999. The parties negotiated in a series of meetings from January to May 25, 2000. No further meetings were held until September 25, 2000. Respondent became aware that a supermarket chain would cease buying from Respondent pursuant to the Union's request that it boycott Respondent. Respondent adopted a plan to deal with the loss of business that called for layoffs and reductions in hours. The first layoff occurred on September 5, 2000, following the "steaming off" on August 30 of mushrooms that the pickers who were laid off on September 5 would have harvested.

Additional layoffs to adjust to the boycott followed in the next several weeks. Respondent did not give the Union notice of the layoffs until September 14. The parties met on September 25, 2000, and agreed that layoffs and recalls would be in order of departmental seniority.

The Union requested information concerning Respondent's profit sharing plan. Respondent provided some information, consisting primarily of information other than what the Union had requested.

The acting leadman of Respondent's maintenance department told an employee that he would be transferred into the maintenance department if the employee signed a decertification petition. The employee did not sign the petition and was never transferred into the maintenance department.

Respondent had granted raises to the pickers in 1992, 1994, 1996, and 1998, but not in 2000 and did not notify the Union that it intended not to follow pattern of biennial raises. Respondent also maintained an employee manual that stated a company policy that employees not seek representation by "third parties," provided that non-adherence to any company policy was grounds for discharge and had a receipt form requesting that employees signing it acknowledged that they were subject to discharge for failing to adhere to all policies in the handbook.

ALJ's Decision

The ALJ found that Respondent's packing employees were non-agricultural and not subject to the Board's jurisdiction. The ALJ rejected Respondent's contention that the original certification was insufficient to establish the Union's status as bargaining representative of Respondent's agricultural employees.

The ALJ rejected Respondent's alternative defenses of actual notice, waiver, and past practice, finding the September 5 layoff was a unilateral change. However, the ALJ found the September 5 layoff to be lawful because it was an economic weapon in response to the Union's boycott analogous to a lockout or strike stopgap measure. The ALJ found that several employees were laid off or recalled in violation of the criteria agreed to between Respondent and the Union in their September 25, 2000 negotiating session. The ALJ found that the Union failed to request bargaining concerning reductions in hours of employees who were not laid off.

The ALJ found Respondent violated section 1153(e) by failing to grant its pickers a raise in 2000 because biennial raises for pickers had become an established practice over the prior eight years. The ALJ found that Respondent failed to provide information relevant to its profit sharing plan requested by the Union. Respondent had proposed the plan as a central element in its wage proposal and the Union's need to determine the plan's reliability as a source of wages made the information request reasonable. The ALJ also found that an acting leadman's statement to an employee that the employee's request for a transfer to the maintenance department would be granted if the employee signed a decertification petition and the failure to transfer him were violations. The ALJ found that Respondent's employee handbook statement that Respondent preferred that employees not seek union representation was not a violation.

Board Decision

The Board affirmed the ALJ's findings and conclusions with three exceptions. It found that the September 5 layoff was an unlawful unilateral change and not a lockout. It was an adjustment to a lack of work, the layoff was not brought to the Union's attention, and the Union was not informed that it was intended to put economic pressure on the Union to influence the Union's position in bargaining. The Board found that the employee handbook's policy statement that employees not seek union representation was unlawful because the handbook provided that violation of any policy in the handbook was grounds for discipline or discharge

and employees were required to sign a form stating that they would adhere to all policies in the handbook. While affirming the conclusion that the statements conditioning transfer on signing the decertification petition was unlawful, the Board found no violation as to the failure to transfer because it was established that there were no openings in classification the employee was qualified for in maintenance department.

* * *

This Case Summary is furnished for information only and is not an official statement of the case or of the ALRB.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro/Oxnard Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint that alleged that we, Pictsweet Mushroom Farms, 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 failing to give the pickers a wage increase in 2000; by failing to provide information to the UFW which it needed in contract negotiations; by laying employees off without bargaining with the union; by changing our agreements with the UFW to lay off and recall employees in departmental seniority order; by maintaining a policy in the "employee relations philosophy" section of our handbook that employees not seek union representation to deal with us and that employees may be discharged for violating that policy; and by one of our leadperson's telling an employee that his transfer was conditioned on that employee's signing a decertification petition.

The ALRB has told us to post and publish this Notice. We will do what the ALRB has ordered us to do.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following 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;
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 lay off employees without notifying the UFW and giving it an opportunity to bargain, unless we have reached agreement with the UFW on layoff and recall of such employees; and where we have reached agreement with the UFW on order of the manner in which we lay off and recall workers, we will make no changes without first notifying the UFW and giving it an opportunity to bargain about such changes.

WE WILL NOT make any changes in your wages or when you receive wage increases without first notifying the UFW and giving it an opportunity to bargain about such changes.

WE WILL NOT tell any employee that approval of his/her request for transfers is conditioned on his/her signing a petition to decertify the UFW.

WE WILL NOT maintain the employee relations philosophy section of our handbook as a policy that employees may be discharged or disciplined for violating.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in your exercise of the rights listed above.

WE WILL reimburse each of the pickers for all losses of wages and other economic losses they have suffered as a result of our failure to provide a wage increase in 2000.

WE WILL reimburse any employees for losses they have suffered as a result of their being laid off on September 5, 2000 or for being laid off or recalled out of departmental seniority order between September 25, 2000 and March 31, 2001.

WE WILL expunge the "Employee Relations Philosophy" section of our employee handbook or eliminate the requirement that employees may be discharged or disciplined if they seek representation from the UFW or any other union in dealing with us.

DATED: PICTSWEET MUSHROOM FARMS

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 319 South Waterman Street, El Centro, California 92243. The telephone number is (760) 353-2130.

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

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case Nos. 00-CE-332-EC(OX)**
	)	**00-CE-333-EC(OX)**
	)	**00-CE-342-EC(OX)**
PICTSWEET MUSHROOM FARMS,	)	**00-CE-343-EC(OX)**
	)	**00-CE-344-EC(OX)**
	)	**00-CE-373-EC(OX)**
Respondent,	)	**01-CE-6-EC(OX)**
	)	**01-CE-10-EC(OX)**
	)	**01-CE-66-EC(OX)**
and	)	**01-CE-68-EC(OX)**
	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
	)	
	)	
Charging Party.	)	

Appearances:

Harry R. Stang
Barbara Krieg
for Respondent

Thomas P. Lynch
Mario Martinez
for Charging Party

Eugene E. Cardenas
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

Nancy C. Smith, Administrative Law Judge: This case was heard by me from February 14, 2002, through February 22, 2002, in Oxnard, California. It arises from ten charges (00-CE-332-EC(OX); 00-CE-333-EC(OX); 00-CE-342-EC(OX); 00-CE-343-EC(OX); 00-CE-344-EC(OX); 00-CE-373-EC(OX); 01-CE-6-EC(OX; 01-CE-10-EC(OX); 01-CE-66-EC(OX); and 01-EC-68-EC(OX)) filed by the United Farm Workers of America, AFL-CIO (hereinafter the "UFW" or "Union") between September 13, 2000, and March 1, 2001. The General Counsel issued a complaint based on those charges on June 26, 2001. Respondent Pictsweet Mushroom Farms (hereafter Pictsweet or PMF) filed its answer to the complaint on July 5, 2001.

The complaint charges Respondent with violations of sections 1153 (e) and (a) of the Agricultural Labor Relations Act (ALRA or Act, Labor Code sec. 1140 et seq.) by (1) failing to give notice to and bargain with the UFW before the layoffs of September 5, 2000, and before various other layoffs/ reductions of hours between September 5, 2000 and March 1, 2001; (2) failing to give a periodic increase in wages to its pickers in 2000[1]; (3) failing to provide information requested during bargaining related to Respondent's profit sharing plan; and (4) failing to recall employees according to classification seniority as agreed upon by respondent and the UFW on September 25, 2000. Respondent is also charged with a violation of section 1153(a) by its direct communications to bargaining unit employees between April 2000 and January 12, 2001, and by virtue of the policy set forth in its Employee Handbook which states a preference

[1] Although the complaint does not limit the failure to give periodic wage increases to the pickers, at the Prehearing Conference, Paragraph 20 was narrowed to include only the pickers.

for dealing directly with its employees, all of which the General Counsel contends undermined the UFW as the exclusive bargaining representative of Respondent's agricultural employees. Lastly, Respondent is charged with a violation of sections 1153 (c) and (a) by conditioning the transfer of irrigator Solomon Martinez to the maintenance crew upon his signing of a petition to decertify the UFW.

Respondent denies that it violated the Act in any respect. Specifically, Respondent contends that any layoffs and/or reduction of hours were privileged as a response to a UFW-initiated boycott of Respondent's products by Vons and Ralphs grocery stores, and/or that the Charging Party waived its right to bargain about the layoffs and reduction of hours due to its past conduct and its failure to request bargaining in a timely manner; and/or that the layoffs and any reduction of hours were justified by business necessity/exigent circumstances. Respondent further contends that its obligation to bargain with the UFW was excused by the UFW's conduct and that the UFW has unclean hands.[2] PMF also asserts that its communications to employees were protected by Respondent's right to free expression as set forth in section 1155 of the Act; that its pickers were not regularly provided with wage increases every two years; that it provided all information requested by the Charging Party during the bargaining process which it was legally required to provide; and that it never conditioned any offer to transfer Solomon Martinez on his signing a decertification petition. Respondent also raised the issue of ALRB agent misconduct in its answer, contending that the complaint was issued

[2] Respondent did not address the "unclean hands" defense in its Post-Hearing Brief, and thus appears to have waived it.

for an improper purpose, pursuant to "flawed and incomplete investigations, which created an appearance of bias." (Answer, p. 5.)[3]

Pictsweet further asserts that the UFW had abandoned the bargaining unit, thus extinguishing any bargaining obligation that Pictsweet may at one time have had to the UFW.[4]

At the prehearing conference in this matter, Respondent's motion for summary judgment or, in the alternative, summary adjudication of issues was heard and denied by me in an order dated December 22, 2001.[5] During the hearing, Respondent moved for dismissal of paragraph 22 of the Complaint after the close of the General Counsel's and Charging Party's cases, but also after Respondent had put on all of its witnesses, with the exception of the recall of Ruben Franco, its general manager. I denied the motion as untimely.

Section 20243 of the Board's regulations provides that a motion for decision for lack of evidence may be made by the opposing party after the General Counsel or the Respondent has completed its presentation of evidence. Such a motion can be

[3] At the hearing, I ruled that a defense based on agency misconduct during the investigation was not material or relevant to the Board's unfair labor practice case. (*West Foods* (1985) 11 ALRB No. 17, ALJD, p. 6; *U.S. Tool and Cutter Co.* (1964) 148 NLRB 20, 24; *Illinois Electric Porcelain Co.* (1941) 31 NLRB 101, 148, fns 7&8.) Pictsweet made no offer of proof as to any evidence that it wished to present, other than to argue that the complaint was issued when the company's request for further information as to one of the charges was pending before the Regional Director. (See RT 1223-1228) I rejected RX No. 19 on this issue. (RT 1237: 14-19) Respondent has not addressed this issue in its Post-Hearing Brief and thus appears to have waived this defense.

[4] Evidence on this point was not permitted at the hearing since such a defense, in the absence of decertification, is not recognized under the ALRA. Additionally, Respondent's offer of proof as to employee sentiment toward the UFW was based primarily on hearsay. (See RT 490-494) (See infra, pp 13-14.)

[5] Essentially the motion was denied because I found that summary judgment was not appropriate in this unfair labor practice proceeding as there were disputed material facts as to each of the allegations in the complaint. I also questioned whether summary adjudication is appropriate in cases that do not involve technical refusals to bargain, stipulated facts, or default matters.

made without waiving the moving party's right to offer evidence in support of its defense in the event that the motion is not granted. Here, Respondent put on most of its testimony—that of five witnesses—and nonetheless made its motion. Given that the hearing was nearly concluded, Respondent's motion served no purpose.[6]

The General Counsel, Respondent, and Charging Party (intervenor) were represented at the hearing and were given a full opportunity to participate in the proceedings. All filed briefs after the close of the hearing. Based on the entire record,[7] including my observations of the demeanor of the witnesses, and after consideration of the arguments and briefs submitted by the parties, I make the following findings of fact and conclusions of law.

FINDINGS

1. <u>Jurisdiction</u>

Respondent Pictsweet Mushroom Farms, a division of United Foods, Inc., is engaged in agricultural operations, specifically the growing and harvesting of mushrooms in Ventura, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of section 1140.4 (a) and (c) of the Act. I further find that the UFW is a labor organization within the meaning of section 1140.4(f) of the Act, as was also admitted by Respondent.

[6] It should also be noted that the General Counsel and Charging Party had put on a prima facie case that the recalls by Pictsweet were out of seniority, see e.g. Raul Gutierrez who was recalled on October 16, 2000, although he had more seniority than Margarito Sanchez who was recalled on 10/7/00 and Erasmo Torres who was recalled on 10/7/00. There was a further basis for denial of Respondent's motion based on that showing. I can only speculate that Respondent did not move for dismissal after the close of General Counsel's case because Respondent's counsel believed that they needed the testimony of Gilbert Olmos to "explain" errors in the various layoffs, recall, and seniority lists.

[7] References to the hearing transcript will be to page number and line. Respondent's General Counsel's and Charging Party's exhibits will be identified as RX,GCX,CPX, number, respectively.

At the commencement of the hearing, Respondent moved to exclude from the bargaining unit Pictsweet employees who pack mushrooms in its Ventura facility. Respondent argued that the packers are not agricultural employees as defined in section 1140.4(b), because they pack mushrooms grown by outside growers as well as Pictsweet. In support of its contentions, Pictsweet presented the testimony of general manager Ruben Franco. Franco testified that Respondent regularly purchases enoki, oyster, portabello, and wood's ear mushrooms from other growers, as Pictsweet does not grow any of these exotic/specialty mushrooms. These specialty mushrooms are delivered and packed on a daily basis. (RT 49: 1-5; 63: 13-19)

Franco also testified that PMF purchases white and brown mushrooms when Respondent is short mushrooms to fill customer orders. He estimated that Pictsweet buys from 2,000-3,000 up to 80,000 pounds of brown and white mushrooms three-to-five times a year. Pictsweet purchases these mushrooms if it encounters problems with its growing process. If no problems occur, then according to Franco, "we normally don't buy." (RT 64: 24-28) Franco reported that Pictsweet purchased 15,000 pounds of brown and white mushrooms out of a total of one million pounds total mushrooms shipped in January 2002. (RT 64: 4-13)

Franco indicated that Pictsweet employs 20 packers on the average (RT 49: 21-27)[8], and that all packers pack specialty mushrooms and the brown and white mushrooms that are grown by outside growers.

[8] Testimony from Ruben Franco regarding the number of packers was somewhat confusing. He testified that there were 18-20 packers on the average (RT 49: 24-27) and later that there were 40-45 packers (RT 549: 13-16); given my ruling on the jurisdictional questions, this discrepancy need not be resolved.

Charging Party indicated that it would not object to the exclusion of the packers from the bargaining unit since they regularly pack mushrooms grown by growers other than Pictsweet. Counsel for the United Farm Workers indicated that the Union and Respondent had been engaged in discussions about the status of the packers during the collective bargaining negotiations. (RT 36: 14-18) The General Counsel would not join in any stipulation as the status of the packers, taking the position that a unit clarification petition was the proper vehicle for resolving whether the packers should be included in the unit. (RT 65: 20-23) Moreover, at the close of the hearing, the General Counsel stated that he was seeking a remedy on behalf of those packers who suffered losses due to any unfair labor practices committed by Respondent. (RT 1305: 3-5) During the hearing, I reserved ruling on the status of the packers.

Although one method for settling the question of whether the packers should be included in the bargaining unit would be through a unit clarification proceeding pursuant to section 20385 of the Board's regulations,[9] because the General Counsel seeks a remedy for the packers in this unfair labor practice proceeding, the jurisdictional issue of whether the packers are agricultural employees within the meaning of section 1140.4(b) of the ALRA must be resolved in this unfair labor practice proceeding.[10]

[9] The ALRB's regulations are found at Title 8 of the California Administrative Code, sections 20100 et seq.

[10] The General Counsel in its Post-Hearing Brief argues that this jurisdictional issue should be resolved in compliance proceedings so that the Respondent's documentary evidence in support of its jurisdictional argument can be reviewed. Although I agree with the General Counsel that the proceedings would have been expedited had Respondent directly raised the issue of the status of the packers at the pre-hearing conference, nonetheless, the General Counsel had ample opportunity to examine Franco as to the purchases from outside growers and/or to review his testimony with PMF workers who would be in a position to know whether Respondent grows any of the specialty mushrooms that it ships. I therefore reject that suggestion.

Section 1140.4 (b) provides that agricultural employees are those employees who are "engaged in agriculture" as defined in section 1140.4(a) and who are excluded from the coverage of the NLRA by NLRA section 2(3) and section 3(f) of the federal Fair Labor Standards Act. Department of Labor regulations interpreting section 3(f) state "No practice performed with respect to farm commodities is within the language [of FLSA] by reason of its performance on a farm unless all of such commodities are the products of that farm."

In *Camsco Produce Company, Inc*. (1990) 297 NLRB No. 157, the NLRB announced the test it would use for determining its jurisdiction over employees who are engaged in secondary agricultural related practices, i.e. those performed as an incident to or in conjunction with farming operations. In *Camsco*, the national board stated that it "will assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question." (Emphasis added) The board ruled, "it is not unreasonable to conclude that a farmer-employer who handles the products of other producers on a regular basis has departed from the traditional model of the farmer who simply prepares his own products for market." The NLRB reasoned that to extend the protections of the NLRA to such employees is consistent with the intent of Congress. *Camsco* actually involved fresh pack employees packing mushrooms grown by their employer as well as those produced by farmers other then the employer. The national board asserted jurisdiction over those fresh pack employees.

The NLRB reached the same result in *Campbells Fresh, Inc*. (1990) 298 NLRB No. 54. That case too involved an employer that cultivates, harvests, and packs mushrooms. Although the UFW was certified as the collective bargaining agent for Campbells' "agricultural employees," the national board found that the employer's short distance drivers were not agricultural employees because they transported outside mushrooms on a regular basis—even though the quantity of outside mushrooms was very small—thus satisfying the criteria in *Camsco*. (See also *NLRB v Cal-Maine Farms, Inc.* (1993) 998 F2d 1336 [The court ruled that the NLRB had jurisdiction over employer that produced and processed eggs, because it regularly procured eggs from outside sources.]) The ALRB has followed this NLRB precedent. (See *William Warmerdam* (1998) 24 ALRB No. 2, ALJD, p. 13, fn. 7, pp.14-16; and *Olson Farms/Certified Egg Farms, Inc*. (1994) 19 ALRB No. 20, p. 5, fn 8.)

Pictsweet's fresh pack employees regularly pack mushrooms grown by outside growers; specifically, they pack exotic or specialty mushrooms on a daily basis. This activity brings them within the *Camsco* criteria for non-agricultural employees. They also pack brown and white mushrooms from outside growers on a periodic basis throughout the year, but it is in relatively small quantities and does not appear to be on a regular basis. Thus, absent the specialty mushrooms, a different result might obtain. However, under the aforementioned NLRB and ALRB precedent, the packers are not agricultural employees, and the ALRB has no jurisdiction over them. Thus, I will not consider any allegations of unfair labor practices involving the packers.

2. **Background**

Pictsweet Mushroom Farm is a division of United Foods Inc. Respondent produces and packs mushrooms. In addition to the mushrooms that it grows and packs, it buys and packs mushrooms grown by other producers. Respondent's operations are year round; prior to the events here, it employed a workforce of some 365 persons, of which some 165 were pickers. (RT 181: 15-17) Its operations are divided into various departments, each of which is headed by a supervisor. The departments consist of the following: compost; filling; spawning; dirt preparation; casing; room control- general labor; room control-water; room control-chemical; room control-disease; dumping; general grow hourly, maintenance-yard clean; maintenance-facility; maintenance-boiler; pickers, pick-up, pack-packing; pack-sanitation; pack-box prep; pack-cooler; compost-sales. There is also a department consisting of drivers, and one for the truck maintenance crew. (CPX # 161.)

Ruben Franco, Pictsweet's general manager, directs the company's operations; he has worked in that capacity for PMF or its predecessors since 1987. (RT 46: 16-20, 179: 1-25) The personnel department is headed by Gilbert Olmos, who has been employed by Respondent as Human Resources Manager for four years. (RT 1044: 20-23.)

The witnesses at the hearing did not set out the process of growing the mushrooms at Pictsweet in detail. A very detailed explanation of the culturation process is offered in the ALJ decision in *West Foods, Inc*. (1985) 11 ALRB No. 17, ALJD, pp. 9-12. However, for the purposes of this case, the process for reducing production is most

relevant in light of the allegations relating to unlawful layoffs and reductions in hours which occurred when Pictsweet reduced its operations after the Vons' cancellation notice. Ruben Franco described that process:

> What we call a cycle is from the day that we put the canvas inside the building to the day that we take the canvas out of the building. That's what we call a cycle, which is 87 days. Picking cycle is from the day we start picking to the day that we steam off the room, and then we take the canvas out. And that picking cycle is 28 days.
>
> We get four breaks in that [picking] cycle. Every seven days we get one crop. So we got the first break, second break, third break, and fourth break. When the Vons' business was lost, the third and fourth breaks were the ones that we started steaming off [i.e. killing before they were harvested]. (RT 265: 3-13, see also 264; 18-20.)

The mushroom crop is highly perishable. Franco testified that PMF can sell mushrooms one or two days old, but that by the third day, the product has to be downgraded and sold to canneries. By the fourth day, any mushrooms not shipped have to be thrown away. (RT 531: 11-14)

Franco stated that usually the mushrooms are picked, cooled, packed and shipped on the same day. (RT 512:22-25, 5131-13.) With respect to the mushrooms that are sent out the second day, he testified that PMF has to pick and choose, because as the mushrooms get darker, the customers do not want them. Mushrooms picked and shipped on the first day were sold on the average at $1.30 per pound; those shipped the second day were sold on an average of $1.18-$1.20 per pound, while those shipped on the third day to the canneries were sold for $.35-$.45 per pound. At the time Vons cancelled its

business, Pictsweet sold 90% of its product to retail operations, with only about 10% going to canneries. (RT 517: 11-23, 518: 1-22, 5191-21, 520 21-25)

The UFW was certified as the exclusive bargaining representative of the employees of PMF's predecessor in 1975.[11] Although at one time there was a contract between the UFW and Pictsweet's predecessor, there has been no collective bargaining contract in effect for many years. (RT 179: 18-20; 192: 7-9) The United Farm Workers contacted Respondent in December 1999, and the parties began negotiations for a collective bargaining contract in January 2000. (RT 637:17-25; 638: 13-15) The parties held six bargaining sessions between January 26, 2000 and May 2, 2000. UFW negotiator Jorge Rivera canceled a May 30, 2000 session (RT 837: 6-9), and the parties did not meet again until September 25, 2000. (RT 756: 23-26)

The parties stipulated that while the negotiations were on-going, the UFW became involved in unspecified boycott activity directed against PMF, which led to a cancellation of purchases of PMF's products by Vons on August 27, 2000, and to a loss of Ralphs' business on September 21, 2000. Together, the two grocery chains made up approximately 50% of Respondent's business. (RT 201: 22-23; 221: 7-9; All Parties' Exhibit #1.)

On August 28, 2000, Respondent posted a notice at its facility directed to its employees, stating that due to the loss of the Vons' business, which it attributed to illegal

[11] See *West Foods, Inc.* (1985) 11 ALRB No. 17. West Foods was a predecessor to PMF.

UFW boycott activity, Respondent would be forced to immediately reduce production and layoff employees. (GCX #6; RT 208: 6-18) Vons' represented 25% of Pictsweet's business. (RT 201: 22-23; 505: 12-15)

3. **Respondent's Defense of Abandonment**

Respondent argues that the ALRB should reconsider abandonment as a defense to a refusal to bargain. Contrary to Respondent's assertion, the ALRB does in limited circumstances recognize the abandonment doctrine. This case is simply not an appropriate case for such a defense.

In *Nish Noroian Farms* (1982) 8 ALRB No. 25, p. 15, the Board ruled that just as the means by which a union will be recognized under the ALRA is through winning a secret ballot election and being certified by the Board, withdrawal or termination of recognition must also be left to the election process. In *Lu-ette Farms* (1982) 8 ALRB No. 91, p. 5, the Board stated that a certified union remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, or until the union becomes defunct or disclaims interest in continuing to represent the unit employees.

The Board reaffirmed that position in *Bruce Church* (1991) 17 ALRB No. 1, in which it defined abandonment as a showing that the certified union was either unwilling or unable to represent the bargaining unit. The Board there found that the ALRA requires formal decertification in such instances. (See also *Cardinal Distributing Co. Inc.* (1993) 19 ALRB No. 10.) Here, Pictsweet recognized the UFW as the certified representative of its employees, and in January 2000, began collective bargaining with the UFW. The

Union is obviously interested in representing the bargaining unit members, and Respondent has recognized the validity of the certification by engaging in bargaining. There has been no decertification of the UFW. Under such circumstances, Respondent cannot establish the defense of abandonment.

4. **The Unfair Labor Practices**

A. **Layoffs and Reductions in Hours**

1. The September 5, 2000 Layoffs

On August 28, 2000, the day that the notice about the loss of Vons' business was posted, a group of the workers gave a copy of the notice to UFW staff member Jessica Arciniega. She in turn faxed the notice to the UFW's Parlier office, which is where Jorge Rivera, the UFW's chief negotiator, received his mail and faxed communications. (RT 694: 3-17; 695: 3-8) Rivera testified that he did not see the notice until a short time before the February 14, 2002, unfair labor practice hearing. He stated that he discovered it among his paperwork relating to Pictsweet and faxed it to the UFW's legal department, which then provided the document and the faxed cover sheet to Respondent in response to a earlier discovery request. (RT 767: 10-27; RX #11)

On September 5, 2000, Respondent posted a list of the employees it decided to lay off due to the drop in its business caused by Vons' cancellation of purchases. (GC# 10) Although that list includes 14 employees, based on the documentary evidence introduced by Charging Party, it appears that a fifteenth employee, Jose Sanchez, a weighmaster, was also laid off on September 5, 2000. (See CPX # 85, 90 and 93) Of the 14 employees on the list, ten were pickers: Alfredo Macias, Raul Gutierrez, Carlos Mendoza, Erasmo

Torres, Mario Morales, Jose M. Garcia, Gustavo Palomino, Cesar Aguirre, Miguel Arias, and Bernardo Montenegro. The other four employees were packers over whom I have ruled that the Board has no jurisdiction.[12]

It is undisputed that the UFW did not request bargaining with Respondent over the projected layoffs or with respect to any reductions in hours. Instead, the UFW filed an unfair labor practice charge on September 13, 2000. Rivera testified that he only found out about the layoffs from UFW vice-president, Lupe Martinez, on September 11, 2000. (RT 742: 26-28; 743: 1-10.) At some point, he also learned that a charge had been filed by the UFW with respect to the layoffs. (RT 743: 13-18)

Rivera also received notice of the layoffs in a September 14, 2000 letter from Respondent's negotiator, Harry Stang (faxed and sent certified mail), which informed Rivera that as a result of the UFW's boycott activities, one of Respondent's major customers had terminated mushroom purchases. In that letter, Stang informed Rivera that, due to the drop in sales volume, there would be layoffs and reductions in employee hours. He noted that Pictsweet had already provided the UFW with the names and hire dates of the first group of employees to be laid off. (GC #14) Rivera testified that he did in fact receive Stang's letter, and he also sent a written response. (RT 840: 17-21; GC #15) In that response, he requested additional information about how Pictsweet proposed to deal with the reduction of work for its employees.

It is likewise undisputed that Respondent itself did not give any <u>prior</u> direct notice of the layoffs to the UFW chief negotiator. Although Franco says that he gave a copy

[12] Those four were Jose Sanchez, Cecilia Rodriguez, Maria Palomino, and Guadalupe Vega.

of the August 28, 2000 notice to Arciniega, she denied receiving it from him. (RT 205: 4-15,17-19) She testified that PMF workers gave her the notice. I credit her testimony on that point.[13] In fact, when Stang wrote to Rivera on September 11, 2000, he did not mention either the boycott or layoffs. (GC # 13)

There was not any bargaining about the layoffs until the parties met for negotiations on September 25, 2000. On that date, they reached an agreement that any layoffs would be in order of classification seniority, i.e. seniority in the particular department where any layoff would occur, and that recalls would likewise be in order of classification seniority, with those employees with the most seniority being the first to be called back to work. (RT 757:12-19) Prior to the September 25, 2000 meeting, the parties had not met for negotiations since May 2, 2000.

2. Subsequent Layoffs and Reductions in Hours

The documentary evidence admitted at the hearing indicates that further layoffs

[13] There is no reason that Arciniega would lie about from whom she received the notice and her testimony is consistent with her earlier declaration in which she also stated that she received the notice from some PMF workers. Franco did a declaration regarding the August 28th notice and never mentioned that he had given the notice to Arciniega. At the hearing he testified that he forgot that he gave the notice to Arciniega until the morning of the hearing. I do not believe that Franco would have just forgotten that he gave the notice to Arciniega when this point was so crucial to Respondent's defenses. I also believe that he would have provided the English and Spanish versions had he given a copy of the memorandum to Arciniega, yet she faxed only the Spanish. Additionally, I do not credit Franco's testimony that he was the only person at Pictsweet with a copy of the August 28th memorandum. I find it hard to believe that Olmos and the other supervisors were not given copies. Respondent misrepresents Monroy's testimony; he testified that he distributed the memo to the pickers on Friday, September 1st. There was no testimony how or when the other employees were given copies. It is possible that Franco confused the August 28th notice with the September 5, 2000 layoff notice that he did give to Arciniega.

I also credit Arciniega's testimony that she was not at PMF on August 28, 2000. I do not credit the testimony of Rosario Salinas and Maria Ayala. I found them to be hostile to Arciniega and to the UFW and generally their testimony generally to be lacking in credibility. I found it disturbing that counsel for the UFW saw and heard Ayala telling Salinas about the questions she was asked. Ayala denied that she discussed her testimony with Salinas, but I do not credit that denial. Moreover, they prepared declarations about their observations of Arciniega in November 2001, well over a year after the event, ostensibly at no one's request.

occurred at Pictsweet in the months after the loss of Vons' business. Specifically, layoffs in the bubble/trash crew took place on September 9, September 29, October 2, and October 9, 2000.[14] Margarito Sanchez, a picker, was laid off on September 9, 2000. On September 19, 2000, Jesus Davila was laid off from the box making crew. [15] On September 24, 2000, Armando Cortes was laid off from his work as a driver. More packers were laid off in October 2000, and in January and February 2001.[16] On November 15, 2000, a group of 12 workers were laid off for one day. They were all pickers.[17] (See CPX #94) Virtually all layoffs were in the picking, fresh pack, and bubble trash departments. (See RT 337: 17-21; CPX # 81-96)

With respect to the reductions in hours, Franco testified that as Pictsweet reduced production due to reduced demand, the workers' hours would have to be reduced. (RT 201: 22-25) As Franco put it: "Production went down. Production was cut back. Yes, the hours had to be less." (RT 220: 25; 221: 1; See, also 269: 19-25 and 671: 9-25, as well as CGX # 8, 9, and 14) Pictsweet shipped 385,381 pounds of mushrooms the week ending August 26, 2000, and 335,811 pounds the week ending September 9, 2000; by the week ending September 30, 2000, Pictsweet shipped only 276,588 pounds. (RX #6)

[14] Those in the bubble trash crew laid off included Lilia Casarez on September 9, 2000; Leonila Martinez, Yong Sim Martinez, Maria Vasquez, and Claudia Avalos on September 29, 2000; Graciela Paniagua on October 2, 2000 and Rosa Magana on October 9, 2000.

[15] The note on CPX #90 indicates that Davila was on medical leave and was laid off because he did not return from that leave.

[16] With respect to the packers, see CPX # 91.

[17] Those workers included: Erasmo Torres, Raul Gutierrez, Alfredo Macias, Benito Torrez, Jesus Gonzalez, Miguel Yepez, Pedro Alaniz, Eliseo Zavala, Fidel Melendez, Silvano Sandoval; and Andres Lugo. (CPX # 94)

The interim agreement covered only layoffs. It did not address the question of reductions in hours. Rivera denied that the parties ever discussed any planned reductions in hours; he stated that at the September 25, 2000 meeting, the UFW proposed that there be an across the board reduction in hours, rather than layoffs, but the company refused to consider such an option. (RT 757: 5-8; 758:7-9) Rivera was emphatic that there was no bargaining over any planned reduction in hours on September 25, 2000; he stated that Respondent was insistent that the facility could not work on a schedule of reduced hours. Stang's confirming letter to Rivera after the September 25, 2000 meeting mentions only an agreement as to future layoffs, thus corroborating Rivera's testimony. (See GCX #16)

Analysis and Conclusions

Layoffs and reduction in the hours of employment affect a material, substantial and significant change in the affected employees' working conditions. Both are mandatory subjects of bargaining, and a union has the right to bargain over layoffs and proposed reductions in hours before they can be implemented. *(Schied Vineyards and Management Co.* (1995) 21 ALRB No. 10, pp 3-8; *NLRB v Katz* (1962) 369 U.S. 736, 747; *Porta-King Bldg. Systems v NLRB* (8th Cir. 1994) 14 F3d 1258, 1261; *Eugene Iovine, Inc.* (1999) 328 NLRB No. 39, p.1; *Top Job Building Maintenance Co. Inc*. (1991) 304 NLRB No. 117.) Where there are no contractual provisions regarding layoffs and the parties are engaged in collective bargaining, an employer who wishes to make changes which will result in layoffs or reductions in hours must bargain to good faith impasse before instituting any such change.

In *Katz*, the Supreme Court ruled, "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action." (Id. at 748)

A waiver or refusal to bargain by the union or exigent circumstances or business necessity may justify unilateral action. Both the NLRB and ALRB decide these issues on a case-by-case basis. (*Joe Maggio Inc*. (1982) 8 ALRB No. 72, pp. 25-30; *NLRB v Katz, sup*ra, 369 U.S. 736; *Porta-King Building Systems, s*upra, 14 F3d 1258; *Clements Wire* (1981) 257 NLRB 1058, 1059.)

Respondent's Defenses

Respondent justifies its unilateral actions in laying off employees on September 5, 2000, as well as subsequent layoffs and reductions in hours on a number of different grounds. Respondent contends that the UFW had notice of the planned layoffs since a UFW staff member was given a copy of the August 28, 2000 notice and that the Union's failure to request bargaining constituted a waiver of its right to bargain over these changes. In a related waiver argument, Pictsweet also contends that there had been layoffs in the past, most recently in May 2000, and the UFW never requested bargaining, thus acquiescing in such unilateral changes by its past conduct.[18] Respondent also argues that the layoffs and reduction in hours were a privileged response to the UFW's boycott activity, about which it had no duty to bargain. PMF further contends that the layoffs were the result of business necessity or exigent circumstances, given the loss of 50% of its business. Respondent also claims that the UFW refused to bargain, thus justifying

[18]There was little testimony about the May 2000 layoffs. Rivera testified that as far as he was aware, the UFW never filed any ULP charges regarding the May 2000 layoffs. (RT 1189: 24-25; 1190: 3-4, 11-12.) Franco testified that the UFW never filed any ULP charges prior to September 2000. (RT 1250: 6-17.) He also testified that he had not notified the UFW regarding any layoffs in 13 years. (RT 192: 7-9)

unilateral action by Pictsweet. Each of Respondent's defenses will be considered separately.

1. Waiver

Respondent argues that the UFW was in fact provided notice of the layoffs because Jessica Arciniega received a copy of the August 28, 2000, memorandum to Pictsweet's employees. Respondent contends that it does not matter whether Arciniega received the notice from Franco or PMF workers, because the undisputed evidence establishes that the UFW had actual notice of the planned layoffs, and nevertheless chose not to request bargaining. Thus, Respondent argues that the UFW waived its right to bargain about the layoffs and the reductions in hours.

Unfortunately, the notice issue is not so easily analyzed. First of all, the party alleging a waiver of bargaining rights bears the burden of proof on the issue. (*Roberts Farms* (1988) 13 ALRB No. 14, pp. 5-6; *Litton Microwave Cooking Products Division*, *Litton Systems, Inc*. (1987) 283 NLRB 973.) Although it is undisputed that Arciniega received a copy of the notice, two additional questions arise. First, did her receipt of the August 28, 2000 memorandum constitute timely notice of Pictsweet's planned changes, and second, was Arciniega's receipt of the memorandum effective notice to the Union of Respondent's intention to layoff workers and reduce production.

Arciniega received the notice from the workers sometime in the afternoon of August 28, 2000. The notice is clear:

> [I]t will be necessary to reduce production immediately. This also means that some employees will have to be laid off. Layoffs

> will be based on our production cycle and seniority. The layoffs will begin immediately.

(GCX No. 6) The notice, then, presents the workers—and the UFW—with a *fait accompli.* By the time the workers saw the memorandum, Pictsweet had already considered its options and come to a decision: it would immediately cutback production in light of the 25% drop in customer demand due to the loss of Vons' business, and it would begin layoffs immediately.

Franco's testimony bears out such an interpretation of the pace of events and the clear import of the memorandum. He stated that he found out about the loss of Vons' business from Marty Craner, a PMF salesperson, who called him early Saturday morning, August 26, 2000. Franco immediately notified John Haltom, Pictsweet's president. Franco and Haltom had several conversations on Saturday and on Sunday, August 27, 2000. Haltom directed Franco to have a plan in place to reduce production. Franco confirmed that the plan to reduce production was finalized by Sunday, August 27, 2000. (RT 194: 8-15; 195: 12-13; 261: 22-25, 262: 15-22, 265: 15-22.) He testified that by the time he posted the August 28, 2000 memorandum, he had decided to reduce production and layoff workers. (RT 198: 12-20) He also testified that once production was reduced, it was axiomatic that employee hours would be reduced. (RT 266: 2-4) Contrary to Respondent's contentions, Pictsweet's decision had been made prior to the posting of the memorandum. (RT 266: 7-17) Although Franco subsequently backtracked and testified that he did not have a plan in place Sunday and that he and Haltom did not decide until August 31, 2000 to steam off breaks, I credit his initial testimony as the more candid portrayal of what occurred the weekend of August 26-27, 2000.

Notice of a layoff, in order to be effective "must be given sufficiently in advance of the actual implementation of a decision to allow a reasonable scope of bargaining….Notice of a *fait accompli* is simply not the sort of timely notice upon which the waiver defense is predicated." (*ILGWU (Garment Workers) v NLRB* (D.C. Cir. 1972) 463 F2d 907, 919; *Pontiac Osteopathic Hospital* (2001) 336 NLRB No. 101, p. 4.) Here, even assuming that Arciniega's receipt of the memorandum, rather than notice to the Union's negotiator, was sufficient to put the UFW on notice of the pending charges, I find that the Union did not waive its right to bargain because bargaining in this instance would have been futile as the decision had already been made. (*NLRB v National Car Rental System, Inc*. (3rd Cir. 1982) 672 F2d 1182, 1189.)

The second issue is whether Arciniega's receipt of the memorandum was sufficient to put the Union on notice of the unilateral changes planned by Pictsweet, so that the Union could request bargaining over those changes. Arciniega testified that she faxed the memorandum to Jorge Rivera, the UFW employee with responsibility for the negotiations with PMF. I credited Rivera's testimony that he did not receive the fax from Arciniega, and that he did not see it until a few weeks before the unfair labor practice hearing.[19]

Arciniega works for the UFW in its Oxnard office. She is responsible for working with the PMF workers' negotiating and organizing committees. She began working with

[19] I credit Rivera's testimony on this point because he convincingly explained that he was frequently on the road in his capacity as the UFW's chief negotiator and that he carried with him voluminous papers from various negotiations and he had no clerical help until September 2001, when a clerical was hired who organized all of his documents in separate binders for each set of negotiations. He testified that in reviewing documents in preparation for the unfair labor practice hearing, he found Araniega's August 28, 2000 fax and forwarded it immediately to the UFW legal department. (RT 817-821)

the Pictsweet workers in September 1999. She had no responsibility for collective bargaining with Pictsweet, although she attended the negotiations, translating for the negotiating committee. (RT 682: 2-13) Respondent introduced no evidence to show that Arciniega routinely communicated with Pictsweet management on issues involving bargaining. She stated that she had no authority in terms of negotiating with PMF. (RT 696: 3-5)

Since I credit Arciniega's testimony that the workers gave her the memorandum, I find that Respondent did not even know that she in fact had it. Franco himself testified that he had not given notice to the UFW of changes in terms and conditions of employment over the past thirteen years. All communications with the UFW for collective bargaining were through Rivera. Neither Pictsweet management nor its negotiator attempted to contact Rivera in advance of the decision to immediately reduce production and commence layoffs. Since PMF undoubtedly blamed the UFW for the loss of business, it was even less likely in this instance that Respondent would have considered complying with its duty to give notice and bargain about the planned changes outlined in the memorandum. Given the fortuitous nature of Arciniega's receipt of the notice, the fact that she undertook to forward it to Rivera cannot be considered to have relieved Respondent of its obligation to provide notice.

Furthermore, I credit Rivera's testimony that he never saw the fax; therefore, I do not believe that under these circumstances, Respondent has met its burden of proving that the union waived its right to bargain. A waiver can not be inferred from the UFW's failure to request bargaining after Arciniega received the memorandum. (*William*

Warmerdam (1996) 22 ALRB No. 13; *NLRB v Roll and Hold Warehouse and Distribution Corp*. (7th Cir. 1998) 162 F3d 513, 518.) Such a result does not or penalize Pictsweet, since Pictsweet itself made no effort to provide notice to the UFW's negotiator or to any other union employee of the planned layoffs and reduction of production. Had it done so, it would then have been up to the UFW to request bargaining.

Respondent additionally argues that it had made layoffs and reduced hours "during the decade preceding September 2000, based on fluctuations in production requirements." (Post-Hearing Brief, p. 23.) However, as the Board observed in *William Warmerdam* (1996) 22 ALRB No. 13, p. 22; "[a] union's past practice of permitting unilateral changes … does not constituter a waiver of the union's right to bargain over such changes … as [NLRB] 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 8 (a)(5) [cites omitted]." Moreover, Respondent admits that with the exception of May 2000, it gave no notice of these layoffs and reductions in hours to the UFW.

With respect to the May layoffs, in its post-hearing brief, Respondent claims to have given information regarding the details of the May layoff and recalls to the Union. Yet neither its transcript citations nor Respondent's Exhibit # 5 bears out that claim. It appears that no information was provided to the UFW regarding the "turn down in picking production," which was caused by a "significant down turn in yield (RX # 5); although a list of employees laid off and recalled as of June 7, 2000, was faxed to the Union on June 7, 2000. Certainly no <u>advance</u> notice of the May layoff was given to the

Union. Apparently all workers were recalled by the time the Union was notified. Certainly, no waiver can be inferred by the UFW's failure to request bargaining over the May layoffs. Respondent's conduct in May appears to be yet another instance of its policy of not notifying the Union before taking unilateral action.

2. Exigent Circumstances Defense

Respondent next argues that it was not required to bargain about the Layoffs because they were justified by exigent circumstances. The exigent circumstances defense to unilateral action was explained by the NLRB in *RBE Electronics* (1995) 320 NLRB 80:

> Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception…that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain.

The national board held that under such circumstances, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change. *RBE Electronics* set forth certain criteria that the employer must meet in order to rely on exigent circumstances to justify unilateral action. The circumstances must be truly exigent, demanding prompt action, and the exigency must be caused by events beyond the employer's control or by events that were not reasonably foreseeable. The board once again pointed out that the "economic exigency exception" involves a heavy burden.

This argument, too, must be rejected. First, even as explained by Respondent, such a defense to a unilateral change requires that there be notice to the union and an opportunity to bargain . Here, Respondent did not give notice to the UFW. There was no opportunity to bargain and no bargaining occurred before the layoffs or reduction of hours. (*Eugene Iovine, Inc*. (1999) 328 NLRB No.39 , p. 7 [Board adopts ALJ's finding that, since employer did not give notice to union, it could not rely on the *RBE Electronics* "limited exception" to the duty to refrain from unilaterally changing employee terms and conditions of employment during contract negotiations.]) Moreover, as explained above, I have rejected Respondent's claim that the Union waived its right to bargain. Thus, Pictsweet has not established the elements of this defense to its unilateral actions.

3. <u>The Business Necessity Defense</u>

Pictsweet also argues that it was not required to bargain due to business necessity that dictated a need for immediate action. As the NLRB explained in *Hankins Lumber Co*. (1995) 316 NLRB 837:

> Most layoffs are taken as a result of economic considerations. However, 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.

Business necessity does not justify taking unilateral action such as Respondent did here. Indisputably, Respondent lost a significant portion of its business, but such a loss does not justify its implementation of changes without prior notice to or bargaining with the

UFW. (*Angelica Health Services Group* (1987) 284 NLRB 844, 852; *Clements Wire & Mfg. Co*. (1981) 257 NLRB 1058, 1059.)

In *Van Dorn Plastic Machinery Co.* (1982) 265 NLRB 864, 865, modified (6th Cir. 1984) 736 F2d 343, the NLRB drew a distinction between economic expediency or sound business considerations and "compelling economic considerations" which justify unilateral action. In referencing *Van Dorn Plastics* in the *Angelica Health Systems Group* case, the board adopted the ALJ's finding that a loss of 14% of the employer's business did not constitute a "compelling economic consideration" justifying unilateral action. The types of situations which have served to excuse bargaining over layoffs have included a breakdown of machinery (*Tylertown Wood Products* (1980) 251 NLRB 515, 520) and the freezing of an employer's assets in a bankruptcy proceeding (*Aquaslide N Dive Corp*. (1986) 281 NLRB 219, 224).

In *Joe Maggio Inc*. (1982) 8 ALRB No. 72, pp. 25-30, the ALRB reviewed NLRB precedent regarding the business necessity defense to unilateral action and concluded that it agreed with the NLRB that economic necessity is not sufficient to justify a unilateral change without prior notice to and bargaining with the union. The Board determined that it would review the facts and circumstances of each case to determine whether any particular circumstances will justify an employer's unilateral changes. In *Charles Malovich* (1983) 9 ALRB No. 64, the Board did find that business necessity justified the employer's hiring of a labor contractor to assist with the harvest when the employer notified the union two days later, and the union had previously had difficulty in furnishing additional workers to assist in the harvest, which was in danger of spoiling.

In this case, despite the loss of a significant portion of its business, Pictsweet did not begin layoffs until September 5, 2000. It received notice of the loss of Vons' business on August 26, 2000. It had time to provide notice to the Union, and it would have then been up to the Union to request bargaining over the layoffs. However, as discussed above, over the past 13 years, Franco had not given notice to the Union regarding changes in working conditions. Pictsweet chose to continue to operate in this fashion, and cannot now avail itself of a defense that compels notice and bargaining to the extent possible with the Union.

4. The Union Refused To Bargain With Respondent Justifying Unilateral Action With Respect To Layoffs & Reductions Of Hours

Although Pictsweet claims that the UFW deliberately and continually delayed bargaining; there is no record evidence to support such a characlerization of the negotiations. There was virtually no evidence introduced at this hearing concerning the course of bargaining between the UFW and Pictsweet, since there were no allegations of overall bad faith bargaining.[20] The record evidence shows the parties met six times, and even according to Respondent, both parties presented comprehensive proposals. (Respondent's Post-Hearing Brief, p.4) The fact that no agreement had been reached between January 26, 2000 and September 25, 2000 does not by itself indicate dilatory conduct by the UFW. Rivera did cancel the May 22, 2000 negotiation session, and although he was apparently responsible for contacting PMF negotiators to reschedule, the record shows no contacts from either side to reschedule another session, until Rivera's

[20] *Southwestern Portland Cement Co.* (1988) 289 NLRB 1264 cited by Respondent included extensive discussion of the course and content of the parties' negotiations, and is not comparable to this proceeding.

contact with Stang on September 8, 2000. (RT 748,838)[21] Respondent cites *M&M Building* (1982) 262 NLRB 1472, in which the NLRB found the Union resisted negotiations by failing to meet with the employer even once in seven months, despite the Employer's efforts to engage in bargaining, yet the case is hardly opposite.

There is no record evidence to support Respondent's claim that the UFW refused to bargain. The parties obviously were critical of each other's bargaining styles; yet the negotiations themselves were not litigated. Respondent's argument on this score must be rejected, since it can only point to the delay in bargaining between May 22, 2000 and the September 25, 2000 session, which was set up on September 8, 2000.

5. No Duty to Bargain in Face of Union's Use of Economic Weapon of Boycott

PMF contends that its decision to layoff employees and reduce the hours of its employees due to its loss of business was in direct response to the UFW's own economic activity directed at PMF. The company argues that since it was the UFW's boycott activities that led to the loss of Respondent's business, Pictsweet was under to obligation to notify and bargain with the UFW over the steps it took to continue its business in response to that boycott activity.

Long-standing NLRB precedent recognizes the rights of both labor and management to use a variety of economic weapons in an effort to influence the collective bargaining process. From the union's standpoint, such weapons include the strike or threat of strike, both of which are specifically allowed in section 13 of the NLRA as a means of exerting pressure. Also available is a consumer boycott (*F.W. Woolworth*

[21] Rivera and Franco spoke by telephone on August 30, 2000; Rivera said he contacted Franco to set up another negotiation session but apparently one was not set up, and Rivera later contacted Stang.

(1993) 310 NLRB 1197) or the use of a slowdown or other tactics such as half-day walkouts or a refusal to perform certain job duties (*NLRB v Insurance Agents' International Union* (1960) 361 U.S. 497). The employer may lockout employees in order to bring pressure to bear on the union to modify its bargaining demands, as long as the purpose of the lockout is "to bring about a settlement of a labor dispute on favorable terms." (*American Ship Building Co. . NLRB* (1965) 380 U.S. 300, 313 80 S. Ct 419; see also *Harter Equipment Inc.* (1986) 280 NLRB 597 rev den. (3d Cir. 1987) 829 F2d 458.) In *Insurance Agents'*, the Supreme Court pointed out that during negotiations for a collective bargaining agreement, the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system" that Congress created." 361 U.S. at 489. The Supreme Court has admonished the NLRB about injecting itself into the bargaining process "to deny weapons to one party or the other because of its assessment of that party's bargaining power." (*American Ship*, 380 U.S. at 308, see *Insurance Agents*, 361 U.S. at 489-492.)

When the union chooses the economic weapon of a strike to further its collective bargaining demands, NLRB precedent permits the employer to take unilateral action—relieving it of its customary duty to provide notice and bargain--in a variety of situations. The board and the courts have permitted an employer to (1) permanently subcontract bargaining unit work, although the employer must show a legitimate business justification for permanent subcontractors (*Hawaii Meat Co. v NLRB* (9th Cir.1963) 321 F2d 307, 400); (2) contract out deliveries to businesses which the striking union intended to boycott (*Empire Terminal Warehouse Co*. (1965) 151 NLRB 1359

aff'd (DC Cir 1966) 355 F2d 842 ; (3) transfer equipment to another facility (*Lion Uniform, Janesville Apparel Division* (1982) 259 NLRB 1141, 1145); and (4) temporarily subcontract out operations (*Titus-Will Ford Sales et al.* (1972) 197 NLRB 147, 153).

I could find no authority directly on point either from the NLRB or ALRB as to this employer's obligations when the union chooses the economic weapon of a consumer boycott, directly causing a downturn of the employer's business. Is the employer required to bargain with the union before taking temporary measures to continue operations? The strike cases suggest a paradigm for analysis. There, when the union employs economic weapons to influence the collective bargaining process, the employer is free to take "reasonable measures necessary in order to maintain operations in such circumstances." (*Empire Terminal Warehouse Co.* 151 NLRB 1359.) Those temporary stopgap measures do not require bargaining. (See above cases, as well as *Land Air Delivery* (1987) 286 NLRB 1131, 1132, fn.7, enf'd (D.C. Cir. 1988) 862 F2d 354, cert. den. (1989) 493 U.S. 810.

The court's opinion in *Laclede Gas Co. v NLRB* (8th Cir. 1970) 421 F2d 610,616 states this proposition clearly:

> In our view, neither an employer nor union is required to bargain over the timing of a strike or lockout or over the selection of the employees who will participate in the action.

In *Laclede*, the court reversed the NLRB's decision that the employer violated section 8(a)(5) of the NLRA when it locked out its employees in anticipation of a strike, without regard to seniority. In *F.W. Woolworth* (1993) 310 NLRB 1197, the union, as did the UFW here, initiated a boycott of the employer, and in response, the employer

discriminatorily altered its scheduling practices and reduced the hours of those employees who were union supporters. Because of the 8(a)(3) violations, the board was not called on to discuss the simple use of economic weapons, by either the union or employer, however, the ALJ remarked *in dicta*:

> No duty to bargain over tactics responsive to the implementation of economic weapons in support of collective bargaining exists.

(310 NLRB at 1207; the ALJ relied on the *Laclede* decision for this proposition.)

The strike cases permit unilateral action by the employer because the Act, as interpreted by the Board and the courts, recognized the right of an employer to keep its business operating. The board has approved arrangements, such as subcontracting, as "stopgap or temporary measure in order to continue [the employer's] business relationships with [its] customers." (*Empire Terminal Warehouse* (1965) 151 NLRB 1359, 1365.) In *MR & R Trucking Co. v NLRB* (5th Cir. 1970) 4343 F2d 689, 696, the court ruled that the employer's unilateral changes were "reasonably directed to insuring the continuance of operations," stating

> In the exigencies of the situation the company was not required to negotiate with the striking union about these deviations in terms and conditions of employment.

The strike cases permit a unilateral employer response to the union's first use of the economic weapon of the strike; the employer is essentially reacting defensively.[22]

[22] The UFW argues that the strike cases are not applicable because in those cases bargaining would place the Union in a serious conflict of interest, caught between vigorously representing replacement workers and perhaps undermining its own strike objectives. It seems that the UFW faces the same sort of conflict in this situation, caught between the requirements of good faith bargaining over layoff and reductions in hours and the objectives of its boycott activities, which like a strike, are aimed at curtailing PMF's operations. The Union argues that to subject an employer to prolonged bargaining in a strike situation would nullify the employer's right to hire replacements. The same is true in this situation. To subject Pictsweet to prolonged bargaining over the reduction of production and layoffs would perhaps nullify the employer's right to continue his business.

One case, not involving a strike, which utilizes this same analysis is *Celotex Corporation* (1964) 146 NLRB 48, enf'd in part (5th Cir. 1966) 364 F2d 552. There, the national board found that there was no 8(a)(5) violation when (1) the employer eliminated "gifttime" to a class of employees (who were paid for eight hours for working little more than two hours) without bargaining with the union because the shortage of work was due to the union's slowdown and curtailment of production; and (2) the employer changed work schedules in order to maintain production in the face of a slowdown and refusal by employees to work overtime. In that case, too, the employer was reacting defensively to the union's use of economic weapons.

As I noted earlier, there is a lack of ALRB precedent on this issue. In *St. Supery* (1991) 17 ALRB No. 14, the ALRB reversed the ALJ's finding that the employer was justified in imposing production standards in response to its employees' slowdown in production, but only because the Board found that there was no evidence that the employees had actually engaged in a slowdown. The Board did not indicate any disagreement with the ALJ's premise that a unilateral change in "response to the economic pressure which was being brought to bear on negotiation process" is privileged.[23]

In this case, the September 5, 2000 layoffs and the subsequent layoffs and reductions in hours were, without a doubt, the employer's response to the Union's use of the economic weapon of the boycott. The Union's boycott activities represented a

[23] See also *Charles Malovich* (1983) 9 ALRB No. 64, cited by the ALJ in *St. Supery*, but which depends more on a business necessity defense that a privileged response to the union's use of any economic weapon, and *Mario Saikhon* (1982) No. 88, pp. 25-30, which includes an extensive discussion of lockouts in the context of the bargaining process.

serious threat to Pictsweet's business. Pictsweet was faced with an immediate loss of 25% of its business. It could have either maintained its current production level and thrown product away or immediately reduced production with its concomitant layoffs and reduction of hours. Pictsweet chose the latter course of action and that choice seems to represent one of those "nonpermanent, stopgap or temporary measures" in the face of union economic pressure over which the NLRB has not required an employer to bargain. (*Land Air Delivery* (1987) 286 NLRB 1131, 1132, fn. 7, enf'd (D.C. Cir. 1988) 862 F2d 354, *cert. den*. (1989) 493 U.S. 810 and cases cited above.)

Based on the foregoing precedent, I find that Respondent was not required to bargain over the decision to reduce production and layoff and reduce the hours of its employees. Neither the UFW nor the General Counsel cited any case requiring bargaining over an employer's defensive response to a union's use of economic weapons. Apart from the NLRB strike cases, which offer some guidance in analyzing this situation, the *Laclede* court decision and the NLRB's *Celotex* decisions both hold that an employer need not bargain over its response to the union's use of economic weapons. I find the reduction of production and accompanying measures to be stopgap, emergency measures designed to continue Pictsweet's business. I do not find the layoffs or reductions in hours to be discriminatorily motivated, but a direct response to the Union's boycott activities. The layoffs and reductions in hours were, for the most part, carried out according to classification seniority; there is no allegation that the manner in which they were conducted was discriminatory in any way. Additionally, both at the time the UFW initiated its boycott activities and at the time Pictsweet responded, the parties continued

to be engaged in collective bargaining, a factor, which was found to be critical in many of the cases discussed above. (See e.g. *American Ship* and *Insurance Agents*)

The UFW argues that even if the decision to reduce production, layoff employees, and reduce employee hours were privileged in some fashion, Pictsweet was required to bargain about the effects of that decision. The parties met on September 25, 2000, and did bargain about the layoffs and the manner of recalls. At that time, the UFW was on notice that production had been reduced, and layoffs and reductions in hours would continue to occur. The UFW could have requested bargaining over the continued reduction in hours, but chose not to do so. Since respondent bargained over the layoffs and recalls, there is no reason to believe that it would not have bargained over the other effects of the reduction of production.[24]

B. **The Failure to Provide Information**

The General Counsel contends that Respondent failed to provide information requested by the UFW during the course of collective bargaining negotiations; specifically, General Counsel contends that Respondent failed to provide profit sharing information requested by the Charging Party. On October 23, 2000, in a letter to Respondent's chief negotiator, Harry Stang, counsel for the UFW made a request for information regarding Respondent's profit sharing plan. (GC#23.) The information

[24] Charging Party relies on *Beverly Health and Rehabilitation Services, Inc*. (2001) 335 NLRB No. 54 to argue that the NLRB's striker replacement cases are not apposite. However, in that case the employer was not justifying its unilateral actions as a defensive response to the union's use of the strike. Rather, the employer defended its myriad changes based on a management rights clause in an expired contract, a defense that the NLRB rejected. Also, it appears from the board and ALJ decisions that the unilateral changes were made by Beverly before the union even gave notice of its intention to strike. The employer was not taking defensive action in the face of the Union's resort to economic weapons.

requested included the following items:

1. Audited income statements and balance sheets with footnotes for 1996 through the present. Provide unaudited documents for the most recent period if audited documents are not available.

2. Income statements and balance sheets year to date for 2000 with forecasts for the current full-year and at least one additional year.

3. Monthly production levels, sales and profit (loss) figures for January 1996 through the latest available month in 2000.

4. Capital expenditure and depreciation figures for the periods described in requests 1 and 2.

5. A list of Pictsweet Mushroom Farms top five competitors, ranked by importance.

6. For each year from 1996 through the present, total annual labor costs and unit-labor costs for each of the following groups: (a) senior executives; (b) supervisors, foremen, or other non-bargaining unit hourly or salaried or employees; (c) employees represented by the UFW, broken down by major job classification.

7. Please provide the total number of individuals and full-time equivalents in each group, with total labor costs broken down into wages, pension contributions or contributions in lieu of pension, health insurance contributions, and other costs.

8. Please provide the amount of profit sharing bonus paid to each employee, and identify said employees, for each distribution of profit sharing funds during the period January 1, 1996 through the present.

9. Please identify the CPA(s) contemplated in your proposal as arbitrator of all disputes involving the profit sharing plan, and provide the following information regarding said CPA(s); education, qualifications, experience, and the history of financial dealings or involvement with Pictsweet Mushroom Farms;

10. All audit or work papers produced, reviewed or approved by the CPA(s) which mention or concern the profit sharing plan, which were generated or maintained with the period January 1, 1996 through the present.

11. Please explain the ascertainable measure of the employer's profit used in calculating profit sharing distributions.

> 12. Please explain all measures in place for any portion of the past 4 years, which ensured or allowed company verification and control or proper profit sharing distributions under the measure set forth in response to the previous request.

In response to that request, in a letter dated November 17, 2000, Respondent's negotiator asserted that Respondent was required only to provide a copy of its plan; any trust indenture or trust agreement pertaining to such plan; any group annuity, deposit, or administration or other insurance contract or policy relating to the plan; any application for an IRS determination with respect to qualification of the plan; and any and all other documents mailed to participants and filed with any government agency with respect to the plan. Respondent thus provided a copy of two pages of its Employee Handbook and information from Pictsweet's CPA regarding the profit sharing plan and information regarding the CPA firm. Pictsweet negotiator Stang relied on the NLRB's decision in *Ironton Publications, Inc*. (1989) 294 NLRB 853, in refusing to provide the additional information the UFW requested. (GC#23) It should be noted that Respondent had earlier provided a Ventura Farm Bonus Percentages Summary for the period 1994-2000, to the UFW. (GCX # 19, 21, 23)[25]

The UFW requested the extensive information set forth above due to its concern over the operation of the profit sharing plan which, according to the UFW, constituted the only new or additional wages that Pictsweet employees would receive under Respondent's proposed contract. (CPX #4)

[25] Respondent took the position that it was not required to provide the requested financial information since Pictsweet's ability to pay was not at issue. (GCX #23)

Analysis and Conclusion

The *Ironton* decision does not constitute a limit on the information that may be relevant to an employer's profit sharing plan. In that case, the union had requested only certain documents, which the employer failed to provide. The NLRB found that the requested information was relevant to the collective bargaining negotiations, and the employer was ordered to provide the union with the information it had earlier, specifically requested.

The duty to bargain in good faith may be violated by the Respondent's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out negotiations or to administer a collective bargaining contract. *(Masaji Eto dba Eto Farms, et al.* (1980) 9 ALRB No. 20; *Kawan*o (1981) 7 ALRB No. 16; *Detroit Edison Company v N.L.R.B.* (1979) 440 U.S. 301, 303; 99 S. Ct. 1123, 155) The NLRB and the federal courts employ a liberal discovery-type standard for determining what constitutes relevant information. (*Cardinal Distributing Co Inc.* (1983) 9 ALRB No. 36, p. 4*; NLRB v Acme Industrial Co.* (1967) 385 U.S. 432, 437; *Mary Thompson Hospital v NLRB* (1991) 943 F2d 741, 745; and *Bohemia, Inc*. (1984) 272 NLRB 1128, 1129.)

In *Ironton*, the ALJ noted that in determining relevancy, it is "sufficient that the Union demonstrate that there is a probability that the desired information is relevant and that it would be of use to the Union in carrying out its statutory duties and responsibilities." The ALJ also noted that with respect to the information requested as to the profit sharing plan, "it is obvious that the information would be of use to the Union in

framing its wage and retirement benefit proposals and also in evaluating and responding to the Respondent's proposals." (294 NLRB 853, 856)

In *Circuit-Wise, Inc.* (1992) 306 NLRB 766, the NLRB again considered the type of information relevant to an employer's profit sharing plan for the purposes of collective bargaining negotiations. There the employer had proposed a profit sharing plan funded by 2% of its pretax profits. The employer's plan was in response to the union's demand for a pension plan with a fixed level of contributions. After several discussions, the union requested financial documentation, including documentation of the employer's profits for a four-year period, and also further information regarding total labor costs, overhead costs, selling and general administrative expenses, interest, and other costs set out in a summary provided by the employer. The union also orally requested information as to how the company accounted for net profits and how it derived those figures.

When the employer said it would not provide the requested information, the union requested an additional ten categories of information directed at determining what the employer meant by pretax profits, how that figure was calculated, and whether that figure was subject to manipulation by the employer. The NLRB ruled that the employer was required to provide the information requested by the union.[26]

In *Fairprene Industrial Products Company, Inc*. 1994 WL1865744 (NLRB Div of Judges) during the course of collective bargaining negotiations, the union requested ten items of information including information regarding interest expenses for three years,

[26] Even if the Charging Party's request here was broader than that in *Circuit-Wise, Inc., supra,* Respondent never attempted to narrow the scope of the Union's information request or raise any issue as to the confidentiality of the materials sought. (See *A Plus Roofing* (1989) 295 NLRB 967, 972, fn. 7., remanded on other grounds by *NLRB v A-Plus Roofing* (9th Cir. 1994) 39 F3d. 1410)

management fees and/or corporate charges, extraordinary gains and income taxes; selling, general and administrative expenses, and other financial information. The union's financial analyst testified he needed this information to review the history of the profit sharing plan, including validating that the plan worked as described and to see how different accounting costs categories impacted the profit sharing plan. He also stated that he wanted to devise the most effective ways to improve the plan. The employer refused to supply the requested information contending *inter alia* that some of the requested information was not relevant. The ALJ rejected that argument, ruling

> [T]he Respondent was at all relevant times including the bonus plan as a part of its economic proposal package. The information sought was clearly relevant to the Union's ability to assess the plan and decide intelligently whether it wanted to drop the plan, keep the plan, or modify it in some fashion. (ALJD, p. 10.)

Although the ALJ's decision does not carry precedential value, it offers further guidance in this matter, supplementing the NLRB's *Circuit – Wise* decision.

The ALRB has generally found that information relating to pension benefits and profit sharing plans are relevant to the collective bargaining process, and that the refusal to provide the requested information is a per se violation of section 1153(e) of the ALRA. *PH Ranch, Inc* (1995) 21 ALRB No. 13; *Masaji Eto, supra,* 6 ALRB No. 20. Based on that general precedent and the foregoing NLRB precedent, I find that Respondent failed to meet its duty to provide accurate, complete, and timely information upon the request of

the UFW, and the failure to provide the information requested by the Charging Party to be a violation of sections 1153(e) and (a) of the Act.[27]

C. Conditioning the Transfer of Solomon Martinez upon His Signing A Decertification Petition.

Solomon Martinez testified that at the end of November 2000, he approached Benjamin Andrade outside the restrooms and asked Andrade why he did not find him work in the maintenance department. (RT 79: 9-28; 80:1) Andrade told him that there would be work if Martinez would sign for no union. Martinez said that he would sign if he could get work. Andrade responded that if Martinez would sign then he would get work. (RT 80: 2-20; 81: 10-18) Martinez never signed the decertification petition and he remained in the position he occupied at the time of his conversation with Andrade, that of irrigator. Martinez said that other workers, who were anti-union, were being transferred to the maintenance department, which is why he approached Andrade for work. Martinez wanted work in the maintenance department because of the long hours that he had to work as an irrigator. (RT 88: 18-22; 90: 27-28; 91: 1-10)

Based on the testimony of general manager Ruben Franco, it appears that at the time of Martinez's conversation with Andrade, there was no supervisor or foreman in the maintenance department. Andrade was filling the position of lead man for the department, and in that position, according to Franco, he assigned work and directed employees in their work. (RT 656: 20-25; 657: 1-3) Another Pictsweet employee, Jesus

[27] I agree with Respondent that Item No. 5 of the Information request does not appear relevant to the profit sharing plan or the issue of employee compensation. However, Respondent's additional contention that it was not given notice of what information was still sought by the Union (Post-Hearing Brief, p. 46) is little short of astounding. The General Counsel introduced the letter of UFW counsel of October 23, 2000. (GCX #23) and the parties discussed the exhibit at the time it was admitted. (RT 172-176)

Torres, stated that Andrade was working as the foreman in November 2000; that he handed out checks on Fridays, had a radio and gave orders to the maintenance crew. (RT 101: 21-28) Franco and Andrade testified that Andrade could not hire, fire, or discipline the workers of the maintenance department. (RT 555: 6-15; 953: 27-28, 954: 1-6)

Although Andrade denied having a conversation with Martinez about Martinez's transfer into the maintenance department (RT 950: 25-28), I do not find his testimony credible. Andrade was evasive in testifying about his role in the maintenance department while it was without a supervisor. He denied that he was a lead person; the most he would admit to was "helping them out" in the maintenance department. (RT 957: 7-10, 22-28; 958: 1-6: 961: 15-19) Andrade's testimony regarding his friendship with Martinez was brought forth for the purpose of impeaching Martinez, yet in light of his lack of credibility in testifying about his position in the maintenance department, I credit Martinez's testimony rather than that of Andrade regarding his relationship with Andrade and regarding the transfer to the maintenance if he signed the desertification petition.

Respondent introduced the testimony of Gilbert Oleos that there was no position in the maintenance department for someone of Martinez's general skills in November 2000. Oleos testified that only one person was hired into the maintenance department between November 2000 and June 2001, and that person, Larry Gerald, had a certificate as an electrician. (CPX #69; RT 1050: 3-28; 1052: 7-10.)[28]

[28] It should be noted that Fernando Mendez transferred from irrigator to boiler tender in the maintenance crew on October 16, 2000. (CPX #69) Martinez testified that others had transferred into the maintenance department around the time he asked Andrade for work. (RT 87: 3-7)

Analysis and Conclusions

Although Andrade had some of the attributes of a supervisor, e.g., he assigned work and gave orders to the maintenance crew (RT 656: 6-15), there is not sufficient information from which to conclude that he functioned as a statutory supervisor when he was the leadsperson in the maintenance department. However, that conclusion does not end the inquiry. The next question is whether Andrade was acting as an agent for Pictsweet in his role as either foreman or lead man.

Pictsweet may be held responsible for Andrade's unlawful conduct even if Pictsweet did not direct, authorize or ratify that conduct if Andrade had apparent authority to speak for PMF. (*Vista Verde Farms v Agricultural Labor Relations Board* (1981) 29 Cal. 3d 307; *Frank Foundries Corporation* (1974) 213 NLRB 391.) Such liability can attach if employees could reasonably believe that Andrade was acting on behalf of Pictsweet, or if Pictsweet could have gained an improper benefit from Andrade's misconduct and has the ability to prevent future repetition of such activities or to remove the effect of such misconduct on the workers' exercise of their statutory rights. The test for employer responsibility/liability is from the viewpoint of the affected employees. An employer may be responsible even if it is "utterly unaware of the unlawful coercive actions of a subordinate." *Superior Farming v Agricultural Labor Relations Board* (1981) 151 Cal.App.3d 100. Here, Jesus Torres characterizes Andrade as a foreman; he assigned work, supervised work, and passed out checks; he had a radio like other supervisors. Martinez asked him for work, indicating his view of Andrade as a person of authority.

In *Vista Verde*, the Court relied on *I.A. of M. v Labor Board* (1940) 311 U.S. 72, 80; 61 S.Ct. 83, 85 L.Ed. 50) in which the Supreme Court upheld the NLRB's ruling that the employer was responsible for the actions of lead men who could not hire and fire, but exercised general authority over other workers, and so "were in a strategic position to translate to their subordinates the policies and desires of the management." See also *Superior Farming v Agricultural Labor Relations Board, supra*, and *Paul W. Bertuccio and Bertuccio Farms* (1979) 5 ALRB No. 5. Thus, even if there were no positions available, given Respondent's strong no union position—often expressed to its workers—and Andrade's position of apparent authority, Martinez could reasonably conclude that Andrade was acting on behalf of Pictsweet in offering more desirable work if Martinez would sign the decertification petition. I conclude that Respondent violated section 1153 (c) and (a) by Benjamin Andrade's offer to give Solomon Martinez work in the maintenance department if he signed a decertification petition.

D. Respondent's Employee Handbook and Its Direct Communication With its Employees

The General Counsel alleged that Pictsweet's policy of a preference for direct dealing with its employees rather than dealing with them through a third party, as expressed in its employee handbook,[29] as well as its direct communications to workers,

[29] The challenged portion of the handbook is entitled "Employee Relations Policy" and provides: "Pictsweet prefers to deal directly with its employees rather than through a third party not familiar with what is happening in its plant. It is Pictsweet's objective to operate this facility in such a way that you will not need a third party to intervene for you. A third party did not get you your job, neither can a third party guarantee that you will keep your job. We must work together with mutual respect. By doing so we are all more secure in our jobs. From time to time, we will encounter problems. All of us will be better off working things out among ourselves without outside intervention. Bring your questions and your problems to your supervisor, your Human Resource Manager or your Farm Manager. We promise to listen and give the best response we can. Use the complaint procedure outlined in this book if you wish. We accept our responsibility to provide you with working conditions, pay and benefits that are fair and equitable." (GCX #2)

constituted illegal direct dealing with employees and the solicitation of employee grievances. The General Counsel and the UFW argue that such a course of conduct undermined Pictsweet's employees' certified bargaining representative. The Pictsweet communications to its employees were as follows: April 2000 Report on Negotiations (GCX # #); (2) August 28, 2000 memo re Loss of Vons' Business (GCX #6); (3) September 11, 2000 memo re United Farm Workers' Boycott Against Pictsweet (GCX ##); (4) December 5, 2000 Report of UFW Threats Against Employees Vested Pension Rights (GCX #3); (5) December 21, 2000 Memo (GCX #3); (6) January 12, 2001 Memo re Decertification Election (GCX #3); and (7) January 18, 2001 Memo re Decertification Election Update (GCX #3).

The employee handbook was adopted by Pictsweet's corporate office in 1996. Although the section challenged by General Counsel and the Charging Party contains no threat of reprisal if employees opt for union representation, it does suggest solicitation of employee grievances: "Bring your questions and problems to your supervisor, your Human Resources Manager or your Farm Manager." And, it goes on to promise: "We promise to listen and give the best response we can." The challenged portion of the handbook was not adopted at a time when the Charging Party had a presence at Pictsweet or in reaction to UFW organizing activity at PMF.

The series of memorandum from Franco to Pictsweet employees cover a variety of topics, from the collective bargaining negotiations to the UFW boycott activities to alleged threats by UFW agents to take away workers' vested pension benefits to updates on efforts to by Pictsweet workers to decertify the UFW. None of these memoranda

contains any threat of reprisal or promise of benefit. In their Post-Hearing Briefs, neither the General Counsel nor the UFW argues that any of the memoranda violate the Act.

Analysis and Conclusions

Given the General Counsel's and Charging Party's exclusive focus on the handbook provision, it appears that they have waived any argument that Respondent violated section 1153(a) by the distribution of the various memoranda set out above. In any event, since I do not find any threat of reprisal or promise of benefit in the memoranda, I do not find their distribution to Pictsweet employees unlawful. (See on this point, *Proctor & Gamble Mfg. Co.* (1966) 160 NLRB 334, 340.)

Turning to the employee handbook, the General Counsel did not contend at the hearing or in its Post-Hearing brief that Pictsweet initiated the "Employee Relations Policy" in response to any particular union activity or that any employee has been disciplined for violating the policy. Rather both the General Counsel and the UFW contend that by maintaining such a policy in its handbook, Pictsweet violates section 1152 of the Act because the policy interferes with, restrains, and coerces employees in the exercise of the rights guaranteed in section 1152 of the Act.

In *Lafayette Park Hotel* (1998) 326 NLRB 824, enf'd (DC Cir 1999) 203 F3d 52, the NLRB set out the appropriate inquiry for determining whether the maintenance of personnel rules violates section 8(a)(1): Does the rule reasonable tend to chill employees in the exercise of their Section 7 rights. (See also *Adtranz ABB Daimler-Benz Transportation v NL*RB (D.C. Cir 2001) 253 F3d 19, 25; *Flamingo Hilton-Laughlin* (1999) 330 NLRB No. 34, p. 3). In analyzing company rules or personnel policies, the

NLRB considers the entire context of the case as well as the objective impact of the rule on employees. (*Adtranz ABB Daimler- Benz Transportation v NLRB, supra,* at 28.) The NLRB has found unlawful employer rules/policies that prohibited (1) employees from discussing company affairs, activities, personnel or operations with unauthorized persons (*Advance Transportation* (1993) 310 NLRB 920, 925); (2) discussing hospital affairs and employee problems and wages (*Pontiac Osteopathic Hospital* (1987) 284 NLRB 442, 465, 466; and (3) criticizing company rules and policies so as to cause confusion or resentment between employees and management (*Lexington Chair Co.* (1965) 150 NLRB 1328, enf'd (4th Cir. 1966) 361 F2d 283, 287).

The NLRB cases discussing the maintenance of rules/policies do so in the context of balancing an employer's right to maintain discipline and employees' undisputed right to self-organization. Most of these cases go to the maintenance of rules such as those that limit employee solicitation or distribution of literature at the work place; limit discussion of wages or other personnel matters; limit disclosure of confidential business information; prohibit employees from making false or malicious statements about any employee, supervisor or the employer; or prohibit employees from being on the premises during their non-work hours. As noted above, the rules are analyzed by the NLRB in light of whether the rule can be said to reasonably chill an employee' exercise of section 7 rights. For example, in *Lafayette Park, supra*, the board held that a rule, requiring employees to leave the employer's premises immediately after the completion of their shift and not return until their next scheduled shift, would reasonably tend to chill employees in the exercise of their section 7 rights because it would limit an employee's

right to engage in protected concerted activity on the employee's free time and in non-work areas.

In the above NLRB cases, the rules considered by the national board carry with them a built-in "threat of reprisal" in that violation of the rules can lead to disciplinary action. The NLRB's general counsel challenges the maintenance of rules that would tend to chill employees in the exercise of section 7 rights in order to ensure that employees can freely exercise those rights. The cases do not depend on a showing that the rules have been utilized to interfere with protected activity or that any union adherent has been disciplined.

The General Counsel and the UFW argue that Pictsweet's Employee Relations Policy comes within the ambit of the rules that the NLRB has found unlawful because the policy discourages employees' exercise of section 1152 rights, in particular, the right to join a union. Respondent argues that the provision of the handbook to which the General Counsel and the Union object is within the scope of section 1155 of the ALRA, which provides:

> The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute evidence of an unfair labor practice…if such expression contains no threat of reprisal of promise of benefit.

Both the General Counsel and UFW object to that part of the policy stating that Pictsweet "prefers to deal directly with employees rather than through a third party…" and it is "Pictsweet's objective to operate this facility in such a way that you will not need a third party to intervene for you." (GCX #2) The UFW terms the policy invalid on its face.

Yet section 1155 of the Act clearly permits an employer to express its preference for "no union." (*NLRB v Aluminum Casting & Engineering Co*. (7th Cir. 2000) 230 F3d 286, 295 [The court found lawful the employer's statement in its handbook that its intention was "to do everything possible to maintain our company's Union-free status for the benefit of both our employees and (the company)].") And, although the policy arguably contains a solicitation of grievances, the NLRB observed in *Uarco Inc*. (1974) 216 NLRB 1, 1-2, that the solicitation of grievances is not prohibited under the act, it is only when such conduct is accompanied by the promise to correct those grievances, that 8(a)(1) is violated. Here, Pictsweet does promise to listen to employee complaints and "give the best response we can." Although this can be interpreted as a promise to remedy employee complaints, in the context of this case, I do not find it to be an unlawful promise of benefits. The statement is similar to that of the employer in *Uarco*; there the plant manager distributed a statement to employees in which he wrote: "I am asking you to believe that we can work together. I will make one promise that I will do my best." 216 NLRB 1,3. The NLRB ruled that the plant manager's statement was not unlawful.

Examining the Employee Relations Policy in context reveals, as noted above, that the policy was adopted in 1996, when the UFW did not have a presence at Pictsweet. Although the UFW continued to be the certified representative of PMF's workers, there do not appear to have been any collective bargaining negotiations in progress, and it does not appear that between 1996, and the union's request to bargain in December 1999, there was any contact between Pictsweet management and the UFW. Thus, when Pictsweet

was urging employees to bring their complaints to management for a response, there is no record to suggest that there was any other way to attempt to resolve employee grievances.

Looking at whether an employee would reasonably believe that Pictsweet (1) is soliciting and promising to remedy employee grievances, thus bypassing the UFW, and (2) is threatening job loss if an employee supports the Union, I conclude that Pictsweet's employees would not reasonably interpret the "Employee Relations Policy" in that fashion. Thus, I find that the maintenance of the policy would not tend to chill employees in their exercise of their 1152 rights. My finding is premised on the following: (1) the policy was not adopted in response to any particular Union activity (see *Armstrong Nurseries, Inc.* (1983) 9 ALRB No. 53, pp. 8-9 and *NLRB v Aluminum Casting & Engineering Co., supra*, 230 F3d 286, 295); (2) neither the General Counsel nor the UFW introduced any evidence that any employee had been disciplined due to his/her disregard of this policy; and (3) when a group of employees sought to discuss the issue of layoffs directly with Ruben Franco on September 11, 2000, he told them that he was not able to deal directly with them (RT 215: 12-217). Moreover, for those workers employed at the time the policy was adopted, the provision could not have carried the interpretation urged by the General Counsel and the Charging Party, given the absence of the UFW at Pictsweet.

The cases cited by General Counsel and Charging Party do not compel a different result in the context of this case. For example, in *Harris Teeter Super Markets* (1993) 310 NLRB 216, the employer showed a proposed changed work schedule to its employees and proceeded to ask them about their reaction to the proposed changes, in

advance of discussing the change in schedule with the union. Similarly, in *Obie Pacific Inc*. (1972) 196 NLRB 458, the employer called a meeting of employees in which a supervisor discussed changing the staffing requirements set out in the contract; the employer admitted that the purpose of the poll was to obtain the opinion of the employees to present to the union at an upcoming negotiation meeting. In *Allied Signal Inc*. (1992) 307 NLRB 752, the employer contacted employees directly to set up a task force to determine a smoking policy, without first contacting the union. Lastly, in *Thill, Inc*. (1990) 298 NLRB No. 90, the employer, at a meeting with employees, asked them directly what problems they had with their jobs; the board found that the company's president impliedly was promising to remedy those problems. Each of these cases involved situations in which the employers directly contacted employees without the knowledge of the union, with the result that the union's position as the workers' exclusive bargaining representative was eroded.

Other cases such as *Coronet Foods* (1991) 305 NLRB 79; *Uarco Inc*. (1974) 311 NLRB 833; *DTR Industries, Inc*. (1993) 311 NLRB 833; and *The Sharing Community* (1993) 311 NLRB 393, are cases involving very direct solicitation of grievances by employers in a pre-election period of union activity, with the promise (except in *Uarco, Inc*.) that the grievances would be addressed by management. *Electric Hose & Rubber Co.* (1983) 267 NLRB 488 also involved active solicitation of employee grievances while union objections to a representation election were pending; in that case, management even remedied the problems identified by employees.

I find that the "Employee Relations Policy" in Pictsweet's employee handbook does not contravene section 1155 of the Act. The handbook provision would not reasonably be interpreted as containing a threat of reprisal or promise of benefits. It does not indicate that PMF will use illegal tactics to rebuff the Union. It would not reasonably tend to chill employees in their exercise of section 1152 rights. In the specific context of this case, I do not find it unlawful.

E. Breach of the Interim Agreement of September 25, 2000

The UFW and Pictsweet met on September 25, 2000, to continue collective bargaining negotiations. As noted ante, at that time, they agreed that any further layoffs and recalls would be conducted by classification seniority. They further agreed that if Pictsweet intended to use another method with respect to specific cases, "it would give notice of the facts and circumstances of such cases to the Union before finalizing a decision." (GCX #16, p.2)

The General Counsel and Charging Party contend that Pictsweet breached that agreement, thereby again making a unilateral change in Pictsweet's employees' terms and conditions of employment. As described above, a number of layoffs occurred after the parties reached this agreement. Members of the bubble/trash crew were laid off on September 29, October 2, and October 9, 2000. On September 24, 2000, Armando Cortes, a driver, was laid off. On November 15, 2000, a group of 12 pickers were laid off for one day.[30]

[30] Packers were also laid off after the agreement was reached, but due to my ruling on the jurisdictional question, their layoffs will not be considered herein.

Analysis and Conclusions

Based on my review of the records, I found that it appears that of the 12 employees laid off on November 15, 2000, Andres Lugo (June 7, 1998), Eliseo Zavala (August 6, 1998), Miguel Zavala (July 28, 1998), Fidel Melendez (August 2, 1998) and Pedro Alaniz (November 1, 1998) were laid off, while Jose G. Lopez's seniority date was August 24, 1999, and he was not laid off.[31] Nor were Angelica Valdez (May 24, 1999) Angueles Garcia (June 14, 2000) and Alejandra Garcia (June 14, 2000). (CPX #79, 94, and 106)[32]

Also, Raul Gutierrez was recalled after the September 5, 2000 layoff on October 16, 2000. He had more seniority than Margarita Sanchez, recalled on October 7, 2000, and Erasmo Torres, recalled on October 7, 2000. Compare his seniority date of August 31, 1999 with Sanchez's September 8, 1999 and Torres' October 4, 1999. (*See* CPX #81, but contrast with CPX #93; CPX #81 appears to be the record kept by the department supervisor and is presumably more accurate; *see* also CPX #163 for weeks ending October 7, 2000 and October 14, 2000.)

Charging Party and the General Counsel contend that Leonila Martinez and Yong Sim Macias of the bubble trash crew were laid off prior to Graciela Paniagua and Rosa

[31] Even though Jose G. Lopez does not appear on the layoff list, it does not appear that he worked on 11/15/00 (*see* CPX # 163, PMF 8944). There is no way to know why he did not work that date. Respondent argues that CPX #163 should be disregarded since the reason why a worker didn't work on any particular day is not indicated. Disregarding CPX #163, certainly leads to the conclusion that Lugo, the Zavalas, Melendez and Alaniz were laid off out of seniority.

[32] Andres Lugo is not listed on the February 9, 2001 seniority list provided to the UFW by PMF (CPX #106.) Olmos testified that this list was prepared from the payroll records for that week and rather incredibly, it not include any employees out on vacation, sick leave, layoff, or leave of absence. (RT 1053: 14-28; 1054: 1-25.)

Magana, even though Martinez and Macias had more seniority. Olmos testified that Paniagua was on vacation until October 2, 2000 and Magana was on vacation until October 9, 2000, which is why they were not included in the September 29, 2000 layoff. Although Respondent had an explanation for the layoff out of seniority, there was no notice to the UFW of the need to deviate from seniority, as the parties had agreed.

Charging parties points out new hires of at least six employees in general labor, weigh master, and irrigator classification between October 23, 2000 and February1, 2002. Also, labor contractor employees worked for periods of time at Pictsweet during this period. However, the interim agreement does not appear to cover new hires or the use of labor contractor employees outside the classifications affected by the layoff. While I agree with the Union that it would have been a better practice to provide notice to the Union of open positions and to make those available to employees on layoff ,[33] Respondent's failure to do so does not appear to a violation of the interim agreement.

It is easy to see why Charging Party may have thought that there were more layoffs out of seniority given the multiplicity of employee lists, coupled with the errors in the various employer-generated lists. (See e.g. CPX # 94, which includes the list for November 15, 2000. Also see Respondent's "seniority list" which shows Fidel Melendez

[33] At least one employee on layoff after September 5, 2000, Bernardo Montenegro, applied for one of the vacant positions in one of the incentive crews and was hired into that position. There may have also been a failure to post vacant positions in the incentive crews, but such failure were not covered by the interim agreement. Charging Party argues that new hires were covered by the September 25, 2000 interim agreements. (Post-Hearing Brief, p. 40) Yet the parties' correspondence (GCX # 16) and Rivera's testimony do not bear out that contention. Rivera first testified in response to a leading question from the General Counsel.

Q: So, was there a discussion concerning new employees during that time period?

A: No.

(RT: 757: 20-22.) Rivera then went on in response to another question that it was his understanding that if a new employee could be hired, it would be a violation of the agreement. There was no followup as to why he had that understanding when the hires--especially in other departments--were not discussed.

with a seniority date of May 20, 1993, and Pedro Alaniz with a seniority date of November 24, 1995, CPX #106. The notice has the actual classification seniority dates of August 1998 and August 28, 1999, respectively.)

At the hearing, Respondent offered no explanation as to why the above workers were either laid off or recalled out of seniority. Respondent moved for the dismissal of allegation. However, Respondent made this motion after it was well into the presentation of its case, on the very last day of hearing. (RT 1240: 15-28; 1241: 1) I denied the motion as untimely. At that time, and at various other points in the hearing, Respondent alluded to its uncertainty as to which employees, if any, were laid off or recalled out of seniority. It did not take a lengthy review of the records to ascertain the facts I set out above. Respondent was on notice of the General Counsel's theory of the case. Given the small number of employees actually laid off, it seems to me that Respondent should have been able to ascertain whether any of those employees were laid off or recalled out of seniority.

This task was more complicated for Charging Party and General Counsel. Although they had anecdotal evidence from Pictsweet workers about new employees being hired when Pictsweet employees were still laid off, the documentary evidence provided by Respondent as to seniority was inconsistent, mistakenly identified, and not particularly accurate. It would seem that the parties could have resolved this portion of the case if Respondent had provided Charging Party with correct seniority information from the outset of this dispute.

Charging Party has asked that I draw an adverse inference from Respondent's failure to provide seniority lists for all departments, inferring from the fact that the lists were not supplied, that the information therein would have been unfavorable to Pictsweet. The testimony of Ruben Franco on February 15, 2002, at the unfair labor practice hearing was clear that each department supervisor maintained a seniority list. (RT 316:6-25, 317:1-3,319:21-24, 321:22-25, 322: 1; see also 325-330.)

I directed Respondent's counsel to obtain the lists with Franco's assistance and to provide them to the General Counsel and the Union on the following Monday. When the hearing commenced on Monday, counsel informed the parties and myself that, apart from Monroy's list of the pickers' seniority (CPX #79) and the seniority list for the packers (CPX # 80), no other department supervisors maintained written seniority lists. Franco corroborated counsel's statements, indicating that he assumed that each supervisor had a list with the department's classification seniority, but that, upon investigation, he found out that they do not have the lists in writing. (RT 345: 12-15.)

Based on the NLRB's decisions in *Yeshiva University* (1994) 315 NLRB 1245 and *Champ Corp*. (1988) 291 NLRB 803, 879, it appears that Respondent should have compiled for the UFW, the seniority lists for the departments that did not regularly maintain a written list. This is what was done in *Champ Corp.* when the General Counsel subpoenaed various job descriptions; the respondent denied that it had written job descriptions, but after receiving the General Counsel's subpoena, consulted with its leadmen and foremen and compiled the descriptions. Both *Champ Corp* and *Yeshiva University* are 8(a)(5) cases and deal with an employer's obligations in responding to

requests from the union in its capacity as the bargaining representative of the employer's employees.

In this case, I decline to draw any adverse inference from Respondent's failure to compile and provide seniority lists from Pictsweet's other departments. First, I would note that virtually all layoffs and recalls were in three departments, picking, fresh pack, and bubble trash. The Union and the General Counsel were provided with the departmental seniority lists for the picking and fresh pack departments. (CPX #79 and 80). It was only the seniority list for the bubble trash department that was lacking. That department contained only seven or eight persons. (RT 349: 4-5) Also, Respondent did provide a general seniority list for all Pictsweet workers, compiled by Olmos (GCX #106), so that in fact, the Union did have the seniority information for that department as well. This is not a case in which Respondent ignored subpoenas or refused to turn over documents in its possession.

The cases cited by the UFW on the adverse inference issue are factually distinguishable. In *NLRB v Shelby Memorial Hospital* (7th Cir. 1993) 1 F3d 550, the respondent argued that significant financial losses led to scheduling changes about which it had failed to bargain with the union. The employer introduced evidence of financial losses in some months, but not in the months in which the scheduling changes were made. The national board rejected the respondent's justification for the scheduling changes, drawing an adverse inference from its failure to introduce evidence of any financial losses in the relevant months. In *Auto Workers v NLRB* (D.C. Cir. 1972) 459 F2d 1329, the court found that the national board failed to offer any convincing reason

for failing to draw an adverse inference from the employer's refusal to produce payroll and hiring records subpoenaed by the General Counsel, which were determinative of the issue of whether respondent hired replacements for laid off union supporters. In *Bannon Mills* (1964) 146 NLRB 611, the NLRB ruled that the employer could not refuse to provide payroll and other employee records pursuant to a general counsel subpoena, and then object to the general counsel's introduction of secondary evidence regarding the size of the bargaining unit and whether the union enjoyed majority support of the unit. The national board also rejected the employer's belated attempt to introduce those records during its case.[34]

Respondent's record keeping does appear to be deficient, at best. For example, Olmos testified that the various lists that he compiled with a column entitled "Hiring Date" did not actually reflect the workers' hiring dates, but instead, reflected their seniority date. When asked why he did not entitle the column "seniority date", Olmos replied that his computer already had the heading "hiring date" and he did not bother to change it. (RT 1058: 9-14; 1131: 21-28; 1132: 1-17.) Additionally, there was no centralized tracking of departmental or classification seniority. (RT 1057: 24-27; 1129: 15-22.) Sometimes Olmos would note if an employee had transferred from another department, thus explaining differences in seniority and hiring dates, but other times he would not. It would appear that such an approach would make tracking seniority problematic to say the least.

[34] See *Champ Corp.*, *supra,* 291 NLRB 803, in which the NLRB declined to draw an adverse inference from the union's failure to turn over notes taken at union meeting when it appeared that union made good faith search for notes and produced evidence from which it could reasonably inferred that the notes could have been inadvertently destroyed or misplaced.

The above layoffs out of seniority and the failure of Respondent to notify the Union of the deviation from seniority in the September 29, 2000 layoff in the bubble trash crew did result in a breach of the September 25, 2000 interim agreement. These unilateral changes also constitute a violation of section 1153(e).

F. **The Failure to Give Pickers A Wage Increase in 2000**

In Paragraph 20 of the complaint, General Counsel charges Respondent with a violation of section 1153(e) and (a) because it failed to give the pickers the biannual wage increase that they had come to expect. The General Counsel introduced the testimony of employees Jesus Torres and Jose Garcia, both employed as pickers, who testified that they received a raise every two years. Although Torres was vague about the timing and the amounts, he was clear on his expectation that the pickers would receive a raise every two years. Both the General Counsel and Charging Party introduced documentary evidence showing that the pickers were given raises every two years beginning in 1990. (See GCX #11 and 12; CPX # 77, 101, 108.) The Charging Party also introduced the testimony of Jorge Rivera, who testified that during the course of negotiations, Ruben Franco had stated that the workers received wage increases every two years. (RT 764: 24-28; 765: 1-4, 22-27) Jorge Rivera also testified that during an August 30, 2000 telephone call, Franco again confirmed that the workers received a wage increase every two years. (RT 744: 10-24.) In a letter dated May 18, 2000, to Respondent's negotiator, Rivera also mentioned his understanding that the workers received a wage increase every two years. (GCX #20) Respondent apparently never corrected that understanding.

Respondent denied that there was any pattern to the wage increases for the pickers. Specifically, Franco testified that decisions about any wage increases were by Pictsweet management in the level above him and that wage increases depended on yield and the market price. Franco also denied ever mentioning at negotiations that the pickers received a wage increase every two years and denied that the subject was even mentioned during the course of the August 30, 2000 telephone call. (RT 1252: 24-28; 1253: 1-9; 1254: 13-18)

Analysis and Conclusion

The documentary evidence does indicate that the pickers received a wage increase every two years. (See GCX # 11 and 12; and CPX # 77, 101, and 108) Based on that evidence I find that during the 2000 negotiations, Pictsweet unilaterally decided to end its practice of providing wage increases every two years to its pickers.[35] The pickers' testimony establishes that the workers had an expectation of such an increase. Indeed, when the pickers' wages were raised in 2002, they were increased by $.02 per basket (RT 104: 18-22), which would be in line with a $.01 increase in 2000, and another $.01 increase in 2002. It appears that the increase was ordinarily $.01 per basket, but that it had been increased to $.02 in 1998, to compensate for the workers having to pick the bigger mushrooms at one time, going from mushroom house to mushroom house, thus taking longer to fill the baskets. (RT 567-571)

[35] I hereby deny Respondent's request for administrative notice of Charge No. 02-CE-6-EC(OX). Evidence Code section 452 permits judicial notice of official acts, which the charge is not. While the UFW's filing of that charge may be a fact that is not reasonably subject to dispute, and thus is a subject of permissive judicial notice, I find that the charge is not relevant to the issues of this case and that Pictsweet has not provided the other parties with sufficient notice to meet the request. For those reasons, I deny the Request.

As for the conflicting testimony of Rivera and Franco, I do not credit Rivera's testimony that he asked Franco about the company's practice regarding wage increases during the August 30, 2000 telephone call.[36] Rivera testified that Franco made the statements about the wage increases sometime in March and perhaps in October. His letter regarding the wage increases was dated May 18, 2000. (GCX #20). There does not seem any reason to believe that Rivera would have been asking Franco about the increases during the August 30, 2000 telephone call, which was ostensibly for the purpose of setting another negotiating session. I do credit Rivera's testimony that Franco mentioned the wage increases during the negotiating sessions—whether Respondent's negotiator told Franco to "shut up" when Franco made the statements is open to question. I do find it believable that Respondent's negotiator, who would realize the significance of such a statement by Franco, would caution Franco about such statements. Whether he said "shut up" or not, I find that Rivera's use of that phrase probably conveys the sense of Stang's annoyance with Franco, and, based on my observations of counsel during the course of the hearing, I do not find some such intemperate language hard to credit.

Neither Charging Party nor Respondent introduced any evidence to corroborate/contradict whether Franco mentioned the wage increases during the course of

[36] I find it unnecessary to resolve the conflict between Rivera's and Franco's version of the conversation with respect to Franco's claim that Rivera asked for a private meeting with Franco. (RT 1253: 13-21) Rivera denied that he made that suggestion and credibly testified that it was UFW policy that union negotiators may not meet individually or in private and that the negotiating committee had to be present at all times. (RT 830: 13-18.) Franco made this same claim in a letter to Rivera dated August 30, 2000, to which Rivera did not respond, but the letter specifically stated that Rivera was to maintain contact only with Stang. I do not credit all of Rivera's testimony because at times he seemed evasive and unwilling to answer Respondent's questions, though he was ill during the hearing and had difficulties hearing the questions propounded to him. Also in many instances, the form of the questions could certainly have been simpler. Nor do I credit all of Ruben Franco's testimony. He was an interested witness, who at times changed his testimony, apparently so that it would be more in line with Respondent's defenses.

negotiations. Respondent apparently had someone taking notes during the negotiating sessions, and those notes were not introduced. (RT 1093: 9-19.) Also, Gilbert Olmos attended a number of the negotiating sessions, but no one asked him about any such statements by Franco, rather he was asked only whether he heard Stang tell Franco to "shut up." (RT 1093: 22-24; 1094: 10-19.) On the other hand, Jessica Arciniega testified that she attended the negotiating sessions, and neither party asked her about Franco's statements about wage increases. Granted Arciniega was translating during the negotiations, and she might not have heard Franco's remarks, but she was not asked.

Overall, I find that, as the parties were discussing wage proposals during the course of the negotiations, it does not seem unlikely, based on the documentary evidence, that Franco would have made the statement attributed to him by Rivera. Whether from PMF records or from remarks by Franco, Rivera had the impression, set forth in his letter of May 18, 2000, that the PMF employees received a wage increase every two years. (CGX # 20)

Unilateral changes in working conditions during bargaining are equivalent to per se violations of the duty to bargain since they constitute a refusal to negotiate or bargain in fact. (*NLRB v Katz* (1962) 369 U.S. 736, 743.) The discontinuance during negotiations of an established past practice of granting periodic wage increases constitutes a violation of section 1153(e). (*East Maine Medical Center v NLRB* (1st Cir. 1981) 658 F2d 1, 7-8) In this instance, I have found that Pictsweet had a past practice, developed since at least 1992, of increasing the wages of the pickers every two years. Respondent argues that the wage increases were discretionary, relying on Franco's

testimony that wage increases depended on yield and market price. Yet, Respondent raised the pickers' wages in 1996, despite low yield. Although the precise timing of the increase may have varied by month, this does not preclude a finding that the raises were customarily granted every two years. (*Stone Container Corp*. [Amount of wage increase varied each year although it was always granted in April; the NLRB found no violation of 8(a)(5), only because the Respondent bargained with the union over the decision to eliminate the annual wage increases; *East Maine Medical Center v NLRB, supra,* 658 F2d 1, 8 [Annual wage increase was based on inflation and community wage patterns rather than a definite amount; court nevertheless found established practice of annual wage increase.] *Daily News of Los Angeles* (1994) 315 NLRB 1236, 1239-40, enf'd (DC Cir 1996) 73 F3d 406 [Board finds employer's discontinuance during negotiations of annual merit increase which ranged from 3% - 5% for those who received them, violates 8(a)(5) even though amount of increase was discretionary.]) Respondent was not free to alter that past practice by choosing not to provide such an increase in 2000 without violating section 1153(e).

ORDER

By the authority of Labor Code section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that Respondent Pictsweet Mushroom Farm, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to transfer or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment or any term or condition of

employment because he/she is engaged in concerted activity or union activity protected by Section 1152 of the Act.

(b) Instituting or implementing any changes in layoff and/or recall policies without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such changes.

(c) Unilaterally changing the terms or conditions of employment, in particular eliminating established past practice of giving wage increases to pickers every two years, without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such changes.

(d) Failing and refusing to provide relevant information requested by the UFW for the purposes of collective bargaining.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to refrain from any and all such activities.

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

(a) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to such employees' wages, hours, and other terms of

employment, and provide such relevant information as requested by the UFW to conduct the negotiations.

(b) Make whole for all losses in wages and other economic losses they suffered, plus interest, all pickers who were not provided with a pay increase in 2000.

(c) Make whole for all losses in wages and other economic losses they suffered, plus interest, all employees who were laid off or recalled out of seniority between September 5, 2000, and March 1, 2001.

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

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

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees in the bargaining unit employed at any time during the period from July 1, 2000 through June 30, 2001, at their last known addresses.

(g) Post copies of the attached Notice, in all appropriate languages, in

conspicuous places on its property, for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days after resuming agricultural operations, of the steps which have been taken to comply with the terms of this Order, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: June 19, 2002

_____

NANCY C. SMITH
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro/Oxnard Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by failing to give the pickers a wage increase in 2000; by failing to provide information to the UFW which it needed for contract negotiations; by changing our agreement with the UFW to layoff and recall workers by classification seniority with first notifying and bargaining with the UFW, and by one of our leadperson's conditioning an employee's transfer on that employee's signing of petition to decertify the UFW.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following 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;
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 ALRB;
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 make any changes in your wages and when you receive wage increases and/or in the manner in which we layoff and recall workers without first notifying the UFW and giving it an opportunity to bargain about such changes.

WE WILL NOT refuse to provide information requested by the UFW that it needs for collective bargaining negotiations.

WE WILL NOT condition the transfer of any worker on his/her signing a petition to decertify the UFW.

WE WILL reimburse each of the pickers for all losses of pay and other economic losses they have suffered as a result of our failure to provide a wage increase in 2000.

WE WILL reimburse any employees for all losses of pay and other economic losses they have suffered as a result of their being laid off or recalled out of seniority between September 5, 2000 and March 31, 2001

DATED: _____ PICTSWEET MUSHROOM FARM

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 ALRB. One office is located at 319 South Waterman Avenue,
El Centro, California 92243. The telephone number is (760) 353-2130.

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

DO NOT REMOVE OR MUTILATE