Guadalupe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KYUTOKU NURSERY, INC., Employer, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case No. 77-CE-18-M 4 ALRB No. 55

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On August 8, 1977, Administrative Law Officer (ALO) Robert G. Werner issued the attached Decision. The General Counsel, Respondent, and the Charging Party (UFW) thereafter each filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order as modified herein.

Respondent admits in its answer to the complaint that it has refused to bargain, but contends that it was justified in so doing because the UFW was improperly certified as the exclusive collective bargaining representative of the Respondent's agricultural employees. In Case No. 75-RC-27-M, we considered and ruled on Respondent's objections to the election when we denied

the Respondent's Request for Review of the partial dismissal of it Objections Petition on December 31, 1975, and when we dismissed the balance of the Respondent's objections on November 22, 1976, based on a stipulated evidentiary record, and thereafter denied the Respondent's Request for Review of said dismissal on January 7, 1977.

We agree with the ALO that the Respondent may not, in the absence of newly-discovered or previously-unavailable evidence or extraordinary circumstances, re-litigate in a refusal-to-bargain proceeding matters which were or could have been raised in a prior representation proceeding. Perry Farms, Inc., 4 ALRB No. 25 (1978), Since none of the exceptions to the foregoing rule apply, in this case, the bar against relitigation requires the rejection of Respondent's defense. Accordingly, we conclude that Respondent had a du to bargain with the UFW based upon that union's certification on January 12, 1977, and that Respondent has failed and refused to meet and bargain collectively in good faith with the UFW, in violation of Labor Code Sections 1153(e) and (a), at all times since January 27, 1977.[1/]

THE REMEDY

In accordance with our Decision in Perry Farms, supra, we shall order that Respondent, rather than its employees, bear the costs of the delay which has resulted from its failure and

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1/In the absence of proof of the date of receipt of the UFW's request to bargain, we presume that it was received on January 27, 1977, three days after sent, and we adopt that date as the date when Respondent first refused to bargain.

refusal to bargain with the UFW, by making its employees whole for any losses of pay and other economic benefits which they may have suffered as a result thereof, for the period from January 27, 1977. to such time as Respondent commences to bargain in good faith and continues so to bargain to the point of a contract or a bona fide impasse. The Regional Director will determine the amount of the award based in general upon the principles and criteria set forth in Perry Farms, supra, and Adam Dairy, 4 ALRB No. 24 (1978).

Because the certification in this case issued considerably later than the certifications in Adam and Perry, the exact data used to compute the basic make-whole wage in those cases may not provide a satisfactory basis for such a computation in this case. See Adam Dairy, supra, at page 19. We therefore direct the Regional Director to investigate and determine a basic make-whole wage to use in calculating back-pay and other benefits due in this matter. The investigation should include a survey of more-recently-negotiated UFW contracts. In evaluating the relevance of particular contracts to the determination of a make-whole award in this case, the Regional Director shall consider such factors as the time frame within which the contracts were concluded, as well as any pattern of distribution of wage rates based on factors such as were noted in Adam Dairy, supra, (size of work-force, type of industry, or geographical locations). We note, however, that the Bureau of Labor Statistics data which we used in that case to calculate the value of fringe benefits are unchanged so that the investigation herein need only be concerned with establishing an appropriate wage rate or rates for straight-time work. See Adam Dairy, supra, at pp. 24-28.

Our remedial Order in this case will include a requirement that Respondent notify its employees that it will on request bargain with the UFW as their certified collective bargaining representative. In addition to the usual means of publishing this Notice, we hold that it is appropriate, where Respondent has refused to bargain in good faith, that the Notice be distributed to those employees who participated in the election in which the UFW was selected as their bargaining agent by secret ballot election on September 6, 1975. Accordingly, we shall order distribution of the Notice to Employees to all employees who were on Respondent's payroll during the payroll period immediately preceding the filing of the petition for certification herein on September 4, 1975.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent, Kyutoku Nurseries, Inc., its officers, agents, representatives, successors and assigns is hereby ordered to:

1. Cease and desist from:

(a) Refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the United Farmworkers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed to them by Labor Code Section 1152.

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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, and if understanding is reached, embody such understanding in a signed agreement.

(b) Make its agricultural employees whole for all losses of pay and other economic benefits sustained by them as the result of Respondent's refusal to bargain.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall thereafter reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice for 90 consecutive days at places to be determined by the Regional Director.

(f) Provide a copy of the Notice to each employee hired by the Respondent during the 12-month period following the issuance of this Decision.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed during the payroll period immediately preceding September 4, 1975, and to all employees employed by Respondent

from and including February 22, 1977, until compliance with this Order.

(h) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice 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 the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

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IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

DATED: August 8, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain about a contract with the UFW. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives farm workers these rights:

(1) To organize themselves;

(2) To form, join or help any union;

(3) To bargain as a group and to choose anyone they want to speak for them;

(4) To act together with other workers to try to get a contract or to help or protect each other; and

(5) To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our employees.

WE WILL reimburse each of the employees employed by us after February 22, 1977, for any loss of pay or other economic benefits sustained by them because we have refused to bargain with the UFW.

KYUTOKU NURSERY, INC.

By: _____

Representative Title

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Kyutoku Nursery, Inc. 4 ALRB No. 55
Case No. 77-CE-18-M

ALO DECISION

The UFW was certified as the bargaining representative of Respondent's employees on January 12, 1977. The UFW made its request for bargaining on January 24, 1977. Respondent refused to meet and bargain with the UFW concerning wages, hours and working conditions of employees in the unit, contending that the Board's certification was not proper.

The ALO rejected Respondent's attack on the certification, holding that it could not relitigate issues which were or could have been litigated in a prior representation proceeding, citing Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146 (1941).

The ALO concluded that Respondent had failed and refused to bargain in good faith with the UFW, and recommended that Respondent be ordered to bargain with the UFW and to make its employees whole for any loss of wages or other benefits resulting from Respondent's violation.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALO and adopted his recommended order with modifications. Noting its prior review and rejection of Respondent's representation objections, the Board re-emphasized its policy of proscribing relitigation of representation issues in related unfair labor practice proceedings, citing Perry Farms, Inc., 4 ALRB No. 25 (1978).

REMEDY

The Board ordered that Respondent make its employees whole for any losses of pay and other benefits resulting from Respondent's refusal to bargain from January 27, 1977 until such time as Respondent commences to bargain in good faith. The Board held that the make-whole period would commence 3 days after the union's bargaining demand was submitted. Respondent was also ordered to meet and bargain in good faith with the UFW, to embody any agreement reached in a signed contract, and to post, mail and read a Notice to its employees. Finally, the Board extended the UFW's certification for one year from the date Respondent commences to bargain in good faith with the UFW.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of KYUTOKU NURSERY, INC., Employer, and UNITED FARM WORKERS OF AMERICA AFL-CIO, Charging Party.	CASE NO. 77-CE-18-M

Norman K. Sato, Esq., of Salinas, CA for the General Counsel Bronson, Bronson & McKinnon by R. Stewart Baird, Jr., Esq. of San Francisco, CA, for Respondent

E. Michael Heumann II, Esq. of Salinas, CA, for the Charging Party.

DECISION

Statement of the Case

ROBERT G. WERNER, Administrative Law Officer: This case was heard before me in Salinas, California, on July 18, 1977. The complaint issued on June 17, 1977, alleging violations of sections 1153(a) and (e) of the Agricultural Labor Relations Act, hereinafter called the Act, by Kyutoku Nursery, Inc., hereinafter called the

Respondent. The complaint is based on a charge filed on June 7, 1977, by the United Farm Workers of America, AFL-CIO, hereinafter called the Union. Copies of the charge and complaint were duly served upon Respondent. Respondent's answer to the complaint was filed on June 29, 1977.

On July 11, 1977, the General Counsel filed a notice of motion and motion for summary judgment with the Board and the ALO received a copy on July 13, 1977. In his moving papers the General Counsel indicated his intention to file a brief in support of a make-whole remedy; thereafter he filed a notice of intention to file said brief ten days after the scheduled hearing date, July 18, 1977. On July 18, 1977, prior to the commencement of the hearing, Respondent filed a declaration by Frederick A. Morgan with attachments in opposition to the motion for summary judgment. Decision on the motion for summary judgment was deferred until after the hearing and receipt of the parties' post-hearing briefs.

All parties were given full opportunity to participate in the hearing, and Respondent and General Counsel submitted post-hearing briefs.[1/]

Upon the entire record, and after consideration of the briefs filed by Respondent and General Counsel, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Jurisdiction

Kyntoku Nursery, Inc., is engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

[1/]The brief of the General Counsel was exceptionally thorough and quite helpful to the ALO.

The Union is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. Motion for Summary Judgment

The General Counsel filed its motion for summary judgment herein pursuant to Section 20240 of the Board's Regulations[2/] during the week immediately preceding the scheduled date for the hearing. In his moving papers the General Counsel indicated that he would file a brief in support of his claim for a make-whole remedy at a later date prior to July 18, 1977, the scheduled date of the hearing. On July 14, 1977, the General Counsel served a notice of intention to file the further brief within 10 days from the scheduled date of hearing. A declaration in opposition to the motion with attached exhibits was presented by Respondent on the day of the hearing. The informal pre-hearing conference made it clear that the presentation of the parties' respective cases could be accomplished in less than one-half day of hearing. Accordingly, the ALO elected to proceed with the hearing rather than to continue the hearing to a later date after the motion for summary judgment had been disposed of.

I have concluded that a case such as this could properly be disposed of by summary judgment.[3/] However, I decline to do so in this case because as of the date of the hearing not all of the material necessary for a determination had been submitted to me and the full hearing was in fact conducted. It seems advisable in such

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[2/] Cal. Admin. Code § 20240.

[3/] See, e.g., Warner Press, Inc. v. NLRB, 525 F.2d 190, 196 (7th Cir. 1975); NLRB v. Red-More Corp., 418 F.2d 890 (9th Cir. 1969); NLRB v. Union Bros., Inc., 403F.2d 883, 887 (4th Cir. 1968).

circumstances to dispose of the matter on the basis of the hearing and post-hearing briefs rather than by summary judgment. As the remainder of this recommended decision makes clear, I would have disposed of this matter by summary judgment in the same fashion I have done had all the same material been presented well in advance of the hearing date.

III. The Alleged Unfair Labor Practice

The Complaint alleges that Respondent violated Sections 1153(a) and (e) of the Act by refusing to bargain collectively in good faith with the certified bargaining representative for its agricultural employees, which refusal interferred with, restrained and coerced Respondent's employees in the exercise of their rights guaranteed by Section 1152 of the Act. Respondent admits in its Answer that it declined to bargain with the Union but alleges that its actions: doing so were proper and did not violate the Act.

The relevant evidence may be summarized simply. On September 4, 1975, a representation petition was filed by the Union and the election among Respondent's employees conducted by the Board on September 6, 1975, was won by the Union. The Respondent filed objections to the scheduling and conduct of the election which were overruled by the Board. On January 12, 1977, the Union was certified as the exclusive bargaining representative for all of Respondent[1]s agricultural employees (G.C. Ex. 1-E). On January 24, 1977, Cesar Chavez, president of the Union, wrote to Respondent requesting a meeting for preliminary negotiations (G.C. Ex. 1-G). On February 12, 1977, Mr. Chavez again wrote to Respondent requesting a negotiations meeting (G.C. Ex. 1-H). Counsel for Respondent replied to Mr. Chavez by letter dated February 22, 1977, stating Respondent's belief that the Board certification was

erroneous and indicating that Respondent was undecided whether to bargain or to challenge certification (G.C. Ex. 1-I) . On March 15, 1977, and March 16, 1977, counsel for Respondent advised Mr. Chavez by letter that Respondent would decline to bargain in order to obtain court review of the certification (G.C. Ex. 1-J, 1-K).

It is, therefore, clear from the foregoing evidence that Respondent has refused to bargain collectively in good faith with the Union in violation of Sections 1153(a) and (e) of the Act. The evidence offered by Respondent challenging the validity of the election and certification is irrelevant in this proceeding. These issues have already been determined adversely to Respondent by the -Board and it is well settled that, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging an unlawful refusal to bargain is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. E.g., Pittsburg Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Porta-Kamp Mfg. Co., Inc., 189 NLRB 899, 900 (1971).

The fact that Respondent refused to bargain in order to obtain court review of the election and certification does not immunize Respondent from the consequences of its decision. It has clearly refused to bargain with the certified representative of its employees in violation of Sections 1153(a) and (e) of the Act, unless and until a court overrules the Board and determines that the certification was invalid.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (e) of the Act,

I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

A. A Make-Whole Remedy is Appropriate

1. The Act and NLRB Precedent.

The Act, unlike the National Labor Relations Act, contains an explicit provision authorizing the make-whole remedy. Section 1160.3 provides in relevant part that a remedy for an unfair labor practice may include:

> . . . an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain. . .

This provision was consciously inserted to remedy what was thought to be a deficiency in the federal act. Now Chief Justice Bird testified as follows at the May 21, 1975, public hearings on the proposed Act:

> (T)his language was just placed in because there has been a good deal of discussion with the National Labor Relations Act that it ought to be amended to allow the "make-whole" remedy and this is something that the people who have looked at this Act carefully believe is a progressive step and should be taken. And we decided since we were starting anew here in California, that we would take that progressive step.

The National Labor Relations Board has determined that a cease and desist order for a refusal to bargain is inadequate, but nonetheless that it is prevented from issuing a make-whole remedy absent statutory authority to do so. See, e.g., Ex-Cell-O Corp., 185 NLRB 107 (1970). In Ex-Cell-O the two dissenters, McCulloch and Brown, made a convincing case that the NLRB does have statutory authority to utilize a make-whole remedy.

Some courts have disagreed with the Board and held that it has the authority under the NLRA to order a make-whole remedy, but only where the refusal to bargain is "a clear and flagrant violation of the law" and the objections to the election "patently frivolous" and not where the objections to the election are "fairly debatable." United Steelworkers of America, AFL-CIO [Metco] v. NLRB, 496 F.2d 1342 (5th Cir. 1974); Culinary Alliance and Bartenders Union, Local 703, AFL-CIO v NLRB, 488 F.2d 664 (9th Cir. 1973); Lipman Motors, Inc. v. NLRB, 451 F.2d 823 (2d Cir. 1971); International Union of Electrical, Radio and Machine Workers [Tidee Products] v. NLRB, 426 F.2d 1243, 1248 (D.C. Cir. 1970). As the NLRB has observed, this "frivolous" versus "debatable" test is not very workable. The Ex-Cell-O majority, supra at 109, stated:

> With due respect for the opinion of the Court of Appeals for the District of Columbia [Tidee Products], we cannot agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is "debatable" while that of another is "frivolous." What is debatable to the Board may appear frivolous to a court, and vice versa. Thus the debatability of the employer's position in an 8(a) (5) case would itself become a matter of intense litigation.

Given the explicit statutory authority for the make-whole remedy under the Act, the NLRB and Circuit Court decisions discussed above are not binding on the Board's determination. The question remains whether the clearly authorized make-whole remedy is appropriate in this case. I conclude that it is for the reasons set forth below.

2. The Appropriate Test; Any Economic Harm

The purposes of the Act would be furthered by the issuance of a make-whole order in every case where the Board finds that the respondent has refused to bargain in good faith and economic harm has

been sustained by the employees as a result, regardless of the motivation of the employer in refusing to bargain. The effects of the employer's unlawful refusal to bargain are the same whether the reasons are substantial, debatable, frivolous, or whether the employer is "testing" the Board's certification. Of course, if Respondent prevails in its arguments to the court that the election and certification were improper, the Board's order will be set aside and no liability will attach. On the other hand, if the court concludes Respondent was incorrect in its contentions and should have granted the Union's request for bargaining, there is no reason Respondent should not pay the damages which its employees suffered as a result of Respondent's violation of the Act. As between the employees who suffered losses as a result of the Respondent's law violation and the Respondent wrongdoer, the equities certainly suggest that the employees should be compensated.

Even the make-whole order will not make the employees entirely whole for all the losses they incurred, but only for those that can be measured as loss of compensation. As the dissent in Ex-Cell-O observed at page 116:

> Potential employee losses incurred by an employer's refusal to bargain in violation of the Act are not limited to financial matters such as wages. Thus, it is often the case that the most important employee gains arrived at through collective bargaining involve such benefits as seniority, improved physical facilities, a better grievance procedure, or a right to arbitration. Therefore, even the remedy we would direct herein is not complete, limited as it is to only some of the monetary losses which may be measured or estimated. The employees would not be made whole for all the losses incurred through the employer's unfair labor practice.

However, the adoption of the proposed test for imposition of the make-whole remedy should have a salutary deterrent effect on respondents who might otherwise, without the financial risk of make-whole,

have elected to "appeal" for the purpose of gaining time, knowing that they would not suffer economic loss. Conversely, a failure to impose a make-whole remedy on employers who unsuccessfully "test" certification in court would place the employer who chooses to follow the law and bargain at a competitive disadvantage.

I do not find other tests that have been proposed to be acceptable. The "debatable" versus "frivolous" test would spawn endless and pointless litigation, as noted by the NLRB in Ex-Cell-O, supra. In addition, in a case like this one where the employer refuses to bargain in order to challenge the election and certification, the ALO would be required to receive extensive evidence concerning the merits of the employer's election objections, a matter already fully processed by the Board in the representation proceeding. This would be extremely wasteful of the resources of both the Board and the litigants. Likewise, I find nothing to recommend the test suggested by the ALO in Adam Dairy, Nos. 76-CE-15-M, 76-CE-36-M at page 49. He suggests that make-whole be found appropriate only where "there has been substantial harm to the employees." I see no reason why the Board should open up extensive litigation over the question of what constitutes "substantial" harm. Another ALO in P & P Farms, No. 76-CE-23-M at page 31 suggests that the Board examine "the totality of the circumstances" to determine whether a make-whole remedy is approprate. It is submitted that an award of make-whole in any case where the refusal to bargain causes economic loss to the employees is more in accord with the purposes of the Act to promote collective bargaining, make the injured employees whole, and deprive the law breaker of the fruits of its unlawful activity. In addition, it would be considerably easier to administer than the other proposed

tests. Thus, a make-whole remedy in a refusal to bargain case would be found to be "inappropriate" only where the refusal resulted in no economic loss, as, for example, with a refusal of very short duration That leaves the question of how the "make-whole" remedy should be measured.

B. Application of the Make-Whole Remedy

The correct approach at the compliance hearing was set forth clearly by the dissent in Ex-Cell-O, supra at 118:

> As previously indicated, the injury suffered by employees is predicated upon the employees deprived of the right to collective bargaining as required by the Act. The burden of proof would be upon the General Counsel to translate that legal injury into terms of measurable financial loss, if any, which the employees might reasonably be found to have suffered as a consequence of that injury.
>
> A showing at the compliance stage by the General Counsel or Charging Party by acceptable and demonstrable means that the employees could have reasonably expected to gain a certain amount of compensation by bargaining would establish a prima facie loss, and the respondent would then be afforded an opportunity to rebut such a showing. This might be accomplished, for example, by adducing evidence to show that a contract would probably not have been reached, or that there would have been less or no increase in compensation as a result of any contract which might have been signed. [emphasis added].

The term "pay" in the make-whole provision of the Act should be interpreted broadly to include any economic benefits that would have flowed to the employees such as, but not limited to, vacation benefits, bonuses, pension coverage, medical coverage, and wages. On the other hand, benefits that would have accrued only to the Union and not to the employees individually, such as Union dues, should not be part of the "pay" covered herein.

I conclude that the period to which the make-whole order should apply is that suggested by the dissent in Ex-Cell-O, supra at 116: from the date of the employer's unlawful refusal to bargain until

it begins to negotiate in good faith. In his post-hearing brief, the General Counsel has suggested what he terms a variation of this plan, under which the compensatory period would run from refusal to bargain until either a contract or a bona fide impasse is reached, with the employer given credit for the portion of time he can prove he was bargaining in good faith. I see no justification for such an order in this case; there is no reason to presume that the employer, should he lose his certification test in the courts, would fail to bargain in good faith. Thus it would be unfair to require him to deposit money to an escrow account while he is bargaining in good faith and to shift the burden to the employer to prove that he was bargaining in good faith. Under the Act the burden is on the General Counsel to prove that a violation of Section 1153(e) has been committed. The suggested approach would also place an additional economic pressure on the employer to reach an agreement; such a tampering with the economic balance by the Board is contrary to the Act, See, e.g. Labor Code § 1155.2. Accordingly, the make-whole remedy herein will run from February 22, 1977, the date the employer refused to bargain, until the employer begins to bargain in good faith. C. Extension of Certification

The General Counsel asks that the Union certification be ordered extended for one year from the time the employer begins to bargain in good faith. Such an order is standard with the NLRB. See, e.g., Mar-Jac Poultry Co., Inc., 136 NLRB 785 (1962). Respondent argues that Section 1155.2(b) of the Act and Section 20382 of the Board's regulations provide the exclusive method for extending certification, namely through the filing of a petition for extension between the

90th and 60th day preceding the expiration of the certification period. In the absence of any controlling authority on this point, I conclude that the purposes of the Act are best served by ordering certification extended for one year after Respondent commences bargaining in good faith. It appears to be wasteful to require a second hearing to determine whether an unfair labor practice has been committed in order to rule on the petition authorized by Section 1155.2(b) of the Act.

D. Litigation Costs

The General Counsel also seeks an award of litigation costs from Respondent. Although these may clearly be awarded in a proper case, I find that such an order would not be appropriate in this case where the employer is following the only procedure available to it to obtain court review of its contentions concerning objections to the election.

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

ORDER

Respondent, its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain collectively in good faith with the Union or its authorized representatives.

2. Take the following affirmative action which is deemed necessary to effectuate the purposes of the Act:

(a) Make whole all persons in the bargaining unit of Respondent and employed by Respondent between February 22, 1977, and the date Respondent begins good faith bargaining with the Union for any losses in pay they may have suffered as a result of the refusal

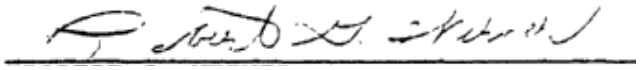
to bargain in good faith, as those losses have been defined in the Remedy portion of this decision.

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records required by law, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount or amounts that may be due the harmed employees under the terms of this order.

(c) Post the notice attached hereto and marked "Appendix" in both English and Spanish in a conspicuous place on its property for no less than sixty (60) days during the next peak season.

It is further recommended that the Certification of the Union as the exclusive bargaining agent for Respondent's agricultural employees be extended for twelve months after Respondent commences good faith bargaining with the Union.

DATED: August 8, 1977



ROBERT G. WERNER
Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

After a hearing where each side presented evidence, the Agricultural Labor Relations Board has found that we refused to bargain with the Union in violation of the law. The Board has told us to post this notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. to join or help unions if they choose;
2. to bargain as a group and choose whom they want to speak for them;
3. to act together with other workers to try to get a contract or to help or protect one another.

We will give back pay to those workers who were employed after February 22, 1977, and who suffered any loss of pay because of our refusal to bargain with the Union.

We will in the future bargain in good faith with the United Farm Workers.

DATED:

KYUTOKU NURSERY, INC.

By_____
(Title)

LIST OF EXHIBITS

General Counsel No. 1-A	Charge	In Evidence
General Counsel No. 1-B	Complaint	In Evidence
General Counsel No. 1-C	Answer to Complaint	In Evidence
General Counsel No. 1-D	Order of Dismissal of Objections Petition	In Evidence
General Counsel No. 1-E	Certification of Representative	In Evidence
General Counsel No. 1-F	Decision 3 ALRB No. 30	In Evidence
General Counsel No. 1-G	Letter from Cesar Chavez to Respondent January 24, 1977	In Evidence
General Counsel No. 1-H	Letter from Cesar Chavez to Respondent February 12, 1977	In Evidence
General Counsel No. 1-1	Letter from Mr. Stumpf to Mr. Chavez February 22, 1977	In Evidence
General Counsel No. 1-J	Letter from Mr. Morgan to Mr. Chavez March 16, 1977	In Evidence
General Counsel No. 1-K	Letter from Mr. Morgan to Mr. Chavez March 16, 1977	In Evidence
General Counsel No. 1-L	Letter from Mr. Heumann to Mr. Stumpf March 31, 1977	In Evidence
General Counsel No. 1-M	Affidavit of L. Lopez	In Evidence
Respondent No. A	Telegram to Regional Director	I. D. Only
Respondent No. B	Letter from Mr. Greer to Mr. Kyutoku September 5, 1977	I. D. Only
Respondent No. C	Handwritten Memo 9/6/75	I. D. Only
Respondent No. D	Tally Sheet	I. D. Only
Respondent No. E	Telegram of Election Objections	I. D. Only
Respondent No. F	Letter from Mr. Kyutoku to Board September 11, 1977	I. D. Only

Respondent No.	G	Notice of Hearing 12/15/77	I. D. Only
Respondent No.	H	Request for Review	I. D. Only
Respondent No.	I	Order Denying Appeal	I. D. Only
Respondent No.	J	Order of Dismissal of Objections Petition	I. D. Only
Respondent No.	J-l	Stipulation	I. D. Only
Respondent No.	K	Employer's Request to Review	I. D. Only
Respondent No.	L	Order Denying Request to Review	I. D. Only
Respondent No.	M	Declaration of Frederick A. Morgan in Opposition to Motion For Summary Judgment	I. D. Only

At the request of Respondent, judicial notice was taken of the transcript and exhibits in Kyutoku Nursery, Inc., Case No. 75-CE-115-M. I determined that this material was not relevant to the issues herein.