Salinas, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

P & P FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 76-CE-23-M 5 ALRB No. 59

DECISION AND ORDER

On June 14, 1977, Administrative Law Officer (ALO) Jeffrey S. Brand issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party each filed exceptions and a supporting brief.

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.

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 as modified herein, and to adopt his recommended order as modified herein.

We affirm the ALO's conclusion that Respondent violated Section 1153 (e) and (a) of the Act by its refusal to bargain with the UFW concerning: (1) the wages, hours, and working conditions of its year-round employees; and (2) the effects on the said employees of Respondent's termination of all agricultural

operations. Contrary to the ALO, however, we find that Respondent was not under a duty to bargain with the union concerning workers employed in its onion-packing shed.

Respondent employed approximately 15 workers in a short-term onion packing operation in 1974 and again in 1975.[1/] This task was completed in each of those years on or about October 1. Respondent did not resume onion production following completion of the 1975 season, but did continue to raise a variety of other row crops. Respondent ultimately ceased all agricultural operations, terminating its last year-round employee in November or December of 1976.

The UFW received a majority of the votes cast in a representation election which was conducted in a unit of Respondent's agricultural employees on October 6, 1975. Although no packing-shed workers were employed at the time of the election, they had worked during a portion of the applicable payroll eligibility period and most of them voted in the election. Thereafter, on October 14, 1975, in the absence of any post-election objections, the UFW was certified as exclusive collective bargaining representative by the Board.

The ALO found that Respondent decided to close its onion-packing facility sometime after the UFW had been certified as the exclusive bargaining representative of its agricultural employees; the ALO assumed that otherwise it would have notified the Regional Director before the election of planned changes in

---

[1/] The shed was located on the farm and processed onions grown only by Respondent.

the unit or filed post-election objections. We reject the ALO's finding and the rationale therefor.

In order to establish a Section 1153 (e,) violation here, General Counsel must prove an obligation to bargain existed at the time changes were decided on or made. Part of that proof is to show the date of the decision or changes. At the hearing, no testimony or other evidence was received as to the date on which Respondent made or effectuated its decision to cease onion production and close its packing shed. In the absence of evidence as to when the decision was made, we can make no determination thereof.

It is clear from the record that the onion-shed employees were laid off between the eligibility period and the election, but there is no evidence as to whether the Employer intended, or whether the employees interpreted, that action as a final termination or the regular October layoff.

It is true that Respondent did not protest the inclusion of onion-shed employees in the unit or their voting in the election after the shed ceased operations for the season. However, as those employees were clearly eligible to vote in the election, and as the unit would in any event include all of Respondent's agricultural employees, Respondent would have no basis for lodging a pre-election protest, or for filing post-election objections, with respect to the inclusion of the onion-shed employees.

Accordingly, we conclude that Respondent did not violate Section 1153(e) and (a) of the Act by failing and refusing to

bargain with the UFW concerning the wages, hours and working conditions of the onion-shed workers and/or to bargain over the effects on said workers of the closure of the onion shed.

Remedy

As we have affirmed the ALO's conclusion that Respondent has engaged in unfair labor practices within the meaning of Section 1153(e) and (a) of the Act by refusing to bargain with the UFW concerning its approximately four year-round employees, we shall order that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Consistent with prior decisions, we shall order that Respondent, rather than its employees, bear the cost of the delay which has resulted from its failure and refusal to bargain with the UFW, by making its former year-round employees whole for any losses of pay and other economic losses which they have suffered as a result of said delay for the period from on or about October 30, 1975 (the date of the UFW's demand for bargaining), to the date on which Respondent terminated all agricultural operations and thereby eliminated all unit jobs. See, e.g., J. R. Norton Company, 4 ALRB No. 39 (1978).

As the ALO indicated that Respondent had ceased all operations prior to the end of 1976, it appears that the basic wages/fringe-benefit package Respondent's employees would reasonably have expected to receive, had their employer bargained to agreement with the UFW, is reflected in the first-time bargaining contracts actually consummated by the UFW prior to

1977. Accordingly, the Regional Director is hereby directed to follow the guidelines set forth in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978), in developing an appropriate remedial back-pay/fringe-benefit award in this matter.

In addition, we shall order Respondent to bargain with the UFW over the effects on the former year-round employees of its termination of its agricultural operations. Because a bargaining order alone cannot remedy Respondent's refusal to bargain with the UFW about that matter, we shall also order a limited make-whole remedy designed to create conditions similar to those that would have been present had Respondent met its obligation to bargain with the UFW prior to the closure of its business. We shall order Respondent to pay to its agricultural employees their daily wages, as of the date immediately prior to the closure of its agricultural operations, for the period commencing five days after the issuance of this Decision and continuing until: (1) the date Respondent bargains to impasse or agreement with the UFW about the impact on the said employees of the termination of its agricultural operations; or (2) the failure of the UFW to request bargaining within five days after the issuance of this Decision or to commence negotiations within five days after Respondent's notice of its desire to bargain; or (3) the subsequent failure of the UFW to bargain in good faith. In no event shall this limited make-whole period for any employee exceed the period of time necessary for the employee to obtain alternative employment comparable to that which he or she enjoyed at P & P Farms. Highland Ranch and San Clemente Ranch,

Ltd., 5 ALRB No. 54 (1979).

ORDER

Pursuant to Labor Code Section 1160.3, the Respondent, P & P Farms, its officers, agents, successors, and assigns is hereby ordered to:

1. Cease and desist from:

a. Refusing to bargain collectively in good faith, upon request, with the United Farm Workers of America, AFL-CIO (UFW), with regard to wages, hours, and other working conditions of its agricultural employees.

b. Refusing to bargain in good faith with the UFW, upon request, with regard to the effects upon its agricultural employees of its termination of its agricultural operations.

c. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 1152 of the Act.

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

a. In the event that Respondent resumes agricultural operations, recognize the UFW as the collective bargaining representative of its agricultural employees and, upon request, meet and bargain collectively in good faith with said union as the exclusive representative of its agricultural employees and, upon request, embody any understanding reached in a signed agreement.

b. Make whole its former year-round agricultural employees for all losses of pay and other economic losses sustaing.

by them as a result of Respondent's refusal to bargain with the UFW.

c. Upon request, bargain collectively with the UFW with respect to the effects upon its former year-round employees of its termination of operations, and reduce to writing any agreement reached as a result of such bargaining.

d. Pay its former year-round employees their normal wages for the period described in the section of our attached Decision entitled "Remedy".

e. 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 in accordance with this Order.

f. 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.

g. Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all of its former employees who were employed during the payroll period which ended on September 29, 1975, or at any time thereafter up to and including December 31, 1976, at their last known addresses.

h. Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in

writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative for Respondent P & P Farms' agricultural employees, be extended for a period of one year from the date on which the union requests bargaining in the event that Respondent P & P Farms resumes agricultural operations.

Dated: September 28, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its evidence, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by failing and refusing to bargain about a contract with the UFW and by refusing to bargain about the effects on our employees of our terminating our agricultural operations. The Board has ordered us to mail copies of this Notice to our former employees and to take 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, in the event we resume agricultural operations, meet and bargain in good faith with the UFW on request about a contract and provide to the UFW information in our possession which is relevant to collective bargaining and which the UFW requests.

WE WILL reimburse each of the employees employed by us during the period before we went out of business for any loss of pay or other economic losses which they suffered because we have failed and refused to bargain with the UFW.

WE WILL pay to each of the employees employed by us during the period before we went out of business their normal wages for the period required in the Decision and Order of the ALRB.

Dated:

P & P FARMS

By: _____
Representative Title

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

CASE SUMMARY

P & P Farms (UFW)

5 ALRB No. 59
Case No. 76-CE-23-M

ALO DECISION

After a representation election held on October 6, 1975, the UFW was certified by the Board on October 14, 1975. Following a hearing on a complaint that Respondent had refused to bargain with the UFW, the ALO concluded that Respondent had violated Labor Code Section 1153(e) and (a) by refusing to bargain concerning: (1) its employees' working hours, wages, and terms and conditions of employment; and (2) the impact on its employees of Respondent's termination of all agricultural operations.

BOARD DECISION

The Board affirmed the ALO's conclusion but only with respect to Respondent's approximately four permanent or year-round employees. The Board found that the General Counsel did not establish that Respondent's decision to close its onion-packing shed (where approximately 15 seasonal workers were employed prior to the election) had been made at a time when Respondent had a duty to bargain with the UFW. The Board rejected the ALO's finding that said decision was made at some time after the UFW had been certified, in the absence of testimony or other evidence as to the date of that decision.

REMEDY

The Board ordered a conventional make-whole award to remedy Respondent's refusal to bargain with the UFW concerning the wages, working hours and terms and conditions of employment of its former permanent or year-round employees. The Board also ordered Respondent to bargain with the UFW as to the effects on the said employees of its termination of all agricultural operations, and provided a limited make-whole award for the year-round employees to remedy Respondent's failure and refusal to notify and bargain with the UFW as to said effects.

* * *

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of: P & P FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NUMBER: 76-CE-23-M

INITIAL DECISION

TABLE OF CONTENTS

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the matter of: P & P FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NUMBER: 76-CE-23-M INITIAL DECISION

JEFFREY S. BRAND, Administrative Law Officer: This case was heard before me on March 21 and March 22, 1977 at the office of the Monterey County Board of Education in Salinas, California.

The initial complaint against respondent P&P FARMS (General Counsel Exhibit No. IB) alleged among other things that:

> 7. Respondent has interfered with, restrained and coerced and is interfering and coercing its employees in the exercise of the rights guaranteed in Section 1152 of the Act by the following conduct:
>
> (a) Beginning on October 14, 1975 and continuing to the present, respondent has refused to bargain in good faith with the UFW, the certified representative of its employees, for the purpose of collective bargaining, by the following conduct:
>
> (1) Respondent has refused and continues to refuse to meet with the UFW and discuss the terms and conditions of employment of the employees of respondent.

At the conclusion of the hearing, General Counsel amended the complaint to conform to proof. The amendments are not of major consequence to the decision herein, and need not be outlined in detail. Said amendment was reduced to writing and filed with the ALRB on March 24, 1977. Since not formally made a part of the record at the time of the hearing, I have marked the amendment ALRB 1 for the purpose of easy reference and clarity.

General Counsel was represented by Robert Farnsworth. The intervening party, United Farm Workers of America, AFL-CIO, was represented by its counsel Michael Heumann. The Respondent appeared in Propria Persona.

Subsequent to the close of the hearing, General Counsel and Respondent filed briefs summarizing their respective positions. (Respondent filed a two page document stating his position in regard to the hearing. He titled the document Answer to Complaint. Obviously, this was not the actual answer to the Complaint and for the purposes herein I have considered the document to be Respondent's Post Hearing Brief.)

Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings:

I
JURISDICTION

P&P FARMS (hereinafter referred to as "P&P") was a sole proprietorship owned by Pete Perez. P&P FARMS leased land in Monterey County on which it produced, at various times, onions, sugar beets, potatoes and broccoli. P&P FARMS is an agricultural employer within the meaning of Section 1140(c) of the Agricultural Labor Relations Act.

Further, the United Farm Workers of America, AFL-CIO (hereinafter referred to as the "Union") is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

II

FACTUAL SETTING

A. THE OPERATION OF P&P FARMS

Pete Perez was the sole proprietor of the now defunct P&P FARMS. The Company existed for at least three years and at its height employed no more than twenty (20) employees.

During the life of the business, P&P FARMS produced onions, sugar beets, broccoli, and potatoes. Pete Perez owned none of the land that he worked. Rather, he leased it from various land owners in Monterey County.

The evidence reflects the following operations of P&P FARMS from 1975 through 1977:

1. In 1975, Mr. Pete Perez leased 300 acres of land on which he produced onions and broccoli. Two hundred acres were leased from a Mr. Orisetti and produced the onion crop. The onions were harvested toward the end of September and were taken to a packing shed on the

Orisetti land. The shed operation was also controlled by Mr. Pete Perez although he did not own the shed itself. The shed, like the land, was leased. In 1975, Perez also leased 100 acres of land from an owner by the name of Thalke.

For the year 1975, the entire P&P work force consisted of approximately 20 employees. Fifteen to 16 of these employees worked in the packing shed where the onions were prepared for market. Another three or four employees worked the land for the production of both the onions and the broccoli.

2. In 1976, P&P FARMS ceased the production of onions (the evidence also reflects that prior to 1975 the onion operation operated under similar circumstances in 1974). Pete Perez testified that the onion shed ceased operation around the first of October 1975, with the conclusion of the harvest of the 1975 onion crop. Further, in 1976, P&P FARMS no longer leased the Talke land.

Rather, 1976 saw the production of broccoli, potatoes, and sugar beets on 380 acres of Monterey County land. P&P continued the Orisetti lease of 200 acres producing broccoli on 150 acres and potatoes on the remaining 50 acres. A second parcel of 180 acres was leased from an owner, Perroda, in 1976. This parcel was used by P&P for the production of sugar beets. They were planted in February of 1976 and harvested in December 1976.

In 1976, a maximum of four employees were used by P&P in the production of the broccoli, potatoes and sugar beets.

3. In 1977, P&P FARMS ceased operations completely. The lease on the Perroda and Orisetti land expired (in fact, the Orisetti lands were sold to a new owner) and Mr. Pete Perez ceased all operations. During the year 1977, he employed no agricultural employees. Mr. Pete Perez cited the sale of the Orisetti land and the loss of money as the reason for the demise of P&P FARMS.

B. THE RELATIONSHIP OF JESS PEREZ TO P&P FARMS:

Jess Perez is the brother of Pete Perez. Jess, although playing a significant role in P&P from 1974 through 1976, had no financial interest in P&P FARMS. During the years 1974 and 1975, he worked in the packing shed for the onions. There he supervised the employees, hired, fired and set their rate of pay. Yet, the evidence is uncontradicted that Jess Perez received no compensation for his work in the onions which occupied 15 or 16 hours per day of his time for four or five weeks in September and October of 1974 and 1975. The evidence is also uncontradicted that P&P as a name did not stand for Jess and Pete Perez, but rather was used for convenience by Pete who had the sole financial interest in the operations.

Aside from his agricultural work with P&P, Jess Perez was in charge of labor relations work with the Company. The testimony is uncontra-dicted that Pete asked his brother, Jess, to receive the mail for P&P

and to be responsible for all contact with the United Farm Workers of America, AFL-CIO. In fact, this occurred. Pete stated that he vaguely knew of the discussion with the UFW, but could recall little of substance as to what was occurring. Realtions with the Union was Jess's responsibility. The testimony indicated that Jess Perez was responsible for the contact and negotiations with the Union after his work in the onion shed terminated in 1975. In fact, Pete Perez candidly testified that Jess was in charge of all Union problems and negotiations for the years 1975 and 1976.

Jess Perez's relationship with his brother was that of advisor and business manager. In fact, throughout the course of the hearing herein, Jess Perez acted as his brother's representative in the examination of witnesses and the presentation of arguments on behalf of Respondent.

C. THE TERMINATION OF P&P FARMS:

It is stipulated by the parties that P&P FARMS is now out of business. The actual date of the termination of the entire business is not clear in the record, but it is clear that by January 1, 1977, the business no longer existed.

It is also uncontradicted in the record that the onion shed operation had terminated after the 1975 harvest. The exact date of this is again not clear from the record.

Finally, it appears from the record that the number of employees at P&P decreased dramatically after 1975 because of the termination of the onion shed operation. Again, the numbers are not exact in the record but it appears that the total work force may have dropped from 20 in 1975 to four in 1976. As will become apparent below, the uncertainty of the figures regarding the total number of employees and the termination of P&P FARMS as a business entity is of no consequence to the issues presently before me. At a later time and place they will have to be determined with certainty, but in regard to the issues of whether the Company bargained in good faith, and, if they did not, the nature of the appropriate remedy, these figures need not be resolved at the present time.

D. THE COMPANY AND THE UNION: THE COURSE OF NEGOTIATIONS SUBSEQUENT TO UNION CERTIFICATION

An election pursuant to the Agricultural Labor Relations Act was held among the agricultural employees of P&P FARMS on 10/06/75. Subsequent to the holding of the election, on October 14, 1975, the United Farm Workers of America, AFL-CIO was certified as the sole bargaining agent for "all agricultural employees" of P&P FARMS. The Employer filed no objections to the election.

Subsequent to the certification of the Union as the sole bargaining agent pursuant to the Act, a letter was sent from the United Farm Workers to P&P FARMS over the signature of Union President, Caesar Chavez.[1/] (General Counsel Exhibit Mo. 3.) The letter requested preliminary negotiations and also contained a Union request for information (General Counsel Exhibit No. 4).

It is acknowledged by all that the letter from Chavez was the first contact between the Union and the Company in regard to the negotiation of a contract. Throughout the course of the hearing three persons related the course of contact between the Union and the Company — Jess Perez; David Martinez, currently a UFW organizer in Coachella, but at the time a negotiator in Salinas; and, Roberto Garcia, a co-or-dinator of negotiations for the Union. To insure clarity in the record, the contact between the Union and the Company is examined in relevant time periods subsequent to the writing of General Counsel Exhibit No. 3, (the letter by Caesar Chavez) until the time of the hearing itself.

1. October 1975 through January 1976; David Martine-z did not join in the process of negotiation with P&P FARMS until late March of 1976". Thus, the early period of contact between the Company and. the Union is spelled out in the, testimony of Jess Perez and Roberto Garcia.

Perez provides the fullest account. Jess Perez acknowledges that the Union asked for a time and place for the negotiation of a contract after the Company received the Chavez letter and demand for information. He indicated that in this time period he had contact with the Union one or two times. The details of the contract are not clear from the record. Jess Perez did indicate that he told the Union that he could not sit down with them until his attorney was available — an event for which he provided no timetable.

During this time period, Roberto Garcia indicated that there were phone calls between himself and Perez and perhaps some written correspondence.[2/]

2. January 1976 through April 1976; Again, the testimony of Jess Perez indicates the course of conduct between the Union and the Company. The Union made no attempt to rebut Perez's account. Perez related that he probably called Garcia at the Union office, and again admits, that the Union requested contract talks with the Company. Perez apparently rejected the idea of negotiations on two separate grounds.

[1/]It is stipulated by both of the parties that all correspondence presently in the record was in fact received by the party for whom it was intended.

[2/]if there was any written correspondence, the record does not so reflect it other than by the oral testimony of Garcia. The first letter from the Union to the Company after the Chavez Letter is dated May 20, 1976. General Counsel Exhibit No. 9.

First, he again claimed that the Company could not negotiate until his attorney, a Mr. Atteridge of Salinas, had time. Second, he claimed that there was no need to negotiate since the Agricultural Labor Relations Board had ceased functioning.[3/]

3. A meeting in May of 1976:

David Martinez joined the Union effort to contact P&P FARMS at the end of March or beginning of April 1976. He worked with Roberto Garcia who was also assigned to the Union office servicing Salinas.

According to Martinez, he had his first meeting with Jess Perez around the first week in May of 1976. Martinez relates that he went to Old State Road to talk with P&P FARMS and there encountered Jess Perez. Martinez testified that he discussed the initial letter from Chavez back in October of the preceding year. He states that the "gist" of Perez's response was that the Company would not respond to the Union. According to Martinez, Perez stated that the Board was out of business and that there was no need for him to negotiate. Martinez reminded Perez that the Union could take legal action against the Company and the meeting terminated.

Perez acknowledges the first meeting with Perez at Old State Road. He. claims that Martinez never showed him identification. He states that he informed Martinez that the onion shed operation had terminated and that there were no workers whose interest had to be negotiated.[4/] He states that he told Martinez that while he had tried to contact Garcia four or five times to arrange a meeting, there could be no negotiations until his attorney, Atteridge had time.

On May 20, 1976, the Union sent a letter to P&P in which they expressed their version of the contact with the Company to that date. (See General Counsel Exhibit No. 9.) The letter refers to the Martinez meeting and other phone contact between the Union and the Company.

4. A second meeting on June 8, 1976: David Martinez relates that he did meet with Jess Perez a second time in June of 1976. He sets the date as June 8th, Martinez attended with Pauline Floras, another Union organizer. He claims that Perez's response was similar to the response in the past. He states that Perez again noted that there was

---

[3/] This theme is recurrent throughout Respondent's presentation and also throughout the course of its conduct during the time in question for the negotiation of a contract. See discussion of the breach of the duty to bargain in good faith, infra.

[4/] This is also a recurrent theme and apparently surfaced earlier. Jess Perez also testified that he had previously told Ruth Friedman of the General Counsel's office in Salinas that the UFW was losing nothing because there was nothing to negotiate since the onion shed employees had been terminated.

no need to negotiate since the Board was out of business. Perez, according to Martinez, also stated that there were no more packing shed workers and that he (Perez) could not negotiate for the "steadies" on Old State Road (apparently three or four in number,) because they did not vote for or support the Union.

At this time, Martinez, gave him pp. 1-79 of the UFW Master Agreement (General Counsel Exhibit No. 2), negotiated at Bakersfield. Martinez states that Perez refused to accept a copy of the proposed agreement, but after three or four refusals, finally, did. Martinez told Perez that rejection of any section of the proposal would constitute rejection of the Master Agreement and that the Company had to reply within a reasonable time.

According to Martinez, Jess Perez again stated that he could not negotiate without his lawyer who was about to leave on a two and one-half month trap.

By Martinez's account, the meeting ended with his (Martinez's) suggestion that they meet again on June 15th at the packing shed at 9:30 in the morning.

Perez's account of the meeting is not significantly different. He confirms-that upon receipt of the Master Agreement he told Martinez that he would have to speak with his lawyer who was going out of town. He stated that he would discuss the proposals when his lawyer returned. Perez also reiterated his position that the UFW was not losing anything by the lack of negotiations since there were no longer any shed workers for whom to negotiate.

Perez denied that a firm date was set up for a subsequent meeting on June 15, 1976.

On June 9, 1976, Martinez sent Jess Perez the letter now in evidence marked as General Counsel No. 5. The letter summarized what Martinez felt occurred at the encounter on June 8th and also noted that there would be another meeting on June 15, 1976 at 9:30 AM at the office of Mr. Perez. As with all other Union correspondence, it is stipulated by the parties that General Counsel No. 5 was received by the Company.

Subsequent to the meeting of June 8th, Roberto Garcia and Jess Perez had telephone contact. As Mr. Garcia relates it, Mr. Perez told him that he felt threatened by Mr. Martinez and his statements of possible legal action against the Company. He (Mr. Perez) told Garcia that he would not meet with the Union again unless he (Garcia) was present. Garcia related that Jess Perez, in one of these phone conversations subsequent to the June 8th meeting, confirmed the meeting for June 15th. This confirmation by Perez, while not specifically denied by Perez, is impliedly denied by other testimony of Perez about the firmness of the date of the June 15th meeting.

5. June 15, 1976 — no meeting and a letter: David Martinez returned to P&P on June 15, 1976. This time he went with Roberto Garcia

and Pauline Floras. They arrived at the place where the meeting was to allegedly have occurred at 9:20 AM. By 10:00 AM, no one had appeared for the Company. They inquired of a woman worker as to the whereabouts of Jess Perez, but apparently to no avail. The representatives of the Union left. The evidence reflects no face to face meeting between the Company and Union after June 8, 1976.

On June 15, 1976, however, Jess Perez did send a letter (General Counsel No. 6) to the Union offices in Salinas. The letter summarized the position of the Company. There was no need to negotiate since the Board was out of business and since "the farm workers that we have, completely refused to join your union." (See paragraph 2 of General Counsel Exhibit No. 6.) Further, Perez reiterated that his attorney was on a trip.

6. Fitial correspondence — July 1976 until the hearing: On July 2, 1976, the Union sent Jess Perez a letter (General Counsel Exhibit No. 7) in response to the letter sent by Perez on June 15th. It again summarized the respective positions of the parties. An identical letter was sent by the Union on July 6, 1976 to P&P FARMS and Jess Perez (General Counsel Exhibit No. 8).

The same day that the copy of General Counsel Exhibit No. 7 was sent to the Company, Mr. Perez sent a letter to Roberto Garcia (General Counsel Exhibit No. 10). Again, the non-participation of farm workers that P&P presently employed was stressed by Perez as the reason for the non-participation in the negotiating process. Perez stated that he felt these workers — who apparently had not voted in the election resulting in certification — were entitled to an election to determine whether, in fact, they want to be part of the Union.

Garcia stated that after June 15th he could not make phone contact with Perez. He indicates that the last piece of correspondence that went from the Union to the Company was dated October 1, 1976 (General Counsel Exhibit No. 11). The letter was generally conciliatory in nature but did set a deadline of October 14, 1976 for response by the Company.

Other than that which is outlined above, the record reflects no other contact between the Union and the Company in efforts to negotiate a contract.

III

P&P FARMS DUTY TO BARGAIN AND THEIR LACK OF GOOD FAITH

The factual setting presents two separate lines of legal inquiry: A) did the Company have a duty to bargain with the Union; and, B) if such a duty existed, did the Company refuse to bargain within the meaning of the Agricultural Labor Relations Act and controlling

precedent. [5/]

A. P&P'S DUTY TO BARGAIN

In regard to this first line of inquiry, it appears, upon preliminary analysis, that the Company was under a duty to bargain with the UFW. Section 1156 of the ALRA provides in relevant part that:

> Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment. (Emphasis added.)

On October 6, 1975, an election was held at P&P FARMS among all its employees. The tally of ballots indicated that the UFW had been chosen as the bargaining agent within the meaning of 1156 of the ALRA. Further, since the Company did not choose to exercise its right to challenge the results of the election within five days subsequent thereto (see ALRA Section 1156.3(c)), the Union was certified as the bargaining agent for all agricultural employees of P&P FARMS pursuant to 1156.3(d) of the Act. With the certification of the Union (see General Counsel Exhibit No. IE) on October 14, 1975, the duty to bargain prescribed by 1156 of the Act attached. From that date forward, a request by the Union for negotiations required the Company to bargain with the Union in "good faith" (see 1153(e) and 1155.2 of the Act) in regard to "rates of pay, wages, hours of employment or other conditions of employment."

Thus, it appears that with the submission of General Counsel Exhibits No. 3 and 4 — the letter from Mr. Chavez and the demand for information — by the Union to the Company, the Company was bound to bargain in good faith within the meaning of the Act.

The situation is complicated, however, by the fact that subsequent to the certification of the Union P&P FARMS totally ceased its operations. Thus, it is agreed by all parties that at the time of the commencement of the hearing, P&P FARMS did not exist in any form whatsoever as an agricultural employer within the meaning of the Act.

5/ Section 1148 of the ALRA provides that "the board shall follow applicable precedents of the National Labor Relations Act, as amended." In the area of good faith bargaining and applicable remedies, the current dearth of ALRB cases forces heavy reliance on NLRB precedent. The one exception of course involves the appropriateness of the "make whole remedy" specifically provided for in the ALRA. See infra.

The situation is further complicated by the fact that the termination of the business diet not occur all at once, but in stages. Thus, the bulk of P&P employees, employed to carry out packing shed operations in the onions, were terminated after the conclusion of the 1975 onion season. Subsequent to the 1975 onion season, However, P&P still continued work in broccoli, potatoes and sugar beets. It is apparent from the record, however, that the work force during the time period following the 1975 onion harvest was reduced by as much as 15 percent.6/ Thus, prior to mandating a duty to bargain on the part of the Company, I must determine what effect, if any, the partial, then complete termination of P&P had on the Company's duty to bargain.

The problem may be observed from another perspective. The demise of P&P FARMS occurred over a period of time as the result of several actions. Subsequent to the certification of the Union on October 14, 1975, there was a decision by P&P to partially terminate their business by discontinuing the onion operation.7/ Thereafter, the onions were, in fact, discontinued, Subsequently, there was a second decision to totally discontinue P&P as an agricultural entity. The second decision to totally terminate was carried out sometime prior to the commencement of the hearing herein. Viewed from this perspective, the question of the duty to bargain may be examined during four time periods: 1) what was the duty to bargain, if any, from the time of the certification until the decision to terminate the onion operation; 2) what was the duty to bargain, if any, from the time of the decision to terminate the onion operation until the actual ceasing of the onion operations; 3) what was the duty to bargain, if any, subsequent to the termination of the onion operation until the decision to terminate the entire operation; 4) finally, what was the duty to bargain, if any, from the decision to terminate P&P until its actual demise?

6/ The testimony reveals and I so find that approximately 15 to 16 employees worked the onions in 1975. An additional four employees were in the fields. Thereafter, only four employees worked for P&P FARMS in the combined operations of sugar beets, potatoes and broccoli. Thus, with the conclusion of the 1975 onion harvest, P&P's operations dropped from 20 to approximately four employees or a drop of 75 to 80 percent of the work force. The remaining employees were terminated after P&P ceased agricultural operations completely.

7/ It is apparent that the decision to terminate the onion operation must have occurred subsequent to the certification of the Union as the bargaining agent. There is no indication in the record that the Company objected to the designation of the bargaining unit or the holding of the election among the onion employees. Further, there was no objection to the results of the election. It seems apparent that if the Company had decided to terminate 80 percent of their employees prior to the election or the certification, it surely would have notified the Board that the business where most of the voters emanated from would no longer be in existence.

For the reasons set forth below, I find that P&P FARMS was under a duty to bargain during each of these time periods. While the duty to bargain may have varied in scope depending on the period of time and the particular employee, there can be no doubt that throughout — from the date of demand by the Union until the total 'demise of its busniess — P&P was under some duty to bargain with its employees.

1. The duty to bargain from the date of certification until -line decision to terminate the onion operation: During this time period, the company employed approximately 20 persons. Four of the employees were permanent and the remaining sixteen were seasonal workers who worked the onion shed with Pete's brother Jess. During this period, the Company's duty to bargain was clear. As to all the workers --those who were permanent with the Company and those who worked seasonally in the shed — the Company was under an obligation to bargain with their bargaining representative the UFW. The scope of the bargaining during this period was also clear: "rates of pay, wages, hours of employment, or other conditions of employment." Section 1156 of the Act. Prior to the decision to terminate the onion operation, the Company had in no way objected to the election or the nature of the bargaining unit. Thus, as in any other situation subsequent to certification, they were obligated to bargain in good faith with the employees in the unit (herein "all agricultural employees") over subjects covered by the Act.

2. The duty to bargain from the time of the decision to terminate the onion operation until the actual ceasing of the onion operation; At some point subsequent to the certification, the Company decided to terminate the onion operation. The decision to shut down the onions in no way affected the obligation of the Company to bargain in good faith with the employees who were not to be terminated with the close of the onion shed. These employees — apparently four in number who would continue to work with the Company in broccoli, sugar beets and potatoes — were entitled to have the Company bargain with their representative in regard to all the areas outlined in No. 1, supra.

The question remains whether the Company had a duty to bargain with those employees who would be terminated as a result of the P&P decision to close the onion shed. (Again, this comprised a segment of from 14 to 16 employees.) The answer is complex. The starting point is to be found in two landmark decisions of the United States Supreme Court: Textile Workers v. Darlington Co. (1964) 380 US 263 and Fibreboard Paper Products Corp. v. NLRB (1964) 379 US 203.

In Fibreboard, supra, the Court was concerned with the question of whether or not the decision on the part of the Company to subcontract work was a subject over which there existed a duty to bargain by the employer. The issue, framed within the context of the NLRA, was whether or not Section 8(a) of the NLRA was intended to include subcontracting as "a term and condition of employment" over which the employer was required to bargain. The companies' decision to contract out was dictated by economic necessity. In holding that the question of subcontracting was a mandatory subject of bargaining, the United States Supreme Court wrote:

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work, did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business. At 404.

In Darlington the Court viewed the opposite pole of the spectrum. Therein, the factual setting potentially revealed a total dismantling of a company's operations. The Court wrote that when "an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice„" Darlington, supra, at 274. Whereas Fibreboard did "not alter the company's basic operation," the Court in Darlington envisioned not only a basic change but an actual termination of the operation. When a company decided to totally discontinue its operation, the decision was not subject to collective bargaining. Darlington was consistent with Fibreboard. The Fibreboard Court itself had written:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment. . . At 409.

If there is a duty to bargain when the issue is a mere subcontract involving no change in the "basic operation," and there is no duty to bargain regarding a decision to totally terminate the operation, what is the duty to bargain when a business is partially terminated? That is, what is the scope of the duty to bargain about a company's decision to partially terminate its operation? In NLRB v. Royal Plating and Polishing Co. (1965) 350 F2d 191, the question was considered. Therein, the employer, without notice to its employees or tae union which represented the employees, unilaterally terminated the operation of one of its plants. The question confronting the Court was whether or not the company had a duty to bargain over the decision to close the plant and terminate the employees. The Court held in the negative. Relying in large part on Fibreboard, and noting that the shut down of the plant in question was the result of economic problems, the Court stated: "We conclude that an employer faced with the economic necessity of either moving or consolidating the

operation of a failing business has no duty to bargain with the union respecting its decision to shut down." At 196.

Despite the fact the employer had no obligation to bargain over the partial closing itself, the Royal Plating court did demand that:

> Under the circumstances such as those presented by the case at bar an employer is still under an obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision. (citations.) Bargainable issues such as severance pay, seniority and pensions, among others, are necessarily of particular relevance and importance. At 196.

Thus, despite the fact there was no duty to bargain over the decision to close the plant, there remained a duty to bargain over the effects of the closing.

A similar result was reached in NLRB v. Transmarine Navigation Corporation (1967) 380 F2d 933, where a company unilaterally, for economic reasons and without notice to its employees or their bargaining representative, terminated some employees during a corporate change which involved a change in location and shift to minority shareholder position for the company. Despite the "managerial" nature of the change, the company was still duty bound to bargain over the "effects" of the change on the employees.

The rationale behind the holdings in Transmarine and Royal Plating was well summarized in the Supplemental Decision and Order handed down by the NLRB in Transmarine following the decision by the Court of Appeals (170 NLRB No. 43). Therein, the Board wrote: "It is apparent that, as a result of the Respondent's unlawful failure to bargain about such effects, the Respondent's guards were denied an opportunity to bargain through their contractual representative at a time prior to the shut down when such bargaining would have been meaningful in easing the hardship on the employees whose jobs were being terminated." At 389, emphasis added.8/

8/ It appears to me that in the situations outlined above – i.e. partial termination and complete termination of a business – the conclusion is inescapable that the respondent need not bargain over the actual decision to terminate all or part of the enterprise. It further appears to me that the only mandatory subject of bargaining in such a situation is over the effects of the partial or complete closing on the affected employees.

While ray reading of applicable Federal Appellate and U.S. Supreme Court decisions compels this conclusion, it is interesting to note that at least two Board decisions seem to warrant an opposite conclusion. That

Thus, in regard to the employees who were to be terminated as a result of the closing of the onion shed, the duty on the part of P&P

[8/] (con't) is, there is a line of thought that states than an employer should, in fact, be required to bargain not only over the effects but also over the decision itself.

Thus, in Ozark Trailers, Inc. (1966) 161 NLRB No. 48, the Board agreed that there was an obligation to negotiate over the effects of the partial closing, but perceived as the more difficult question whether or not there was an obligation to bargain "over the decision to close the plant permanently." Emphasis added, at 564. The Board respectfully disagreed with the Courts of Appeal for the Third and Eighth Circuit and said that even though a decision may affect the "basic" nature of a business enterprise it also severly affected the employees. The Board concluded that:

> We think it plain the same may be said, about a management decision to terminate'a portion of the enterprise -- termination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective bargaining framework set out in the Act. Ozark at 567.

Finally, the Board noted the problem of reaching a satisfactory definition of the term "effects" of the decision (see also footnote 10 of this opinion):

> Finally, while meaningful bargaining over the EFFECTS of a decision to close one plant may in the circumstance of a particular case be all that the employees' representative can actually achieve, especially where the economic factors guiding the management decision to close or to move or to subcontract are so compelling that employee concessions cannot possibly alter the cost situation, nevertheless in other cases the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised. An interpretation of the law which carried the obligation to "EFFECTS," therefore cannot well stop short of the decision itself which directly affects "terms and conditions of employment." At 570.

Similarly, in a situation where there was a total cessation of business the Board has concluded that the decision should be put to the "mediatory influence of collective negotiations." New York Mirror (1965) 151 NLRB No. 110 at 839. The Board wrote: "The elimination of unit work is no less within the statutory phrase when it is to result from a management decision affecting an entire operation." At 839.

While I personally agree with both of these conclusions, I do not believe that they accurately state the law. If, however, the Board should feel it had the authority to override the rulings of the Federal Appellate Courts it would appear to me to be a wise decision. To demarcate a line between the decision to terminate and the effects of

FARMS is evident. The closing of the onion shed amounts to a partial closing of a business for apparently economic reasons.9/ While, there was no obligation on the part of P&P to bargain over the terminating of the onion operation itself (see fn. 8, supra) , there certainly existed the duty to bargain over the effects of the termination on the employees who would lose their jobs in an attempt to "ease the hardship'' for the following onion season.

Finally, P&P's duty to bargain in this respect, i.e. over the effects of the termination with the employees of the onion shed, is in no way altered by the fact that there was no collective bargaining agreement in effect at the time of the closing of the shed. Thus, in Automation Institute of Los Angeles, Inc., d/b/a West Coast Schools (1974) 208 ALRB No. 92, the union won the election, no objections were filed thereto, and the termination preceded the completion of the contract with, the Employer. The Board still wrote that:

> The Board has held that the effects of a termination of operations is a mandatory subject of bargaining because the elimination of unit jobs is within the statutory phrase

8/ (con't) the termination appears an exercise in futility (see fn. 10). Further, given my conclusion as to what the "effects" of termination encompasses (see Remedy, infra) I believe the distinction in Royal Plating and Transmarine to be almost meaningless.

9/ I say "apparently" for economic reasons because there does not appear to be a sufficient quantity of evidence in the record to sustain a finding that the motive for the closing of the shed was motivated by an anti-union animus. Further, General Counsel did not pursue such a theory either at the hearing or in his post hearing brief.

It is interesting to ponder, however, what impact a finding that the partial closing of an operation (herein the shed) was caused by an anti-union animus would have on the scope of the duty of the respondent to bargain. While it is clear that the total cessation of operations, even for an anti union purpose, is not an unfair labor practice, the partial closing for anti union reasons may well be. See Darlington, supra. It appears to me if such a finding of anti-union motivation in regard to the partial closing be found, an expanded bargaining order requiring bargaining not only over the effects of the closing, but the decision to partially close itself, might be appropriate. It is interesting to note that in all the cases cited herein, the partial closing was for apparently valid economic reasons. See e.g. Automation Institute of Los Angeles, Inc., infra, and Royal Plating, supra. Such a finding would obviate the problem discussed in footnote 8 at least insofar as a partial closing is concerned. As I indicated above, however, since there is no evidence to support a finding of anti union animus herein, the discussion is purely conjectural.

> "other terms and conditions of employment." Further, we have held, with court approval, that an employer must notify its employee's collective bargaining representative of' a decision to close its operations so the union can bargain about the effects of the closing upon displaced employees. As the Court of Appeals for the Ninth Circuit said in Transmarine, once a decision is made to close an operation, the union must be given the opportunity to bargain over the rights of employees whose employment status will be altered. At 726.

Thus, I find that in the time period in question, from the time of the decision to close the shed, the employer was under a duty to bargain over the effects of such a decision with the employees who were affected by the decision.10/

3. The duty to bargain subsequent to the termination of the onion operation until the decision to totally terminate the business: Subsequent to the close of the onion operation, as previously noted, the Employer maintained 'approximately four agricultural employees in the sugar beets, onions, and broccoli. As to these employees, his duty was, and I so find, the same as it had been in previous times (1. and 2., supra) to bragain in good faith over the terms and conditions of employment as outlined in the Act.

4. The duty to bargain from the decision to completely terminate P&P until its actual demise: The analysis herein is identical with that in 2. , supra. At the time that P&P totally decided to terminate its operation it was under no duty to bargain with the Union over whether it should, in fact, cease operations. See Darlington and Fibreboard, supra. In fact, with a total cessation of operations there is no question whatsoever of a duty to bargain over the closing itself — regardless of the motive of the employer. (See footnotes 8, 9 and 10, supra.) Nonetheless, even a total cessation of business will not obviate the employer's obligation to notify the union so that they may bargain over the issue of the effects of the termination on the employees. See Hew York Mirror (1965) 151 NLRB No. 110.

There is nothing in the languare of Royal Plating, supra, or Transmarine, supra, to indicate that a partial cessation of business requires bargaining over the effects of the termination, but that a total cessation does not. In fact, in Automation Institute of Los Angeles

---

10/ To this point, I have intentionally not discussed what the phrase "effects of the decision to terminate" means. I think this is more appropriately outlined in the portion of the opinion dealing with the appropriateness of various remedies. Suffice it to say at this point that I find it to be defined by the parameter that the employer's obligation is to "ease the hardship on the employees whose jobs were being terminated." Transmarine, supra, at 389.

supra, there was a total termination of all "unit" jobs and in Transmarine , the company completely changed form and dismissed all of its security guards. Still a duty to bargain over the effects of the termination was found to exist. Thus, whether the change in the structure of the business be total or partial in nature, the Company is at least required to bargain over the effects of the termination on employees as a result of the change in the business structure.

5. P&P's duty to bargain — a summary: Given the foregoing, it is evident to me that P&P FARMS was under a duty to bargain with the Union from the time of certification (assuming, of course, a request by the Union to bargain, see General Counsel Exhibit No. 3) until the termination of all of P&P's agricultural operations.

In regard to the onion shed employees, there existed a duty to bargain in good faith over all matters covered by the Act. Once it was decided by the Company that they were going to terminate the shed operation, the Company was still under an obligation to bargain in good faith with the Union over the question of the effects of the termination on the shed employees.

Similarly, the Company was under an obligation to bargain in good faith with their other employees not involved in the shed operation from the date of certification. Once the Company decided to terminate their remaining employees — apparently well after the termination of the operation of the shed — P&P was still under an obligation to bargain over the effects of the termination of the remaining employees despite the fact it was also coincidental with the total termination of P&P as an agricultural entity.[11/]

B. P&P FARMS HAS BREACHED THEIR DUTY TO BARGAIN IN GOOD FAITH:

As indicated, supra, P&P FARMS was under a continuing duty to bargain from the date of certification of the Union until the total termination of the business. While the scope of the duty to bargain may have varied depending on the employees involved (shed v. other employees) and the relevant time frame (prior or subsequent to the

---

[11/] We are dealing here only with the general question of whether there existed a duty to bargain in general. Thus, the exact dates of the termination of a portion of the business and the exact date of the termination of the entire business are not necessary. Further, the actual number of employees involved in each decision is not necessary at this time. This does not mean, however, that exact numbers will not become important at some later date. As will become apparent in the Remedy portion of this opinion, those numbers will be important to fairly assess the financial obligation owing on the part of the employer to the employees. For the present time, however, I am solely concerned with the general question of a duty and a possible breach thereof, and not concerned with the questions more properly presented at the compliance stages of these proceedings.

decision to terminate the business), a duty to bargain always existed. The question then becomes whether or not P&P breached its continuing duty to bargain in good faith with the Union.

Section 1153(e) of the Act reads: "To refuse td bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5..." is an unfair labor practice. Whether an employer has breached his obligation to bargain in good faith will depend on the totality of his conduct. NLRB v. Stevenson Brick & Block Co., 393 F2d 234 (CA 1968); B.F. Diamond Construction Co. (1967) 163 NLRB No. 25; Rhodes Holland Chevrolet Co.(1964) 146 NLRB 1304, 1304-5; and, NLRB v. Virginia Elec. & Power Co. (1941) 314 US 469 from which the doctrine generally is derived. Viewing the totality of the record, I find, for the following reasons that the Employer flagrantly, frivolously and continually violated his continuing duty to bargain with the Union.

The evidence conclusively supports the position' that the Employer and the Union never entered into any real negotiations to reach an agreement. It is clear that the Union made repeated attempts to start the negotiating process. Toward this end, the Union, sent a formal demand for negotiations and a request for information (General Counsel Exhibit No. 3 and 4.) The Union followed the request with several phone calls to the Employer's acknowledged representative, Jess Perez. (See testimony of Roberto Garcia.) These attempts by the Union were summarized in their letter to 'the Employer dated May 20, 1976 (General Counsel Exhibit No. 9).

Despite these repeated efforts on the part of the Union there was no meeting with the employer until David Martinez, the Union negotiator met with Jess Perez sometime in the latter part of May. At this meeting, no negotiations of any kind took place. The only other face to face meeting between the Union and the Employer took place on June 8, 1976. Again no negotiations took place and the Employer, again through Jess Perez, expressed no immediate willingness to sit down and discuss the relevant issues. Subsequent to June 8th, the Union embarked on a course of both telephonic and written communications to attempt to have meaningful negotiations with the Employer. These efforts were to no avail (see testimony of Roberto Garcia, General Counsel Exhibits Nos. 5,7, 8 and 11).

Interestingly, Employers version of his relationship with the Union is not, in significant detail, inconsistent with the testimony and documentary evidence presented by the Union. Employer does not deny that there were no negotiations, but rather blazes a trial of justification for his refusal to sit down and talk with the Union.[12]

12/ The only true conflict in the testimony involves the question of whether there was actually a meeting that was planned for the 15th of June 1976. The union claims that there was and the Employer denies that such an agreement was ever made. Given my finding that there was

In all the contact between the Union and the Employer, the Employer's position, as seen through the eyes of all parties during the course of the hearing, is essentially consistent. The issue herein is not one of credibility. The issue is the legal persuasiveness of the justification for the Employer's continual refusal to enter into meaningful negotiations with the Union.

The Employer's justification for his action revolves around three separate rationales: (1) his attorney, Mr. Atteridge, was unavailable; (2) the ALRB was out of business during much of the period in which bargaining might have occurred, and therefore, he was not under an obligation to bargain; and, (3) during much of the time in question the onion shed employees had already been terminated and that the remaining employees — approximately four in number — either did not vote for or presently support the Union thereby eliminating his need to bargain with the Union. In essence, Employer admits his refusal to negotiate with the Union but then pleads mitigating circumstances. I find that each of Employer's rationales is without legal merit and in no way excuses his obligation to bargain in good faith under the Act.

First, it is of course important that an Employer have the aid of legal counsel during the course of negotiations with a Union. Nonetheless, employer's claim that he could not proceed because his attorney was not available strains credibility. As early as November of 1975, Jess Perez told David Martinez and later Roberto Garcia that he could not proceed until Mr. Atteridge was available. (See testimony of Roberto Garcia, David Martinez, and Jess Perez.) The Employer was still making this same claim more than six months later. "Mr. Atteridge, our attorney, has gone on a trip for two and a half months...," Mr. Perez wrote on June 15, 1976 (General Counsel Exhibit No. 6). While a reasonable period of time should be available to obtain the advice of counsel prior to the start of negotiations, the course of conduct on the part of Employer, herein, represents nothing more than a dilatory tactic to avoid the negotiating process. If Employer really could not contact his lawyer for the length of time indicated, he should have sought the advice of other capable counsel.

Second, the statement that the duty to bargain was suspended as a result of the Board's financial demise is equally without merit. While funding may lapse, the law itself remained in effect. The obligations imposed by Sections 1156 of the Act did not lapse simply because budgetary cuts forced the cessation of the Board's administrative mechanism.

[12/] (con't) an outright refusal to bargain for over five months prior to this particular date, I do not consider it necessary to resolve the credibility conflict on this one narrow point. As I noted above, the testimony of both sides is very consistent in most material aspects.

Finally, Employer contends that he did not bargain with the Union because many of the employees involved in the election were no longer with the Company during much of the time in question. That is, with the termination of the shed operation the employees who supported the Union were no longer working for the Company. As a corollary, the Employer states that the remaining employees who were with the Company from the time subsequent to the termination of the onion operation to the cessation of the entire business itself either did not vote for or support the Union. Therefore, concludes the Employer, there was no obligation to bargain with the Union. Thus on June 15, 1976, Jess Perez wrote to the Union: "The farm workers that we have, (sic) completely refused to join your union." Again on July 6th, Jess Perez wrote: "This is to advise you that the farm workers that P&P Farms have did not take part in the voting that was held during the Fall of 1975 in the onion warehouse North of Salinas and thereby are entitled to vote whether or not to join the union.", (See General Counsel Exhibits Nos. 6 and 10; see also, the testimony of Jess Perez.)

The Company position merits several responses. In the first instance, the bargaining unit at P&P was designated as all agricultural employees of the Company (General Counsel Exhibit Ho. IE). It is hard to extend credibility to the concept that the Employer's conduct in regard to the bargaining process was really a means of objecting to the election and/or the bargaining unit that was certified. It is interesting to note that in the case herein, the Employer did no' object pursuant to 1156.3(c) of the Act to the conduct of the election. If the purpose of his conduct throughout the contact with the Union and at the hearing herein was to object to the certification, it appears to me that it would have been improper. While it is true that the ALRA, like the NLRA, does not provide for Appellate Court review of representation certifications and that a "technical" refusal to bargain may be appropriate to test such a certification (see AFL v. NLRB (1940) 308 US 401), such is not the situation here.

In Automation Institute of Los Angeles, supra, a refusal to bargain followed an election to which no objections were filed. Therein, the Board wrote:

> Although the Respondent's answer to the complaint appears to admit the validity of the Union's majority status and certification, we note that, in any event, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of 8 (a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. Citing Pittsburgh Plate Glass Co. v. NLRB, 313 US 146, 162 (1941). "At 726.

Herein, Respondent has never objected to the conduct of the election or

the nature of the bargaining unit. His intonations at the present time, and during the time when the bargaining process should have been occurring, are not only untimely, but represent, in my view, another belated attempt to avoid his obligation to bargain in good faith under the Act.

Finally, as noted above, the mere fact that certain employees were terminated, and the mere fact that eventually all of his employees were terminated does not, in and of itself, obviate the obligation to bargain. The obligation was present throughout. Only Respondent's willingness was absent.

Employer's rationales for his conduct subsequent to the certification of the Union are meritless. His conduct represents a flagrant and frivolous attempt to avoid the bargaining process. I need not speculate on the Employer's deeper motivation for his refusal to bargain. Whether it was born of ignorance as to the law or a conscious belief that he could avoid the Union by biding time and eventually liquidating, I do not know. What is apparent, however, is that the Employer refused to bargain in good faith and thereby committed an unfair labor practice within the meaning of Section 1153(e).13/

IV

REMEDY

In. fashioning an appropriate remedy, I am mindful that the remedy should "'be adapted to the situation that calls for redress,' with a view toward "restoring the situation as nearly as possible to that which would have been obtained but for (the unfair labor practice).'"

13/ Implicit in my finding is the fact that the Union was not notified of the fact of the termination of the shed or the entire business and that they did not waive their right to bargain about any matter involving the effects of the closing of the shed or the entire operation. The record is devoid of any evidence that the Union was notified that P&P would cease, entirely, to exist. There is some indication that they may have been informed that the shed was going to cease operation. (See General Counsel Exhibits 6 and 10. See also the testimony of Jess Perez.) However, the notice is at best vague and not what is required by Royal Plating and Transmarine when they note that an employer is under an obligation to inform the union of its intent to terminate a portion of a business. Royal Plating at 350 F2d 191, 196. In fact, the notice appears to have been after the fact.

Further, there is no doubt that the Union did not waive its rights to bargain as outlined above. They made numerous and continual efforts to sit down with the employer even after the oblique references by the employer to the partial termination of his operations. While waiver of the bargaining right may occur in certain instances (see New York Mirror, supra) it is not applicable here.

Winn Dixie Stores (1964) 147 NLRB. No. 89 at 791 citing NLRB y. Mackay Radio & Telegraph Co., 304 US 333, 348, and Phelps Dodge Corp. v. MLRB 313 US 177, 194, respectively.

In their complaint (General Counsel Exhibit No. IB), General Counsel initially requested that if the violations be proved an order be made requiring:

1. The employer to bargain with the UFW on request;

2. Loss of pay to all employees working for respondent on October 14, 1975, and employer from October 14, 1975 to the present resulting from respondent's refusal to bargain.

General Counsel also requested posting of a notice; a public apology; and such other relief as might be deemed just and proper. In their post hearing brief, however, General Counsel solely requested that the employees at P&P FARMS during the period in question be "made whole" for the losses they incurred as a result of the violation of the Act on the part of Respondent. Apparently, the circumstances which came to light during the hearing (namely that Respondent was totally out of business), motivated General Counsel to modify his request for relief. For the reasons set forth below, I concur with General Counsel in his belief that a "make whole" remedy is appropriate.

A. A PROSPECTIVE REMEDY HEREIN WILL NOT REMEDY THE HARM:

The situation is unique and requires a remedy to meet the factual setting. At the present time, P&P FARMS no longer exists. This is agreed to by all the parties. It is difficult for me to envision how a purely prospective remedy would in anyway remedy the harm done to the employees as a result of P&P's refusal to bargain.

P&P FARMS was a relatively small enterprise at its inception. There are no remnants of the company left. The posting of notice and/or public apology to the aggrieved employees is either virtually impossible or totally meaningless to redress the harm.

Further, a propsective order to bargain does not remedy the wrong. More than one and one-half years has passed since the time of the initial refusal on the part of Respondent. While the delay is not completely the fault of Respondent [14]/, it is certainly not the fault of the harmed employees. To be sure, a prospective bargaining order, under appropriate circumstances, where a business has either partially or completely

---

[14]/ Obviously, the Board's lack of funding caused much of the

closed, is proper. Royal Plating, supra; Automation Institute of Los Angeles, supra. In this case, however, the lapse of time and the total demise of the company would make a bargaining order a relatively futile act.[15/]

The problem with prospective remedies in refusal to bargain cases has long been recognized. In fact, the situation presented herein, a purely prospective order would work to the advantage of the employer.[16/] Thus, in International-Union of E.R. & M., AFL-CIQ v. NLRB (hereinafter Tiidee I) (1970) 426 F2d 1243, the Court wrote:

> Counsel for the Board tells us that the prospective order to bargain entered in this case is what is conventionally entered by the Board. Assuming the general validity of a purely pro-spective type of order, the case of a brazen refusal to bargain, in violation of solemn obligations, presents special considerations. While such remedy may provide some bargaining for the date of the order's enforcement, it operates in a real sense so as to be counter-productive, and actually to regard the employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace. (citations.) Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. (citations.) Yet a prospective only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the "fruits of its violations." (citation.) Tiidee at 1249.

[15/] It is unclear from General Counsel's post hearing brief what he ultimately requests. The thrust, however, appears to be that he is giving up his request for a bargaining order. If that is his desire, I would agree. A bargaining order would be futile in this action. I would note that in certain cases involving partial or complete closures, hybrid remedies including make whole and bargaining orders might be appropriate.

[16/] See footnote 15. A hybrid order may be appropriate in the right circumstances.

B. THE NATURE OF THE VIOLATION AND THE HARM TO THE EMPLOYEES:

If a prospective remedy is inappropriate, the question arises as to the type of retrospective remedy that would be most appropriate to redress the aggrieved employees and to effectuate the policies of the Act. The question is answered by examining the nature of the refusal to bargain and the resultant harm to the employees.

The refusal to bargain herein was frivolous, flagrant and brazen. It was not a "technical" refusal based on debatable objections to the certification of the Union. Subsequent to the holding of the election, the Union was certified without objection by Respondent

The duty to bargain was clear, upon demand, from the date of the certification — October 14, 1975. It is true that the scope of the duty may have, varied, but as to all employees in the bargaining unit the duty was clear. Thus, for all packing shed employees there was, for a period of time, a duty to bargain over all aspects of employment required by the Act. Even after the decision to close the shed, there existed a duty to bargain over the "effects" of such a closure. As to other employees of Respondent, there existed the duty to bargain over all matters required by the Act. Even after the decision to liquidate, the entire business, there existed the duty to bargain over the "effects" of such a closure on the employees.

Even if it be assumed that there is no obligation to bargain over the actual decision to close a business (see discussion supra in fns. 8, 9 and 10), the duty to bargain over the effects of the decision is not a hollow phrase. Traditionally, the "effects" include such matters as "severance, seniority and pensions..." Royal Plating, supra, 350 F2d at 196.

The concept of "effects" is not, however, limited to solely those matters. Thus Royal Plating, supra, did not find those areas to be exclusive. Rather, it stated that they were among "other things," and that the duty to bargain over the "effects" was really the duty to bargain over the "rights" of the employees whose employment status would be affected by the managerial decision Royal Plating, supra, at 196; see also, Transmarine, supra, at 739.

As noted above, the parameter for the duty to bargain over "effects" is to give employees, through their bargaining representative, an opportunity to bargain "at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs were being terminated." Transmarine, Supp. Dec. and Order, 179 NLRB No. 143 at 389. Thus, notice to the employees is not required because the employees can require an employer to change his decision to partially or completely close his business, but to give the employees the opportunity to give their views and present their positions to "ease the hardship" of the valid managerial decision.

The Board wrote in their first Royal Plating decision that:

> The Act requires that an employer give the employee's bargaining representative notice and opportunity to confer about and discuss the closing down of a plant not for the purpose of securing the employees' agreement before he may proceed, but to give his employees an opportunity to induce him to follow a different course of action which may safeguard both his and their rights and interests. Royal Plating (1965) 152 NLRB No. 76 at 622.

The fact that such input from the employees may not, in the final analysis alter the company's course, it not the point. The important factor is that the employees at least be given the opportunity to present their views. "That such discussion might have had a salutary effect cannot be gainsaid." Winn Dixie, supra, at 789, emphasis added.

Thus, the employees at P&P, all of whom were entitled to the benefits of collective bargaining and all of whom suffered the effects of termination, were denied those benefits the Act seeks to insure. They were., not given the opportunity to bargain collectively over wages and other conditions of employment when such bargaining would have been meaningful and proper. Further, they were denied the opportunity to ameliorate the effects of their termination.

In this regard the situation is far different from New York Mirror, Division of the Hears Corp. (1965) 151 NLRB No. 110 at 83TITherein, the failure to notify the employees regarding the total termination of the business proved inconsequential since the respondent had previously guaranteed severance and termination rights with the abolition of unit jobs and the employer was gravely concerned with the question of future employment for their former employees. The relatively secure termination therein is far different from the situation facing employees at P&P. It is in this context that I fashion the remedy herein.

C. THE "MAKE WHOLE" REMEDY IS APPROPRIATE IN THE PROPER CASE:

1. Make-whole and the ALRA; The Act provides in relevant part that a remedy in 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...making employees whole, when the Board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain... Section 1160.3.

Essentially, the make-whole remedy restores to the employee the benefit of the bargain he could have gained had the employer bargained in

good faith. In this regard, it differs from the standard back-pay remedy. Rather than ordering relief based on a wage paid in the past, the make whole remedy allows recovery of a benefit that might have been bargained for in the future.

This remedy was specifically added to the ALRA even though it does not similarly appear in the NLRA. General Counsel correctly perceives that this addition filled what was perceived as a major omission in the Federal Act.[17/] General Counsel cites the thoughtful remarks of now Chief Justice Rose Bird at hearings over the ALRA:

> (T)his language (make whole) was just placed in because there has been a good deal of discussion with the 1JLRA 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.

To be sure the NILRB has long considered the propriety of the make whole remedy. While the lack of statutory authority for the institution of make whole remedy does not confront us in the way it has the NLRB, historical guidance from NLRB cases is useful to understanding the nature of the remedy and when it is appropriate.

2. Make whole and the NLRA; The NLRB itself was reluctant to grant make whole remedies in part because of its lack of specific statutory authority for such a remedy. See Ex-Cello Corp. (1970) 185 NLRB No. 20, and Tiidee I (1969) 174 NLRB No. 103. In Tiidee I, the union won the election and the respondent filed timely objections. Subsequent to the granting of certification, the respondent refused to bargain. While the Board itself refused to grant make whole the Federal Appellate Court found that the Board did have the power to grant make whole and that it was appropriate where the refusal was found to be "a clear and flagrant violation of the law (section 8(a)(5))" and its objections to the election "patently frivolous." Tiidee I, 426 F2d at 1248.

At about the same time, a second make whole case wended its way through the HLRB-Appellate Court process — Ex—Cello Corp., supra. In a factual setting similar to Tiidee I, the Board again stated it was without power to grant make whole.

[17/] It should not noted that last year HR 12822 was a bill in the House including make whole for NLRB cases. The bill is currently numbered HR 77 and is presently under consideration by the House of Representatives.

The Tiidee I appellate bench also reviewed Ex-Cello. Again, they recognized NLRB power to make whole, but then stated that Ex-Cello did not present a "flagrant" or "frivolous" objection and therefore, make whole in the Ex-Cello setting was not proper.[18/] Ex-Cello Corp. (1971) 449 F2d 1058 at 1063-5.

While neither Tiidee nor Ex-Cello is controlling here in light of California's specific statutory authority for make whole, there is to be gleaned a collective wisdom from the majority and dissents in the decision to help establish the soundness of the California solution to make whole and the proper context and means in which make whole should be applied.

a. make whole is not punitive;

> "Furthermore, this compensatory remedy is not a punitive measure. It would be designed to do no more than reimburse the employees for the loss occasioned by the deprivation of their right to be represented by their collective bargaining agent during the period of the violation. The amount to be awarded would be only that which would reasonably reflect and be measured by the loss caused by the unlawful denial of the opportunity for collective bargaining. Thus, employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act." Ex-Cello dissent, 185 NLRB No. 20, supra, at 115-116.

b. make whole does not force a contract among the parties;

> "The board cannot be faulted on the ground that it is imposing contract terms upon an unwilling employer when it is engaged only in a determination of a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice. This is not mere playing with words. We are in accord with the view of a careful student of this field of law who points out that no one would suggest that the award of damages in an anti-trust suit would

---

[18/] Ultimately, Tiidee did not grant make whole despite the Appellate Courts apparent approval in a "frivolous" setting. The Board ultimately read the Tiidee appellate decision to mean that even though make whole might be appropriate in a frivolous context it was not mandatory. The Board went on to accord "other appropriate" relief. (194 NLRB No. 198.)

> constitute the imposition of contract terms even if the calculation of reasonable and probable damages took into account a conclusion as to business opportunities denied, based on an appraisal of an agreement the parties would probably have realized- but for the defendant's illegal acts. See St. Ahtoine, A Touchstone for Labor Remedies, 14 Wayne L. Rev. 1039, 1053 (1968)." Tiidee I, supra, at 1252.

c. make whole is not speculative: It is well established that the rule which precludes recovery of "uncertain" damages refers to uncertainty as to the fact of injury, rather than to the amount. Ex-Cello dissent, supra, at 117. Where, as here, the employer has deprived its employees of a statutory right, there is by definition a legal injury suffered by them, and any uncertainty concerns only the amount of the accompanying reimbursable financial loss.

> "...the following methods for measuring such loss do appear to be available, although these are neither exhaustive nor exclusive...Thus ...(the) parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry." Ex-Cello dissent at 118.

> "A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulties in quantifying appropriate compensation as a justification for withdrawal and frustration of the policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor,," Tiidee I at 426 F2d 1243 at 1251.

Assuming then, the authority for and the appropriateness of make-whole in general, turn to the specifics herein, i.e. is this the "appropriate" case for make whole and, if so, how should make whole be applied in this factual setting?

D. MAKE WHOLE IS APPROPRIATE IN THIS FACTUAL SETTING:

It appears to me that the facts herein present the ideal setting for the application of the "make whole" remedy.

1. The refusal is flagrant and frivolous: Tiidee I and its progeny deemed make whole appropriate where the objections to an election were frivolous arid the refusal to bargain flagrant. See also United Steel-workers of America, AFL-CIO v. NLRB (1974) 496 F2d 1342. On the other hand, MLRE decisions hold that where the refusal is not flagrant and the objections to the election are "fairly debatable" the make whole remedy is not applicable.

Whether this distinction is valid and one that should survive ALRB application of make whole is a question that remains open. It is a question I need not decide here because I find that even if the NLRB framework is applied, the refusal was flagrant and the objections frivolous and therefore 'make whole should be available to the wronged employees.

As noted earlier, there were no objections filed to the election. At the hearing itself, Employer raised no objections other than vague references to employees who did not vote for or presently support the UFW. A more brazen refusal is difficult to imagine. As was noted in United Steelworkers of America, supra (also known as Metco):

> The possibility of a more complete remedy for refusal to bargain cases where an employer's contentions are frivolous {i.e. make whole) should deter employers who before had nothing to lose and much to gain by delaying collective bargaining, while leaving more time for the Board and the courts to consider meritorious petitions for review. At 1353.

Despite the fact I need not reach the issue of whether only frivolous objections and flagrant refusals warrant application of the make whole remedy, I believe the Board would do well to rid itself of the distinction and apply other criteria for application of make whole. The statement is made for several reasons.

First, it is apparent that the distinction grew in large part out of the failure of the NLRA to specifically provide for the make whole remedy. See Tiidee I supra.[19/] The question of explicit power to grant make whole is not an issue before the ALRB.

Second, if the policy behind the distinction is to prevent delay in certification of elections, one should consider whether doing away with the distinction would not better serve the policies of the Act. As a commentator in the Michigan Law Review noted:

> However, an analysis of the purposes underlying the statutory provisions for judicial review of representation proceedings seems to indicate that there should not be any distinction drawn between

---

[19/] It is interesting to note in this regard that the original Board decision in Royal Plating essentially granted back pay from the date of termination of employment until, at the outside, the date of closure of the business. (148 NLRB No. 59.) In the Second Supplemental Decision of Royal Plating, the Board awarded a more limited back pay order noting that it was "well within the bounds of administrative discretion..." (160 NLRB at 998.) This language indicates the tension the Board was feeling over its ability to provide expansive compensatory remedies.

> "good faith" and "bad faith" violations of Section 8(a)(5) (i.e. frivolous v. debatable) with respect to the application of the make whole remedy. In fact, automatic, application of the remedy without regard to the suggested distinction would seem to further the purposes of the NLRA....the only effect that the presence of the make whole remedy will have (whether the violation is flagrant or not) is that it will force the employer to assess much more carefully the validity of his objections to the representation proceedings. Therefore, the contention that the make whole remedy amounts to a destruction of the "right" of an employer to use his avenue of review (refusal as a means of challenge) amounts to nothing more than a plea for continuing the present impotency of the cease-and-desist order as a remedy for violations of section 8(a)(5). Michigan Law Review, Vol. 67 at 38607 (1968), "An Assessment of the Proposed 'Make Whole' Remedy in Refusal-to-Bargain Cases."

Third, the distinction between frivolous and debatable misplaces the emphasis. The question of remedy should focus on the wrong to the employee and not on the motive of the employer. Even the majority of the Board in Ex-Cello which held there to be no power to grant make whole, did not approve of the distinctions. The Ex-Cello majority wrote:

> With due respect for the opinion of the Court of Appeals for the District of Columbia (Tiidee I) 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.
>
> We do not believe that the critical question of the employer's motivation in delaying bargaining should depend so largely on the expertise of counsel, the accident of circumstances, and the exigencies of the moment. At 109.

2. Toward a more viable test of the "appropriateness" of the remedy: If the frivolous v. debatable distinction is discarded, the question remains as to when make whole is "appropriate" within the meaning of the Act. For this Board, the definition is truly first impression.

Only one previous ALO decision to date has even attempted to deal with the subject. The case has not yet been subjected to full scrutiny by the Board.[20/]

It appears to me that in fashioning a test for "appropriate(ness)" of make whole the emphasis should focus on the harm, if any, to the employee. By harm to the employee, I mean the nature of the harm rather than the calculable dollar amount of the harm. That is the primary focus should be on the fact of the injury rather than the extent of the injury.

Once the fact of injury to the employee has been established, the Board should then examine the circumstances surrounding the harm to the employee. It is by viewing the totality of the circumstances surrounding the harm that the Board would then determine the appropriateness of the remedy to effectuate the policies' of the Act.

It appears to me that in weighing the question of whether the totality of the circumstances warrants a make whole order, the Board should be concerned with the effect of the particular violation on the ability of the employee to effectively exercise his rights under the Act. That is, will a prospective or retrospective order best serve the employee in insuring that his lawfully chosen bargaining representative can effectively negotiate on his behalf? Stated in another manner, whether make whole is "appropriate" should focus not only on the nature of the individual loss to any employee, but also on how the aggrieved employee and his duly chosen representative can best be protected in the future so that he may forcefully exercise his rights guaranteed under the Act. Whether make whole is appropriate must be judged case by case. No magical legal phrase will obviate the need to look at each factual setting to determine how best to effectuate the policies of the Act.

Under such a "totality of the circumstances" test herein, make whole is warranted. The employees at P&P have been denied their statutory rights to bargain. With the employer defunct, prospective orders for reinstitution of the business or bargaining are either futile or improper. The employees have been denied their right to at least pose alternatives to the Company to minimize the "hardship" of termination. Only a compensatory remedy in the nature of "make whole" can even attempt to place the employees in the situation they would have been in but for the unfair labor practice. Further, only make whole can insure that the policies of the Act are effectuated by emphasizing to the employer that while his business exists he cannot escape the obligation

---

[20/] This is Adams Dairy, Case Ho. 76-CS-15-M; 76-CE-36-M. I have not adopted the suggested test in Adams Diary — i.e. substantial harm — because I believe it incorrectly places the focus on the amount of the harm rather than on the nature and fact of the harm.

of his duty to bargain in good faith. Finally, such a remedy herein insures that the strength of the Union is not disipated as a result of the wrongful acts of the employer.

3. The appropriateness of make whole herein – a summary: Whether one apply the present NLRB construct or the proposed test in D_2_, supra, make whole is appropriate in the instant case. Since I find the refusal was flagrant and the objections frivolous, I need go no further. Metco and Tiidee stand for the proposition that at least in this setting make whole is appropriate to further the policies of the Act.

I have gone beyond Metco and Tiidee only because of the virtual first impression nature of the decision before me. The discussion of the appropriate test and the lack of need for the frivolous v. debatable distinction, while not central to the decision herein, will eventually be central to the effective use of make whole under the ALRA.

E. HOW THE "MAKE WHOLE" REMEDY SHOULD BE APPLIED HEREIN:

1. The burden: The burden at the compliance hearing for the proper application of make whole was succinctly stated in the Ex-Cello dissent:

> 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 increased in compensation as a result of a any contract which might have been signed. At 118, emphasis added.

2. "Employees could have reasonably expected to gain a certain amount of compensation" – compensation defined: California has giver

expansive definition to the concept of pay. See California Labor Code Section 200; Ware v. Merrill, Lynch, Pierce, Fenner and Smith (1972) 24 CA3d 35. Further, the policy of the ALRA and make whole is to benefit the employees for the respondent's refusal to bargain in good faith. Pay includes such items as vacation benefits (Richard W. Kaase Co. , 162 NLRB No. 122 (1967)); bonuses (United Shoe Machinery Corp. , 96 WLRB No. 1309 (1951))-; pension coverage (Richard W. Kaase, supra); health and medical coverage (Knickerbocker Plastics Co., 104 NLRB 514 (1953)); and, of course, the wages of the employee.

In his post hearing brief, General Counsel includes the following items as part of the "compensation" from which make whole should be comprised: medical benefits; pension plan; leave pay; vacations; holiday time; rest periods; overtime and shift premiums. It appears to me that if an employee would have received economic benefit from any of these items if the employer had bargained in good faith he should be entitled to the benefit he would have received as to each of them.

Further, it appears to me that the purpose of make whole is to make whole the employee as a result of the unfair labor practice and not the representative of the employee. Thus, benefit that would accrue to., the Union and not the employee would not be part of the compensation owing on the part of Respondent to the aggrieved employees. Thus, Union dues[21/] should not be part of the compensation as defined herein.

Further, employer contributions to the Martin Luther King Fund (an employee service and education fund) are only part of "compensation" within the meaning of make whole if it is determined that a specific benefit would have accrued to the employee had the Respondent bargained in good faith. Those portions of the Martin Luther King Fund that would have accrued to the Union are not included in the terra "compensation as defined herein. Similarly, medical benefits should only be awarded if the employee can show he or she actually lost money because of not being covered by the Plan. The Union is not entitled to reimbursement for lost premiums. The question is what the employee lost.

The definition of "compensation" attempted is not meant to be exhaustive. At the compliance hearing, the General Counsel has the burden to show specific benefits that could reasonably have been expected to accrue to the employee had Respondent not failed to bargain in good faith. Any such benefit is appropriate as part of the make whole compensation whether listed here or not.

3. What the employee reasonably expected to gain — a suggested approach; The question at the compliance stage is what the employees

---

[21/] See also Tiidee, supra, note 10 at 1251.

lost as a result of the failure to bargain, or, conversely, what the "employees could have reasonably expected to gain." Ex-Cello, supra at 118. See also Hearings before the Sub-Committee on Labor-Management Relations of the Committee on Education and Labor of the United States House of Representatives and NLRB staff reports, at 79 (1976), Hearings re HR 12822.

What the employee could "reasonably" have expected may be determined from "collective bargaining agreements at like companies, in like industries, in like areas. The respondent would then have the opportunity to demonstrate that his position, in some material way, is unique and outside the general pattern." Staff report, id. See also Ex-Cello dissent cited earlier: "The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry." At 118.

In Adams Dairy, supra, a part of the record (Exhibits 23-26, UFW) are analyses of wages before and after contracts with the UFW and agricultural employers throughout the State of California .as well as analyses of other benefits included in such contracts. This type of data would be useful in making the determinations herein.

General Counsel in his post hearing brief suggests:

> In the case of Perry Farms, Inc., 76-CE-l-S the Administrative Law Officer recommended that the amount of make whole be measured by the "highest pay provided in any existing agreement between any entities concerning the type of crop or crops involved." In the absence of labor agreements concerning the crop or crops in question, he recommended that pay rates be gauged by the worker's pay in similar crops. This measure is acceptable. At page 18.

To the extent that this implies that General Counsel blanketly would seek the highest figure for any particular benefit in any other existing contract or non-contract situation throughout the State, it is disapproved. To just take the highest figure, without regard to whether the particular employee in this case could have reasonably expected to receive such a benefit, is punitive to Respondent. At the compliance hearing, the Hearing Officer should be mindful that the test is what the employee "could reasonably have expected" and that Respondent should be given the opportunity to show why the employee could not, in this particular situation, have reasonably expected it. The receipt of comparative data from like crops and employment situations is to serve only as a guide to what is "reasonable," and not as a fixed standard which must be applied.

4. The "net" compensation; Of course, as to each employee, the gross reasonably expected compensation when making whole is to be set off against other compensation the employee received during the period in question. The net make whole compensation is to be computed quarterly. F.W. Woolworth Co., 90 NLRB 289 (1950). Interest is to be added in compliance with the dictates of Tex-Cal Land Management, Inc., 3 ALRB No. 14 at p. 17.

5. The time period in which "make whole" should be applied herein; General Counsel requests that the "make whole" period be computed from "the date of certification of (sic) Union to the date of complete discontinuance of all operations." At page 25, General Counsel Post-Hearing Brief. With minimal modification, I agree with General Counsel's approach.

a. the starting date for make whole; General Counsel correctly perceives that traditionally two time periods have been used to determine "make whole:" (1) bad faith to good faith; and (2) the date the company would have signed a contract assuming good faith until the date they actually sign or reach an impasse. The merits of each are discussed in General Counsel's brief. They are also discussed in the Ex-Cello dissent, supra, at 115-116, see especially the analysis in fn. 51.

What should be noted is that each method of computation takes into account the period it normally takes to negotiate a contract in the particular industry and does not penalize Respondent by requiring him to make whole during a period when there would have been no contract even if he had been bargaining in good faith. Thus, the bad faith to good faith approach takes the period into account at the end; while the second measure takes it into account at the beginning of the computations.

General Counsel's request herein does not take it into account at all. That is, by General Counsel's approach, there is no set off to the Respondent of the period it would have taken to negotiate a contract if he had been acting in good faith. Such an approach, given the context of this case, is not unreasonable. Prospective bargaining orders, while not totally remedial, are useful. The employees can reasonably expect good faith negotiations from which to forge a contract. The Respondent can honestly claim that while he may have violated the Act, he must now bargain in good faith and thus he should not be penalized for that portion of time it would have taken to find a contractual understanding if he had originally acted in good faith. It is from these premises that the two traditional means of computing make whole have arisen.

Where an employer, for valid economic reasons, partially or completely terminates his operation, the situation is far different. Such a decision by the employer is one that he can make virtually at will (mindful of course of his duty to bargain over the "effects" of the decision). When such an act is taken, there is generally no prospect of reaching a contract. Prospective orders are virtually meaningless.

If a grace period were allowed in this situation, the employer could refuse to bargain, decide to shut down and know that he could escape liability for his bad faith for at least the period he would normally be required to negotiate a contract. That is, not only would prospective orders be useless, but the employer would be allowed to avoid bargaining altogether and bear no burden for at least the average contract period if he is intending to close his business. Such an incentive to avoid the Act should not be available.

Given the above, it does not necessarily follow, as General Counsel suggests, that the period should run from the date of certification. It appears to me that the employer could not have reasonably been expected to bargain in good faith until the date of the request by the Union for such bargain and for such information to facilitate the bargaining process. In this case, the certification occurred on October 14, 1975. The request for information and the first request to bargain went out on October 30, 1975 (General Counsel Exhibit No. 3). From the date of the receipt of this request by Respondent, the bargaining could or should have begun. It is from this date I find the make whole should begin to run.

b. the ending date for "make whole:" The exact date of the dissolution of the business is not clear from the record. At the compliance hearing, such a determination should be made. Obviously, for those employees employed until the total dissolution of the business, the make whole period should end on. the date the business went out of existence.

A more difficult problem arises as to the onion shed employees. That portion of the business was terminated prior to the total dissolution of the business. Nonetheless, for the reasons set forth below, I find that the make whole period for the onion shed employees should also run through the date of <u>total</u> dissolution.

It may be argued that the period should not run through the total dissolution of the business because even if the employer acted in good faith he might still have terminated the onions at a date well before the total dissolution of the business. Such an argument, however, begs the central question. The issue is not whether a decision would have been the same. The issue is how best to effectuate the policies of the Act. To best effectuate the Act, the remedy herein demands that all employees be made whole through the date of total

termination. Fibraboard, supra, helps one understand why I am compelled to such a conclusion.

In Fibreboard, back pay was ordered even though there was no certainty that the decision of the employer to subcontract would have been any different had he bargained in good faith. As was noted in the Michigan Law Review cited supra;

> Since the decision to contract out the maintenance would have been made even if the matter had been discussed with the union, it could be contended that there was no basis upon which to award compensatory damages to the discharged employees because there was not a showing of actual loss. However, such an argument would seem to have been at least implicitly rejected by the Court's decision. The Fibreboard opinion did not address the question of whether the employer would have made the same decision if he had bargained; rather, the Court relied on the illegality under section 8(a)(5)... At 380-381.

The issue is the wrong to the employee rather than a game of speculation as to how things might have been had all parties acted properly. The same article correctly notes that:

> There would be little motivation for an employer to refrain from violating section 8(a)(5) where a decision to subcontract is to be made if he could claim that any back pay remedy is inappropriate because his final decision would not have been different even if he had behaved legally and bargained with the union. One would surely not expect such conduct to be deterred merely by an order to bargain after the decision to subcontract has been made and implemented. In order to give section 8(a)(5) any meaning at all in these situations, effective remedies for violations must be devised. At footnote 23, page 380.

Similarly, if an employer could go out of business and then claim that compensatory remedies are inappropriate to remedy the wrong because the decision would have been the same, there would be no motivation to bargain in good faith at all. See also: Winn-Dixie, supra, and NLRB v. American Mfg. Co., 351 F2d 74, where compensatory remedies were valid even though an employer's decision might, have been no different had he bargained in good faith. In American Mfg Co. such an order "was reasonably needed to effectuate the policies of the Act." At 81.

Therefore, I find the make-whole period to end on the date of total termination for all employees.[22/]

F. THE AWARDING OF COSTS:

General Counsel has requested other "relief as will effectuate the policies of the Act." At page 3 of the Complaint, General Counsel IB. The Board has the power to award costs of the litigation to a party where it is appropriate. (Section 1160.3 of the Act; Resetar Farms, 3 ALRB 18; Valley Farms, 2 ALRB 41; MLRB v. Food Store Employees, Local 347, 417 US 1 (1973); NLRB v. Local Union 396, 5"09" F2d 1Q75 (9th Cir., 1975).) I find that awarding costs of the litigation to the charging party is appropriate herein.

The test most often used to determine the grant of litigation costs is whether the respondent's defense is frivolous. (Hecks, Inc., 215 1-ILRB 142 (1975).) The rationale is that "frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets as well as our own." Tiidee. Products, Inc., 194 NLRB 1234 (1972). Frivolous has been defined as a defense which obviously lacks merit, is not debatable and not one which falls simply upon the ALO's resolutions of conflicting testimony (12 U. of Pa. NLRB Remedies fr ULP's at 224). As previously articulated, the defense herein was patently frivolous and not debatable.[23/] Therefore , it shall be recommended that an order issue granting fees and expenses necessary to prove such refusal to bargain in good faith to the Union but not to the General Counsel. (International Union of Electrical Radio and Machine Workers v. NLRB, otherwise entitled Tiidee III (DC Cir. 1974).)

/////
/////
/////
/////
/////
/////
/////
/////
/////
/////

[22/] Of course, the employee who worked seasonally would only be made whole for those days he would have worked in a particular year during a particular season. Further, if the employee received other compension it would be deducted from the make whole determination.

[23/] Whether this distinction is valid insofar as it relates to the awarding of costs, is an issue I need not reach.

V

ORDER

Respondent P&P FARMS, INC., its officers, agents, representatives, successors and assigns, including, but not limited to Pete Perez, shall:

Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

1. 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.

2. Make whole all persons in the bargaining unit at P&P FARMS and employed by P&P FARMS between the date of receipt of the Union request to bargain and the date of total termination of P&P FARMS as an agricultural employer for any losses 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 opinion herein.

3. Pay the costs of litigation of the charging party at such time as this order becomes effective.

DATED: June 14, 1977

JEFFREY S. BRAND
Administrative Law Officer

LIST OF EXHIBITS

ALRB No.		Amendment to Complaint: In Evidence
General Counsel No.	1A:	Charge Against Employer: In Evidence
General Counsel No.	IB:	Notice of Hearing and Complaint: In Evidence
General Counsel No.	1C:	Notice of Hearing: In Evidence
General Counsel No.	ID:	Answer of P. Perez: In Evidence
General Counsel No.	1E:	Certification of Representative: In Evidence
General Counsel No.	2:	The Collective Agreement Between Inter-Harvest and UFW, pages 1-79: In Evidence
General Counsel No.	3:	Letter to Mr. Perez from Caesar Chavez: In Evidence
General Counsel No.	4:	Request for Information attached to letter from Chavez: In Evidence
General Counsel No.	5:	Letter from David Martinez to Jess Perez: In Evidence
General Counsel No.	6:	Letter from Jess Perez to Robert Garcia: In Evidence
General Counsel No.	7:	Letter from Robert Garcia to Jess Perez: In Evidence
General Counsel No.	8:	Letter from Robert Garcia to Jess Perez: In Evidence
General Counsel No.	9:	Letter from Robert Garcia to P&P Farms, Inc: In Evidence
General Counsel No.	10:	Letter from Jess Perez to Roberto Garcia: In Evidence
General Counsel No.	11:	Letter from Roberto Garcia to Jess Perez: In Evidence
General Counsel No.	12:	Decision on Cross-Motions for Summary Judgment, Waller Flowerseed Co.: In Evidence