Salinas, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

O. P. MURPHY PRODUCE CO., INC. dba O. P. MURPHY & SONS,	
Respondent ,	Case Nos. 77-CE-31-M 77-CE-37-M 77-CE-41-M 77-CE-42-M 77-CE-43-M 77-CE-53-M 77-CE-57-M 77-CE-60-M
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	5 ALRB No. 63

DECISION AND ORDER

On November 28, 1978, Administrative Law Officer (ALO) Matthew Goldberg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed a brief in reply to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, find-ings, and conclusions of the ALO, and to adopt his recommended Order, to the extent consistent herewith.[1/]

Bargaining Issues

The ALO concluded that Respondent violated Labor Code Section 1153(e) and (a) by refusing to bargain in good faith with the UFW. He concluded also that Respondent had demonstrated a lack of good faith in the negotiations, and that it had

[1/] Member McCarthy did not participate in this decision.

committed certain <u>per</u> <u>se</u> violations of Section 1153(e) and (a). Respondent takes exception to these conclusions. We affirm the ALO's conclusion that Respondent unlawfully refused to bargain with the UFW.

The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on March 17, 1977. [2/] On April 7, the Union sent to Respondent a request for information relevant to bargaining, a proposal on contract language, [3/] and a request to begin negotiations. On April 28, the Union asked that the parties meet to begin negotiations, and again requested the information. The first meeting was eventually held on June 29, and was followed by eleven more meetings, the last being on October 13. During that period the parties reached agreement on only two major issues, union recognition and a grower-shipper clause.

A. <u>Bad Faith Bargaining</u>

Respondent did not flatly refuse to meet with the Union. There were a number of meetings, a few areas of agreement, and some substantive discussion of the issues. But the Act requires more than merely meeting with the other side and

[2/] Unless otherwise noted, all dates herein refer to 1977.

[3/] According to the UFW negotiator, the Union generally separates collective bargaining agreements into three parts: language, economics,, and local issues. The language section includes general, non-economic contract provisions such as recognition and union security. The economics section includes such items as wages and medical plans. Local issues are those drafted to meet the special concerns and needs of a particular employer and its employees, such as the size of buckets used in picking tomatoes.

going through the motions of negotiating. Labor Code Section 1153 (e), modeled after Section 8(a) (5) of the NLRA, requires Respondent "to bargain collectively in good faith." Good faith bargaining is defined in Labor Code Section 1155.2 as:

> the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....

Early in the NLRB's history of the NLRA, the NLRB noted:

> [I]f the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible. Atlas Mills, Inc., 3 NLRB 10, 21 (1937).

The duty to bargain in good faith requires, the parties "... to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." NLRB v. Montgomery Ward & Co., 133 P. 2d 676, 686, 12 LRRM 508 (9th Cir. 1943). Mere. talk is not enough. [4/] Although the Act does not require the parties to actually reach agreement,

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[4/] As was observed in NLRB v. Herman Sausage Co., 275 P. 2d 229, 232, 45 LRRM 2829 (5th Cir. 1960):

> [B]ad faith, is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union a runaround while purporting to be meeting with the union for the purpose of collective bargaining."(footnotes omitted)

or to agree to any specific provisions,, it does require a sincere effort to resolve differences, and "... presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." NLRB v. Insurance Agents' Intl. Union', AFL-CIO, 361 U.S. 477, 485, 45 LRRM 2705 (1960). "Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations as they display in other business affairs of importance." A.H. Belo Corporation (WFAA-TV), 170 NLRB 1558, 1565, 69 LRRM 1239 (1968); modified 411, f.2d 959 (5th Cir. 1969).

Our task, therefore, is to determine whether Respondent met its "...obligation...to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement..." Cox, The Duty to Bargain in Good Faith, 71 Harv. L Rev. 1401, 1413 (1958). However, we do not find here, and it has rarely been found in other cases, an admission of intent to obstruct agreement. Rather, we must study the whole record, to discern Respondent's intent from the totality of its conduct. See, e.g. NLRS v. Reed & Prince Mfg. Co., 205 F.2d 131, 32 LRRM 2225 (1st Cir.), cert, denied 346 U.S. 887 (1953); B.P. Diamond Construction Co., 163 NLRB 161, 64 LRRM 1333 (1967), enforced 410 F.2d 462 (5th Cir,), cert, denied 396 U.S. 835 (1969), General Electric Company, supra; McCulloch Corp.,

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132 NLRB 201, 48 LRRM 1344 (1961). [5/]

With these principles in mind, we turn now to the facts of this case. Upon reviewing all of the evidence concerning negotiations between the Union and Respondent, we find that Respondent engaged in many dilatory tactics, causing negotiations to be slow-moving and lacking in substance. Respondent postponed meetings, changed negotiators, delayed discussion on substantive issues, and failed to present adequate contract proposals. Given Respondent's methods, it would be difficult to imagine the possibility of an agreement being reached.

Respondent consistently refused to agree to meeting dates, and postponed or cancelled meetings, thereby interfering with a regular meeting schedule. While the UFW first requested on April 7 and April 28 that the parties begin negotiations, and on May 21 proposed a first meeting for June 2, the parties did not meet until June 29. [6/]

Throughout the next four months, the UFW's negotiator repeatedly requested more meetings, including night and weekend

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[5/] The Second Circuit discussed the necessity of relying on circumstantial evidence to prove bad faith:

> The problem, therefore, in resolving a charge of bad faith bargaining, is to ascertain the state of mind of the party charged, insofar as it bears upon that party's negotiations. Since it would be extraordinary for a party directly to admit a "bad faith" intention, his motive must of necessity be ascertained from circumstantial evidence. Continental Insurance Company v. NLRB, 495 P.2d 44, 48, 86 LRRM 2003 (2d Cir. 1974).

[6/] This delay was partially due to the illness of the UFW's negotiator, but the Union was prepared to meet in early June.

meetings. The Union was anxious to reach an agreement by the end of October, when Respondent's three-month harvest would end, as Respondent, a harvesting, packing, and selling operation, apparently had no employees in the off-season.

Respondent replied with delaying tactics. It did not answer telephone calls from Union representatives. Its negotiators refused to set a date for the next negotiating session at the conclusion of each meeting and claimed that their heavy workloads, as attorneys for many clients, interfered with their abilities to meet.

Respondent argues that the UFW itself could not have met in earnest until August, when Respondent hired its employees and the Union was in a position to establish an employee negotiating committee. The record shows, however, that the existence of the committee was not a prerequisite to meaningful negotiation, that an interim committee was established before the season began, and that the Union always indicated to Respondent its willingness to proceed with negotiations.

Where an employer does not make itself available for negotiations at reasonable times, it may be inferred that it is attempting to delay agreement. Insulating Fabricators, Inc., Southern Division, 144 NLRB 1325, 54 LRRM 1246 (1963), enf'd. mem., 338 P. 2d 1002, 57 LRRM 2606 (4th Cir. 1964),- Solo Cup Company, 142 NLRB 1290, 53 LRRM 1253 (1963), enf'd., 332 P. 2d 447 (4th Cir. 1964); "M" System, Inc., 129 NLRB 527, 47 LRRM 1017 (1960); Hemet Wholesale Company, 4 ALRB No. 75 (1978). There is no specific schedule of meetings, standing alone,

which would or would not discharge Respondent's statutory duty. But Respondent does have an affirmative duty to make prompt and expeditious arrangements to meet and confer, and this is not met by delaying arrangements for meetings, and by failing to advise when another meeting could be arranged. Exchange Parts Company, 139 NLRB 710, 51 LRRM 1366 (1962), enf'd. 339 F.2d 829, reh. denied 341 P.2d 584 (5th Cir. 1965); Coronet Casuals, Inc., 207 NLRB 304, 84 LRRM 1441 (1973). Respondent is also obligated "... to provide a representative who could conduct negotiations with the degree of diligence expected and required of it by statute." Insulating Fabricators, Inc., Southern Division, supra, at p. 1328. The use of an attorney as negotiator cannot excuse delays caused by the attorney's busy schedule. NLRB v. Exchange Parts Company, 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965); NLRB v. Milgo Industrial, Inc., 567 F.2d 540, 97 LRRM 2079 (2d Cir. 1977).

Respondent claims that it met its obligation by meeting twelve times over four or five months. As the number of meetings alone cannot determine the presence or absence of good faith on Respondent's part, we must evaluate the totality of the circumstances. We therefore add to our consideration the fact that Respondent's harvest season is limited to three months, and that its employees will in all probability be working elsewhere after the season ends.

Respondent also caused delays when it changed negotiators, Prom May through mid-September, Respondent's chief negotiator was its attorney, Dressier. On September 21, attorney Stoll

became Respondent's chief negotiator, ostensibly because he was not so busy as Dressier, and would be able to devote all his time to the sessions. However/ the pace of negotiations did not increase, and Stoll claimed that he was unable to meet frequently because of his busy schedule. Rather than speeding up negotiations, the change of negotiators caused more delay while the Union informed Stoll of the progress of the talks.

Difficulties also arose from Respondent's failure to provide a bargaining representative familiar with the company's operations. Respondent's attorneys were continually delaying discussion of substantive items in order to find out about company practices from Respondent's personnel. This problem was especially apparent during discussions of the UFW's proposal for a hiring hall. Respondent's negotiators suggested a practical meeting to discuss the proposal. The company representative at the meeting, however, was another of Respondent's attorneys, who was unfamiliar with both the hiring hall proposal and the company's position.

The NLRB has found' that the failure of an employer to provide a bargaining representative sufficiently familiar with its operations to engage in fruitful discussions about working conditions and wages may be an indication of bad faith bargaining. Coronet Casuals, Inc., 207 NLRB 304, 84 LRRM 1441 (1973)? see also 0 & F Machine Products Company, 239 NLRB No, 143, 100 LRRM 1090 (1978).

Respondent further delayed the negotiations by refusing to fully discuss any contract provisions until the Union had

submitted a complete proposal. The UFW unwillingly agreed to this condition. Meanwhile, Respondent was slow in providing information which would aid the UFW in formulating its proposal. Although the Union first submitted a comprehensive request for information on April 7, Respondent did not submit a complete list of its employees with their dates of hire, wages, and other information until October 13, and hourly picking rates were not supplied until August 24. These delays in providing information made it difficult for the Union to develop a complete proposal.

The NLRB has held that the imposition of conditions on the discussion of substantive proposals may be another indication of bad faith. See, e.g., Lebanon Oak Flooring Co., 167 NLRB 753, 66 LRRM 1172 (1967); Butcher Boy Refrigerator Door, Company, 127 NLRB 1360, 46 LRRM 1192 (1960), enforced 290 F.2d 22 (7th Cir. 1961); Wavetronics Industries, Inc., 147 NLRB 238, 56 LRRM 1212 (1964). Rhodes-Holland Chevrolet Co., 146 NLRB 1304, 56 LRRM 1058 (1964).

While requiring the Union to submit a full contract proposal, Respondent's first proposal omitted approximately

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7/ Respondent claims that because the Union agreed to the condition, it has waived its right now to raise the issue. But the-fact that the Union accepted the condition is not dispositive, as it could not have forced the company to begin substantive talks. See ."M* System, Inc., supra. International Union of Elec. Wkrs. v. NLRB, 273 F.2d 243 (3d Cir, 1959), cited by Respondent, does not support its waiver theory. Also, the evidence in the instant case shows that the Union negotiator's acceptance of the company's demand was accompanied by a remark that she needed the requested information to complete the Union's proposal.

half of the articles included in the union proposal. [8/] Respondent slowly added articles to its proposal until its last proposal, submitted October 13. It was not until September 2 that Respondent addressed any local issues, and then by a half-page document addressing three areas. We find that Respondent's failure promptly to provide a complete counter-proposal, after requiring a complete proposal from the Union, and its delay in furnishing requested information to the Union, constituted additional indicia of its bad faith. [9/]

While the duty to bargain does not require agreement to any specific proposal, or the making of concessions, Labor Code Section 1155.2(a), "the employer is obliged to make some reasonable effort in some direction to compose his differences with the union." NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135, 32 LRRM 2225 (1st Cir.), cert, denied 346 U.S. 887 (emphasis in original). The submission of "predictably

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[8/] Respondent claims that many areas were covered under other articles, apparently claiming that many of the Union's proposals are either part of a very broad management rights clause, or are subsumed by the "leave of absence" clause. For example, Respondent claims that "discipline and discharge" appears in its management rights clause. That clause, however, states only that management has the right to direct and supervise employees. Similarly, it claims that leaves, vacations, illnesses, and funerals are all covered by the article on unpaid leaves. This argument is not indicative of a good faith effort to reach agreement. As to several of the items, there was no apparent relationship between the item and the article cited by Respondent.

[9/] we do agree with Respondent, however, that some subjects covered by the Union's proposal were not mandatory subjects of bargaining and that Respondent cannot be required to bargain about such subjects. Since many items omitted from Respondent's proposal were mandatory subjects, however, we do not find it necessary in this case to categorize each of the disputed topics.

unacceptable" proposals may in some circumstances indicate bad faith. See, e.g., Stuart Radiator Core Mfg. Co., 173 NLRB 125, 69 LRRM 1243 (1968).

On October 13, Respondent finally submitted a proposal on vacations. But applying the requirements stated in the proposal would mean that no current employees would be eligible for vacations. Respondent also submitted a holiday proposal which provided for extra pay on one holiday, Labor Day, which was a day no one ever worked. These articles were "predictably unacceptable, and their submission at such a late day provides further indication of Respondent's lack of desire to reach agreement.

Respondent's lack of good faith is also apparent from a document it required employees to sign on September 13, before they were allowed to return to work from a one-day work stoppage. Although there was much testimony, involving translations back and forth between English and Spanish, concerning whether Supervisor Frances Arroyo told employees that they could be fired or that they could be replaced if they engaged in a strike, we do not find it necessary to resolve this conflict. By requiring individual employees to sign an agreement that they would follow the company's regulations and would not engage in protected activity, Respondent unlawfully bypassed the Union and. negotiated directly with the employees. See, e.g., Plastics Transport, Inc., 193 NLRB 54, 78 LRRM 1185 (1971); Moisi & Son Trucking, Inc., 197 NLRB 198, 80 LRRM 1325 (197_2), The Supreme Court stated in Medo Corp. v. NLRB, 321 U.S. 67, 684, 14 LRRM

581 (1944):

> [I]t is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees...

Viewing all of the above conduct, along with the per se_ refusals to bargain discussed below, we conclude that Respondent unlawfully attempted to delay negotiations until the end of the harvest, in an effort to preclude the possibility of agreement on a contract.

B. Per Se Refusals to Bargain

While we generally probe conduct for evidence of the presence or absence of subjective "good faith," some types of conduct, even when viewed independently, constitute per se violations of the duty to bargain, without regard to good or bad faith. Morris, The Developing Labor Law, p. 322. Such conduct, in addition to constituting an independent violation, acts to support an inference of bad faith. Ibid., p. 323. Thus, where an employer institutes unilateral changes in working conditions during the course of negotiations, it violates the duty to bargain. NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. American Mfg. Co. of Tex., 351 f.2d 74 (5th Cir. 1965)? NLRB v. Mid-West Towel & Linen Service, Inc., 339 F.2d 958 (7th Cir. 1964), NLRB v. Wonder State Mfg. Co., 344 F,2d 210 (8th Cir, 1965), The ALO concluded that Respondent unlawfully instituted unilateral changes by implementating new picking rates and by reducing the guaranteed hours paid to dumpers and checkers. We affirm the ALO's conclusions.

Respondent and the union initially agreed, in vague terms, that Respondent could raise the picking rate for the 1977 season over that paid in 1976. Although we find that the agreement was uncertain enough to justify Respondent reasonably believing that the union had consented to an hourly rate of $3.25, Respondent could not have inferred that it could thereafter raise the rate to $3.55, and then change to a piece-rate, and a higher rate for second-picking, without consulting the union. Respondent's witness Francis Murphy admitted that Respondent implemented these changes in the picking rate without consulting with the UFW. Unilateral implementation of a wage increase constitutes a change in a significant term of employment without regard to the union's role as representative of the employees, and has been considered "by far the most important 'unilateral act, "NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 267, 268 (2d Cir.), cert, denied 375 U.S. 834 (1963), and a per se violation. NLRB v. Katz, supra; NLRB v. Burlington Rendering Company, 386 P.2d 699 (2d Cir. 1967).

Respondent asserts that institution of the wage increase simply followed its past practice, since in 1976 it had switched from an hourly rate to a piece-rate, and then to a higher rate for second-picking. Respondent's practice, however, is limited to one season in 1976, and the raises did not follow any mechanical, prescribed pattern. As the Court stated in NLRB v. Katz, supra, 369 U.S. at 746;

> [T]he raises...were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a

union to know whether or not there has been a substantial departure from past practice...

We also affirm the ALO's conclusion that Respondent unilaterally implemented a policy of paying checkers and dumpers for only four hours if they worked four hours or less, and paying them for eight hours if they worked more than four and up to eight hours. [10/]

Respondent also violated Section 1153(e) by refusing to provide the UFW with the information it requested concerning the company's production and yield. Since Respondent's employees are sometimes paid on a piece-rate, and the hourly rate is used at certain times during the harvest, Respondent's yield and production figures are closely related to the income of the employees. We find that Respondent violated the Act by failing and refusing to provide information which was relevant to wages, NLRB v. Yawman & Erbe Mfg. Co., 187 F.2d 947 (2d Cir. 1951), General Electric Company v. NLRB, 466 P.2d 1177 (6th Cir. 1972), and which was necessary to enable the union to intelligently determine appropriate wage rates. See The Fafnir Bearing Company) 146 NLRB 1582, 56 LRRM 1108 (1964), enforced 362 P.2d 716 (2d Cir. 1966); J.I. Case Co. v. NLRB, 253 P. 2d 149 (7th Cir. 1958). Respondent did not fulfill its duty by providing only the

[10/] Respondent argues that a stipulation entered into by the parties demonstrated that this policy was effective in 1976. We disagree. While the stipulation does reflect one day in 1976 where dumpers and checkers were paid for only four hours of work, it also demonstrates that on several occasions these employees were paid for eight hours even though they worked less than four hours. While in 1976 Respondent may not have followed a consistent practice, in 1977 it distributed a notice to employees establishing the new policy.

gross numbers of employees and acreage, or by offering to allow the union to look through its general office records.

C. Respondent's Claim of Bad Faith Bargaining by the Union

Respondent contends that the Union exhibited bad faith by taking access without bargaining and by submitting an employee petition regarding Labor Day, and that bad faith on the part of the union precludes finding Respondent guilty of a violation. While a refusal to bargain by a union may weigh on our decision as to whether an employer engaged in unlawful conduct, see Superior Engraving Co. v. NLRB, 183 f.2d 783 (7th Cir. 1950), cert, denied 340 U.S. 930 (1951), we find here no evidence of bad faith by the Union.

We have already considered the incidents of access by UFW representative Linda Manney in our earlier decision, O. P. Murphy & Sons, 4 ALRB No. 106 (1978). We held there that a certified bargaining representative is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain as the representative of the employees. While Manney did not follow all of the suggested procedures we outlined in that case, we find that her conduct did not amount to bad faith. In any event, Manney's actions were limited to a two-week period in early August, while Respondent' s unlawful conduct spanned a. much longer period. Considering a similar allegation, the NLRB has said:

> Although contemporaneous conduct of a union in connection with bargaining may well be a factor to be considered in determining if an employer has refused to bargain, the Act plainly does not contemplate that a refusal by a union to

> bargain at one time operates to absolve an employer from obeying the mandate of the Act to bargain collectively on any subsequent occasion. Times Publishing Company, 72 NLRB 676, 683 (1947).

Respondent further claims that the Union exhibited bad faith when employees submitted a petition concerning a Labor Day holiday. According to Respondent's witness Edwin Colon, this petition was received by the company directly from the employees. As there is no evidence in the record of any UFW involvement in the circulation or submission of the petition, we find that such actions do not establish any bad faith on the part of the union.

We conclude that Respondent has violated Labor Code Section 1153(e) and (a) by implementing new picking rates, by reducing the guaranteed hours paid to dumpers and checkers, and by failing and refusing to provide the UFW with production and yield information.

Non-Bargaining Issues

A. Arroyo's Statement Concerning Hiring Minors

The ALO concluded that Respondent unlawfully threatened to discharge all employees who were minors. Respondent excepts to this conclusion, and we find merit in the exception. We agree with the ALO that the testimony of various General Counsel's witnesses on this issue was in conflict, and was intrinsically illogical. We therefore conclude that the General Counsel has not met its burden of proving that an unlawful threat occurred.

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B. The Work Stoppage

During negotiations with Respondent, the UFW coordinated an employee negotiating committee, made up of representatives from Respondent's crews. The committee members attended the negotiation sessions, gave suggestions to the Union representatives, and reported to the employees on the progress of the bargaining. The season began in early August, and during the following month, the committee members became disillusioned with the lack of progress in the negotiations, and Respondent's unwillingness to bargain seriously.

On September 9, the employee negotiating committee met with other workers and developed a plan to "pick dirty." [11/] The motive behind the plan was to put pressure on the company. The plan did not contemplate a complete work stoppage, but some employees apparently assumed that would be the eventual result of their actions.

When the employees arrived at work on September 12, the plan was implemented. Respondent's supervisors began to check the employees' full buckets, and after rejecting several buckets, Respondent discharged Salvador Hurtado, a member of the negotiating committee, [12/]

[11/] "Dirty picking" involves not only picking ripe, well-formed tomatoes, but also rotten and misshapen fruit, and not removing stems or dirt clods. While Respondent's witness Steven Highfill testified that depending on field conditions, the rate of dirty picking is generally 25 percent, and may be as high as 40 or 50 percent; it is clear that the employee planned to cause a higher-than-average rate of dirty picking.

[12/] The ALO found that Hurtado was lawfully discharged, and no exception was taken to this finding.

Shortly after Hurtado was discharged, a majority of the employees walked out of the field, and did not resume work that day. The employees congregated at the edge of the field, and some shouted that they desired a contract, and complained of Respondent's "bad faith." Antonio Margarito, president of the employees' negotiating committee, addressed the workers, stating that they were stopping work because of Respondent's bad faith.

The following day, September 13, after signing the "no strike" agreement discussed supra, p. 11, the employees entered the field to begin work. In the presence of three of Respondent's five crews, Margarito questioned the supervisors concerning Hurtado's absence, and was told that he had been fired, Margarito then told Supervisor Arroyo that the employees would not work unless Hurtado were rehired. Arroyo answered that if the employees did not begin work within fifteen minutes, they could all be considered fired. Following Arroyo's statement, Margarito and Arnulfo Gazca drove to the location where crews four and five were to begin working, to tell those employees that the other crews had stopped work. Most of the employees then left the fields.

Respondent argues that we should reject the ALO's credibility resolutions, and instead credit its witnesses that Arroyo did not threaten the employees with discharge, but rather told them that if they did not begin work within fifteen minutes,, they would have to leave the field. We have reviewed the testimony of the witnesses to Arroyo's statement, and we

conclude that the ALO's credibility resolutions are supported by the record. While the version reported by two of Respondent's witnesses [13] contained no threat of discharge, the ALO credited the testimony of four employee witnesses that Arroyo threatened the employees with discharge. The testimony by these four witnesses is consistent, and the record as a whole supports the ALO's findings.

Respondent points to a statement made by company negotiator Dressier on September 14, that the employees had not been fired. Although we agree that this statement and Respondent's subsequent conduct in offering reinstatement to some of the employees could be consistent with a belief that the employees were economic strikers and were not discharged, this conduct occurred after Arroyo's threat, and cannot relieve Respondents of liability for her statement and the effect it had on the employees. Once Arroyo told the employees that they would all be considered discharged, they could reasonably conclude that if they failed to begin work within fifteen minutes they would be terminated.

We also affirm the ALO's conclusion that on September 12, when the employees stopped working, they engaged in an unfair labor practice strike rather than an economic strike. [14] An

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[13] The ALO apparently overlooked the testimony of Carlos Escarcega when he found that Arroyo's testimony was uncorroborated,

[14] Respondent claims that the "dirty-picking" plan constituted activity not protected by Labor Code Section 1152, and that the employees were therefore discharged for cause. Where employees are discharged for activity which is not protected, the discharges

(fn. 14 cont. on p. 20)

unfair labor practice strike is activity which is "initiated in whole or in part in response to" the employer's unfair labor practices, while an economic strike is one "neither caused by nor prolonged by" unfair labor practices. Morris, The Developing Labor Law, p. 525. While the strike may have been triggered by the discharge of Hurtado, we find that, it was a result of the employees' disillusionment and frustration with Respondent's failure to bargain in good faith, and was therefore an unfair labor practice strike. NLRB v. Comfort, Inc., 365 F.2d 867 (8th Cir. 1966). An employer's illegal conduct need only be a "contributing cause" of a strike, to make it an unfair-labor-practice strike. NLRB v. Wooster Div. of Borg-Warner Corp., 236 P.2d 898 (6th Cir. 1956), rev'd on other grounds, 356 U.S. 342 (1958).

Respondent argues that the true purpose of the work stoppage was to obtain a contract with higher wages, and that the committee members simply knew the importance of using the legal term "'bad faith." We find Respondent's efforts to distinguish the desire to reach a contract from a protest of its illegal conduct a meaningless exercise, since these goals are inevitably interrelated, As the NLRB stated in Albion Corp.,

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(fn. 14 cont,)

may be lawful. Elk Lumber Company, 91 NLRB 333, 26 LRRM 1493 (1950). But here Respondent discharged only one employee on September 12 for picking dirty, and the ALO found that discharge to be lawful. When the employees sought to return to work the following day, Respondent signified its willingness to have them return by requiring them to sign the "no strike" argument. Respondent cannot now claim that it later fired the employees for their activities on the preceding day. See Mineweld Company, Division of Rasco, Inc., 127 NLRB 1616, 1628 (1960), and cases cited therein.

228 NLRB 1365, 1367, 95 LRRM 1316 (1977), enforced in pertinent part 593 F.2d 936 (10th Cir. 1979).

> . . . even if the sole reason for the employees' voting to strike was that there would be no new contract, still Respondent ' s unlawful conduct was at least in part a cause of the strike for it was that conduct that precluded a new agreement's being reached. . .What is important is what in fact caused the strike in whole or in part, and not.,. the "employees' conscious reasons for going on strike," though these reasons may correspond with the incidents or conduct that in actuality caused a particular walkout.

See also, NLRB v. Birmingham Publishing Company, 262 F,2d 2 (5th Cir. 1958) . We conclude, therefore, that when the employees stopped work on September 12 they were engaged in an unfair labor practice strike.

On September 13, the employees decided to continue their strike once they had determined, that Respondent would not permit Hurtado to return to work. When they refused to work, Supervisor Arroyo told the employees that they were all to be fired. "The right to strike is clearly protected by Labor Code Section 1152, and by discharging the employees for striking, Respondent violated Labor Code Section 1153 (c) and (a). Cagle's Inc. , 234 NLRB No, 170, 98 LRRM 1117 (1978) ,

pertinent part, 588 F,2d 943 (5th cir. 1979) ; see also, NLRB v. International Van Lines, 409 U.S. 48 (1972). C. Reinstatement & Backpay

Because the employees were unlawfully discharged, they have a right to backpay from the time of their discharges until October 15, when Respondent offered them reinstatement. Abilities and Goodwill, Inc., 241 NLRB No, 5, 100 LRRM 1470, In this recent case, the NLRB overruled earlier precedent to the contrary and held

that unlawfully discharged strikers are not required to request reinstatement in order to activate the employer's backpay obligation.

Respondent asserts that we should apply the NLRB rule established in Southwestern Pipe, Inc., 179 NLRB 364 (.1969), modified 444 F.2d 340 (5th Cir. 1971), to limit its backpay liability as to the forty positions it offered September IS. We find the rule announced by the NLRB in that case to be inapplicable to the facts of this case. In Southwestern Pipe, the NLRB held that where an employer offers reinstatement to only a portion of the unfair labor practice strikers, those strikers may refuse the offer of reinstatement without losing status as strikers, but the employer's backpay liability is tolled as to those employees who have been offered work. The Southwestern Pipe rule applies to employees who are engaged in a strike; and not to discharged employees. The NLRB recently emphasized that unlawfully discharged strikers are to be treated the same as other victims of unlawful discrimination. See Abilities and Goodwill, Inc., supra. Indeed, the rationale adopted by the NLRB in Southwestern Pipe makes no sense when applied to a case where the strikers have been discharged. Southwestern Pipe was concerned with the problem of an employer who in good faith believed that its employees were engaged in an economic strike, and offered to reinstate them as openings occurred. In this case, however, Respondent discharged its striking employees. Therefore, the record does not reflect a situation where the employer in good faith believed that its employees were simply economic strikers. See NLRB v. My Store,

Inc., 468 F.2d 1146 (7th Cir. 1972), cert, denied, 410 U.S. 910 (1973). [15]

We conclude that Respondent's backpay liability to the discharged strikers extends from September 13 until October 15. [16]

Respondent claims that the employees should be denied backpay because of violence and threats which took place in September and October. The conduct referred to by Respondent falls into three categories: activities in the fields, threats, and damage to vehicles.

While strikers engaged in some misconduct in the fields on September 12 and on subsequent occasions, we find that the incidents were not so flagrant as to justify depriving these employees of their backpay rights. See Republic Steel Corporation v. NLRB, 107 F,2d 472 (3d Cir. 1939), cert, denied 309 U.S. 684 (1940). On September 12, some tomatoes were thrown at persons who continued working, and one employee, Clementina Chavez, was discharged for hitting a fellow worker with a

[15] Although Respondent's attorney, on September 14, denied that the employees had been discharged, and stated that they could return to their jobs, on the following day Respondent offered only 40 jobs to the approximately 150 employees. In addition, on September 14, Charlie's Farms, a partner with Respondent's parent company, contracted with a labor contractor to provide crews to perform the harvest work the discharged employees usually did. Respondent still purchased the harvested tomatoes, and Francis Murphy testified that Respondent suffered no monetary harm by not performing the harvest work. It is clear from the record that Respondent could have chosen to rehire all of its employees to perform the work.

[16] We reject the ALO's conclusion that Respondent violated the Act by soliciting strikers to return to work. While the reinstatement offers were insufficient to toll Respondent's backpay liability, the record does not support a finding that they constituted an independent unfair labor practice.

tomato. [17] No other specific employees were identified. On one occasion, on September 17, some of the discharged employees ran across a broccoli field adjacent to where Respondent's employees were working. Broccoli plants were trampled, and some of the workers ran to their cars. [18]

We do not condone violent acts or conduct during a strike, and we will make all efforts to prevent violence, but we are also aware that "[t]he transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight," Republic Steel Corporation v. NLRB, supra, at 479, and that the denial of backpay as a remedy for an employer's unfair labor practices constitutes a severe punishment to employees. Drivers Union v. Meadowmoor Co., 312 U.S. 287 (1949); Associated Grocers of New England v. NLRB, 562 P.2d 1333 (1st Cir. 1977). We must therefore weigh the gravity of the employees' misconduct against the employer's unlawful acts which provoked the employees' resort to misconduct, before depriving the employees of backpay. Ramona's Mexican Food Products, 203 NLRB 663, 685, 83 LRRM 1705 (1973), enf'd 531 F.2d 390 (9th Cir. 1975); Local 833, UAW v.

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[17] We affirm the ALO's conclusion that Chavez' discharge was lawful, and we note that no exceptions were filed thereto. She, therefore, is not entitled to backpay or reinstatement.

[18] Respondent's witness Mike Murphy also testified that on September 12 and 21, strikers entered a field and damaged tomato plants. Neither of these incidents was corroborated, and although Respondent's witness Andy Murphy was in the fields daily to document Union violations with his camera, there was no photographic evidence of these incidents. Andy Murphy testified that on September 12 there was nothing to photograph.

NLRB, 300 F.2d 699 (D.C. Cir.) cert, denied 370 U.S. 911 (1962); Golay & Co. v. NLRB, 371 F.2d 259 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967). A factor which we consider significant here is that much of the conduct complained of is not attributed to any named individuals, and denial of backpay for all employees would punish many for the acts of a few. See, e.g., Moore Business Form, 224 NLRB 393, 93 LRRM 1437 (1976), amended, 226 NLRB 688, enf'd in pertinent part 574 F.2d 835, 98 LRRM 2773 (5th Cir. 1978); NLRB v. Cambria Clay Products Co., 215 F.2d 48 (6th Cir. 1954). We conclude that the misconduct in the fields was not so aggravated or coercive as to justify denying backpay to the employees.

Several employees testified that they were threatened by striking employees that if they continued to work they or their vehicles would be harmed. Specific testimony identified Salvador Hurtado, Fidel Aleantar and Guadalupe Alcantar as making such threats. [19/] Because Hurtado was lawfully discharged, he is not eligible to receive backpay in any event. We will not order backpay for Mr. or Mrs. Alcantar, as we find that their statements constituted threats of violence and tended to restrain and coerce employees, NLRB v, Pepsi Cola Company of Lumberton, Inc., 496 F.2d 226, 86 LRRM 2251 (4th, Cir. 1974).

Although some vehicles owned by employees were damaged during the strike, there is insufficient evidence to link any

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[19/] Witnesses also identified Beatrice Savala and Luz Sanchez as speaking to them, but these conversations constituted no more than attempts to persuade the listeners to join the strike.

strikers to these acts. <u>NLRB v. Cambria Clay Products Co., supra.</u> We will not deny any of the employees their right to backpay in the absence of such proof.

In sum, we shall order Respondent to pay backpay to all employees discriminatorily discharged on September 12, with the exception of Fidel and Guadalupe Alcantar.

D. <u>Make-Whole Remedy</u>

We have concluded that Respondent violated Labor Code Section 1153(e) and (a) by failing and refusing to bargain in good faith, and we find, based on the record in this case, that by its illegal conduct Respondent was responsible for the parties' failure to reach an agreement. Accordingly, we shall order Respondent to meet and bargain collectively in good faith with the UFW and to make its employees whole for the loss of wages and other economic losses they incurred as a result of Respondent's refusal to bargain, plus interest. In fixing a date for the beginning of illegal bargaining in a surface-bargaining case, we recognize that preliminary arrangements prior to actual negotiations are an inherent part of the bargaining process. We also recognize that the very nature of a surface-bargaining case makes it difficult to identify with exactitude the first appearance of bad faith, even when such bad faith underlies the entire course of bargaining, We will, however, base the make-whole remedy upon evidence in the record which we believe first establishes bad faith,. We find in this case that Respondent first demonstrated its intention not to bargain in good faith on June 29, the date of the first negotiation session,

by such conduct as refusing to provide information to the UFW and conditioning bargaining upon receipt of a complete proposal from the Union. The make-whole remedy shall continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to a contract or a bona fide impasse.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent O.P. Murphy & Sons, its officers, agents,, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees' wages or working conditions, or by failing and refusing to furnish information relevant to collective bargaining at the UFW's request.

(b) Discouraging membership of employees in the UFW or any other labor organization by discharging any of its agricultural employees for participating in concerted activities.

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

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

(a) Upon request, meet and bargain collectively

in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Make whole those employees employed by Respondent in the appropriate bargaining unit at any time between June 29, 1977, to the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba, Rancho Dos Rios, 4 ALRB No. 24 (1973).

(c) Make whole each of the agricultural employees discriminatorily discharged on September 12, 1977, with the exception of Fidel Alcantar and Guadalupe Alcantar, for any losses he or she suffered as a result of his or her discharge, by payment to each of them a sum of money equal to the wages they lost plus the expenses they incurred as a result of Respondent's unlawful discharge of them until October IS, 1977, less their respective net interim earnings, together with interest thereon at the rate of seven percent per annum. Backpay shall be computed in accordance with the formula established by the Board in Sunnyside Nurseries„ Inc., 3 ALRB No, 42 (1977).

(d) Preserve, and upon request, make available to the Board or its argents for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforementioned employees under the terms

of this Order.

(e) 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.

(f) Post copies of the attached Notice in conspicuous places on its property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Provide a copy of the attached Notice to each employed hired during the 12-month period following the date of issuance of this Order.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order to all agricultural employees referred to in paragraph 2(c) above.

(i) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s)f the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act, The Regional Director shall determine a reasonable rate of compensation to be paid by

Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(j) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

It is further ordered that the certification of the UFW, as the exclusive collective bargaining representative for Respondent's agricultural employees, be extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 26, 1979

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

MEMBER RUIZ, Concurring:

I concur with the majority in the finding of a Section 1153(e) violation and with the application of the make-whole remedy. I would, however, extend the application of the remedy to the date the Respondent received the union's April 7, 1977, letter requesting the company to bargain.

The majority finds, and I agree, that the totality of the circumstances reveals that Respondent engaged in surface bargaining over the entire period of negotiations. Respondent engaged in dilatory tactics, consistently refusing to agree to meeting dates and postponing or cancelling meetings. The record, however, reveals that Respondent embarked upon this course of delay well before the first negotiations session. The union sent Respondent letters on April 7, 1977, April 28, 1977, and May 21, 1977, requesting certain information and requesting that they meet and bargain. On May 27, 1977, the union made a similar request by phone which also proved fruitless. It was not until June 1, 1977,

that the union received a response from Respondent sending what amounted to incomplete information and inquiring as to acceptable meeting dates. Despite the union negotiator's illness sometime between June 3, 1977, and June 29, 1977, the date of the first negotiations meeting, it is apparent that the union was ready and willing to negotiate with Respondent from the time they first formally requested bargaining in the letter of April 7, 1977. Respondent's behavior from the time of the union's first bargaining request was simply part and parcel of Respondent's dilatory conduct which continued throughout the negotiations.

In arriving at its June 29, 1977, date, the majority first makes a determination that the Employer was in fact engaging in surface bargaining by examining the totality of circumstances. It next, apparently out of a deference for the preliminary arrangements that are inherent in the negotiation process, begins the application of the make-whole remedy at a time when it determines that the Respondent's bad faith first became apparent. It seems to be saying that this is where the surface bargaining began. While I, too, recognize the need for preliminary arrangements in the bargaining process, I nevertheless believe that the reliance on the first appearance of bad-faith bargaining to begin the remedy is misplaced. This is especially so when one considers the nature of the violation: surface bargaining. I submit that a skilled negotiator could conceal his bad-faith bargaining for a considerable period of time in surface bargaining cases. The first appearance of bad-faith bargaining is, in my opinion, irrelevant.

In surface bargaining cases, I would begin the make-whole remedy from the time of the union's first request for negotiations unless it can be shown: (1) that the union was not in fact prepared to bargain, or (2) that any delay attributable to the employer after such a request was due to the need for legitimate preliminary arrangements. There will indeed be cases where either or both of these factors will be present. I submit that this is not such a case.

Dated: October 26, 1979

RONALD L. RUIZ, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this Notice. We will do what the Board has ordered, and also tell you that;

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

1. To 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 NOT discharge or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL pay to the employees who were unlawfully discharged on September 12 any money they lost while they were discharged,

WE WILL meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our

O.P. MURPHY & SONS

Dated: By: ________________________________

(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE,

CASE SUMMARY

O. P. Murphy Produce Co., Inc.
dba 0. P. Murphy & Sons

5 ALRB No. 63
Case Nos. 77-CE-31-M
77-CE-37-M
77-CE-41-M
77-CE-42-M
77-CE-43-M
77-CE-53-M
77-CE-57-M
77-CE-60-M

ALO DECISION

The ALO concluded that Respondent violated Section 1153(e) and (a) by the totality of its conduct in the course of negotiations with the UFW between April and October 1977. Such conduct included dilatory tactics to avoid meeting with the UFW, placing unreasonable conditions upon bargaining, proffering predictably unacceptable proposals, failing to provide an adequately informed negotiator, and changing negotiators in the course of bargaining. Respondent's unilateral changes in the employees' wages and conditions of employment and its failure to provide relevant information requested by the UFW were held to be independent violations of Section 1153(e) and (a).

The ALO also concluded that Respondent (1) violated Section 1153(a) by Supervisor Arroyo's threat not to hire minors in the event a contract with the UFW was reached; (2) violated Section 1153(e), (c), and (a) on September 13 by requiring, as a condition of returning to work, that employees sign an agreement not to strike on penalty of discharge; (3) violated Section 1153(e) and (a) by failing to provide numerous items of relevant information requested by the UFW; (4) violated Section 1153(c) and (a) by failing to reinstate unfair-labor-practice strikers after they expressed a willingness to return to work; (5) violated Section 1153(c) and (a) by discharging the employees who engaged in the strike; and (6) violated Section 1153(e) and (a) by soliciting strikers to return to work without consulting their certified bargaining representative.

The ALO concluded that Respondent did not violate Section 1153(e) by unilaterally subcontracting unit work, and did not violate Section 1153(e) and (a) by discharging employees Salvador Hurtado and Clementina Chavez, finding that said discharges were for cause.

The ALO recommended that, in addition to making employees whole for any losses sustained as a result of the Section 1153(e) violations, the Board order Respondent to provide back pay to its employees from September 13, the date of discharge, to October 15, the date unconditional reinstatement was offered. The ALO also recommended that O. P. Murphy be ordered to reinstate all of its employees except those discharged for cause.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated Section 1153(e) and (a) by its dilatory tactics and general course of conduct, which evidenced a lack of good faith in collective bargaining, and by certain independent violations of Section 1153(e) and (a), including unilateral changes in wages and working conditions, and refusing to provide the Union with requested information relevant to collective bargaining. Respondent also showed its disregard for the bargaining process by requiring individual employees to sign a "no-strike" agreement.

The Board rejected Respondent's defense of bad faith on the part of the Union, and also rejected the ALO's conclusion that Supervisor Arroyo unlawfully threatened to discharge minors, as the testimony as to that issue was in conflict and intrinsically illogical.

The Board concluded that the employees engaged in an unfair-labor-practice strike on September 12, finding that the strike was caused at least in part by Respondent's refusal to bargain, and that the employees again participated in strike activities on September 13 and were discharged in violation of Section 1153(c) and (a) for such participation.

Member Ruiz would start the make-whole remedy on the date of the union's first request for bargaining, finding that the employer embarked upon a course of delay from that date. Absent evidence that the union was not prepared to bargain or that any delay was in fact due to the need for legitimate preliminary arrangements, Member Ruiz would always begin the make-whole period at the union's first request to bargain.

REMEDY

The Board ordered backpay for all of the unlawfully discharged employees from the time of the discharges until such time as Respondent offers them reinstatement. The Board distinguished the rule in Southwestern Pipe, 179 NLRB 364, which permits employers in some circumstances to limit back pay liability by offering reinstatement to some of the unfair-labor-practice strikers.

Except as to two employees who were found to have threatened nonstrikers, the Board refused to deny back pay to the employees because of misconduct by strikers. The Board found that the misconduct was not so serious as to justify denial of back pay, and noted that in many instances misconduct could not be attributed to individual employees.

The Board ordered a make-whole remedy for Respondent's failure and refusal to bargain in good faith, finding that its conduct was responsible for the parties' failure to reach agreement.

The Board found that the beginning of the make-whole period was the date of the first negotiation session, allowing for preliminary arrangements for bargaining, and looking to evidence which first established Respondent's bad faith.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	Case Nos.
O. P. MURPHY PRODUCE COMPANY, INC., dba: O. P. MURPHY & SONS,	77-CE-31-M77-CE-37-M 77-CE-41-M77-CE-42-M 77-CE-43-M77-CE-53-M 77-CE-57-M77-CE-60-M
and	
UNITED FARM WORKERS OF AMERICA,	
AFL-CIO,	
Charging Party.	

Jim Gonzalez, Esq., Lupe Martinez, Esq., and Susan Winant, Esq., for the General Counsel;"

Western Growers Association, by Wayne A. Hersh, Esq., and Robert P. Roy, Esq., for the Respondent,

Linton Joaquin, Esq., for the United Farm Workers of America, AFL-CIO, Charging Party.

Before: Matthew Goldberg, Administrative Law Officer

DECISION OF THE ADMINISTRATIVE LAW OFFICER

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I. Statement of the Case

The United Farm Workers of America, AFL-CIO, (hereafter the "UFW") filed and served on O.P. Murphy and Sons (hereafter the Respondent) the above-noted charges as follows: 77-CE-31-M on August 8, 1977; [1] 77-CE-37-M on August 22; 77-CE-41-M and 77-CE-42-M on September 13; 77-CE-43-M on September 15; 77-CE-53-M on September 19; and 77-CE-57-M and 77-CE-60-M on September 27. The charges alleged various violations of Sections 1153(a), (c), (d) and (e) of the Act. On October 3, the General Counsel for the Board issued a consolidated complaint based on these charges. The Respondent filed its answer on October 10, which denied, in substance, that it committed the unfair labor practices alleged in the complaint. Respondent also set forth in its answer three affirmative defenses, namely that the UFW had engaged in an economic strike, that Respondent had bargained in good faith, and that the UFW had not bargained in good faith concerning certain subjects of collective bargaining.

A hearing in the matter was noticed for and held before me in Salinas, commencing October 10. [2] The General Counsel for the Board, the Respondent and the UFW appeared through their respective representatives. All parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and submit oral arguments and briefs.

The hearing proceeded over a span of nearly two months and thirty-six actual hearing days. After the hearing opened, General Counsel moved to and did amend its complaint in two particulars, essentially re-wording and re-arranging specific allegations contained therein. Respondent amended its answer on October 26 to allege, as a fourth affirmative defense, that certain employees, on behalf of and with the acquiescence of the UFW, engaged in acts of striker misconduct.

On November 15, the parties entered a settlement stipulation which resolved the issue framed by a charge number 77-CE-57-M and paragraph 15(e) of the complaint, and thereby disposed of it.

Upon the entire record, from my observations of the demeanor of. the witnesses, and having read and considered the briefs

[1] All dates refer to 1977 unless otherwise noted.

[2] Copies of the various charges, the notice of hearing and the consolidated complaint were duly served on Respondent.

submitted to me since the hearing, I make the following:

II. Findings of Fact

A. Jurisdiction of the Board

1. Respondent Is and was at all times material an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

2. The UFW is and was at all times material a labor organization within the meaning of Section 1140.4 (f) of the Act. [3/]

B. The Unfair Labor Practices Alleged

1. Introduction

The Respondent is engaged in the harvesting, packing and marketing of fresh produce tomatoes from the Salinas Valley area. It is a division of O.P. Murphy Produce Company, Inc., (hereinafter referred to as OPM, Inc.) a Texas corporation which is engaged in the buying and selling of produce interstate as well as in various foreign countries. The Respondent (O.P. Murphy and Sons) carries out its operations exclusively within the State of California during the Salinas Valley tomato harvest season, which generally runs from August to approximately November of each year.

In its field operations, Respondent employs approximately 200 workers, or about five crews of forty pickers each. Each crew has assigned to it two foremen who generally oversee the work, two checkers who punch the workers' tickets for each full bucket of tomatoes they pick and bring to be dumped into a waiting truck, and two dumpers who do the actual emptying of the buckets into bins located on the trucks.

The complaint originally alleged some eighteen separate acts or series of acts giving rise to unfair labor practices. The most numerous of these concerned the alleged refusal by Respondent to bargain in good faith with the UFW, which on March 17, 1977, was certified as the exclusive bargaining representative of Respondent's agricultural employees. (O.P. Murphy & Sons, 3 ALRB No. 26). The refusals to bargain in violation of Section 1153(e) were alleged to have been manifested in the following ways: instituting unilateral changes in the wages and terms and conditions of employment of its employees without the consent of the certified representative; failure to provide the UFW with relevant information needed for: collective bargaining; bad faith conduct in the process of bargaining, including delays, appointing negotiators without .authority to reach agreements, refusals to compromise on or discuss certain UFW proposals, communicating directly with employees on matters which

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[3/] The jurisdictional facts were admitted by Respondent in its answer.

were subjects of bargaining "in order to undermine the employees' support for the UFW, " and "conduct outside" bargaining sessions "designed to subvert the UFW."

Apart from the matters involved in Respondent's alleged refusal to bargain, the complaint .also alleged discriminatory treatment of employees as a result of their concerted activities. This treatment arose primarily as an outgrowth of- a work stoppage which occurred on September 12, 1977.

2. The Refusal to Bargain: Conduct in the Course of Negotiations

a. Preliminary Contacts

As noted above, the UFW was certified as the exclusive bargaining representative of Respondent's employees as of March 17. On April 17, Cesar Chavez, President of the UFW, sent a letter to the Respondent requesting a negotiating meeting. Enclosed with the letter was 'a "Request for Information' listing numerous items which the UFW felt was necessary for the Respondent to provide in order that meaningful, informed bargaining ensue. The list included requests for: name, age, sex, date of birth, residence, social security number, job classification, current wage, and date of hire for bargaining unit employees; summaries of fringe benefits available to these employees; summaries of wages and benefits of employees outside the bargaining unit; types of pesticides and equipment utilized; and production data, including acreage, crop operations scheduled, total number of units harvested, rates paid per unit, units produced per acre, units produced per hour, and the average hourly rate paid. Also enclosed with this UFW "opener" letter was a contract proposal consisting of twenty-five separate articles dealing with the "language" aspects of the collective bargaining agreement, [4/]

The April 7 letter asked for a response from the company within ten days. When none arrived, Marion Steeg, the UFW negotiator, sent a follow-up letter to the company on April 28, 1977. This letter re-iterated the request for meeting dates and for the information listed in the previous letter.

[4/] Marion Steeg, the UFW negotiator who was principally responsible for collective bargaining with Respondent testified that UFW contracts have a basic tripartite format, consisting of "language": proposals, "economic" proposals, and "local issues." The first of these categories concerns items such as recognition, union security, grievance and arbitration, maintenance of standards, union label, and health and safety. Essentially these clauses have widespread application throughout the agricultural industry: wherever the UFW represents employees. In the words of Ms. Steeg these articles provide "basic protections... of conditions for the worker." "Economic" proposals concern wages and fringe benefits. The last category, "local issues," includes items which have a particular application to a specific employer at a specific location.

Approximately two weeks later, on May 12, Donald Dressier, of the law firm of Dressier, Stoll and Jacobs, informed Ms. Steeg that his firm would be representing the Respondent in the negotiations with the UFW. The letter asked that the union provide Department of Labor and Treasury forms . and annual reports for three UFW benefit funds: the Robert F. Kennedy Medical Plan, the Juan de la Cruz Pension Fund, and the Martin Luther King Fund. It further requested a list of "negotiating ranch committee members" and officers, stating that "such information will enable us to communicate with them ... and make sure that their rights are recognized and protected." [5/] No meeting dates were proposed or suggested in the letter. [6/]

On May 21, Steeg wrote Dressier, suggested June 2 as a convenient meeting date. [7/] During this time, the UFW and Steeg were engaged in negotiations with another tomato company which was also represented by Dressier, Stoll & Jacobs, per Charley Stoll. According to Steeg's uncontradicted testimony, in a telephone conversation with Stoll on May 27, Steeg asked him whether the June 2 meeting with Respondent would take place. Stoll replied that the Respondent was a separate company than the one he was then representing in negotiations, and that in any case they would not be able to meet on June 2. At a previously scheduled meeting he would be having with Steeg on June 1, on behalf of that other company, possible meeting dates for Respondent's negotiations would be discussed. At the June 1 meeting itself, Stoll told Steeg he 'could not propose any such meeting dates.

Upon her return to the UFW offices after the June 1 meeting, Steeg received a letter from Dressier, dated May 27. The letter asks for "dates which would be acceptable for our first negotiating session," making no reference to the previously proposed June 2 meeting date. Enclosed with the letter was a list of employees, their mailing addresses, social security numbers, and dates of employment, presumably for the year previous.

5/ During the course of her testimony, Steeg related that, she was also involved in negotiations with Gonzales Packing which, was also represented by Dressler's firm and which also operated in the Salinas Valley. Neither the plan information nor the list: of negotiating committee members was requested by Dressier-pursuant to the Gonzales negotiations.

6/ Dressier testified that he initially was contacted by .... Respondent in "late April or early May." Subsequently, he met with them at corporate headquarters in Houston. He : testified incredulously that at their meeting, he did not look at the correspondence which the company had received up to that date from the UFW, but he requested that the materials be forwarded to his office. Dressier admitted receiving the union's request for information.

7/ Dressier could not recall when he received this letter.

Although the list contains some job classifications, not all are listed. [8/] Also absent from the list were employee birth dates and current wage rates.

In response, Steeg wrote to Dressier on June 3, stating that the information submitted by Respondent was inadequate. In addition, Respondent had not as yet supplied any information regarding benefits, production information, non-bargaining unit employees, etc.

b. The Meeting of June 29

As Ms. Steeg needed a short period of time to attend to personal medical problems, a meeting between the UFW and Respondent was arranged for June 29 in Salinas. Thus, nearly two and one-half months had elapsed after the UFW had sent its original "opener" letter, although part of the delay was not caused by Respondent. Respondent had still not supplied, as of June 29, much of the information requested by the UFW in that letter.

At the June 29 meeting itself, Dressier stated that he had not received the union's initial proposal, although the UFW possessed signed return receipts from the company for that proposal which had been sent by registered mail. [9/]

[8/] More than 500 employees are named on the list. Check marks(✔) appear opposite certain names, which Respondent' s witnesses stated signified that they were checkers; "foremen" is also denoted. Those names without notation were stated to be pickers. However, only two of the total number of employees are listed as "dumpers." Since there are two dumpers per crew, and enough employees are listed to make up twelve crews, it can be inferred that the job classification information furnished by Respondent via their list was incomplete.

[9/] As noted above, I found it difficult to believe that a lawyer such as Dressier would not have requested that his client, the Respondent, show him any correspondence from the UFW that it had received prior to the Respondent's retention of an attorney. Moreover, even if he had-not in fact looked at the UFW proposal at his initial meeting with Respondent, it is somewhat strange that no one would allude to the proposal, and thus prompt Dressier, in the interests of good -faith, to request that the UFW send him a copy. In point of -fact, Francis Murphy, corporate secretary of 0. P. Murphy -Produce Company, Inc., and production manager of Respondent, testified that although to the best of his recollection, he did not provide Dressier with a copy of the proposal, Dressier "asked me what proposal it was..., and when I talked to him about it, he said he knew which one it was." The proposal itself was discussed at the meeting. This account provides a good indication of the reasons why I have discredited the bulk of Dressier's testimony. Other reasons for doing so will be discussed below.

Steeg testified that Dressier orally provided some of the information originally requested by the union, e.g., that the Respondent did not provide any benefits to workers. He could not furnish seniority lists as Respondent's work had been done in the past by labor contractors. [10/] Steeg stated that as concerned the production information, Dressier said that he would provide it prior to their next meeting, [11/] However, in regard to the non-bargaining unit worker information, Dressier, according to Steeg, said that he would not provide this under any circumstances, despite Steeg's explanation that it was necessary in order to have a comparative basis for formulating economic proposals. Dressier, noting that the UFW had not provided the information he requested, insisted on having the names and addresses of the negotiating committee members in order to "protect the workers." As the season had yet to begin, the negotiating committee was not and could not be formed at this point.

Dressier stated he would not discuss or negotiate the proposal on language which the union had initially submitted until it was made part of an entire proposal, one which included economics and local issues. Furthermore, any agreement reached on particular articles was contigent upon agreement to the entire contract. The UFW acceded to this procedure.

In sum, as a result of this meeting, the union had agreed to prepare a full contract proposal, while the

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[10/] 1976 was the first season in which Respondent did not rely on labor contractors to provide the bulk of its work force.

[11/] Steeg testified that when she first asked Dressier about yield and acreage figures, average hourly earnings, etc., Dressier said that the UFW was only entitled to "what pertained directly to wages such as hours [and] units produced ," "that we had no right to yield or production record information, "but after she explained the necessity for such information, he agreed to provide some of it at— the next meeting.

Respondent agreed to provide information in furtherance of that goal. 12/

C. UFW Efforts to Schedule Meetings and Obtain Information: July 19 -August 19

Quite logically, the UFW was not in a position to present a realistic economic package, and thus a full contract proposal, until it had obtained relavant data from Respondent.

By letter dated July 19, Steeg re-iterated the UFW's request for production information (acreage, yield, number of workers, etc.) and for information on non-bargaining unit employees needed for comparison of wage proposals. She stressed the difficulty of formulating a complete contract demand without having relavant input from the Respondent, and the delays in negotiations occasioned thereby. The letter closes with a demand that the information be furnished within one week, and that a date be set for the next negotiation session.

In response, Dressier, on July 25, wrote to Steeg. After alluding to an agreement reached with her concerning a wage adjustment and a statement to the effect that no meeting would be necessary to discuss the adjustment, 13/

12/ There was a slight conflict between the respective testimonies of Steeg and Dressier concerning Respondent's position, by the end of this meeting, on relinquishing information: Dressier testified that Respondent was not prepared to or would not disclose certain production information. The facts presented here are principally based on Steeg 's recitation, which over all appeared to be the more credible. Steeg testified at length and in detail about a protracted series of events, i.e., the progress (or lack thereof) of negotiations over a period of approximately six months. Her testimony was, for the most part, internally consistent, and was presented in a candid, straight forward, unhesitating manner. Dressier's testimony, by contrast, was in large measure self-serving and lacking in specificity. Dressier was seeking not only to establish his credibility as a witness, but also was put in the position of establishing his credibility and effectiveness as the Respondent's representative, being a partner in the firm which argued this case on Respondent's behalf , as well as Respondent's representative at the bargaining table. The American Bar Association frowns' on such a practice (see Canon 19 A.B.A. Canons of Ethics; see also French v. Hall, 119 U.S. 152 (1886)).

13/ The ramifications of this "wage adjustment" will be discussed at length below in a section dealing with "unilateral changes."

Dressier provided a general acreage figure for Respondent's operations (approximately 800 acres) and the approximate number of employees working for Respondent. Dressier claimed that he "did not have available" this information at the time of the June 29 meeting. While professing to be "as flexible as possible" concerning meeting dates, Dressier stated that he would be unavailable to meet during the first week in August. Furthermore, he says that Steeg should contact him "as soon as the union has completed its economic proposals and is prepared to discuss them along with all the other issues in collective bargaining," and that he would be willing to "arrange [his] schedule to be available as early as possible to negotiate ...."

Steeg testified that she was "frustrated" by the scintilla of information supplied by the letter:

> "It did not contain the yields per block, the hours worked, the average hourly earnings, et cetera that were needed for our costing package. It didn't include the other wages that had not been provided to us or the classifications. It was not really workable in terms of as accurately as possible calculating the costs -- package to the company in order to complete an economic proposal."

It is obvious that the UFW, not having this information, could not prepare realistic economic demands. The suggestion by Respondent's representative, that future negotiations be scheduled only after a full proposal (including economics) be prepared, placed the UFW in the anomalous position of having to formulate demands without being possessed of adequate information on which to base them, in order that negotiations proceed. In short, the UFW would have no way of knowing whether their proposals would be realistic or their efforts to prepare proposals would result in futility in the event that Respondent would be unable to afford them.

The next contact Steeg had with Dressier was on Tuesday, August 9, when she telephoned him. Steeg suggested meeting with Dressier daily from August 17 forward, until an agreement was reached, and stressed the urgency of scheduling meetings and concluding negotiations as soon as possible, as the: season had officially commenced on August 4. Dressier responded that he was unavailable on the 17th and 18th, that the might be able to meet on August 19, but that following this time he would not be able to meet until -the-24th.

Despite Steeg's insistence on the need for frequent meetings, due to the shortness of the season, Dressier argued

to her that as he had not as yet received the union's full proposal, the request for increasing the tempo of negotiations was inappropriate. Steeg replied that she had already sent a copy of the "language" proposal to him, and that the UFW aided by input from workers who had recently arrived was in the process of preparing a total package. She re-iterated the UFW's request for information which they had still not received, and were attempting to gather from the workers themselves. Dressier proceeded to argue with her at length over problems which he felt were created by UFW representatives availing themselves of access to Respondent's premises and allegedly interrupting work. [14/] The conversation ended with Steeg specifically proposing that meetings be held commencing August 17. Dressier replied that he would call back that afternoon to inform Steeg whether he would be available to meet on the 19th.

However, Dressier neglected to telephone Steeg as promised. When Steeg attempted to contact him on Thursday, August 11 and the day following, she was unable to. She left messages for him to the effect that she assumed that the next meeting was set for the 19th, and that she was anxious to discuss the access issue with him and attempt to resolve it. Shortly thereafter Steeg had learned that Dressier had attempted to schedule a separate meeting on August 19 involving -another company with Ann Smith, a UFW negotiator. By letter dated August 15, addressed to Charley M. Stoll, a member of Mr. Dressier's law firm, Steeg outlined the difficulties she was having in contacting Dressier, once again

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[14/] Much testimony and undue attention was devoted to a series of disputes arising over the presence of UFW representatives in the fields. Linda Manney, the UFW organizer principally involved in these incidents, apparently felt that it was her mission to maintain almost daily contact with workers during the beginning weeks of the harvest, while she assisted in the formulation of the negotiating committee and informed workers of meeting dates, among other things. The access taken by this individual was generally without prior notification, and in some instances occurred during work hours. It was met with great resistance by Respondent, which, at times, resorted to calling the local sheriff's department in an effort to hasten Ms. Manney's removal from the fields. None of the Board's Regulations directs itself to the guidelines for post-certification access. Suffice it to say that such matters are best resolved at the bargaining table. More importantly, the ramifications of this dispute vis-a-vis the A.L.R.A. were litigated in a previous hearing involving these same parties, case numbers 77-CE-36-M, et al.

emphasizing her concern over the resolution of the access problem. [15/]

Finally, on August 16, Steeg was able to speak directly to Dressier. According to Dressier, Steeg had earlier promised to submit to him the union's complete proposal, in advance of their meeting set for the 19th. During the course of their August 16 discussion, Steeg stated that the proposal would not be ready until the actual meeting date. Dressier then inquired as to the necessity of his presence at this meeting, since he would not therefore be in any position to respond to any of" the proposals advanced by the UFW without having previously had the opportunity to review them. Dressier testified that Steeg agreed that his presence would not be required, and that Wayne Hersh, an associate of Dressier's, would appear at the meeting, receive the proposal, and note any clarifying information concerning it. [16/] Dressier requested that the names of the negotiating committee members who would attend the meeting be furnished to Mr. Hersh. In addition, he stated that he himself would be* available to meet on the week following, on August 24 and 25

d. The August 19 Meeting

In attendance at this meeting in Salinas were Wayne Hersh and Barbara Smith (a secretary from Dressier's office), representing the Respondent, and Steeg, Karen Flock, and Marshall Ganz, on behalf of the UFW. Also present were the members of the recently elected negotiating committee, whose names, pursuant to Dressier's request, had been supplied to Hersh in advance.

After some initial discussion concerning difficulties negotiating committee members were having attending the meetings, the parties confirmed that Dressier himself would be available to negotiate on August 24. and 25. Steeg once again stated that the UFW had not received the information it requested, including information on wage rates for certain classifications and the eight-hour guarantee policy for dumpers and checkers, and would like to have same before the next meeting. Hersh noted what the UFW needed and said he would convey it to Dressier.

[15/] Stoll wrote Steeg on August 4 concerning this issue. Curiously, however, in this letter and in one dated August 10, he noted that Dressier, not he, was representing Respondent in negotiations. In the course of her efforts to communicate with Dressier, Steeg had spoken with Stoll on several occassions.

[16/] Interestingly, it appears that Dressier never intended to attend the August 19 meeting in Salinas, as he had previously scheduled a meeting with UFW negotiator Ann Smith for that date in Blythe.

The UFW submitted to Hersh a "local issues" proposal consisting of five separate articles, including seniority, leaves of absence, health and safety, records and pay periods, and a general article dealing with such items as crew size, picker rotation, lunch boxes, and prohibitions against clearing roads for the tomato trucks and "bordering," a method of picking around the field edges. It also submitted an economic package made up of seventeen articles and an appendix listing wage rates. Within the economic proposal were items concerning hours of work and overtime? vacations; holidays; participation in three separate benefit plans; sick pay; housing; mechanization; rest periods; on-the-job injuries; and a cost of-living allowance. Also included was a proposal for retro-activity of the agreement. Ms. Steeg conveyed the workers' concern over such an article, stating that the UFW requested a response on this particular item prior to the next meeting.

The August 19 meeting took place in the span of about forty minutes. At its close, the UFW had submitted a full proposal to the company; Hersh was to convey the proposal and informational requests to Dressier; and the Respondent was to provide a response and the information requested prior to the next meeting.

e. The Meeting of August 24

On August 24, negotiations reconvened in Salinas. Present at this meeting, representing Respondent for the first time, was Mrs. 0. P. Murphy, Vice President and Secretary of 0.P. Murphy, Inc., and a member of its board of directors. As soon became apparent during the course of negotiations, [17/] Mrs. 0. P. Murphy knew little, if anything, of Respondent's day-to-day operations, particular as regards its agricultural workers. Her presence appeared to be symbolic, rather than for the purposes of providing useful, knowledgeable aid to the negotiations. [18/] More importantly, as Francis Murphy

[17/] Mrs. 0. P. Murphy attended a total of ten negotiation sessions during the 1977 season.

[18/] Francis Murphy testified that Mrs. 0. P. Murphy performed principally clerical and bookkeeping functions at Respondent's offices, and occasionally sighed checks. Although an officer in 0 P. Murphy, Inc., she did not have any supervisorial duties. Even Mrs. 0. P. Murphy's presence in Respondent's offices was sporadic. In the words of Claude Fincher, Respondent's acting officer manager," ... she doesn't have any duties except what she wants to do." Plainly, she had little, if any, contact with Respondent's agricultural employees and exercised no authority with regard to field operations. Her participation in the actual negotiation sessions was limited at best, and was generally restricted to occasional comments.

testified, she had absolutely no authority, on her own, to make any agreements on behalf of the Respondent. Such decisions, as he stated, could only be made with the, concurrence of himself, Mr. O. P. Murphy, and Mr. 0. P. Murphy.

This meeting also began with a discussion concerning problems that workers were experiencing when they attempted to attend negotiation sessions. The controversy centered on Respondent's request for forty-eight hour notice of negotiation meetings which the committee would attend. Steeg deemed the notice unnecessary, and the issue remained unsolved.

Insofar as the requests for information conveyed to Mr. Hersh at the meeting of August 19th, the Respondent had not provided such information in the period between that negotiation session and the one on the 24th. Accordingly, Steeg asked Dressier again about this information: specifically, information which was noted on the initial request form sent by the union in April, information concerning the eight hour guarantee for checkers and dumpers, production information, hourly picking rates, machine picking rates, opening roads and second and third picking rates. [19/]

Regarding the eight hour guarantee for checkers and dumpers, Dressier stated that he had no further information at that time. Steeg asked if he would have such information during the course of the meeting ; Dressier responded that there was no need for him to duplicate any information that the UFW had received from workers. Steeg replied that information concerning the eight hour guarantee that she had received up to that point was conflicting and that she needed confirmation concerning this policy from the Respondent. Dressier said that he would provide information to the union as it became necessary in the course of negotiations. A bit later in the meeting, Steeg conveyed to Dressier the UFW position on the guarantee, that checkers and/or dumpers would get paid for eight hours regardless of whether they worked less or more than four hours. Dressier stated that the UFW's understanding of such a practice was inaccurate,, and that the Respondent never adhered the policy as the UFW interpreted it. Steeg suggested that Respondent's records from the previous year should be examined to determine exactly what the policy was. Dressier replied that he would make inquiries and get back to the UFW on this item at some future time.

He stated once again that the UFW had no right to production record information that it was only entitled to information with regard to earnings and wages, and that at no time would he provide the UFW with non-bargaining unit worker

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[19/] As the name implies a second or third picking is a situation where a field has already been gone through once by picking crews. The crews then return at some later time to harvest the tomatoes which remain.

information. Steeg noted that Hersh indicated at the meeting of the 19th that the union would be provided with the aforementioned prior to the current meeting. At various points in the meeting of the 24th, Steeg inquired as to whether Hersh had in fact conveyed these requests for information, as he had represented he would. Dressier responded by saying that Hersh, he was sure, had made no promises and that he, not Hersh, would be the authorized representative of the company. [20/]

Regarding the hourly picking rate, Steeg told Dressier that they still had no information on this item. Dressier responded that his understanding on the hourly picking rate was that workers were paid $3.25 an hour until they proved that they were qualified or competent, at which time the rate was increased to §3.55 per hour. The workers present at the meeting disputed Dressier's assertion, in that workers who had picked tomatoes for several years all began this season at $3.25 per hour: their "qualifications" could not be a factor in their wage rate, as these were beyond dispute.

When asked about rates for second and third pickings, Dressier, rather than providing same, merely asked Steeg what information she had from employees, and also stated that the organizer, Manney, knew this information.

Regarding the machine picking rate, Dressier professed a lack of knowledge concerning it and whether the machine was in fact being utilized. He stated, however, that he would inquire into the matter.

The parties preceded to a discussion of a problem which had occurred in the fields concerning a delay in the start of picking operations on a given day. Apparently, workers reported to a particular field at 7:00 a.m. and had not actually begun picking until 9:30. There was a dispute over whether the delay was caused by wetness in the fields. Dressier stated that he would investigate the problem. Also discussed was the failure of the Respondent to rehire twelve individuals who had been involved in a prior unfair labor practice proceeding. [21/]

The parties then talked about a certain leaflet which had been distributed to workers which outlined Respondent's work policies. One item on the leaflet stated that if a worker did not report to work* for one day without having obtained prior permission from the company the worker would be considered to have quit his job. The UFW strongly objected to this, stating that the policy had not been previously in effect. Dressier maintained that this had always been the company’s position,

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[20/] In the initial negotiation session of June the 29th Dressier Had stated that from time to time other members or associates of his firm might represent the company at the negotiation sessions, and that such individuals would be clothed with the same authority as he had.

[21/] 4 ALRB No. 62

and that workers had been instructed to inform supervisors before they left work if they were to absent themselves for any reason. The UFW did not object to this stance, but rather to the Respondent's position that workers had to inform the company by 8:00 A.M. if they were not coming to work that day. The UFW concluded this particular discussion by stating that they considered it a proposal as it had been advanced during the course of negotiations, and that they rejected it. [22/]

The retroactivity issue was debated. Dressier stated that he could not agree to it at that time.

At this meeting the Respondent provided its first counter-offer. It spoke merely to the UFW proposal on language and economics. Dressier stated that he was not yet prepared to respond to the "local issues" portion of the UFW proposal. The entire proposal submitted by Respondent consisted of 21 separate articles with a wage schedule attached and was some 21 pages in length. , By contrast, the initial full proposal submitted by the UFW contained some 42 articles plus a wage appendix and was some 60 to 70 pages in length. Obviously, there were many items in the UFW contract proposal to which the company did not respond. Although Steeg testified that no wage increase for the current season had been proposed by Respondent a wage increase for the first picking piece rate had already been implemented with the acqiescence of the union.

A comparison of the two proposals reveals the following: The recognition article proposed by the Respondent was practically identical to the UFW proposal on this issue. [23/] Under the procedure followed pursuant to these negotiations it may be inferred that the Respondent agreed to a good portion of the UFW's recognition proposal. The union security article proposed by the union contained a provision for a union shop-as well as a dues check-off. Respondent's counter-proposal provided for the dues check-off but did not contain a paragraph agreeing to a union shop. Respondent's security article also did not contain language concerning the release of payroll information to the UFW which the UFW's contract proposal sets forth.

The UFW article concerning hiring had language making it mandatory that the company obtain new or additional workers through the hiring hall, whereas the company's response made the utilization of the hiring hall discretionary with the company. The period for notification of the need for new or additional.

[22/] No allegation was made in the complaint to the effect that the Implementation of this particular policy was a unilateral change ~ in the. terms of employment. Critically, no evidence other than ~: the assertion of Miss Steeg as to the statements made through -the course of negotiations was presented on this particular point. Accordingly, no finding of a unilateral change regarding this policy can be made.

[23/] The Respondent's recognition article did not contain three of the clauses present in the UFW recognition article.

workers differed in the two proposals. Another significant difference between the proposals on hiring was the Respondent's position that it could exercise ultimate authority as to whether or not a particular individual was hired, whereas the UFW's proposal contained no such provision.

Respondent's proposal provided .for a no-strike clause. Such a clause was absent from the UFW proposal.

Respondent in its seniority article proposed that seniority would be acquired after working for 30 days. [24] The UFW provided a different definition of seniority in its proposal which states that "seniority shall be defined as a total length of continuous service with the company." Only slight variations were evident between the UFW proposal concerning a break in seniority and that submitted by the company. While the UFW proposal provided that vacancies shall be filled by the most senior workers and on the job training shall be provided to, .those workers in the event that they did not posses the necessary skills., Respondent's proposal states that "the filling of vacancies...shall be on the basis on seniority provided that the in judgment of the company, the workers have the qualifications to perform the work under normal supervision with reasonable efficiency."

.... Significant differences also appeared in the provision dealing with the supplying to the UFW of seniority lists. Unlike the UFW proposal, no provision was contained in the Respondent's counter concerning the posting of the seniority list. Nor was there any provision in Respondent's proposal for a review of seniority policies after one year from the date of the signing of the agreement on the request of either party, as set forth in the UFW proposal.

Notice provisions for the recall of workers differed significantly between the two proposals, the UFW requesting a two week notice and Respondent providing for a five day notice of recall. The UFW proposal contained, a provision for notifying the union of any layoffs. Such a provision was absent, from the Respondent's proposal.

Conflicting proposals were submitted regarding the articles on the grievance and arbitration procedure. Respondent proposed that as the final step in arbitration that the matter be referred to the State of California Conciliation Service, as opposed to the UFW article which provided for submission of the matter to an arbitrator. Other difference involved the time period set for the processing of grievances, and the right of -workers to be present at each step in the grievance procedure.

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[24] Steeg testified that the union objected to this" provision on the basis that the season was only 90 days or less.

In essence, the UFW proposal on grievances and arbitration procedure was far more extensive than that submitted by the company.

The article dealing with new or changed jobs" submitted by Respondent pertained only to new job classifications and not to changes in existing job classifications as provided in the UFW proposal. The Respondent's proposal states that it may unilaterally set the wage rate for new job classifications until agreement is reach with the UFW concerning these wage rates. The UFW proposal, by contrast, stated that after thirty days' notice to the UFW of a new job classification or change in operation of an existing job classification, the UFW and the company shall meet to negotiate wage rates. If no agreement is reached between them, the matter shall be submitted to an arbitrator.

The article concerned with leaves of absence differed significantly between the two proposals in the respect that the Respondent's article contained no provision for leave of absence for workers to conduct union business or to serve as an official or employee of the union, as opposed to the UFW article which did contain language to that effect. Slight variations arose in the two proposals in their respective articles on supervisors and bargaining unit work. The proposals were virtually identical in the records and pay periods articles, except that the' UFW proposal provides that the union shall have the right to inspect compensation and work production records, and the daily record of piece-rate production shall furnished to each crew steward. There was substantial agreement on the two proposals on the bulletin boards article, except that the union proposal contained specifics as to the size of said bulletin boards. Both proposals contained modification clauses. However, the UFW's modification article contained a provision that the agreement between these parties shall be superseded in those particulars where an agreement had been, reached in the same branch of the agricultural industry where the signatory to that agreement had acreage in excess of 1,000 acres.

The savings clauses in the two proposals were identical, and" therefore, pursuant to the procedure followed during the course of negotiations, it may be assumed that agreement was reached as concerns this particular provision. The reporting and standby time provisions of each proposal both provided that a worker who is required to report to work and does report and is furnished no work shall be paid for at least four hours of the employees' regular hourly rate of pay. However, the Respondent's article contained significant exceptions absent from the UFW proposal. Respondent's proposal did not contain a provision for call-out pay, unlike the UFW proposal. The rest period provided in the Respondent's proposal was one-half that: provided in the UFW proposal.

As concerns health and safety, the Respondent's health and safety provision consisted of two short paragraphs and stated that the company agreed to abide and comply with applicable

federal and state laws and regulations pertaining to employee health and safety, and that adequate first aid supplies shall be provided. By contrast, the UFW proposal contained 12 separate paragraphs including one setting forth a policy for "sound use" of "economic poisons"; a provision for the formation of a health and safety committee; a specific list of economic poisons which were not to be used; the periods of time which should elapse before workers shall be allowed to enter the fields in which pesticides have been used; a. provision that the UFW be furnished a record concerning the use of pesticides and economic poisons; and provisions that there be adequate toilet facilities and drinking water and that tools, equipment, and protective garments be supplied to workers.

Respondent's proposal concerning a medical plan stated that the company shall pay into the plan $0.10 per hour worked for each employee, and that each worker who has been employed for one year by the company shall be entitled to benefits pursuant to the plan-,, whereas the UFW proposal provided that all employees shall be eligible, that 16 1/2 cents per hour be paid for each employee, and that weekly summary reports be provided by the company.

The UFW proposal regarding duration of the agreement • was for a one year period. The Respondent's proposal provided for a two year effective period.

The following provisions included within the UFW proposal in addition to the "local issues" portion are totally absent from the Respondent's proposal: right of access; union labels; no discrimination; income tax withholding; credits union withholding; location of company operations; subcontracting; successor clause; family housing; hours of work and overtime; vacation; holidays; citizenship participation day; Juan de la Cruz pension fund; Martin Luther King. Farm Workers fund; leave of absence for funerals; jury and witness pay; injury on the job; sick pay; travel and out of town allowance; mechanization; housing; cost of living allowance.

After the Respondent's proposal was submitted the meeting recessed in order that the UFW and the negotiating committee might examine it. When the meeting resumed following a caucus with the workers, Mrs.. Murphy was not in attendance. Steeg noted that there was no one from the company present to discuss the working operations of the company and to answer questions: Dressier had demonstrated his lack of familiarity with Respondent's operations by professing ignorance about the machine picking and second picking wage rates.

Steeg mentioned to Dressier that she doubted whether the Respondent had submitted a serious counter proposal in that a large majority of the issues dealt with in the UFW proposal had been omitted in the counter proposal. There was an extended discussion about wages and cost of living increase comparisons.

The meeting closed with a statement to the effect that the UFW would need to review Respondent's proposal and that the UFW requested that someone from the company be present the next day for a meeting at 9:00 A.M. The entire session took place over a period of approximately one and a half hours.

As is evident from the foregoing, this meeting, which took place some five months from the UFW's initial request for bargaining, resulted in little, if any agreement between the parties. Although it provided the occasion for the first submission of a counter offer by Respondent, the meeting significantly lacked evidence of any real give and take and serious debate over substantive contract issues.

f. The Meeting of August 25th

The parties resumed negotiations at 9:20 A.M. on August 25th. Mrs. O.P. Murphy and Donald Dressier were once again present representing the Respondent. The meeting of the 25th also began with discussion concerning the reinstatement of workers who were subject to a previous unfair labor practice proceeding. The parties then went on to discuss the hourly picking rate. Dressier confirmed that the Respondent had paid $3.25 per hour for the hourly picking at the beginning of the season and that the supervisor was authorized, after determining that a worker's performance was satisfactory, to raise that rate to $3.55 per hour. The UFW contested this information, stating that the reason was for the raise was the fact that many of the workers had requested that the piece rate be implemented. Dressier replied that the hourly rate was put into effect because of the weather and poor field conditions. However, the UFW argued that the rate was changed from an hourly wage to a piece rate when Respondent's operations shifted from first to second pickings. [25/]

The eight hour guarantee policy for the payment of dumpers and checkers was again discussed. Dressier restated that it had not been the company's policy at any time to pay for 8 hours work when dumpers and checkers worked less than 4 hours. This UFW reiterated its request to-examine company records to confirm this and Dressier said that he would make them avail able after lunch.

The UFW requested information concerning the job classifications of sanitarian and truck drivers. Dressier maintained that the trucker was subject to a National Labor Relations Board decision and that he would also defer the matter .of the sanitarian to that decision. However, he did state he would provide the UFW with job descriptions for the trucker and sanitarian.

25/ Respondent's payroll records reflect this fact as well,

The UFW repeated its request for prediction records. Dressier responded as he had in the past, that the UFW was entitled to production record information only with regard to earnings, and was not entitled to any further information. As concerns seniority information, Dressier stated that he would provide payroll lists which would contain, hopefully, some of that information and promised to furnish the lists by the following Wednesday. [26/]

A problem concerning the dumping of buckets by Supervisor Francis Arroyo was discussed with Dressier agreeing to look into it. The incident involving the delay in starting one particular day was also the subject of renewed debate. The UFW again raised the issue of the settlement of the retroactivity problem. Dressier responded that he was not prepared to agree to retroactivity until the union made a more reasonable proposal.

Following a short recess, there was a discussion concerning a leaflet which the company felt it should issue in order to alleviate some of the tension surrounding the workers' concern over the reaching of an agreement. The UFW agreed that the issuance of such a leaflet was a good idea.

The access issue was discussed. Dressier stated that if the parties signed the contract, he felt sure that there would be something with regard to access, but at the present time there would be no answer pending the resolution of certain difficulties which were occurring in the fields concerning access. In short, Dressier made no proposal regarding access.

A discussion was held on the issue of seniority, particularly as it pertained to workers who were also students. In regard to the UFW "local issues" proposal, Dressier promised to have a written response on these "local issues" prior to the next meeting.

The UFW then proposed two or three meetings for the following week. Dressier responded that he could not commit himself to a meeting until Monday of that week, and that the parties should consult one another at that time concerning a negotiations session. Dressier insisted on not setting a date for the next meeting.

At the close of this meeting, the status of the negotiations was that Dressier was to confer with Steeg on the following Monday concerning meeting dates, that the UFW was to make a counter-proposal or further proposal to the Respondent's latest offer, and that the Respondent would provide their local issues

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[26/] Dressier subsequently failed to provide this information as promised. Interestingly, Francis Murphy testified that Respondent did gather seniority information at the close of its 1976 season.

proposal prior to the next meeting and also the information which the UFW had requested. The meeting of the 25th was the longest one between the parties up to that date. It lasted approximately five and one-half hours.

g. The Meeting of September 2

As previously arranged, Steeg spoke to Dressier on Monday, the 29th of August, to set the next meeting date. This meeting was scheduled for Friday, September 2.

Although Dressier had told Steeg on August 29 that the UFW would have the Respondent's "local issues" proposal prior to the September 2 meeting, it was not actually given to the UFW before the meeting. On the other hand, the UFW delivered, on August 30, a proposal to the Western Growers Association offices in Salinas, as per Dressier's instructions that the documents would be forwarded from that location to his office in Newport Beach. [27/] The UFW response contained modifications in seventeen of its proposed contract articles, in addition to a modification of its 1977 wage demands.

At the meeting itself, held in Salinas, Dressier and Mrs. O. P. Murphy were present on behalf of the company. The UFW had repeatedly requested a written job description for the job classifications of trucker and sanitarian. Dressier provided oral descriptions at the meeting. It was Dressier's position that the trucker was not part of the unit but that he would bargain about the sanitarian. As stated previously, any resolution of the issue of these two job classifications he would hold in abeyance pending the ruling of the NLRB, which he maintained was processing a petition for another union which sought to represent the sanitarian and the trucker. [28/] Dressier also orally conveyed wage information concerning the sanitarian and informed the union for the first time that there was a ten hour guarantee for this job classification.

There was renewed discussion about the eight hour guarantee for checkers and dumpers. Despite his earlier promise -to produce company records to verify information concerning the guarantee during the course of this meeting, Dressier failed to provide same. He also neglected to furinsh information concerning the machine picking rate. In addition, Dressier did not provide, on the morning of the 2nd' any information concerning production

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[27/] Dressler’s law firm provides legal services to the association,

[28/] At the hearing the parties stipulated that the sanitarian did not vote in the N.L.R.B. election and the classification was to be included in the unit represented by the UFW.

or seniority. Dressier stated that he had compiled some information but that he needed to talk to the company in that he was not yet authorized to convey this information to the UFW, and that he shaiald have something for the UFW in the afternoon. However, when a certain list was actually submitted by Dressier that afternoon, it was only a partial one: it was in alphabetical order, yet it began with the letter "L," thus omitting the names and information for employees whose names began with letters in the first half of the alphabet. The data supplied by the list consisted merely of hours worked and money earned to date: it did not contain any of the yield or block information, or did it contain the number of units picked or the rate paid for those units. As such, the UFW could not determine whether the listed wages that were paid were for first, second, or third pickings. [29/] The fact that there was no seniority information on the list was noted by Steeg, who was then informed by Dressier that pursuant to some previous unfair labor practices involving contractors engaged by the Respondent, the legal department of the UFW had been provided a list which contained that information, and also that the Respondent had submitted a list pursuant to the representation election. The UFW would have to work with that, since that was all of the information that the Respondent had. Steeg thereupon stated that neither of those lists set forth dates of hire.

Retroactivity and the wage issue were again discussed, with Dressier maintaining his position that the workers had already received a wage increase in 1977. Also discussed were particular grievances which had arisen during the course of Respondent's operations in the fields, including the reporting time issue, the problem with supervisor Arroyo dumping buckets, a problem arising over Respondent's leaflet which many workers claimed that they did not receive, difficulties concerning "border picking" by crew five and a problem involving a particular worker who failed to report to work without notifying the company, the' union maintaining that this problem was an outgrowth of Respondent's tightening of the previous policy concerning notification.

In regard to other specific contract items, the UFW presented Respondent with a modification of its original grievance and arbitration and health and safety articles. Dressier stated that he wished to have some further discussion with officials from Respondent during the lunch hour and that he had some written counter proposals prepared, but that he needed to go over them with those officials before submitting them to the UFW, which

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[29/] Interestingly, the computer print-out utilized for Respondent s payroll submitted during the season does provide the number of units picked and the wage rate paid for each worker. Respondent's obstinate refusal to furnish this readily available data provides a further indication of the posture which it affected throughout the course of negotiations.

he did that afternoon. In regard to the hiring hall issue, Dressier suggested that it might be beneficial to have a separate hiring hall meeting to discuss the ramifications and the actual utilization of the hiring hall apparatus. The UFW acceeded to this request.

This meeting reconvened at approximately ten minutes of two. Again there was discussion concerning the eight hour checker and dumper guarantee, with Dressier maintaining his position. Dressier finally provided the machine picking information which evoked a comment from Mrs. Murphy to the effect that in the course of discussions concerning the machine rate had not understood what the parties were referring to.

Respondent submitted its counterproposal to the UFW's articles concerning "local issues". This counterproposal consisted of one half of one page and dealt with issues concerning lay-offs by seniority, students' seniority, a proposal that the company "will discuss with the union the obtaining and making available for purchase by workers at cost of gloves," and would supply workers with buckets. This was the Respondent's entire counter to the UFW "local issues" proposal although there was some oral discussion concerning items in the UFW proposal including that regarding a seniority article under the UFW "local issues" proposal in which the UFW named the trucker and sanitarian as seniority classifications. Dressier repeated that these classifications were the subject of a pending NLRB hearing, that he did not feel it was appropriate to consider the trucker, and would wait for the outcome of the NLRB case before resolution of the sanitarian issue.

Under a health and safety provision contained within the UFW "local issues" proposal, there was discussion concerning dumper platforms. [30] Dressier stated that the company was making efforts to change the dumper platforms, that some had already been changed, and that in time the remainder would be modified. Steeg requested a time schedule for the change in the dumper platforms and asked how many had been replaced within that time. Dressier said he would convey that information to the UFW. However, Steeg testified that she never received such information. The parties then proceeded to_ discuss all of the local issues which the UFW had proposed, whether or not they were actually responded to in writing by the Respondent.

As noted earlier, that afternoon Respondent also submitted to the UFW a revised employer proposal. Dressier indicated that; the revision did not contain a response on grievance and.

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[30] Dumpers stand on moveable platforms which are mounted on the Bins on the tomato trucks. The UFW maintained that the platforms currently in use were unsafe.

arbitration or health and safety, since the UFW had just turned in its proposal that morning and that the Respondent had not had time to prepare a response. The revised employer proposal contained modifications of its original articles concerning recognition, union security, seniority, supervisors and family members, Robert F. Kennedy Farm Workers Medical plan, income tax witholding, credit. union witholding, grower-shipper contracts and locations of company operations. There was a renewed discussion on the hiring hall issue and the anticipated meeting which would be specifically directed toward the practical aspects of the hiring hall.

Respondent's latest proposal contained nothing concerning wages. Dressier responded that he had not modified his wage position because the UFW had not modified its. Steeg noted that a modification of the UFW wage proposal had been submitted on August 30 with the UFW proposal given that date to the Respondent . Dressier maintained that the copy of this proposal which he<had received did not contain a wage appendix, 'despite Steeg's representations that copies furnished of the August 30 proposal were complete.

Following a recess, Steeg attempted to get a committment from Dressier regarding future meeting dates. Dressier would not set any definite date for the next meeting but suggested that Steeg call him the following Tuesday morning. Dressier noted that it might be necessary to begin having weekend meetings, and the UFW agreed. Steeg stated that the UFW would be available for negotiations throughout the following week. Dressier responded again that she should call him on Tuesday in order to set a future meeting date. When Steeg asked whether Dressier would have an economic response to submit to her by telephone on Tuesday Dressier stated that he would have one for the UFW before the next meeting. Dressier also noted that when they spoke oh Tuesday a date would be set for the hiring hall meeting.

In sum, as a result of the meeting on September 2, the Respondent needed to submit counter proposals to the grievance and arbitration, health and safety, and economics articles and was to provide additional information before the next meeting. The following Tuesday, Dressier would discuss with Steeg further meeting dates for the actual negotiation sessions and for the hiring hall meeting. In addition, the UFW was to prepare a reply to the proposal submitted by the Respondent that day.

h. Communications Between the Parties after the September 2 Meeting

Steeg attempted to contact Dressier as originally planned on the morning of Tuesday, September 6 Dressier was unavailable. Steeg left a message for him to return her call. Dressier did not contact her that day, In the afternoon of Wednesday the 7th, Steeg attempted once more to contact Dressier, who finally returned her call, late in the day.

Dressier began discussing a problem that was arising at the Meyers Tomato Company with which the UFW had a contract. Steeg replied that she had called Dressier in order to establish meeting dates for negotiations with Respondent. Dressier stated that in light of the problems at Meyers Tomato, he did not think that he would be able to meet until the following week, on Wednesday. Steeg reminded him that he had earlier stated that he would meet two days during the week of September 5, and possibility even meet on weekends. Dressier responded, according to Steeg's testimony, that under the present circumstances, "the union wasn't acting right, and it was not appropriate to meet." Steeg noted that accordingly, they should schedule more meetings for the following week. Dressier said he could only commit himself to one meeting, perhaps at some other time, and that he would have to wait before setting the actual date.

Steeg asked Dressier about responses on the grievance and health and safety proposals. Dressier stated that Steeg would have the response in her office on Friday of that week. Steeg also asked him about the response to the economic proposal. Dressier promised to give this to her prior to the next meeting, depending on what happened at the Meyers Company. Steeg asked him again about the hiring hall meeting, and Dressier stated that he would have to speak to Respondent's officials concerning this, and would get back to her.

When Steeg telephoned Dressier on Friday, September 9, he was not in his office. She spoke to Charley Stoll, and left a message with him that she was confirming a meeting date for the 14th and that she would like Dressier to call her back concerning the actual time for the meeting. She also told Stoll that the UFW was sending its revised proposal to him that day. The proposal was actually delivered to the Western Growers Association offices in Salinas and contained extensive revisions of UFW positions on many issues.

On Monday, September 12, "a serious labor dispute developed on Respondent's premises. [31/] Steeg attempted to speak with some body at Respondent's offices and telephoned them three times requesting an immediate meeting to resolve the conflict which had arisen in the fields. No one at the offices returned her phone call that day. Steeg followed up these unanswered phone calls with a mailgram to the Respondent and to Dressier himself requesting an immediate meeting. On the day following/ Steeg sent another mailgram to Dressier reiterating the difficulties she was having in setting meeting dates and communicating with him, and also confirming her assumption that a meeting would _ be held on Wednesday the 14th in Salinas.

i. The Meeting of September 14

The parties resumed negotiations on the morning of. the

[30/] The substance of this dispute will be discussed "below.

above date in Salinas, Present on behalf of company were Mr. Dressier and Mrs. O.P. Murphy. As the meeting opened, Steeg told Dressier that the UFW understood that he did not have sufficient time to review its latest proposal and that perhaps it would be beneficial if he were to take time that morning to look at it and respond later. Dressier stated that although that he had not been able to review the entire proposal he was prepared at that point to "start at the top." Steeg responded that it would be better if he did not look just at a portion of the proposal but review it in its entirety in order that he understand the movement that the UFW had made in it. In addition, a problem had arisen concerning the arrest of the president of the negotiating committee that morning, and Steeg noted that UFW officials needed time to investigate the situation before the meeting continued.

Dressier then mentioned that he had received some unfair labor practice charges alleging that workers had been fired and replaced with other employees. Dressier stated that Antonio Margarito, the president of the negotiating committee, had not been fired as alleged in these charges, but he confirmed that workers had been replaced. Steeg set forth the UFW position that a "lock out" had occurred on the company premises and that the workers had unconditionally offered to return to work, but that the company had not rehired them. [31/]

When asked by Dressier whether the workers were in fact willing to go back to work, Steeg responded in the affirmative, that they never intended not to work. Also discussed was a document which certain workers were asked to sign by supervisor Arroyo before they would be allowed to return to work. [32/]

Steeg asked Dressier if he had anything in writing to submit to the UFW at that time and Dressier responded in the negative. Steeg noted that Respondent had come to the meeting without being prepared to respond fully to the UFW's latest proposal, expressing dismay at the fact that communications problems were still occurring between Dressier's office and the Western Growers Association office in Salinas, that documents delivered there to be forwarded to him would not being so handled.

These discussions occurred over a span of approximately 20 minutes, at which time a recess was taken. Negotiations resumed between 1:30 and 2:00 that afternoon. When the meeting reconvened, Cal Watkins Jr., an associate in Dressier's law firm, was present on the behalf of the company and Jerry Cohen,

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[31/] Needless to say, these statements are not set forth as truth of the matters asserted.

[32/] The circumstances surrounding the signing of this document and its substance will be discussed in greater detail below.

chief counsel for the UFW, was also in attendance. Steeg expressed great concern that the parties were now being embroiled in an ever-widening dispute while matters were not being resolved at the negotiating table. She conveyed the workers' opinion that Dressier was stalling in negotiations and not regarding them seriously.

The parties proceeded to go through the latest UFW proposal article by article. This verbal exchange advanced as far as article 34 of the UFW proposal, "Bereavement." Dressier stated he was not prepared to go any further at that time, nor was he prepared to make any proposal on "local issues." That afternoon, however, he did submit to the UFW two new proposals in writing regarding access and discipline and discharge. Notably, the implimentation of the access proposal submitted by the Respondent was contingent upon the execution of a full contract and the resolution of all pending litigation between the company and the Union, including unfair labor practice procedings.

Future meeting dates were then discussed. Dressier proposed that the Hiring hall meeting be held on Friday, September 16, and that Cal Watkins, Jr, would be in attendance. Steeg inquired as to the authority that Watkins would have at such a meeting and Dressier stated that he would have full authority, and would be empowered to reach agreements if any were made insofar as scheduling additional meetings was concerned. Steeg stressed to him the urgency of the current situation and the necessity for meeting as frequently as possible. Dressier reiterated that he would not set any dates until after the Friday meeting and that such future sessions would depend on circumstances in the fields.

At the close of this meeting the status of negotiations was that Dressier would have a full proposal in writing to submit to the UFW at the Friday meeting, that the meeting would be held in Salinas with regard to the hiring hall, and at the end of that particular meeting further negotiations would be scheduled.

j. The Meeting of September 16

On the morning of September the 16, Steeg called Dressier with a number of questions about verbal responses to the latest UFW proposal that the Respondent had made at the last meeting. Dressier stated at that time that he would be unable to meet with the UFW on Monday or Tuesday of the week following. He stated that he was preparing a written response for the UFW and arrangements were made for the UFW to obtain this proposal. [33/]

[33/] The proposal was actually picked up in Los Angeles that evening.

The meeting on September 16 started at approximately 2:00 in the afternoon. Present on behalf of the Respondent were Cal Watkins, Jr. and Mrs 0. P. Murphy. Steeg initially expressed concern over the lack of the presence of company personnel responsible for hiring whom Dressier had previously suggested would be there in order to get a better understanding the workings of the hiring hall. Steeg asked Mrs. Murphy what her responsibilities were concerning the hiring of agricultural workers. She responded that she just worked in the office and was not involved in the direct hiring or firing of workers. When Steeg questioned what authority Watkins would have in the meeting Watkins stated that he would be authorized to reach agreement with the UFW. However, he did not have a copy of the latest UFW proposal and as was subsequently borne out during the course of the meeting, he was unfamiliar with Respondent's positions on specific issues.

The parties then commenced to discuss the hiring hall. In the course of these discussions Mrs. Murphy stated that she could make no decisions at the bargaining table, that she was only one member of the board of directors with one vote. Steeg expressed concern over the desirability of having present during the course of the current discussions people who were empowered to make decisions and who could discuss the practical applications of the hiring hall issue. Nevertheless, extended discussion ensued with Watkins and Mrs. Murphy both asking questions on the specifics of hiring hall practices. Watkins, who had not seen that portion of the latest UFW proposal dealing with the hiring " hall, Article 3, was given a copy of the proposal at the meeting. As the discussions concluded Watkins stated that the UFW proposal in regard to the hiring hall was rejected in its entirety, and that the previous proposal that the Respondent had submitted on this issue would stand.

Steeg asked Watkins about scheduling subsequent negotiation meetings. Watkins stated that he was not authorized to speak on that issue and that Mr. Dressier would have to set his own schedule. Steeg reminded him that at the previous session Dressier had said that further negotiating meetings would be scheduled at the close of the current meeting. She then asked Watkins to telephone Dressier to ascertain what dates were to be proposed. After Steeg attempted to reach Dressier and could not she left a message for him to return her phone call. Dressier did not do so. Thereafter Watkins called him again and, without allowing Steeg to speak to Dressier personally, conveyed the message from Dressier that he would speak to her on Monday about future meeting dates.

Upon her return to the UFW offices that day Steeg once again telephoned Dressier and was told that he was unavailable. When Steeg insisted on her need to communicate with him, Dressier came to the phone. Steeg emphasized to Dressier the urgent need for frequent and immediate meetings. Dressier asked her why

there was such a need. Steeg answered that the season was moving on, that there had been no meetings the previous week, and that there had been only one substantial meeting that week and one "useless meeting" that day with regard to the hiring hall. Dressier stated he would not be available to meet until the following Thursday, after a meeting he had scheduled for Wednesday concerning another grower, Gonzales Packing Company.

As a result of Steeg's insistence a meeting was tentatively scheduled for the following Tuesday evening. Dressier also asked Steeg about the workers position on returning to work, stating that the company might be more willing to meet if the UFW had not been involved in so many problems in the fields. Steeg stated that the workers had been presenting themselves every day to return to work and had been turned away. Dressier responded that workers could be hired on Saturday if they went to work. With that, the discussion concluded.

k. The Meeting of September 21

On Monday, the 19th of September, Steeg telephoned Dressier to confirm the meeting date for that week. Dressier informed her that there was going to be a change regarding the Respondent's representative at the 0. P. Murphy negotiations: his associate Charley Stoll, would be assuming that responsibility. [34/] Dressier represented to Steeg that as Mr. Stoll did not have any commitments at the present time, he would be prepared to meet during all of that week and into the next week, as needed.

As the meeting commenced on the morning of the 21st in Salinas, Stoll and Darryl Voth, an associate of Stoll's, were present on behalf of the Respondent. Steeg initially noted the specific items of information which had not yet been furnished to the UFW. Specifically, she mentioned the production records, the request for which was still outstanding. Stoll inquired which production records she needed, and Steeg outlined each of these items. Steeg made further requests for seniority

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[34/] Dressier testified that he had become involved with a labor dispute that had occurred at Meyers Tomato Company, also located in the Salinas Valley, and that he had too many commitments to be able to devote his attention to negotiations on behalf of Respondent. Dressier also testified that Steeg told him that there would be no problem with the change in negotiator. However, it is apparent that the change at this stage in negotiations would necessarily cause further delays, as Mr. Dressier, had been involved over approximately a four month period in negotiations with the UFW on behalf of the Respondent, and that the recently substituted Mr. Stoll would necessarily have to devote some time to familiarize himself with the issues.

lists, records on the eight hour guarantee, the reporting time issue, information on the problem with border picking, and also information concerning the trucker job Classification. [35] The production records, despite Steeg's repeated requests, were not provided to the UFW.

Following the aforementioned discussion and requests for information, Steeg provided Stoll a full up-to-date history about the progress of the negotiations. She told him that there had been three complete exchanges of proposals, that the UFW would be furnishing a fourth proposal, that there had been agreement on eight contract articles out of 25 in the "language" portion of the UFW proposal, and that there had been no agreement as far as any economic items, despite what Steeg termed as "significant movement" in the UFW proposal.

Steeg then submitted to Stoll the latest UFW's counter offer. This proposal contained revisions in the proposal that had been submitted on September 9 to the Respondent in the following articles: Seniority; Grievance and Arbitration Procedure, Dicipline and Discharge; Leaves of Absence; Records and Pay periods; Union Label; Subcontracting; Hours of Work and Overtime; Reporting and Standby time; Citizenship Participation Day the Robert F. Kennedy Farmworkers Medical Plan; the Juan de la Cruz Pension Fund; the Martin Luther King Fund; Rest Periods; and miscellaneous modifications of the Seniority, Records , Pay Periods, and Health and Safety Articles and in the wage demands.

The parties then addressed themselves to a discussion of this proposal, reviewing the document article by article. Steeg explained to Stoll what the relative positions of the parties were at the time, where there was agreement, where the UFW had made movement and why, and which of the issues were yet unresolved. The hiring hall issue and the meeting that was held for the purposes of explaining it were discussed. Several of the same issues that had been raised in that previous Friday's meeting were again raised by Mr. Stoll. The seniority of student workers and of workers that had not been rehired in the beginning of the 1977 season was also discussed.

Following a short recess, the parties began to analyze the issue of the grievance and arbitration procedure. The UFW had originally proposed an arbitration mechanism; Dressier counter-proposed that the services of an conciliator be utilized. The UFW then acceeded to the proposal to utilize a conciliator although they did lay out a more detailed method than had been originally proposed by the Respondent. Stoll expressed his personal opposition to the conciliation procedure, which gave rise to concern on the part of the UFW, since although there were not opposed to the use of the arbitration mechanism, they felt

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[35] These issues regarding reporting time, border pickings,, and the eight hour guarantee had to be explained to Stoll, as he was unfamiliar with them.

that the mere change of negotiator's should not result in a revision of proposals that have already been made and accepted.

The access issue was discussed in light of the grave problem that the UFW had experienced with the Respondent's proposal which stated that access would be permitted contingent upon resolution of all other legal matters and unfair labor practice. In subsequent meetings, Stoll agreed to remove this pre-condition to access by UFW representatives.

Steeg then suggested that as part of the UFW "language" proposal that four items within that proposal be presented in the form of a package: the "no strike" and managements rights clauses in the "master contract," [36/] together, with a grower-shipper clause and a family member "side letter." [37/] Stoll stated that he would consider the UFW package offer. However, on the following day, he rejected it in entirety.

Insofar as economic issues were concerned, Steeg pointed out movement in the following areas. Regarding "Citizen Participation Day," the UFW had inserted a qualifying period that did not exist previously. Compensation for overtime was revised' from time and a half to an additional 35 cents after eight hours, which was made conditional on Respondent's accepting the proposal that such work be performed voluntarily. The UFW modified its proposal regarding the "24 hour rest period" offering that the period be on a Sunday, provided that work on Sunday would also be voluntary. Regarding wages, the union had revised its proposal downward three cents on the piece rate, five or ten cents on the hourly picking rate, and revised the differential between first and second pickings from eighteen cents to seven cents.

Information was furnished to Stoll concerning the Martin Luther King Fund, which is the UFW's pension and social services plan. Concerning the classification of sanitarian, Mrs. Murphy stated that she thought that this work was subcontracted out. Steeg told her that she believed that she was mistaken. Steeg then pointed out to Stoll that the UFW had received no response on the "local issues" portion of their proposal since the one submitted by the Respondent on September 2 During the course of the discussion on "local issues," the problem of dumper platforms was once again raised, with Stoll stating

[36/] The UFW's proposal of September 9 was _entitled "UFW Master Agreement."

[37/] A "side letter" is a separate agreement not enclosed within the body of the contract which amends or modifies a specific article within the contract.

that he would inquire into it. The reinstatement of workers who are currently imbroiled in the labor dispute with Respondent was also touched upon. As the meeting ended, Stoll stated that he would respond to the UFW's proposal at a meeting on Friday, September 23, and that he appreciated the movement that had been made on behalf of the UFW.

1. The Meeting of September 23

On September 22, Steeg spoke with Stoll about the Respondent in the course of negotiations with another tomato company, Gonzales Packing. Stoll informed her that he would not be available for negotiations on behalf of Respondent the week following. Notably, Dressier had represented to her the exact opposite, and as such the UFW had been misled into believing that Stoll would be available and there would be significant progress in completing the negotiations. Stoll replied that he made his own schedule, that he would not be available for the week following, but that he had openings for the week after that.

On the morning of September 23, the parties resumed negotiations in Salinas. Stoll arrived late to the meeting, and stated that he had some written articles prepared for examination by the UFW. However, he was unable to meet at that time, as there were problems developing in another company that required his attention. The UFW objected to this, stating that he had scheduled the meeting on behalf of the Respondent for that particular day. Stoll then left the meeting saying that he would call and discuss his further availability at some point later in the morning.

When Stoll actually did call back, he cancelled the meeting set for the 23rd, stating that he had to continue to attend to the problems at the Gonzales Packing Company. Despite Stoll's representation that he would call Steeg back to set further meeting dates that day, he failed to do so.

Of the three articles submitted by Stoll to Steeg on the morning of the 23rd, the recognition article contains nearly identical language to that proposed by the UFW on September 9, except that it does not contain one of the paragraphs included in that article. With this exception, therefore, it can be said that substantial agreement was reached on the recognition pro-r vision.

The second proposal submitted by the Respondent concerns the hiring hall. Three of the clauses in the Respondent's hiring hall proposals were basically similar to that submitted by the UFW. Differences arose in clauses providing for notice of -the need for new or additional workers, notices of layoffs, and on .the job training.

In the seniority article submitted by the Respondent on September 23, there was basic agreement with the UFW pro-

posal on the period of employment necessary before seniority was acquired, on the posting of a seniority list, and on three items which would result in the loss of seniority. There was basic disagreement on layoffs, the Respondent proposing that layoffs be by crew seniority, rather than by individual seniority, which was the substance of the UFW proposal. Respondent also proposed that at the end of each season, each seniority worker would be given a layoff slip and an approximate starting time and call-in date for the next season. [38/]

m. The Meeting of October 3

Prior to this meeting, Respondent had supplied the UFW with its latest proposal on Saturday, the 1st of October. At the meeting itself, Respondent was represented by Mr. Stoll and Robert Roy, another associate of his law firm.

Steeg once again requested that the company provide certain production records. Stall stated that their position on this issue was the same, that the UFW was not entitled to production records, only earnings information, and that the production records requested by the- union were confidential and irrelevant. Steeg noted the necessity for such records, explaining that they were needed to gauge the overall fluctuations in costs for a particular season. Stoll promised to reconsider the matter.

At the previous meeting, Steeg had requested the second half of the payroll information list which the Respondent had supplied on September 2. [39/] A list was supplied by Stoll at the October 3 meeting, but' it proved to be merely a duplicate of the list which had been previously supplied. However, Stoll did supply the remaining half of the list on the following day.

[38/] Counsel for Respondent objected to the admission in evidence of the exhibit which contained the three articles submitted as Respondent's proposal of September 23, he stated as the basis for his objection that the exhibit was not complete, and that there were additional items included in the proposal submitted by Respondent at that time. However, no evidence was presented on this particular point. Steeg testified without qualification that the three items which were part of the exhibit were the total contained in the proposal received on the 23rd from Mr. Stoll. Such a statement must be credited in the absence of contrary evidence.

[39/] As noted previously, this list, which .set forth the names _ of employees in alphabetical order, began with the letter "L".

As concerned the eight-hour guarantee for checkers and dumpers, Stoll related that the company told him that the issue had been resolved and that there was nothing more to discuss. However, Steeg noted that there were still some questions concerning this issue and that the UFW had been requesting payroll records to verify the assertions made by the company regarding it. Stoll once more represented that he would make the records available.

As concerns, the seniority list, Stoll asked Steeg what such a list should contain. She replied that the UFW needed names, social security numbers, job classifications and dates of hire. This information was eventually provided by the Respondent, but not at that time.

Discussions were held on recurring issues which basically might be termed grievances as opposed to negotiations issue: items such as shifting of checkers between crews, the reporting time issue, and the border picking incident involving Crew Five.

Stoll was asked if he had brought any response to the trucker issue. There was none provided. The parties then proceeded to review the number of exchanges and the status of various proposals, and a discussion of the contract issues ensued. The package proposal that had been submitted to Stoll previously was rejected by Respondent in its entirety. The recognition paragraph was discussed, Steeg noting that it was necessary for the supervisors to realize their obligations in connection with recognizing the union. The problem of the distribution of a leaflet by Respondent expressing their intent to bargain was once again raised as the distribution of the leaflet had not been extensive.

Steeg brought up the fact that as Stoll now was the negotiator, the UFW felt that someone from the company who was familiar with field operations should be present at the bargaining table in order to discuss recurring problems. Stoll responded that the company was busy with the harvest of tomatoes, and that it alone would have the eventual authority to decide who would be present at the table.

There was no agreement in regard to the hiring hall proposal. Many of the same issues that had been raised in previous meetings concerning the hiring hall were once again raised at the October 3. meeting. The proposal which had been submitted by the Respondent on October 1 contained a hiring hall provision which had two conflicting paragraphs in it regarding period of notification for lay-offs.

Concerning the issue of health and safety, there was some discussion about he placement of toilets in the fields.

The revised employer proposal submitted on October 1 omitted several of the articles which had been within previous proposals. Specifically those articles included "Bullentin Boards'"; "Supervisors"; "Hours of Work and Overtime" and/or "Meal Periods"; and "Reporting and Standby Time." Respondent had made offers concerning these issues previously. Stoll explained that their exclusion was simply a mistake.

Concerning economic issues, Steeg testified that there had been no movement on the part of Respondent. However, examination of the proposals submitted by Respondent reveals that the revised proposals submitted by them on September 16 contained an article increasing their offer of contribution to the Robert F. Kennedy Farm Worker Fund from an originally proposed 10 cents per hour to the 16 and one-half cents per hour per worker requested by the UFW.

Concerning the rest period issue, the union had proposed a 15 minute rest period, whereas Respondent offered one of 10 minutes. Steeg stated that the previous company policy had been to accord workers a 15 minute break, and that even this year such was the length of the break period. Stoll represented that he would investigate the matter.

Steeg indicated that the UFW was very disappointed in the Respondent's latest proposals, in that there appeared to be movement on only four of the articles submitted, none of which were overly significant. There was no movement on economics, little movement on language,-and no proposals submitted to date regarding "local issues" other than that of September 2. However, as it was the UFW's position at that point to make a counterproposal, Steeg stated that she would have one prepared for the Respondent as soon as possible. Since the Respondent did not indicate agreement in several areas in which the UFW had modified prior positions, preparing a revised proposal would present great difficulties.

Nevertheless, on the morning of October 4th, the UFW delivered to Mr. Stoll its latest proposal. The documents submitted to Stoll consisted solely of the articles which were changes from the UFW proposal of September 21. The following articles were modified: "Seniority", "Health and Safety", "Reporting and Standby Time", "Vacations", a general article and the "No Strike" article. In addition, the UFW submitted a revised wage demand.

n. The Meeting of October 4 and Subsequent Communications_

Present on behalf of the company at this meeting was Messrs. Stoll and Roy, their secretary Barbara Smith, and also Mrs. 0."P. Murphy. Once again, the issue of the eight hour guarantee for checkers and dumpers were discussed. Steeg was told that a leaflet had been issued which contained the Respondent

policy concerning the guarantee. [40/] Stoll once again indicated that he would make the records concerning the guarantee available to the UFW. The UFW was not provided with such records at that time. [41/]

A seniority list, had still not been provided by the Respondent. The lists ..which Respondent had alluded to which were in the possession of the UFW legal department did not contain dates of hire. However, Stoll stated that the Respondent was compiling a list which would contain the dates of hire from 1976 forward. [42/]

The issue of the trucker job classification was again discussed. Mr. Roy attempted to provide the job description which had' been repeatedly requested by the UFW, stating that the trucker sometimes worked as a picker, sometimes worked as a foreman, and sometimes worked in the shed. At other times he worked from the fields to the shed. Steeg conveyed to Respondent's representatives the opinions of workers that they had spoken to, to the effect that this was not the case. The issue still remained unresolved.

The reporting time issue was once again discussed. As noted above, at this meeting, Stoll supplied to Steeg another list of employee payroll records. The list contained employee names, social security numbers, employee number, gross pay and hours worked. Obviously, the list did not provide all of the information which the UFW had requested from Stoll in regard to employees. Production record information, acreage, yield per block, ect. were also absent. Such information was again requested. Respondent has yet to provide it.

Information on company rest periods was provided by Mr. Roy, who represented that the past policy of the company was to allow the workers a 10 minute break and that if workers were taking more time it was. not authorized. The UFW once again contested this representation stating that the practice was for 15 minute break period, whether or not it was a spoken policy.

Respondent provided at this meeting five separate written proposals including those dealing with grievances and arbitration, seniority, holidays, records and pay periods, and access. Before the morning recess Respondent acceded to the UFW's latest proposal concerning recognition, the acceptance being made verbally. The UFW also preferred a verbal package proposal con-

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[40/] This- leaflet was entered into evidence as an exhibit. However, the leaflet contained no date.

[41/] As will later be discussed, the records were eventually were produced at the hearing by the Respondent pursuant to sub poena and were made part of the exhibits in this case.

[42/] As stated previously, Francis Murphy testified that a list was prepared at the end of the 1976 season setting forth dates of hire. The UFW was not given this list.

cerning articles on mechanization, union security, duration of the agreement and maintanence of standards.

The UFW wage proposal submitted on October 4 contained a slight adjustment of the previous proposal, despite the fact that there had been no economic proposal from the Respondent. Steeg testified that at this point, the UFW, had made movement four times on the wage issue, resulting in a decrease of 4-1/2 cents from its original piece rate demand. Steeg noted that as these revisions had all been prior to any economics response from the Respondent, the UFW would not be in a position to move any further on this issue.

As negotiations reconvened on the afternoon of the 4th, the issue of recalling the workers who had been emboiled in the labor dispute which commenced on September 12 was discussed. Steeg inquired whether Respondent would continue untilizing replacements and as such, only rehire workers to fill jobs as needed. Stoll replied that he preferred not to answer that question at the time. The mechanics of actually rehiring the workers and the basis on which the workers would be hired were discussed, with the UFW attempting to include assurances against arbitrary conduct in this regard.

Further discussion was held on the health and safety issues regarding the placement of toilets in the fields. Respondent', although changing its position somewhat, did not agree fully to the proposal offered by the UFW.

Following a discussion of recall procedures for putting workers involved in the labor dispute back to work, Stoll stated that he would telephone Steeg regarding further negotiations. Steeg attempted to set a negotiation session for the entire day on the following Friday. Stoll had previously indicated that he would be available. However, when the two spoke that afternoon, he stated he could not be available the full day on Friday, because it was his anniversary.

Steeg had additional contact with Stoll on Thursday, October 6. Stoll indicated to her that he was greatly concerned about the procedure for returning the workers back to work, that the workers who had been told to report had refused to go to work. Stoll stated that he would not meet with the UFW on Friday, as previously scheduled, because of problems which were occurring in the field. Following this conversation, Steeg drafted and sent a letter to Mr. Stoll outlining the difficulties she was experiencing in scheduling definite meeting dates with Respondent's representatives, and proposing that daily meetings be held until agreement was reached.

Over the course of several phone conversations occurring the week following, a meeting was arranged for Wednesday, the 12th of October. On that day, also the UFW submitted another proposal, delivering it to the Western Growers Association offices in

Salinas. The proposal contained revisions in the seniority, grievance and arbitration, and records and pay periods provisions, and also yet another modification of the UFW's position on wages. The afternoon of the 12th, Steeg telephoned Stoll and verbally presented a package with regard to Respondent 's provisions concerning no-strike, management rights, and grower-chipper clauses.

o. The Meeting of October 12

Negotiations resumed in mid-afternoon of this date, in Salinas. Francis Murphy, for the first time, was present on behalf of the company. [43/] Once more Steeg repeated the request for production information. No production records were provided. Respondent, however, did produce a leaflet which spoke to the issue of the eight-hour guarantee, which it maintained set forth company policy in this regard. [44/] The UFW repeatedly requested verification via company records, which Respondent failed to produce.

The union security, hiring hall, and seniority articles were discussed at length. .The meeting of the 12th lasted approximately 3 hours. As it ended, the parties agreed to reconvene at 9:00 in the morning on the following day.

p. The Meeting of October 13

As negotiations resumed on this date, Charley Stoll, Francis Murphy, and Barbara Smith were present again on behalf of the company. Stoll finally provided to the UFW seniority lists, setting forth dates of hire for employees from 1976 forward. As rioted earlier, this information had been requested by the UFW approximately 6 months previously. Steeg testified that this list still did not provide job classifications, "original" dates of hire [45/] and social security numbers.

Stoll presented two written proposals at the meeting on the morning of October 13. One of these articles dealt with the hiring hall issue. The hiring hall proposal adopted almost in its totality the language of the UFW article on this issue. However, as Ms. Steeg testified, the Respondent's proposal contained a clause which stated that the company had the right to reject any applicants referred by the hall, without

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[43/] Francis Murphy was the one individual who had the most extensive knowledge of and authority concerning Respondent's day-to-day operations.

[44/] Respondent's witnesses testified that this leaflet had Been distributed to dumpers and checkers about one week after the season began. Yet the document was not actually given to the UFW until the season was nearly completed.

[45/] As stated above, Respondent did not assume full responsibility for the hiring of the individuals for field work until 1976. Before that year, respondent relied on the services of labor contractors to supply them with field crews.

affording the union the opportunity to grieve the rejection. Thus, as Ms. Steeg pointed out, this clause in effect nulified the hiring hall arrangement as well as the seniority restrictions placed on this arrangement.

The other written proposal submitted by Respondent that day dealt with the vacation article. The most salient aspect of this article was that under the conditions proposed by the Respondent none of the employees of the Respondent would be qualified to receive vacation time: as a prerequisite to earning such vacation time a worker on an hourly basis would have to work 1,000 hours, and piece rate workers would have to work for 700 hours to qualify. As the season itself lasted approximately 2 1/2 to 3 months, no field laborers would be able to meet this requirement.

Respondent accepted UFW proposals on union access and worker security in exchange for the UFW acceptance of the grower-shipper clause which they had proposed. Respondent rejected another package offered by the union involving the no-strike, management rights, and union security clauses as set out in the UFW "master" contract.

When asked again about the issue of the trucker, Stoll replied that he thought the trucker issue was a subject of an NLRB proceeding and that it should be decided by that agency.

Steeg asked Respondent's representative why there had been no reply to the UFW pension proposal despite the fact that the UFW had provided all the information that the Respondent had requested pertaining to it. Stoll's response was simply that Mr. Murphy did not want to pay for the pension, and thus no counter proposal was made to the UFW.

Steeg then brought up the problem of the "local issues" portion of the UFW proposal. In the course of 12 exchanges, 6 on each side, none from the company addressed what the UFW termed "general" items in the "local issues" proposals. Stoll stated that what they had thus far presented was all that they had to offer There was no change in their position of union security, nor on seniority, the issues that had been discussed at length on the previous day.

When the issue of further meetings was discussed, Stoll brought up the fact that due to the instant hearing and the fact that many attorneys in his offices, as well as Respondent's personnel, would be deeply involved in proceedings, the Respondent would be unable to meet for the purposes of negotiations. Steeg stated that the UFW was prepared to meet through the weekend prior to the opening of the hearing on the following Monday. The entire meeting on the 13th lasted approximately one hour.

On the following day Steeg spoke to Stoll in an attempt to schedule future meeting dates. Stoll had no such dates to propose.

q. The Summary of the Negotiations

Steeg testified as follows concerning the progress of negotiations from April until October. [46] There had been a total of twelve proposals submitted, six from each side. The initial proposal was submitted by the UFW, and contained 44 articles. It was about 70 pages in-length., Respondent's first counter proposal spoke to approximately 1/2 of the. UFW articles. The UFW then modified its position on about 18 articles; Respondent modified its position on about 9 provisions of its proposal and also submitted some additional articles. At that point in the negotiations there were approximately 20 provisions in the UFW proposal to which the company had not responded. The third proposal submitted by the UFW contained movement on approximately 28 articles, which was met by movement on around 11 articles on the part of Respondent. The UFW then modified its position on approximately 20 additional provisions and in reply the Respondent altered 4 or 5 of its proposals. At that point, there was movement on approximately 7 articles by the UFW countered by movement in approximately 6 areas by the Respondent. Additional modification was made in 7 areas by the UFW which was met by movement on approximately 4 or 5 of the Respondent's proposals.

In summary, 14 specific provisions of the contract were agreed to as of the date of the hearing. The only article which Ms. Steeg deemed "major" from the UFW's perspective which the Respondent had agreed to was the union recognition article.- The "major" article that the UFW agreed to submitted by the respondent was the grower-shipper clause.

The UFW provided responses to each of the articles that Respondent submitted. The Respondent, on the other hand, did not answer in any form and therefore totally rejected 13 articles proposed by the UFW. In regard to economics there was little agreement. Only one wage proposal was submitted by the Respondent which offered no increase. [47] The Respondent had come close to agreement with the UFW on one facet of the economics portion, namely the Robert F. Kennedy Medical Plan. The holiday proposal offered by the Respondent was in effect no proposal at all, since it pertained to payment of a premium time-and-a-half wage for Labor Day, which no one worked anyway. As the period for qualifying for vacation pay was in far in excess of the period which any field worker would be capable of working, there

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[46] As noted previously, I found Ms. Steeg's testimony to be thorough and credible. The summation that she provided at the conclusion of her direct testimony was amply supported by the documentary evidence.

[47] Although during the course of the negotiations there was no actual increase proposed, an increase had been implemented at the beginning of the 1977 season.

was no effective vacation proposal made. In addition, there were no proposals on funeral pay, jury duty, witness duty or proposals on pension plans. [48/]

As Respondent did not supply records pertaining to the eight hour guarantee for dumpers and checkers, there was great uncertainty on the party of the UFW regarding the past practice of Respondent in this area. The proposal submitted by Respondent on the 2nd of September spoke to a few of the health and safety and "general" "local issues," but provided no response to approximately three and one-half pages of these proposals, which included approximately twenty-four items. There was no agreement on union security and the hiring hall. The discipline and discharge clause proposed by the Respondent provided for no representation of the individual affected. There was a grievance and arbitration procedure proposed by the Respondent which would be the sole remedy for the UFW in the event of a contract dispute, but pursuant to. which Respondent would be permitted to/ litigate any such disputes in court. In the' words of Ms. Steeg:

> " ...in essence we have very simple issues like they will take out income tax if the workers choose or credit union payments or put up bullentin boards, but of real significance we have one article agreed to, recognition and of medium significance, the access issue. The rest of them are the lesser of the articles and that's as far as we've gotten in 12 meetings and 6 full exchanges, and now there are no meetings proposed."

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[48/] Significantly, Respondent did not provide any-benefits to workers previously, save what Francis Murphy termed "a place to work."

3. Unilateral Changes

General Counsel pleaded in its complaint that as a further indication of Respondent's refusal to bargain collectively in good faith with the certified labor organization herein, Respondent instituted certain unilateral changes in wages and other terms and conditions of employment. Specifically, General Counsel alleged and or argued in its brief that the Respondent, without prior consultation with the UFW, instituted changes in the wage structure; changes in the eight hour guarantee for checkers and dumpers; made threats by supervisors that the Respondent would discontinue its practice of hiring minors; forced employees to sign a "no-strike" agreement; and subcontracted unit work in contravention of its duty to recognize and bargain with the UFW as the certified representative of its employees.

a. Unilateral Changes in Wages

In the course of negotiations in mid-July Dressier requested a meeting with UFW-negotiator Marion Steeg in order to resolve the issue of a wage increase which Respondent felt was necessary to grant employees in order that it would remain competitive for the labor market with other tomato companies in the area. Specifically, Dressier discussed the possibility of granting the workers an increase equal to that given by the Meyer's Tomato Company with which the UFW had a contract: the piece rate for picking would be increased from $.32 to $.325 per bucket, and the hourly wage for classifications such as checkers, dumpers, and sanitarian would be raised from between $3.25 and $3.50 an hour to $3.875 per hour. The day prior to the meeting, which was scheduled for July 19, Steeg telephoned Dressier and informed him that the UFW was in agreement "that he raise the specific wages to the Meyers rate." [49/] As such both negotiators felt the meeting on the 19th would be unnecessary and cancelled it by mutual agreement.

On July 25, Dressier sent Steeg a letter which ostensibly confirmed the telephone conversation of the previous week regarding wage adjustments. Dressier wrote:

> "...it has been my understanding in discussions with you and your concurrence that no meeting would be needed to communicate and understand that wage rates for 0. P. Murphy's employees would be adjusted at the start of the 1977 season rather than being delayed pending negotia-

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[49/] As will be discussed more fully below, "Dressier denied that Increases were made in reference to a specific contract rate.

tions. It is also understood that these wage adjustments in no way are a committment by the union as to any further wages or any retroactive application of wages negotiated between the company and the union in our discussions for a new contract. Of course, there is no concession on the employer's part either as to any application of retroactive wages. Both sides do, however, understand that this is not a unilateral wage increase but a wage increase which for the purposes of benefiting the employees within the perimeters (sic) discussed above are concurred in by both parties."

Steeg steadfastly maintained throughout her testimony that her understanding of the increase referred to in Dressier's letter of the 25th was that it applied solely to the piece rate for pickers and the hourly wage rate paid hourly job classifications, such-as checkers, dumpers, and sanitarian as per the Meyers contract rate. However, Respondent had certain work practices which were not found at the Meyers Company, and accordingly no wage rates in those particulars were provided under that agreement. Specifically, the Meyers Company did not perform second and third picking as did the Respondent, nor did it pay pickers at an hourly rate. In addition, the Respondent had used workers to open roads in the fields and perform border pickings, neither of which were done at the Meyers Company. Accordingly, Steeg testified, modifications of these wage rates were not contemplated in the course of the parties' mid-July discussions.

Respondent's witnesses testified in vague, general terms about the wage increase that was agreed to in July. Dressier testified that his "recollection is we were talking about that there were (sic) obviously a disparity of wages that had been paid by Murphy with what other companies were going to be paying this year, and it was necessary that he adjust his wages up and I don't recall saying he would adopt a certain contract [50/] However, Dressier testified that according to his recollection of the negotiation session held on the 25th of August, the UFW raised some, questions as to how the hourly picking wage had been implemented, stating that they would prefer that there be a piece rate rather than an hourly wage for picking. Francis Murphy, Respondent's operations manager, testified that with regard to the-agreement reached with the UFW concerning wage increases for 1977, his understanding was that "we raised the rate to a comparative rate," comparative to competitors and not restricted to the Meyers Company. Murphy stated that Dressier communicated this understanding to him, but did not specifically

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50/ Nevertheless, the increases which were granted brought Respondent's rates to the exact level of those paid by Meyers, although the rates were actually lower if the total Meyers' fringe package was taken into account,

state which wages would be increased. [51/]

It strains the credulity that the UFW would have given the Respondent carte blanche in an area as vital as the setting of wage rates, as Respondent's witnesses would have us believe. Rather, given Steeg's overall reliability as a witness "and the logical import of her testimony, I find that the agreement that she reached with Dressier concerning wage rates in mid-July pertained solely-to an increase in the piece-rate wage from 32 cents to 32-1/2 cents per hour and an increase in the hourly rates paid to job classifications which were paid on that basis, such as checkers and dumpers, and not to the hourly picking wage. This explanation acquires additional support from the fact that it was not until the negotiation meeting of August the 24th that Steeg actually learned that pickers were being paid on an hourly basis at a specified wage.

In actual terms, the hourly picking rate was increased from a rate of $3.10 per hour paid in 1976 to $3.25 an hour, which was subsequently increased to $3.55 an hour. Respondent also produced evidence through testimony and documents to the effect that in addition to the hourly rate of $3.10 per hour paid in 1976 there was an incentive rate of 32 cents per bucket once a specified number of buckets had been picked on a given day. Not only was the rate for first picking increased one half cent from the rate workers were paid in 1976, but also the second picking rate was increased by the same margin. The differential between first and second pickings remained 5 cents per bucket as in the previous season. Respondent's witnesses [52/] also testified that the hourly rate of $3.25 an hour was increased to $3.55 an hour after a so-called "probationary period." These witnesses stated that after the workers had shown that they could do a good job, the $3.55 rate was imposed retroactively.

[51/] The testimony of Francis Murphy can best be characterized as unreliable in many instances. At times, he proved to be an exceedingly vague, evasive and a most reluctant witness. The assertion that Respondent's Operations Manager, the one charged with the most extensive authority regarding company policies, would not be told the specifics of-certain wage increases, greatly strains one's credulity. Following his discussion of the wage rate increase, Francis Murphy testified that a meeting for July 19 had been cancelled, and that the purpose of that meeting was to discuss wages. In response to a succeeding question "Did Mr. Dressier explain to you the reasons for it being cancelled?", Francis Murphy testified that there was no reason given, "apparently there was no legitimate reason for it." If Francis Murphy was aware as he testified that the July 19 meeting was for the purpose of discussing the wage increase, and that this issue had been 'resolved' between the parties, then the reason for cancelling the meeting should be self-apparent. Such seemingly purposeful evasiveness cast grave doubt on Francis Murphy's veracity and colored his testimony seriously in regard to this issue, as well as others on which he testified.

[52/] Principally, Mike and Francis Murphy.

Respondent's field superintendent, Mike Murphy, testified that both he and Frances Murphy made the decision whether to pay workers on an hourly or piece rate basis. Their decision was based on the particular adaptability of the field which was to be picked to an hourly wage structure. Basically, at the beginning of the season, a field contains many "culls" or misshapen tomatoes. In order to insure that workers pick slowly and carefully, and avoid as many culls as possible which will have to be eventually discarded by the company, an hourly rate is paid. [53/] Respondent's records reveal that workers were paid on an hourly basis for the first five days of the season, which commenced on August 4th. When workers began to earn the piece rate during the 1977 season, except for a brief period on that first day, workers were performing second pickings. There was testimony to the effect that the hourly rate was paid only for a first pick,

As noted above, I have found that at no time did the UFW specifically agree to an increase in the hourly picking rate from $3', 10 an hour plus incentive to $3.25 an hour. Even if one were to disregard the plain logic of this stance and assume for the purposes of argument that the UFW had acceded to this particular modification, no where can there be found any evidence that the UFW agreed to the change from an hourly plus incentive wage policy to a strict hourly wage to be increased after a "probationary period," the length of which was to be determined solely in the discretion of the Respondent. The fact that the $3.25 an hour wage was, approximately three days later, increased to $3.55 and made retroactive to the beginning of the season without consulting the union, indicates a clear-cut unilateral action on the part of the Respondent as regards wage rates. Furthermore, the transition from the hourly picking rate to the piece rate, substantially affecting the earning capacities of the Respondent's workers, [54/] was made without any prior notification to or agreement on behalf of the UFW. [55/]

[53/] The piece rate naturally encourages workers to work as fist as possible in order to earn as much as possible. Steven Highfill, a labor-relations consultant with some experience in the tomato industry, was called by Respondent as a witness. He testified that the "cull rate" was significantly greater under the piece rate than under an hourly rate.

[54/] Highfill stated that workers were capable of greater earnings under the piece rate.

[55/] Frances Murphy admitted that the UFW was not consulted at all concerning the changes in the hourly rate from $3.25 an hour to $3.55 an hour, the making of the latter rate retroactive, as well as the change from hourly to piece rate.

It might be argued that the payment of the hourly rate in the beginning of the season was in accord with past practice. However, the actual setting of the rate, as well as the increase in this rate which was made retroactive, was done without any consultation with or notification to the UFW. Likewise, a similar contention might be raised in regard to the rate for second picking. As noted above, in 1976 there was a five cent differential between the piece rate for first and second picking. This differential was maintained in 1977 even with the increase of 1/2 cent per bucket. As there was no notice of what second picking rate would be paid, the UFW was denied the opportunity to bargain about this issue before the wage increase was actually implemented. In addition, each of these various increases should be viewed in light of the fact that the company did not disclose, at least until the negotiation meeting of August 24, what wages it was actually paying its workers.

In, sum, therefore, Respondent during the 1977 season instituted the following unilateral changes in regard to wages without consulting the UFW: increasing the hourly picking rate from $3.10 per hour plus incentive to $3.25 per hour; increasing that rate to $3.55 after a so-called "probationary period/" and imposing that increase retroactively; shifting from an hourly to a piece-rate method of compensation; and increasing the rate paid for second pickings from .37 to .375 per piece.

b. <u>The Eight Hour Guarantee for Checkers and Dumpers</u>

Marion Steeg testified that during the course of negotiations she raised the contention that the Respondent had changed its policy in regard to payment of an eight-hour guarantee for dumpers and checkers. Specifically, Steeg maintained that in the previous season dumpers and checkers had been paid for eight hours of work, regardless of the number of hours that they actually did work when they reported on a given day. In the course of negotiations, Dressier indicated to Steeg that the company had not changed its policy in this regard, that in the current as well as- the previous season, the Respondent had paid dumpers and checkers wages for four hours if they worked less than 4 hours, and had paid these classifications for eight hours if they worked more than 4 hours.

Steeg repeatedly asked Dressier for information and documents which would substantiate his position. However, -it was not until October 13 that the Respondent provided the UFW with a copy of a leaflet which was undated and which stated "Checkers and dumpers and foreman are paid a full days pay -for more than 4 hours. If they work 4 hours or less, they are paid 1/2 days pay."

Various witnesses called by Respondent, including Frances Murphy and supervisor Frances Arroyo, testified that the foregoing was indeed the company policy concerning the

payment of dumpers and checkers in both the 1976 and 1977 seasons. A checker called by the Respondent, Socorro Salinas, testified that she received a leaflet embodying the aforementioned company policy approximately one week after she began working in the 1977 season. Ms. Salinas also testified that the policy had been the same in the previous year.

Adelina Savala, a checker who had been employed both in the 1976 and 1977 seasons by the Respondent, testified that in 1976 there was in effect an "eight hour guarantee," that no matter how many hours of work checkers or dumpers performed on a given day, they would be paid for eight hours. However, she substantially modified this testimony on cross-examination when, she stated that she would be paid for eight hours work only if she worked four or more hours. She could not recall a specific instance when she worked less than four hours. [56/] Her husband, Gustavo, a dumper employed by Respondent in the 1976 and 1977 seasons, was also called by the General Counsel as a witness. He testified that he could recall occasions during the 1976 season when he worked less than four hours and was paid for eight.

The UFW was unable to verify whether there had been a change in company policy concerning the eight hour guarantee due to the fact that the company did not release pertinent records to it during the course of negotiations. However, pursuant to subpoena, Respondent did release such records. The parties stipulated that dumpers and checkers work solely in conjunction with picking crews, except that dumpers worked approximately 15 minutes longer each day in order to set up, and checkers worked approximately one hour longer than the crews

[56/] Ms. Savala also testified contradictorily that on a certain Saturday in August, 1977 crews worked less than four hours, and checkers and dumpers were paid for two hours' work. She later changed her assertion to the effect that they were paid for four hours. Mike Murphy allegedly told her that they had to work at least four hours to get a full days' pay. Savala complained to Arroyo, and stated that after being paid for only two hours that Saturday, she received the additional money pursuant to the 'eight hour rule in a subsequent paycheck. Savala could not initially remember specifically the date on which the two hours were worked. Respondent's payroll records revealed that on Saturday, August 13, Crew Two (in which Savala was a checker) worked, for three hours. The parties stipulated that checkers worked approximately one hour longer than the pickers. Thus, if on that Saturday, Ms. Savala worked slightly more than four hours, even under the Respondent's interpretation of the guarantee policy, she would be paid for eight. In the payroll period ending August 17, Savala was paid for forty-nine hours, thus receiving eight hours pay for each of the six days worked in the pay period. In .the following week, on August 18, Crew Two pickers worked approximately 2.55 hours. The remainder of the week they worked more than four hours.. Savala was paid for 44.5 hours, or for five days at eight hours, day plus one day at four hours. Despite the fact that her husband Gustavo corroborated her statements concerning the "short" day worked in August, I am unable to credit her testimony in this regard, since the payroll records, as best evidence, do not support her assertions.

in order to make out and distribute the picker punch cards and to collect them when the work day was finished. When the records were finally provided during the course of the hearing, they revealed that on three particular occasions in 1976 crews worked less than four hours while dumpers and checkers were marked as having worked eight hours. [57/]

Only Gustavo Savala testified with certainty concerning the eight hour guarantee as it existed in 1976. As outlined above, his wife's testimony was riddled with self-contradiction. However, despite the testimony of the Respondent's witnesses, which I find to be self-serving, I conclude that the best evidence of the eight hour guarantee issue is the evidence provided in the "picker books'. "or documents which were submitted during the hearing. Accordingly, I find that the policy for the payment of dumpers and checkers in the 1976 season was to pay them for eight hours regardless of the number of hours worked when they reported. In the 1977 season this policy was unilaterally modified by the Respondent, without prior agreement with the UFW, to a policy wherein dumpers and checkers would be paid for four hours if they worked four hours or less, and would be paid for eight hours if they worked in excess of four hours. [58/] In addition, I find that an adverse inference may be drawn from the failure of the Respondent to release the picker books to the UFW during the course of negotiations to the effect that the picker books themselves, as was proved during the hearing, would only serve to buttress the UFW's position concerning the eight hour guarantee.

c. Alleged Changes re: the Policy of Hiring Minors

General Counsel, in paragraph 15 b of its complaint, preferred what I consider a strangely-conceived allegation:

> "Respondent did engage in discrimination in regard to hiring practices...and terms or conditions of employment, thereby discouraging membership in a labor organization and discouraging concerted activity by...(b) On or about August 6,

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57/ These records consisted of "picker books" which were maintained by foreman for each of the crews. The records were sketchy and incomplete and required a good deal of analysis before "any rational interpretation could be given them. For example, while particular dates were noted, they were set forth without reference to the month in which they occurred. Correlation with a 1976 calendar. was necessary before specific dates could be attached to the records.

58/ Parenthetically, it should be noted that the failure of witnesses such as Frances Arroyo, Francis Murphy and foreman Bonifacio Galvan to testify truthfully in this regard casts serious doubt on their respective overall credibilities.

1977, during the period of collective bargaining negotiations between Respondent and the UFW, Respondent, by its agent, Frances Arroyo, is bypassing and continues to bypass the UFW on subjects of bargaining, including but not limited to threats that a contract with the UFW would' prohibit Respondent from hiring minors."

and that such acts and conduct resulted in violations of §§ 1153(a), (c) and (e) of the Act.

General Counsel produced three witnesses to substantiate this allegation. The testimony of Trinidad Chavez, given at a prior hearing case number 77-CE-31-M et. al., was admitted into evidence pursuant to §1291 of the Evidence Code, after it was determined that he was unavailable as a witness. Chavez testified that approximately three days, after the season began on August 4, foreman Bonifacio Galvan [59/] told him "that if I was on that [negotiating] committee with the Union that I was going to be fire (sic), and that Bancha said that the minors would not be able to help me..." [60/] Under cross-examination however, Chavez significantly modified his testimony stating that Galvan told him "if the union was certified that they weren't going to allow the minors to go to work anymore." Chavez also testified that two of his children under the age of 18 worked with him for the Respondent, and that he knew of other families who had their children working with them also.

Fidel Perez, a picker in Crew 1, testified that he has a son 16 years of age who also worked with him in Crew 1 during the 1977 season. Perez stated that at some point near the beginning of the 1977 season, Frances Arroyo "told me that if the union starts representing us, the company will not hire minors." Perez further testified that he knew of other workers with family members under the age of 18 that were employed by Respondent during the 1977 season including one or two children in the Ramon Perez family, one in the Louis Lopez family and two in the Trinidad Chavez family. Perez also stated that to his knowledge no one had been discharged from the Respondent who was under 18 years of

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[59/] Respondent admitted in its answer that Galvan was a supervisor within the meaning of the Act.

[60/] Chavez later testified that "Pancha" was another name for supervisor Frances Arroyo.

age during the 1977 season.

On cross-examination however, Respondent introduced a declaration signed by Perez on August the 6th. Perez stated that what he said in the declaration was true. In that declaration he states "Frances said that Murphy knows very well that minors under the age of 18 do not work for the Meyers Company where there is a contract with the Farmworkers Union. For this reason Murphy will not give work to people under 18 years of age." Immediately after having the statement read to him, Perez denied that Arroyo said those words: "She told me that if the company signed the contract they would not hire minors." On further examination by this hearing officer Perez testified that Arroyo stated, "Now, think, Fidel, if the union wins and if the company signed a contract with them, it will not hire minors." He then admitted that the statement contained in his declaration was a statement he may have heard at a meeting at which other workers were present, and that he never heard Frances say. anything about Meyers.

Enedina Contreras, a picker employed by the Respondent during the 1977 season, testified that she has a daughter under the age of 18 who also worked for the Respondent during the 1977 season. Ms. Contreras, on direct examination, stated that Frances Arroyo told her in the first few days after picking started in the 1977 season, "if the union comes in we are not going to hire the minors. On cross-examination, however, Ms. Contreras testified that Frances Arroyo "said if the union comes in, you vote for the union and then the company signs up with the union and they're not going to allow any minors under 18 of age (sic) to work, and since you all like to have your workers here, I don't think its convenient for you to have a union." Contreras denied that Ms. Arroyo made any reference to the Meyers contract at that time. On further examination by this hearing officer, Contreras stated; She (Frances Arroyo) said it this way: "if the people want the' union, if they vote for the union and it comes in, the company will not be hiring the minors." Contreras then admitted that the union had already "come in," that they had already voted on whether to accept the union or not, and that there were people under the age of 18 already working there. She then modified her testimony again saying that Frances Arroyo stated "if you want a union —and then if the company signs the contract, we're,not going to hire the minors." Further Contreras had testified that Arroyo had come over to her personally and made the statement although there may have been other workers standing around the immediate area. Respondent introduced a declaration executed by the witness on August 6. The declaration states "a general foreman by the name of Frances said in front of all the crew that if the union •— if the union would come in to 0. P. Murphy Co. that they will not allow any more workers under the age of 18."

Frances Arroyo herself testified that Fidel Perez asked her on one occasion if the Respondent were going to hire minors if the union came in, and that this conversation occurred during the first week of the season. She stated "I told him that I hadn't worked with the union, and I didn't know what they did, that I knew that Meyers was union and if they hired minors, we were going to hire minors." She also testified that foreman Bonifacio Galvan was standing "pretty close," but she did not know whether he heard everything or not. Galvan was not asked to corroborate Arroyo's testimony, nor was Frances Arroyo requested to admit or deny that she had a conversation on this subject with witness Contreras.

The testimony of General Counsel's own witnesses belied the contention that Respondent had changed its policy concerning the hiring of minors. Several witnesses stated that members of their families under the age of 18 had in fact worked for the Respondent during the 1977 season. Furthermore, the testimony of three separate witnesses was presented concerning the alleged statement made by Arroyo. Each of the witnesses presented conflicting versions of the alleged statement and in many instances the conflicts arose within the confines of that particular witness's testimony or occurred when that testimony was compared with a sworn declaration. In addition, even if one were to assume for the purpose of argument that a statement was made to the effect that "if the union came in" the Respondent would change its policy in regards to minors, such a statement makes no logical sense in light of the fact that the union election had already been held and the UFW had been certified.

Nevertheless, in the face of the testimony of three witnesses, albeit inconsistent, concerning this allegation, and in light of the fact that I have found supervisor Arroyo's testimony altogether unreliable, it is concluded that she did, on more than one occasion, threaten that Respondent would not hire minors if a contract with the UFW was signed. [61]

d. The "No-strike" Clause

As will be discussed at greater length below, the agricultural workers employed by Respondent did, on September 12, engage in a work stoppage. When these workers reported to work on the following day, Tuesday the 13th, before they were permitted to enter the particular field where the Respondent was engaged in harvesting operations, Supervisor Frances Arroyo had them sign a paper. That much is certain; what the paper

[61] This is the most logical construction which I can attach to the sum of the testimony regarding her remarks in this connection.

actually contained or what workers were told that it contained before they actually signed it is a source of controversy.

The English version of the document in question reads:

> Do you agree that you will report to work at 0. P. Murphy Co., and abide .by the company rules. You will not engage in violent or disruptive conduct. If you go on strike the Company has the right to replace you. Do you understand and agree to these terms.

The Spanish version contains a phrase which was crossed out on the face of the document and another statement written along side of it, as follows:

> Usted esta de acuerdo de que va trabaja en la compania de 0. P. Murphy Co.y ir por los reglamientos de la compania. No va a violar o ilegal conducto. Si usted hace guelga(sic) la Compania tiene el derecho para paaraarie-de tsabaje-a-ttsfeed replacarlo a usted. Usted entiende y esta de acuerdo de acuerdo de estos reglamientos.

Scott Wilson an attorney for Western Growers Association, testified that his services were requested by Respondent on the day of the work stoppage, September 12. The following morning, Wilson stated, he felt it was necessary to-prepare a statement regarding the Respondent's rights in a strike situation. [62/] After initially testifying that supervisor Prances Arroyo wrote the English version of the statement, Wilson later modified this testimony to the , effect that it was Mike' Murphy who wrote the English portion . [63/] After the English statement was prepared Wilson testified that Frances Arroyo translated the statement into Spanish. After she translated what she had written from Spanish back to English, Wilson said that he advised her to make the change signified by the emendation in the text above, i.e., to substitute the

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[62/] Francis Murphy testified that he was responsible for preparing the statement above. The reason that he gave for the statement was "to make sure the people who went to work [on September 13] were those who previously had been on the payroll." This conflict between Respondent's own witnesses gives emphasis to the lack of credence which can be attached to the great portion of Francis Murphy's testimony and indicates his general lack of candor.

[63/] The rationale for utilizing the services of an attorney to provide advice and to be present at the drafting of a statement rather than actually drafting the statement itself escapes me, particularly in light of the fact that the wording of such a statement could have a variety of legal implications.

word "replacarlo" for the word "parlarlo," or to change the word in Spanish "to fire" with "to replace." It was at this point, before the statement was taken to the workers themselves, that the words were allegedly crossed out.

Numerous workers called by the General Counsel testified that on the morning of September 13, at the entrance to one of the fields being harvested by Respondent,. Frances Arroyo read the statement to them and then gave it to them to sign. Witnesses Antonio Marguarito, Emma Martinez, Gustavo Savala, Adelina Savala, Salvador Hurtado, and Arnulfo Gazca all testified that they did not actually read the statement themselves. What Frances Arroyo told each of them was that the paper had to be signed before anyone would be permitted to work, and that Arroyo did not say that if the people went on strike they would be replaced. Rather, she stated to them that if they went on strike, they would be fired. Arnulfo Gazca testified further that when he saw the statement itself there were no words crossed out on it.

Although Frances Arroyo testified that she read the statement containing the word "replacarlo" to the workers as they came into work that day, because of numerous other inconsistencies in her testimony as well as her demeanor on the witness stand, which can be best characterized as uncomfortable and ill-at-ease, and also given the mutually coborative testimonies of witnesses called by the General Counsel, I am inclined to credit their version of the events which occurred on the morning of September 13, to the effect that these workers were told that if they went on strike they would be fired rather than replaced. As the workers were required to sign the paper before they were allowed to go to work, "agree[ing] to these terms," I additionally find that Respondent, without notification to, consultation with, or agreement of the UFW, attempted to impose as a condition of employment a regulation that workers, in order to be employed, would not go on strike and would be fired for doing so.

f. Unilateral Changes Re: Subcontracting

General Counsel alleged in its complaint that "on or about September 14, 1977 during the period of collective bargaining negotiations between Respondent and the UFW, Respondent unlawfully replaced and continues to unlawfully replace discharged employees in order to discourage protected concerted activities among its discharged employees." General 'Counsel further alleged that such conduct was in violation of §§ 1153 (a), (c), and (e) of the Act. In its brief, General 'Counsel argued that the hiring of replacements for workers -who- had engaged in the work stoppage commencing September .12

was a unilateral modification of terms and conditions of employment in that the hiring of such replacements should be construed as an attempt by Respondent to sub-contract out work which was supposed to be performed by members of the bargaining unit represented by the UFW.

The work stoppage which commenced on September 12 involved the overwhelming bulk of Respondent's agricultural employees. Said employees were not reinstated until October 15 pursuant to a court order. [64/] Francis Murphy testified that during this period, the Respondent had crews working for it containing between 35 and 60 employees. Several witnesses called by Respondent testified that they had been hired fay the Respondent in this interim period to perform harvesting operations which were normally performed by Respondent's regular agricultural employees. [65/]

The Respondent has various contractual arrangements with growers, to buy their tomatoes for packing and shipment. These contractual arrangements take two basic forms: either the Respondent buys the tomatoes in the field or the grower harvests the tomatoes itself and sends them to the Respondent's packing shed. Ordinarily the grower contracts to sell so many acres of tomatoes to the Respondent. If the Respondent purchases the .tomatoes before they are actually planted, it thereby--acquires the responsibility to see that such tomatoes are picked. By August, 1977, Respondent had arrangements with the following growers obligating it to send harvesting crews to their lands to pick the tomatoes grown thereon: Huntington Farms, Pryor Farms, Mill Farms, Bruce Church, Inc., Borazini, Braga, Roy Zacasagawa, and Charlie's Farms.

The parties stipulated that labor contractor Green Thumb, Inc. provided harvesting crews to harvest tomatoes which would have been harvested by Respondent's crews had it not been for the work stoppage. From September 14 to September 19, Green Thumb sent crews to Charlie's Farms to harvest Respondent's tomatoes. From September 20 to September 23. Respondent directly retained the services of Green Thumb Inc. to perform harvesting operations. On September 24 and 25 Green Thumb Inc. worked for Roy Zacagasawa to harvest crops owned by Respondent. From September 26 to September 30, Charlie's Farms employed Green Thumb Inc. to supply harvesting

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64/ Monterey County Superior Court Action Number 73674.

65/ Respondent's payroll records show that 22 new employees were hired for the payroll period ending September 28; 95 more" "were hired for the period ending October 5; and 44 additional were put on the payroll in the week ending October 12.

crews to work on lands wherein Respondent had bought the crop and on October 1 and 3, Respondent once again employed Green Thumb Inc. directly to supply harvesting crews. More specifically, on September 20, 21 and half of September 22, workers obtained through Green Thumb worked on land owned by Huntington Farms and on part of September 22, September 23 and October 1 through October 3 Green Thumb performed work on lands owned by Bruce Church. Charley Duncan, the owner of Charlie's Farms testified that he was involved in a general farming partnership with the Respondent which harvested his tomatoes. He further testified that if it were not for the labor dispute in September and October of 1977 Respondent's crews would have harvested tomatoes that Green Thumb actually did.

The eventual reinstatement of those employees who engaged in the work stoppage belies the contention that their jobs were permanently eliminated via sub-contracting. No evidence was presented that such was Respondent's intent. Rather, it appears that Respondent simply sought to meet its contractual obligations to harvest tomatoes and continue operations despite the work stoppage.

3. The Work Stoppage of September 12 and its Aftermath

a. Events Leading Up to the Stoppage

After work one Monday afternoon early in the season, at a meeting with union officials Roberto Garcia, Marshall Ganz and Fred Roth and also attended by 75 to 80 workers, two representatives from each of the three crews who were working at the time were elected to participate as members of a "negotiating committee." [66/] Antonio Margarito, a farm worker for forty years [67/] was elected to serve as a representative from Crew Two. The committee met later in August with Ms. Steeg and other union officials on four separate occasions. At these meetings the various aspects of the collective bargaining agreement were explained. In particular, the three major sections, "local issues," economics, and the "language" elements of the contract were discussed. The basic function of the negotiating committee was to be a conduit of information between the workers and the UFW in order that the workers could express, through the negotiating committee members, what they felt they wanted to have as part of their collective bargaining agreement, and the negotiating committee members could, in turn, inform them as to what had happened during the course of actual negotiation sessions which they would attend. At the fourth meeting held for purposes of explaining the contract to members of the negotiating committee, Antonio Margarito was elected its president.

[66/] Representatives from the crews subsequently hired were elected at a later date.

[67/] 1977 was the first season that he worked for Respondent, and was also the first time Margarito was employed as a tomato picker.

Margarito and other members of the committee stated that the committee could not report much progress in the negotiations to the workers as no progress had been really achieved. The workers expressed their dissatisfaction with this state of affairs. In response, on Friday, September 9, the members of the negotiating committee held a meeting after work. The committee, as Margarito testified, wished to bring to the attention of the company that the workers were discontent with the lack of progress in and status of the negotiations. Accordingly, the committee strove to devise a plan to "put a little pressure on the company" to come to the negotiating table and bargain in earnest. One alternative that was discussed was known as the "turtle plan:" as the name implies, this plan would involve a work slowdown. The plan that the committee eventually agreed to implement, however, was known as the plan to "pick dirty."

Under normal circumstances, pickers are supposed to pick those tomatoes of a certain size and color, removing the stems and the "star" which connects the tomato to the bush from which it grows. Rotten or misshapen tomatoes, tomatoes which are overripe or not ripe enough, and tomatoes which have not reached a certain size usually are not to be picked. However, under the plan to "pick dirty,." culls or misshapen tomatoes and tomatoes with the stem and the star still attached were to be picked by workers, put in their buckets and brought to the dumpers to be dumped.

Various witnesses testified that under normal circumstances foremen would spot-check pickers' buckets and remove any culls or stems from them before the bucket was actually dumped. If a bucket had too many undesirable tomatoes, the foremen would have the authority to reject the entire bucket and the worker would not get credit for having picked it. A certain amount of "dirty picking" occurs naturally when workers are attempting to pick at a very rapid pace. Adelina Savala, a checker employed by Respondent testified 'that the fast pickers, the people in a hurry, would normally 'pick dirty" to some extent. In fact, Mike Murphy testified that the rationale behind paying pickers at an hourly rate at the beginning of the season was because in a new field the cull rate was so high as to necessitate the rejection of many of the tomatoes that were picked. In order to insure that the workers picked carefully, the workers were paid hourly so that they would work at a slow enough pace and the right type of tomatoes would be picked, thus reducing the number of culls. Steven Highfill, the labor relations consultant, testified that when a piece rate is implemented in the picking of tomatoes, the grower attempts to achieve a 25% cull rate on the average, that "it was normal to have 25 percent of the tomatoes picked [by piece-rate] that were too small or had stems or had bruises or were overripe." After having stated that the cull rate

depended on a variety of factors including weather and the type of ground, Highfill also testified that the highest cull rate that he was familiar with was between 40 and 50 percent.

On Saturday, September 10th, the negotiating committee held a meeting with Steeg, Marshall Gantz, Roberto Garcia and Bill Granfield, officials of the UFW, at 10:00 o'clock in the morning in the union office in Salinas. The negotiating committee members informed the officials of their plan, designed "to call the company's attention" to the lack of progress in negotiations. The officials neither approved nor disapproved of the plan. By their inaction however, it may be inferred that they condoned it. When the plan was conceived, Margarito testified, a mass walk out was neither contemplated nor discussed, nor was the plan discussed in the context of its utilization as a prelude to a strike. Also not discussed was the response, if any, that there would be in the event that the Respondent took any disciplinary action against any worker who participated in the "dirty picking" plan, either in the form of a termination or a. warning notice. [68/]

Salvador Hurtado, another negotiating committee member who participated in formulating the plan, stated that the committee, never planned to go on strike or stop working, that the purpose of the plan was just a protest so that the company would go to the negotiating table. However, Arnulfo Gazca, another member of the committee, stated that there was some discussion about a walk-out. In response to a question whether or not the possibility of a walk-out was discussed during the course of the meeting with the negotiating committee Gazca stated "we didn't know the results or we knew that in those days or around those days, that sooner or later we would probably have to stop...we knew something was going to happen, but we didn't know what was going to happen. Well, we knew something was going to happen if that happening forced us to do it we were going to do it." Gazca later went on to state that he did not know what sort of reaction the company would have to plan.

[68/] One-of Respondent's exhibits outlined instruction to workers. Several witnesses testified that they had seen a circular of this type near the beginning of the season. One of the items on the circular states: "we hope the following instructions would help you understand the job you have been hired to do:...3. Culls, rotten, scarred and misshapen tomatoes will not be acceptable." The-.parties stipulated that no one had been fired in 1976 for violating this rule, and only one person, as will later be discussed, was terminated for violating it in 1977. Various witnesses stated, however, that worker might receive "tickets" or disciplinary notices for such conduct.

b. The Events of September 12

On the morning of September 12th, as the workers arrived for work at around 7:00 a.m. at the Huntington fields near Respondent's packing shed, Margarito, Hurtado, Gazca and other members of the committee informed as many workers as they could of the plan to "pick dirty." Gazca testified, that he did not tell workers about the possibility of a work stoppage, but that "we knew that something serious was going to happen, but we waited and wanted to wait till we found out whatever reaction the company took and then we were going to discuss that."

As might be expected, when work commenced on the morning of September 12th, various foremen and supervisors noted that the picking that was taking place was unusally dirty: workers were bringing buckets of tomatoes containing dirt, stems and weeds. In the words of foreman Leandro Gonzales, "employees were not picking in the way that they were instructed." Dumper Gustavo Savala testified that the picking that occurred' that morning was really dirty. Field superintendent Mike Murphy, who' was substituting for a dumper who had not yet arrived, rejected buckets that had been picked by Antonio Margarito, telling him to "clean it up," Margarito testified that he told Mike Murphy at that point "it's your pay and you don't want to do the contract, so this is the price you pay." He also testified that he told foreman Gonzales not to check his buckets since they were badly picked, and that the purpose behind the bad picking was to call attention to the company to the lack of progress in negotiations.

While Margarito was talking to Gonzales in Crew 2, picker Salvador Hurtado was being confronted by his foreman Carlos Escarsega. Hurtado testified that the foreman inspected the first three buckets that he picked that morning without saying anything. On his fourth trip to the tomato truck, Escarsega said he was going to fire him. Referring to the fact that Hurtado was the crew's representative on negotiating committee, the foreman stated, according to Hurtado, "as representative of that crew you should do a better job and set a good example." Hurtado testified that Escarsega wrote him out a ticket or formal discharge slip and instructed the picker to sign it, go to the office and pick up his check. [69/] While the two were talking, Mike Murphy came by and a verbal exchange with. Hurtado ensued. Apparently this exchange attracted the" attention of the pickers working nearby in Crews One, Two,

[69/] .A, minor conflict in the testimony arose, as will be discussed below, when both Mike Murphy and foreman Escarsega testified that it was Murphy, not the foreman, who decided to terminate Mr. Hurtado.

and Three, who upon perceiving it stopped working.

Mike Murphy testified that that morning foreman Escarsega called him over to ask what to do about Hurtado's picking. Hurtado had already received a formal warning slip for bad picking on the previous Saturday. At this point on Monday, September 12, Murphy decided to fire him. [70/] Mike Murphy stated that when he gave the discharge slip to Hurtado, Hurtado tore it up. [71/] Hurtado testified that he told Mike Murphy the people wanted the company to negotiate. In response, Mike Murphy stated "if that's what you are waiting for, goodbye, because there's going to be no contract." Arnulfo Gazca corroborated Hurtado's account in this regard.

By this time Crews Two and Three 'had gathered around the pair. Certain members of these crews walked down the rows to where Crews Four and Five were picking, approximately forty or fifty yards away. Exactly what was said to these crews' members is uncertain from the record. However, shortly thereafter these crews also stopped working.

Margarito and Mike Murphy then became engaged in a short colloquy. Margarito stated to the workers that we are doing this to call the attention of the company in order that they negotiate and a contract be signed, "and that 'the people are protesting the fact that there had been no contract. " According to Mike Murphy, pickers started to yell after Hurtado was given the discharge slip, and Margarito allegedly stated that he wanted Francis Murphy out in the fields to sign a contract or there would be no more picking. Murphy allegedly responded that there could be no negotiations in the fields. [72/]

[70/] Several of Respondent's witnesses testified that workers would receive several oral warnings if their job performance warranted it, then they would receive a written warning. After a written warning was received by a worker, the next disciplinary step the company would take would be to terminate that worker. The parties stipulated however, that Hurtado was the only worker to be fired, either in 1976 or 1977, for "picking dirty."

[71/] Escarsega corroborated this statement.

[72/] I do not credit this version of the facts as presented by Mike Murphy. Mike Murphy testified that he could not understand Spanish, the language in which Margarito was communicating. Although- supervisor Frances Arroyo attempted to provide corroboration for Mike Murphy's statements in this regard, I find that the logical import of Margarito's remarks was to the effect that the workers wished the company to begin negotiating in earnest and not necessarily sign a contract right there-in the fields. As Margarito was a member of the negotiating committee, he would naturally understand that the contract would have to be hammered out in negotiating sessions.

Margarito then told Mike Murphy to call his father Francis Murphy and bring his lawyers out to the fields.

Foreman Escarsega testified without corroboration that Margarito and Gazca told Murphy that if Hurtado was fired all the workers were going to stop. At that point, they went to .the other crews yelling such things as "huelga, union, more money/; we want a contract now." [73/]

Approximately 90 percent of the workers then left the field en masse, and gathered outside its northwest corner, while the remainder stayed and continued to pick. According to the testimony of various witnesses, as the great bulk of workers filed out of the fields, tomatoes were being thrown. While certain witnesses stated that tomatoes were thrown in no particular direction, and with no particular purpose, workers Gustavo Savala and Jose Mares stated that tomatoes were being thrown by the workers who had participated in the walk-out in the direction of the workers who continued to pick. I find this testimony accurately reflects the events of that morning. One worker in particular, Crementina Chavez, threw a tomato which hit fellow worker Ofelia Conchola. Supervisor Francis Arroyo had previously warned workers not to throw tomatoes at one another. [74/] Although Conchola admitted that she was not hurt by the tomato, Arroyo, upon learning of the incident, ordered that Chavez be terminated.

As the workers gathered in the corner of the field, UFW officials Marshall Ganz, Roberto Garcia, Marion Steeg and J. Torres arrived. Ganz first spoke to the assemblage, then Antonio Margarito addressed the group. Margarito testified that he told the workers that they were stopping work in protest because of Respondent's "bad faith/" that there had been little, if any, acceptance of the proposals submitted to

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73/ I do not credit Escarsega's testimony since it lacked corroboration. Escarsega testified that in the previous season, an individual had been fired for bad picking. To the contrary,, however, the parties stipulate that no one in 1976 or 1977 for that matter, with the exception of Hurtado, was fired for dirty picking.

74/ Various witnesses testified that while waiting for tomato trucks during the course of their ordinary duties, workers at times amused themselves by playfully tossing tomatoes at one. another. Witnesses for the General Counsel attempted to explain Chavez's hitting Conchola with a tomato by stating that ;there was done in jest, that the two were good friends, and there was no serious intent connected with the throwing of the tomatoes. I do not find this to be the case.

Respondent during negotiations and hardly any progress had been made. As Margarito spoke, various law enforcement officials arrived at the fields, including local sheriff's deputies. Supervisor Arroyo testified that Margarito, when speaking, stated that he wanted the company to sign a contract, that the workers wanted more money, paid holidays and vacation benefits. However, her testimony in this regard was substantially colored by the fact that while Margaritowas speaking, she and Mike Murphy were talking. She also stated that although she heard Margarito mention negotiations she "did not remember what he said." I find her somewhat selective recollection of these events to be inherently unreliable, and therefore discount it.

Francis Murphy, who appeared on the premises during the course of the walk-out, determined that if the workers were not picking he did not want them in the fields. Accordingly, he instructed the sheriffs to assist in their removal. The workers proceeded to leave the field, and scheduled a meeting among themselves at, Soledad Park later that afternoon.

Not all the workers left at that point: approximately 30 to 40 remained. Mike Murphy decided to take these workers to another location in order to try to get some picking accomplished that day. Not long after they had been at this other field, a group of people who had participated in the earlier walkout appeared. [75/] These workers, accompanied by Ganz, Garcia, and J. Torres, successfully convinced the workers who were picking to stop. Mike Murphy determined that after the large group had appeared at the second field, it was best to cease operations that day.

Various witnesses offered uncorroborated testimony in regard to statements made by Antonio Margarito concerning the strike. Martha Quintanilla testified that she heard Margarito say that the strike was because they were not being paid enough for the second pick. Parenthetically, she also noted that Margarito told her the stoppage was due to the fact that the company did not want to negotiate. One Maria Garcia, a checker in Crew Five, testified that when the workers came down to her crew to tell the crew members to stop working on the morning of the 12th, Arturo Juarez told her they were going to have a stoppage because they wanted "higher wages and also they wanted the company to sign up with the union." There was no evidence in the record as to exactly what position, if any, Mr. Juarez held with the UFW or whether he was a member of the negotiating committee. As such, his statements, even if actually made, were

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[75/] Various estimates were given as to the number of stoppage-participating employees who showed up at the second field that day. Estimates ranging from 20 to 25 nearly 100 were given by various witnesses. However, I do not find the determination to be critical.

merely the isolated remarks of an individual and cannot be deemed adoptive admissions in any sense. Deputy sheriff Elias DeLeon testified that Margarito, on addressing the workers, stated that the people wanted more wages per bucket. On cross-examination however, DeLeon admitted that Margarito had been talking about the negotiations and the fact that the Respondent had been stalling. As stated above, Frances Arroyo, who "did not remember" all of what Margarito said, allegedly heard Margarito tell people that he wanted the Respondent to sign a contract and pay them more money.

As will later discussed, the preceding paragraph evinces an attempt by Respondent to elicit testimony to the effect that work stoppage of September 12 had as its fundamental rationale the workers' concern over the company's failure to meet economic demands in negotiations. I specifically find this not to be the case. The overwhelming bulk of the testimony concerning the events of September 12 points to the conclusion that the work action (i.e.;-the "dirty picking") and the subsequent work stoppage were due in large measure, if not totally, to the Respondent's failure to engage in meaningful negotiations, notwithstanding the firing of Salvador Hurtado, which may have been "the straw that broke the camel's back." Margarito, picker Emma Martinez, Gustavo Savala, Salvador Hurtado, Arnulfo Gazca, Deputy Sherriff Elias DeLeon, workers Jose and Maria Mares and Guadalupe Guzman all testified in various fashions that either when they were first informed of the plan to "pick dirty" or during the course of the meeting which was held at the edge of the field on the the morning of September 12, Margarito and other members of the negotiating committee instructed them to engage in the work action in order to put pressure on the company so that it would negotiate in good faith, and I so find. I also find that the actual work stoppage of September the 12th was a spontaneous decision which had been admitted by its various instigators to be a possibility but which had not been predetermined.

c. The Events of September the 13

On the day following the first day of the stoppage, workers arrived at approximately 6:30 a.m. at the entrance to one of the fields which Respondent was to harvest. The field was located in between the Respondent's packing shed and a cafe know as the Oasis, a gathering place whose location figures centrally in these events. Antonio Margarito testified as follows concerning the events of September 13. As he arrived at the entrance to the fields, Frances Arroyo, a man in a suit and two policemen were stopping cars on their way into the field. Arroyo approached the cars with a piece of paper-and asked people to sign It. [76] Following the signing

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[76] This document was referred to oil an earlier discussion concerning a "no strike clause."

of this paper, Margarito went to the field scheduled to be harvested that morning, located about one quarter of a mile away. After waiting at the field approximately five minutes and noticing that no other cars had followed him in, Margarito went back to the entrance where he saw Arroyo permitting cars to enter and a large group of workers assembling. UFW officials Roberto Garcia and Bill Granfield arrived. The workers that morning had their picking buckets with them and were ready to go to work. Some of them went past the entrance toward the field. Margarito testified that he overheard workers discussing the fact that the Respondent was not permitting Salvador Hurtado to return to work. Margarito asked the workers what they wanted to do; they responded that they wanted Respondent to give Hurtado back his job. Margarito returned to the location where Frances Arroyo was and asked her personally why Hurtado had not been given work. Arroyo responded that it was because he had been fired.

According to Margarito, the workers then waited to see whether they would hire Salvador Hurtado. Margarito conveyed this sentiment to Arroyo, stating to her that the situation was easy to remedy: hire Salvador Hurtado and we will all go back to work. Margarito then addressed the workers and stated it was their decision whether they wanted to return to work or support Salvador. The workers apparently agreed not to return-.to work. At this point, Frances Arroyo, from, the back of a pickup truck, announced to the assembled workers that they had fifteen minutes to start working, or they would all be fired.

Margarito thereupon discussed the situation with Gazca and decided to travel to another field where Crews Four and Five were to be working, located approximately one-half mile away. Initially prevented from going into the field by sheriff's deputies, Margarito eventually succeeded in telling these crew members that workers in Crews one, TWO, and Three had stopped working. Margarito then attempted to return to the field area where the other crews were located. He was prevented from doing so by a police officer. Instead, he went to the Oasis which was located close to the entrance to the field. He perceived workers coming out in their cars from this field.

The workers assembled at the Oasis and a brief meeting, was held. It was concluded that a further meeting' among the workers would take place in early evening in Soledad.

This meeting was attended by the workers, Marsahll Ganz, arid Roberto Garcia. As a result of the meeting, the workers decided to go back to work without any conditions, and expressed a desire to return to work regardless of whether or not Hurtado was rehired. After some remarks were made

concerning the negotiations, the workers decided to assemble the following morning at the Oasis, since the supervisors passed by that location on their way to the shed, and present themselves for work.

Emma Martinez likewise testified concerning the signing of the paper on the morning of Tuesday the 13th. She corroborated Margarito's statement to the effect that Francis Arroyo give the workers fifteen minutes to commence working or they would all be fired. However, she stated that the people agreed to support not only Salvador Hurtado but also Clementina Chavez, and wanted both of them to be rehired. Chavez herself corroborated this version to a major extent.

Hurtado enlarged on these details somewhat, but nevertheless provided a recitation consistent with that of the great bulk of General Counsel's witnesses. Like the others, he testified that when he appeared at the entrance to the field on the morning of the 13th Arroyo gave him a paper to sign. However, after he signed it Arroyo crossed his name off the list and instructed him to go to the packing shed and pick up his check. Approximately fifteen minutes later he went in to the. field and the possibility of his reinstatement and that of Clementina Chavez were discussed by the workers and supervisor Arroyo. At one point, Arroyo said they were not going to rehire Chavez or-Hurtado, and that she was not going to let "her dignity be trampled over." It was at this moment that she got in the back of the pickup and announced that the workers had fifteen minutes to start working, otherwise they would be considered fired.

Supervisor Arroyo presented a similar account of the events occurring on the morning of September the 13th: that she read a statement to workers as they came in the entrance to the field and told them to sign it. If people did not sign the document she would not allow them to' enter the field. She further testified that Margarito told the workers to agree to anything that was on the paper. [77/] After they had found out that Hurtado and Chavez would not be rehired, the pickers stopped going in to work. Arroyo denied that she told anyone that they would be fired. Arroyo testified, "I told the people that they had fifteen minutes to go back to work, otherwise, leave the field." Arroyo's statement went uncorroborated. In light of the mutually corroborative statements of numerous witnesses that she, on the morning of September 13th, stated that she would fire workers if they did not return to work within a specified time, I credit their versions of the facts rather than Ms. Arroyo's.

[77/] Margarito himself admitted as much,

d . The Events of September 14

As noted above, at a meeting held among the workers employed by Respondent on the evening of September 13th, it was decided that all would seek reemployment regardless of whether Hurtado and Chavez were rehired by the Respondent. As in the previous morning, large groups of workers assembled at the Oasis at approximately 6:30 A.M. on September 14 . [78/] While they were assembled none of the Respondent's supervisors stopped although several were seen driving by. At about 7:00 A.M. Margarito went with worker Enedina Contreras to another field located five to six miles away, near Arroyo Seco. When they arrived at this field they noticed Mike Murphy and a crew of workers picking tomatoes. Margarito and Contreras returned to the Oasis and told the people what they had seen.

A large group of about 150 workers decided to visit the field at, Arroyo Seco. As they arrived at this field and parked their cars, they were accosted by sheriff's deputies who told the workers they would not be allowed to enter. The workers nevertheless proceeded to where the pickers, approximately 60 to 70 in number, were picking. While the large majority of the workers who participated in the stoppage remained outside of the field, 25 to 30 actually did go in to talk to the pickers. Margarito testified that they explained to these workers about the negotiations and read them an ALRB flyer. Some of the workers responded to their entreaties and ceased picking. As Margarito had to leave for negotiations at about 9:00 A.M., he began to walk out of the field. As he and the others were departing, sheriffs deputies stopped them and informed them they would all have to leave otherwise they would be arrested. Margarito told the police it was up to the people whether they wanted to stay or not. It was at this point that he and several others, five in number, were arrested for trespassing.

Adelina Savala testified that on the morning of September 14 she met Prances Arroyo near the Respondent's packing shed and told her that she wanted to go to work. According to Ms. Savala, Arroyo told here that she didn't need any people any more, that she had some new people. Following this discussion Ms. Savala joined the group assembled at the Oasis. Her husband Gustavo substantially corroborated this testimony.

Frances Arroyo could not remember telling Gustavo Savala and his wife that there was no work for them. She

[78/] Margarito testified that there were between 200 and 250 workers on the scene.

testified that she offered jobs to the people who had asked for work. These discussions allegedly took place at the scales located between the Oasis and Respondent's packing shed. Once again her testimony was uncorroborated. [79/] Furthermore, as yet another example of the lack of credence which can be attached to Frances Arroyo's testimony, she testified that on the 14th approximately thirty people worked for Respondent. However, the parties stipulated that the labor contractor Green Thumb, Incorporated supplied eighty-one workers to pick tomatoes an Charlie's Farms which would have been picked by Respondent's crews had there not been the work stoppage. Therefore her testimony concerning offers of work is wholly discounted. [80/]

As discussed earlier, at the negotiations session scheduled for that day Antonio Margarito brought up the subject of the workers' protest, telling Respondent's attorney Donald Dressier that all the workers had been fired. Dressier disputed this contention and stated that-the people were not fired and in fact all could return to work. Marion Steeg also testified that at the meeting of September the 14th on behalf of the workers she expressed their willingness to return to work.

79/ Arroyo further testified on cross-examination that during take course of the labor dispute in the week of September 12 she offered work to all of the strikers—"as a group"— when she stopped, each morning, at the entrance to the fields across from the Oasis. None of the worker witnesses so testified, and therefore Ms. Arroyo's assertions are wholly discounted. In addition, as the workers were seeking reinstatement as a group throughout that week, it seems highly unlikely that if such an offer was made, they would not accept it.

80/ According to the testimony of various witnesses, it was Charlie Duncan, the owner of Charlie's Farms, who actually retained the services of Green Thumb after being informed by Francis Murphy that Respondent's crews would be unable to harvest his fields. As noted above, however, Francis Murphy testified that Respondent and Charlie Duncan were engaged in a general farming partnership. As such, I find that Duncan was an agent of Respondent, acting on its behalf, and that the retention of Green Thumb was performed pursuant to this partnership arrangement. (Calif. Corporations Code §15009). The contention that Respondent technically did not hire Green Thumb, Inc. on the date in question is specious and legally inaccurate. Ms. Arroyo's neglecting to mention crews obtained via Green Thunb, Inc., indicates a decided lack of candor which renders her testimony suspect.

e. The Events of Spetember 15

Antonio Margarito testified that on September the 15th he returned to the Oasis at 6:30 in the morning, where, once again, the workers assembled. While they were gathered at that location, two individuals representing the Respondent appeared: Ed Colon, a labor relations consultant, and Darryl Voth. According to Margarito, Colon stated that the company sent him there to put people back to work and that the company wanted to hire forty workers. When Margarito responded that all the workers and been fired, Colon stated that the workers had actually been replaced. Margarito testified that the general feeling among the workers was that either all should be hired as a group or none would be hired. When he asked Colon who would be hired Colon responded that people would be employed by seniority, without saying what type of seniority he was talking about. Whereupon, the workers themselves refused as a group the employment offer to forty of their number.

Mike Murphy testified that on the date previous he instructed Frances Arroyo to contact members of Crew one and offer them employment. The crew was supposedly to have engaged in picking operations at the Los Coches Field. Frances Arroyo testified that she did call the members of Crew 1. Not one employee witness was called to corroborate this assertion. Colon,., however/ stated that Francis Murphy had told him of this arrangement. He contradicted himself on cross-examination by stating that he himself made the decision to offer forty jobs to employees on the morning of September the 15th and made no reference to the statement in his earlier testimony that he went out to the Los Coches Field where no one showed up to work. In light of these contradictions and the lack of corroboration to Arroyo's statement that she called Crew 1 members and offered them jobs on the afternoon of September the 14th, I find these assertions to be highly suspect. [81/]

Colon himself testified that he and Voth both appeared at the Oasis and conveyed an "unconditional offer for employees to return to work" to Antonio Margarito. Margarito replied that the Respondent was to take "us all or none," to which Colon replied that this was impossible, that they would try to hire forty people on a first-come-first-serve basis. Interestingly enough, Frances Arroyo contradicted colon's testimony by stating

[81/] In addition, Arroyo failed to supply any details about the alleged telephone calls. Linda Manney had testified that many workers did not have telephones, so it is dubious whether Arroyo could have contacted an entire crew in that manner. Furthermore, as will be discussed below, Arroyo's solicitation of workers without-consulting the UFW, if it did in fact take place, constituted an additional violation of the Act.

that when she and Colon went out to the Oasis that morning the procedure that they utilized for calling people to work was by crew. At first she called Crew 1, then Crew 2, then Crew 3 and so. When no one responded she just said ."well, any 40." Colon testified that he told Margarito that the Respondent did not have enough equipment and did not have enough work to employ everybody. He would prepare a sign-up list and call names from the top down: if anyone was interested in working, the list would be available through Prances Arroyo. Cathy Christian, a member of the UFW Legal staff present on the scene, kept insisting that the Respondent hire everyone or no one, according to Colon. Colon stated that he then instructed Frances Arroyo to make the rounds with the sign-up list and ascertain whether anyone was interested in working. When Colon perceived that no progress was being made and that he would not be able to put anyone back to work that morning, he left the area around the Oasis.

Colon's credibility was seriously undermined on cross-examination by the following exchange:

Q. "(By Mr. Gonzalez) To your knowledge, were there any labor contractor crews working picking tomatoes for O. P. Murphy and Sons?

A. At the time I made the offer [for 40 employees to return to work]?

Q. At the time you made the offer? A.

Definitely not."

The parties stipulated that on September 15, 100 workers from Green Thumb, Inc. the labor contractor, were employed picking tomatoes at Charlie's Farms, performing work which would have been performed by Respondents' crews had there not been a labor dispute. As previously noted, the Green Thumb crews were retained pursuant to a general partnership arrangement between Respondent and Charlie Duncan of Charlie's Farms. To maintain that there simply was not enough work available at that time for at least a large portion of the employees engaged in the stoppage was simply belied by the facts.

Colon also contended that there was not enough equipment available, specifically, that tractor pullers had not been engaged in sufficient numbers to handle a full employee compliment. This assertion was negated by photographic evidence which show that on the previous day at Charlie's Farms where 81 workers from Green Thumb, Inc. were engaged, there were at least three truck trailers on the premises which had 0. P. Murphy & Sons tomato bins on their flatbeds.

Colon intimated during his testimony that he characterized the situation which arose during the week of September 12 as an "economic strike," and thus it may be inferred that he did not feel compelled to reinstate all of the workers who had engaged

in the work stoppage. Rather, the job offer on September 15 was an offer to "economic strikers" to return to work only as needed. This contention is further enhanced by the fact that Green Thumb Inc., as noted above supplied workers to various growers in addition to Respondent directly from September 14 to October 3 to perform work which would have been performed by Respondents own crews had it not been for the work stoppage. [82/]

Interestingly, although Steeg stated to Dressier at the negotiations meeting of September 14 that all the workers were interested in returning to work, no procedures had been agreed upon to reinstate them. Colon's decision to re-hire only forty workers, made without consulting with the UFW, and with the intent, inferentially, of utilizing these workers in conjunction with the replacements who had already been hired, can be viewed as an attempt to bypass and undermine the status of the UFW as the exclusive bargaining representative of Respondent's employees, and/or a scheme to "break" the work stoppage with, the very workers who had brought it about. Respondent's extensive prior unfair labor practices centering around the negotiations (as will be discussed in the legal analysis section below) as well as its record before this Board (see 0. P. Murphy & Sons, 4 ALRB No. 62), reinforce this contention, and indicate a pervasive anti-union attitude on the part of Respondent which, inferentially, would lead to the conclusion that such "staggered" offers of reinstatement were not made in good faith.

f. The Events of September 16 and following

Various workers testified that on September 16 and the days thereafter they went to the Oasis. There, as in days previous, large groups of workers would assemble in anticipation of being recalled to work by Respondent's supervisors. Emma Martinez, Salvador Hurtado, and Guadalupe Guzraan each testified to this fact. Lists were made of the names of the workers who had gathered at the Oasis on various days. The lists for September 23 and 26 were entered as exhibits The list for the 23rd contains 101 names, and that for the 26th contains 94 names.

[82/] The parties stipulated that Green Thumb Inc. supplied employees in the following numbers: to Charlie's Farms; September 14 - 81; September 15 - 100; September 16 - 61; September 17 - 87; September 18 - 80; September 19 - 72; to -Respondent directly, September 20 - 85; September 21 - 95; ' September 22 - 103; September 23 - 92; to Roy Zacasagawa; September 24 - 121; September 25 - 88. To Charlie's Farms on September 26 - 115; September 27 - 152; September 28 - 140; September 29 - 117; September 30 - 128; to Respondent directly, October 1 - 108 and October 3-95.

On the 17th of September, a Saturday which was also a payday, Frances Arroyo came to the Oasis to distribute paychecks. The workers objected to receiving them in the fields. However, Respondent was concerned that workers in the fields would be disturbed. After a delay of an hour or two, the workers agreed to receive their checks at the Oasis.

On the 21st of September a group-of about sixty workers attempted to enlist aid in the work stoppage from the workers who worked in the Respondent's shed. Police and security guards were required to disperse the crowd which had gathered pursuant to this goal at the entrance to the shed: no one was prevented from entering the shed area by the protest group. Security guards hired by Respondent testified that barricades were erected around the packing shed and access to the shed was carefully controlled. Only those people who actually worked in the shed or in the offices adjacent thereto were permitted to enter.

At the October 4th-negotiation session the Respondent's representatives discussed with the UFW the reinstatement of employees on a first-come, first-serve basis. As previously stated, no agreement was reached on whether these employees would displace those hired as replacements. Employees were notified, by letter, telephone and word of mouth to appear at the packing shed on the following day and sign up for work. A large group of workers did so. Mike Murphy reviewed the list of names taken that day and crossed out or circled in red the names of people who had been fired or who he felt should not be hired. On the next day October 6, when a security guard read off only forty names of people who were to be put back to work, there was great discontent with this arrangement expressed by the workers. They maintained that employment should have been offered to all of those who had participated in the stoppage. None of the employees who names were called went to work that day.

On October the 13th, Judge Richard Silver of the Superior Court of Monterey County, in case number 73674, granted to the Agricultural Labor Relations Board, as petitioner, a temporary restraining order which commanded that the Respondent "reinstate the workers discharged on September 12, 1977 and September 13, 1977, to their former or substantially equivalent positions of employment" The Respondent was given until October 17 to comply with the order. However, at some time prior to the 15th of October, Respondent's agents began to contact the employees who participated in the work stoppage , and offer them reemployment as of the 15th. Many workers responded and were employed for two or three days in that month.

I find that the assembling of significant number of employees at the Oasis in the days following the commencement of the work stoppage signified their willingness and availability to return to work. Respondent argues in its brief that workers did not inquire at the packing shed in regard to reemployment in late September and early October. However, I find-that owing to security measures there, most workers, in all likelihood, would be refused admittance to the shed and consequently would not be permitted/to talk with supervisors about employment possibilities, [83] In addition, as the workers had been told on September 13 that they were all fired, there would be no reason for them to assume that their jobs would be available upon application. Indeed, when Adelina Savala inquired about re-employment, she was told by supervisor Arroyo that replacements had been hired, and that her services were no longer needed.

g. Respondent's Defense of Striker Misconduct

As noted much earlier in this decision, Respondent alleged as an affirmative defense that employees "on behalf of and with the acquiercence of the Charging Party [UFW], have induced employees of the Respondent to engage in acts of misconduct including but not limited to acts of violence, intimidation, coercion and property destruction directed at the Respondent..." To substantiate this allegation Respondent offered evidence that on the 17th of September a large group of employees who had participated in the work stoppage rushed a field in which the Respondent was conducting harvest operations. The workers who were picking in the field ran to their cars. In the process of reaching the field in question, the evidence showed that significant numbers of the striking employees trampled on rows of broccoli plants which were being cultivated in a field contiguous to that where the tomato . harvesting operation was taking place. Three of the striking employees, Salvador Hurtado, Arnulfo Gazca, and Miguel Ramirez were arrested for trespassing that Saturday by Monterey County sheriff's deputies. No evidence was offered to demonstrate who owned the broccoli field in question, or rather that Respondent had any connection whatsoever to said field. Nor was there any proof made to the effect that the UFW in any manner instigated or condoned the incident which occurred on the 17th of September.

Respondent also sought to demonstrate that various

[83] Dana Ledger, one such security guard, testified that he was given -a list of individuals who would be permitted to "enter the shed area after the work stoppage. Any others, unless approval was received from the main office, would be denied entrance.

individuals were victimized by those who had participated in the work stoppage. Jose Mares, a picker in Crew Two, testified that after he worked on the afternoon oh September 12 thirty to forty strikers, including Salvador Hurtado and Trinidad Chavez, came to his house and told him "not to compromise the people riding with him." His wife Maria corroborated this testimony.. Jose Mares further testified that, sometime in October the windshields of his car were 'broken. He did not know who caused "the damage.

Three employees, Sophia Trujillo, Maria Elena Lopez and George Lopez testified that they began to work for Respondent as of September 15th. They each testified that they worked between three to four weeks for Respondent. Obviously, these were among the workers who were hired as replacements for those who engaged in the work stoppage. Each testified that at some point in October their vehicles were damaged. Maria Lopez stated that on September 15 one Fidel Alcantar, a participant in the work stoppage, threatened to damage her car. However, she 'was uncertain as to when the date of the damage occurred and admitted that Respondent paid for the repairs occasion thereby. The damage in each instance consisted principally of smashed windows,

Without any more pointed evidence I am unable to find that specific participants in the work stoppage caused the damage to 'these individuals' cars, or that the damage was prompted by the individual workers refusals to participate in the stoppage. The fact that a similar modus operandi was involved in each situation admittedly gives rise to certain suspicions. However, the circumstances, although suspicious, were not linked directly either to definite individuals or to the UFW. Significantly, no evidence was introduced to show that the UFW induced others to engage in the suspected acts of violence.

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III. Legal Analysis and Conclusions of Law

A. The §1153 (e) Violations

1. Conduct in the Course of Bargaining

I find that the totality of Respondent's conduct as set forth above, between April and October 1977, in the course of its negotiations with the UFW, amounted to a refusal to bargain collectively in good faith, in violation of §1153(e) of the Act.

Under ordinary circumstances, the standard by which it is determined whether or not a respondent had engaged in good faith bargaining is the "totality of the circumstances." Adam. Dairy, 4 ALRB No. 24 (1978). See also. NLRB v. Reed and Prince Mfg., 205 F.2d 131 (CA 1, 1953), cert, den. 346 U.S. 887 (1953); Continental Insurance Co. v. NLRB, 495 F.2d 44, 86 LRRM 2003 (CA 2, 1974). As the court noted in the Continental Insurance case, the problem is to "ascertain the state of mind of the party charged": motive must be determined, in most instances, from circumstantial evidence which points to a conclusion that the Respondent's conduct evinced an attitude that it had no sincere desire to reach a collective bargaining agreement with the exclusive bargaining representative of its employees.

Circumstances such as those present in the instant case have frequently been recognized as indicia of a Respondent's refusal to bargain in good faith. Respondent herein engaged in extensive dilatory tactics to avoid meeting dates and frustrate the efforts of the UFW to bring it to the negotiating table. Although the UFW submitted its original request to open negotiations in April, the first meeting with Respondent was not held until two months later in June. No meetings were held in between June 29 and August 19, thus occasioning a further delay of approximately two months during which time the tomato harvest season began. Throughout the period from April to October, the UFW negotiator. Marion Steeg, experienced great difficulties in communicating with representatives of the Respondent, who continually avoided contact with her and the setting of a definite negotiating schedule. From time to time, negotiators for the Respondent would represent that they would be available for meetings and then subsequently renege and prevent them being scheduled. Respondent's change of negotiators late in the course of the "bargaining also served to unduly protract negotiations, as it necessitated a refamiliarization with the parties' relative positions by the new negotiator.

Additional delays were caused by Respondent's failing to send a representative to the negotiating table who was reasonably knowledgeable in the various facets of the company's operations. Mrs. O.P. Murphy, who participated in the great bulk of the negotiations on behalf of the Respondent, demonstrated a wide

lack of knowledge of Respondent's agricultural operations, and was unable to answer even the most fundamental questions concerning them. The NLRB has recognized that failing to provide an adequately informed negotiator provides an indication of a lack of good faith in negotiations. See Coronet Casuals, Inc., 207 NLRB 204, 8 LRRM 1441 (1973).

Also worthy of note is Respondent's refusal to consider any proposals advanced by the UFW without having a full contract proposal submitted to it. As will be more fully discussed below, Respondent refused to relinquish certain relevant information or unreasonably delayed the release of such information which the UFW needed to prepare the very proposal, which was to be a condition precedent to the resumption of negotiations. By withholding such information on the one hand, and insisting that a full proposal be a pre-condition for resumed negotiations on the other despite its earlier receipt of partial proposals on which bargaining could commence, Respondent demonstrated a clear intent to unnecessarily delay negotiations and to frustrate the actual reaching of 'a collective bargaining agreement. See Fitzgerald Mills Corp., 133 NLRB 87, 48 LRRM 1745(1961), enf'd 313 F.d 260, "2174, 52 LRRM 2174, Cert. den. 375 U.S. 834(1963); International Powder Metallurgy Co., 134 NLRB 1605, 49 LRRM 1388(1961).It has been held that an employer may not place unreasonable conditions upon bargaining which serve only to cause needless delays. See, e.g., Lebanon-Oak Flooring Co., 167 NLRB No. 104, 66 LRRM 1172 (1967).

Other tactics employed by Respondent and its negotiators unduly protracted the negotiations. While on the one hand insisting that the UFW present a full proposal before actual bargaining could begin, upon receipt of this full proposal at the meeting of August 19, Respondent prepared a counter-offer which neglected to speak to some 23 separate articles in the UFW proposal in addition to the "local issues" items contained therein. When the Respondent finally did submit its "local issues" proposal at the meeting of September 2, it, like the original Respondent's counter-offer, was woefully inadequate, in that it did not speak to many of the issues raised by that portion of the original UFW proposal.

Significantly, although at prior meetings there had been some limited discussion of substantive contract proposals, it was not until the meeting of September 14 that Dressier, Respondent's negotiator, proposed to go through the UFW offer item-by-item in order that the parties might assess their relative positions on each issue contained within the proposed contract. Respondent's conduct in previous meetings can basically be summarized as participating in the mere physical exchange of proposals, hearing and debating requests for information and procedural matters, and discussing extremely narrow issues within the context of bargaining such as problems that had arisen in day-to-day operations. Thus, some five months had elapsed between the time the UFW sent its original request for negotiations and the Respondent actually sat down at the negotiating table and engaged in serious discussions of

a variety of particular contract articles. [84/] Such conduct, occurring approximately half-way through the harvest season despite a request to open bargaining four months prior to the season's actual beginning, clearly evidences an intent on the part of Respondent to delay the negotiations and prevent the reaching of an agreement before the 1977 season had come to a close.

Other specifics involving Respondent's conduct at the bargaining table also demonstrated a lack of good faith in its approach to these negotiations. Although it is not the Board's prerogative to "sit in judgment upon the substantive terms of collective bargaining agreements" (NLRB v. American National Insurance Co., 343 U.S. 395, 404, 30 LRRM 2147 (1952)), Respondent offered several proposals that would be "predictably unacceptable" to the union, and would result in-further delays while Respondent engaged in an "elaborate pretense" to go through the motions of bargaining. The most obvious of these items was the vacation article which Respondent proffered under which none of its employees would qualify for benefits. Another example was Respondent's proposal regarding holidays, which offered premium pay for working on Labor Day, a day when no one had been requested to work in the past.

The dilatory tactics thus engaged in by Respondent during the course of its 1977 negotiations with the UFW, designed to prevent, concluding a collective bargaining agreement, provide an ample basis for finding a violation of §1153(e) of the Act and derivately §1153(a)(see Robert H. Hickam, 4 ALRB No. 73 (1978); Exchange Parts Co. 139 NLRB 710, 51 LRRM 1366 (1963),enf'd 339 F.2d 829, 58 LRRM 2097 (CA 5, 1965), rehearing den. 341 F.2d 584, 58 LRRM 2456 (CA 5,1965); "M." System, Inc., 129 NLRB, No. 64, 47 LRRM 1017(1960).

2. Unilateral Changes

It should be empasized that the Respondent's conduct as analyzed above should not simply be viewed in isolation, but is to be regarded as part of the total mosaic which it presented in its approach to negotiating with the UFW during the 1977 season. (See, e.g., NLRB v. Insurance Agents International Union, 361 U.S. 477, 45 LRRM 2704 (1960).)Certain specific acts committed by Respondent during the course of those negotiations would, in and of themselves, necessarily lead to a finding of an §1153(e) violation, even without an assessment of the state of mind with which Respondent approached negotiations. These include the unilateral changes effectuated by the Respondent without prior consultation with or agreement of the certified bargaining agent during the 1977 season, and its refusal to furnish the bargaining agent with relevant information which was necessary for the UFW to formulate realistic contract proposals, which will be discussed in the succeeding

[84/] One may logically speculate that the work stoppage which began on September 12 provided a major impetus to in-depth discussions of thes nature.

section. (NLRB v. Consolidated Rendering Company, 38'6 F.2d 699, 67 LRRM 2423 (CA 2, 1967); Curtiss-Wright Corporation v. NLRB, 347 F.2d 61, 59 LRRM 2433 (CA 3, 1965) ". These so-called "per se" violations of the duty to bargain in good faith, taken in conjunction with Respondent's dilatory tactics and overall conduct at the bargaining table, evince on overwhelming attitude on the part of the Respondent to ignore its obligations under the Act, in derogation of its responsibilities under §§ 1153 and 1155.2(a).

I have found that the Respondent set and implemented hourly picking rates without notification to, consultation with, or agreement of the UFW. Not only did it determine the $3.25 per hour rate in the beginning of the 1977 season in such fashion, but it also revised this rate upward to $3.55 an hour and made the revision retroactive several days later in like manner. Furthermore, Respondent failed to consult with the UFW when it, subsequent to these events, shifted from an hourly picking rate to a piece rate, and unilaterally set piece rates for second and third pickings. That the making of these aforesaid changes unilaterally and contrary to Respondent's obligation to bargain with the UFW over "wages, hours and other terms and conditions of employment," constitutes a violation of §1153 (e) of the Act is so fundamental that it does not warrant extended discussion. Adam Dairy, supra; NLRB v. Katz, 369 U.S. 379, 50 LRRM 2177 (1962); NLRB v. Consolidated Rendering Co., supra; Continental Insurance Co. v. NLRB, supra.

Likewise, I have found that the Respondent unilaterally effected a change in the terms and conditions of employment for checkers and dumpers during the 1977 season. In 1976, Respondent's records reflected that checkers and dumpers were paid for eight hours' work regardless of the number of hours they actually worked after reporting on a given day. In 1977, without notification to or consultation with the UFW, Respondent modified this policy in that checkers and dumpers would be paid for four hours, not eight, if they worked less than four/ and would only be paid for eight hours of they worked in excess of four hours. This change also constituted a violation of §1153(e) of the Act. Adam Dairy, supra.

General Counsel alleged in its complaint that the Respondent made other unilateral changes in terms and conditions of employment without consultation with the UFW in violation of §1153(e). These included changes in the policy of hiring minors, the implementation of a "no strike" clause, and the subcontracting out of work during the course of the labor dispute which commenced on September 12.

As delineated in the fact portion of this opinion., I was unable to conclude that Respondent actually effectuated a change concerning its policy of hiring minors. However, it is clear that supervisor Arroyo made some threat regarding the hiring of minors in terms of whether or not a contract with the UFW was signed. Since the change was not implemented, I am unable to find that the Respondent in this particular violated §1153(e) of

the Act. However, it has been held that a discharge which is not effected, but is made public and not rescinded, constitutes restraint of workers rights and violates § 1153(a) of the Act. (Anderson Farms Co., 3 ALRB No. 61 (1977)) By analogy, therefore, I find that supervisor Arroyo's statements concerning whether or not the Respondent would hire minors if a contract was signed constituted an independent violation of §1153 (a) of the Act. See, Akitomo Nursery, 3 ALRB No. 73 (1977), [85/]

I have also found that on September 13, before workers were permitted to enter the field which they were to harvest, they were obligated to sign a paper which was represented to them to be an agreement between them and the company that if they went on strike they could be fired. Respondent thus tried to impose as a condition of employment that its employees relinquish their right to strike on penalty of discharge. In so doing, Respondent attempted to ignore the UFW as the certified collective bargaining representative of its agricultural workers, and to deal directly with it employees, as it sought to implement "a term or condition of employment" without having consulted with the UFW before taking such action. This 'conduct demonstrates Respondent's intent in this regard to bypass, undermine and discredit the UFW as the exclusive bargaining agent of its employees, in violation of §1153 of the Act. See NLRB v. National Shoes, 208 F.2d 88, 33 LRRM 2254 (CA 2, 1953); Medo Photo Supply Corp. 321 U.S. 678, 14 LRRM 581 (1954),

It has been held by the NLRB that an-employer .violates §§8(a)(1), (3) and 05} of the Act (the equivalents of ALRA §§ 1153(a), (c) and. Cell by procuring individual agreements from strikers, as a condition of their reinstatement, that they will not engage in further work stoppages. Lion Oil Co. v. NLRB, 245 F.2d 376, 42 LRRM 2193 (CA 8, 1957); see also Washougal Woolen Mills, 23 NLRB No, 1, 6 LRRM 279 (1940); Great Western Mushroom Co., 27 NLRB No. 79, 7 LRRM 72 (1940). By analogy, therefore, Respondent's action on September 13 in seeking to exact an agreement from its employees that they could be terminating for striking, violates §§ 1153 Ca) and (e) of the Act. Also, by requiring the relinquishment of a §1152 right, (i.e., the right to strike), Respondent discriminated "in regard to the hiring and tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization" in violation of §1153(c) of the Act. (Lion Oil Co. v. NLRB, supra; Pecheur Lozenge Co., 209 F.2d 393, 33 LRRM 2324 (CA 2, 1953), cert den. 347 U.S. 393 (19541.

[85/] Although not specifically alleged in the complaint as an. independent violation §1153 (a), the Board is at liberty to find such a violation where the incident giving rise to it is fully litigated by the parties. Andersgn Farms Co., supra; Prohoroff Poultry Farms, 3 ALRB No. 87 (1977) . I find this argument applies particular force to a situation where, as here the General Counsel misconstrued the import of certain conduct and mistakenly alleged, that conduct to be the basis for a violation of the wrong section of the Act, and where such conduct was alleged derivatively to be a violation of §1153 (a) ;in any event.

Even if one were not to place the construction which I have placed on the document which Respondent had workers sign on the morning of September 13 vis-a-vis its import as an "agreement" between Respondent and its employees or on statements made in conjunction therewith, I additionally find that Respondent, by misrepresenting strikers' rights, engaged in a further violation of §1153 (a) of the Act. One of Respondent's, witness, Scott Wilson, testified that the purpose for utilizing the statement in question was in order to inform employees of Respondent's rights in a strike situation. It has been held by the NLRB that once an employer has undertaken to inform employees of its and their legal rights in such situations, the employer has an obligation not to engage in any misrepresentations. Olympic Medical Corp., 236 NLRB No. 140 (1977), By telling workers that they could be fired if they went on strike, Respondent misrepresented to them, in violation of §1153 (a), what their rights as strikers would be: in the event of an economic strike, strikers do not lose their status as employees but may regain their jobs once the strike is abandoned and no replacements have been hired (NLRB v. MacKay Radio and Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938)); in the event workers are unfair labor practice -strikers, they are entitled to full and immediate reinstatement upon their giving an unconditional off to return to work. NLRB v. Pecheur Lozenge Co., 209 F.2d 393, 33 LRRM 2324 (CA 2, 1953" cert. den., 347 U.S. 393 (1954). Even viewing the statement in the light most favorable to Respondent (that is., the statement set forth on the face of the document itself to the effect that if the workers go on strike they could be replaced!. Respondent created uncertainty as to what the rights of strikers actually were: the word "replace" is unsufficiently modified to encompass all possible circumstances. As such, under Olympic Medical Corp., supra, Respondent's conduct in this. particularly constituted an independent violation of § 1153 (a). [86/]

General Counsel also alleged that during the course of the labor dispute which commenced on September 12, Respondent further violated §1153 (e) of the Act by "subcontracting unit work," citing Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 260~3(1964). In so doing, General Counsel totally misconstrues the term "subcontracting." When faced with a labor dispute accompanied by a work stoppage, an employer is at liberty to hire replacements for its striking employees. MacKay Radio and Telegraph, supra; NLRB v. Remington Rand, 130 F.2d 919, 11 LRRM 575 (CA 2, 1942). However, subcontracting implies the permanent elimination of unit jobs: ". . .the replacement of strikers by other employees who remain in the unit does not impair the authority of status of .a bargaining representative to continue bargaining for all the employees-in the appropriate unit." Hawaii Meat Co., 139 NLRB 75,

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[86/] It should also be noted that threatening to discharge workers in the event they decide to go on strike constitutes interference, restraint and coercion in the exercise of rights guaranteed by §1152 of the Act, in violation of §1153(a). See NLRB v. Beaver Meadow Creamery, 215 F.2d 247, 34 LRRM 2715 (CA 3, 1954).

51 LRRM 1430 (1962), rev'd.. 321 F.2d 397, 53 LRRM 2872 (CA 9, 1963). There, has been no showing and no evidence that Respondent, by hiring replacements for those employees who participated in the work stoppage which commenced on September 12, intended to permanently eliminate unit jobs. To the contrary, although grave difficulties, as will be discussed below, were experienced when these employees sought to return to their jobs, eventually they were reinstated. Hence, unit jobs were not eliminated by Respondent's actions following September 12, but rather the positions of the striking employees were being occupied by replacements , who, inferentially, either continued working as recent additions to the unit, or who were displaced when Respondent reinstated its striking employees. Accordingly, no violation of §1153(e),for unilaterally subcontracting unit work occurred as a result of Respondent's actions in hiring replacements.

3. The Refusal to Provide Relevant Information

As a further violation of §1153(e) of the Act, General Counsel alleged in its complaint that Respondent failed to provide numerous items of relevant information to the UFW. Principally, the items which the Respondent refused to provide information concerning included: demographic information for its employees such as dates of birth wage and fringe benefit information for non-unit employees; and production information, including acreage figures, total number of units produced, and data regarding yield or the units produced per acre. Some of the information requested by the UFW in April was furnished during the course of negotiations, albeit begrudgingly. For example, it was not until October, some six months after the UFW had sent its original request for information, that the Respondent provided data on employee senoirity; the Respondent did not provide definitive information concerning wage rates until the negotiation sessions held in late August. The failure to provide these latter two items reasonably promptly gives a strong indication of Respondent's bad faith, as the information was readily available: Francis Murphy testified that Respondent had prepared seniority lists at the close of the 1976 season; and as was noted in the fact portion of this opinion, information on wage rates, the total number of units produced and the amounts paid for such units could be gleaned from the employer's computer payroll printout. See Fitzegerald Mills Corp., supra.

Whether or not this Board adopts a per se approach to a refusal to relinquish information (see NLRB y. Truitt Manufacturing Company, 350 U.S. 149, 38 LRRM 2043 (1956), Frankfurter dissenting),
"it. is clear that the Respondent violated §1153(e) of the Act by failing; to. furnish certain relevant information which the UFW required in order to formulate realistic proposals in the course of collective bargaining. As was stated by the Court in Curtiss-Wright Corporation v. NLRB, supra, "[m]erely meeting and conferring without a prior exchange of requested data, where, such is relevant, does not facilitate effective collective bargaining and therefore does not meet the

requirements of §§ 8(a) (1) and (5). Because of the need to facilitate effective collective bargaining, a refusal to furnish relevant data is an unfair labor practice notwithstanding the good faith of an employer in rejecting the request."

Wage and related information has been held to be presumptively relevant. International Woodworkers of America v. NLRB, 263 F.2d 483, 43 LRRM 2462 (CA,DC 1959). As concerns the production information, there is "language in the Curtiss-Wright case, supra, to the effect that as regards such information the union must "by reference to the circumstances of the case, as an initial matter, demonstrate more precisely the relevance of the data it desires." 43 LRRM 2438. Respondent herein resisted most strenuously the UFW's request for information concerning yield, principally on the basis that such information was confidential: given the highly competitive nature of the tomato industry in the Salinas Valley, it should not be released. Steeg testified that yield information was essential to determine a realistic piece rate, as in some instances such as the grapes and pole tomatoes, the piece rate is determined by direct correlation to the yield per acre. Yield information was also needed to determine whether there was a need for a guaranteed hourly minimum wage rate, and the rates which should be set for second and third pickings. Essentially, such information was needed in determining the overall cost per unit, which necessarily effects the amount which the UFW might realistically demand in terms of a wage increase or fringe package. Steven Highfill, the "expert" witness called by Respondent, initially testified that yield information was not necessary in order to formulate a realistic wage and fringe package demand. However, he subsequently reneged on this testimony and admitted that yield figures were vital in determining unit costs and average daily income. Clearly then, data regarding yield was relevant to collective bargaining in the instant case and should have been released to the UFW. It is no defense that such information is confidential . See Curtiss-Wright Corporation v. NLRB, supra; see also General Electric Company v. NLRB, 466 F.2d 777, 81 LRRM 2303 (CA 6, 1972).

Accordingly, Respondent again violated §1153 (e) of the Act by failing to provide relevant data pertaining to wages to the UFW, and in particular production data regarding yield. As has been noted earlier, Respondent's refusal to relinquish information, ..while at the same time making negotiations contingent upon the UFW's preparation of a complete proposal, provides a substantial indication of Respondent's lack of good faith in its approach to negotiations, in that a proposal could not be realistically formulated without such data Without an economically realistic proposal, negotiations would perforce be unduly delayed.

Another item which the UFW requested that Respondent _ furnish was wage and related information pertaining to non-unit ""employee's"." The only evidence presented during the course of the

hearing in regard to the relevance of such information was that the UFW needed it to make a "comparison" of wage rates paid, to the non-agricultural employees of Respondent. I find that Respondent was perfectly within its rights to refuse to relinquish such information and did not thereby violate §1153(e) of the Act." This finding is based principally upon a reading of the analogous cases arising under the NLRA where information concerning non-unit employees was, for the most part, deemed relevant only when there was a showing of some interchange between unit and non-unit employees', or there were indications that non-unit employees were performing unit work. See, e.g., Brooklyn Union Gas Company, 220 NLRB 107, 90 LRRM 14T9~ (1975); NLRB v. Goodyear Aerospace Corp., 388 F.2d 673, 67 LRRM 2447 (1968); San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 94 LRRM 2924 (CA 9, 1977); NLRB v. Rockwell Standard" Corporation, 410 F.2d 953, 71 LRRM 2329 (CA 6, 1969). In NLRB v> Western Electric, 559 F.2d 1131, 95 LRRM 3231 (CA 8, 1977), the court held that there was no violation of NLRA §8(a)(5) for failing to provide information concerning non-bargaining unit employees where the transfer of unit employees to that group was not imminent. Likewise, no' such showing of transfers or interchange between unit and non-unit employees has been made in the instant situation. 'Although the NLRB and the courts are constrained to follow a more liberal, "discovery type" standard as to relevancy regarding requested information (NLRB v. Acme Industrial, 385 U.S. 432, at 437, 64 LRRM 2069 C1969)), I find that the non-bargaining unit information requested by the UFW herein was not so related to the union's function as a bargaining representative . . .[as to] appear reasonably necessary for the performance of that function." General Electric Company v. NLRB, supra.

B. The Unfair Labor Practice Strike of September 12 and Following

The overwhelming bulk of the evidence pointed to a conclusion that the work action or "dirty picking" plan which was implemented on the morning of September 12 was an outgrowth of the repeatedly expressed frustrations on the part of the negotiations committee and by inference, of the workers themselves, over the failure of the Respondent to negotiate in good faith with the UFW with the intention of reaching an agreement. Although the walk-out itself on that date was immediately triggered by the firing of _Salvador_ Hurtado, and there had been some remarks by workers "following the walk -out .concerning the signing of a contract and demands for increased wages, I find that the "dirty picking" plan and the subsequent walk-out were calculated to "-call attention to the company" to its failure to meet its obligations to bargain in . good "faith with the UFW which I have found violated §1153 (e) of the Act. _

Broadly stated, an "unfair labor practice strike" is a strike which is the result of or which is prolonged by, in whole or in part, the unfair labor practices committed by an employer (NLRB v. Remington Rand, Inc., 94 F.2d 862, 1A LRRM 585 (CA 2, 1938), cert. den., 304 U.S. 576, 2 LRRM 623 (1938)y NLRB v. Pecheur Lozenge Company, supra), as opposed to an "economic strike"

which, conversely, is neither caused or prolonged by unfair labor practices. MacKay Radio and Telegraph, 304 U.S. 333, 2 LRRM 610 (1938); see also NLRB v. Thayer Company; 213 F.2d 748, 34 LRRM 2250 (CA 1, 1953).

Therefore, I conclude that the work stoppage which occurred on September 12 was an unfair labor practice strike, since the prior unfair labor practices committed by Respondent "played a contributory role in bringing about the decision to strike." NLRB v. Comfort, Inc., 365 F.2d 867, 63 LRRM 2118, 2123 (CA 8, 1966H The Comfort case is particularly apposite in that the firing of a particular employee in that case precipitated a strike. There, as here, "while the discharge of [the employee] triggered the strike, the record attests to the general discontent on the part of the striking employees over the failure of Respondent to bargain in good faith with the union, and other asserted unfair labor practices. (ibid.)

Not only was the work stoppage of September 12 initially prompted by extensive unfair labor practices on the Respondent in violation of §1153 (e), but also was "prolonged" by the commission of various additional unfair labor practices. Credible testimony established that on the morning of September 13, when workers attempted to go to work, supervisor Arroyo stated in essence that if they continued in their participation in the work stoppage, they would all be fired. As the work stoppage did continue that morning,'"! find that the workers were in actuality discharged in violation of §1153 (c) of the Act. See NLRB v. Comfort, Inc., supra. Even if one were to assume for the purposes of argument that contrary to my initial finding, the work stoppage of September 12 was not caused by Respondent's refusal to bargain, the discharge of all persons who remained on strike on September 13 would convert the "economic" strike to an "unfair labor practice" strike. See Cagle's, Inc., 234 NLRB No. 170, 98 LRRM 1117 (1978); Hydro-Dredge Accessory Company, 215 NLRB No. 5, 87 LRRM 1559 (1974); NLRB v. International Van Lines, 409 U.S. 48, 81 LRRM 2595 (1972).

As a further and additional violation of the Act which I find to have prolonged the work stoppage which commenced on September 12, it is concluded that Respondent engaged in unlawful solicitation of strikers without consultation with the certified bargaining representative in order to induce these strikers to return to work. [87/] At various times following the commencement of_the work stoppage on September 12, the UFW negotiator, Marion Steeg, "expressed to Respondent that the employees who had engaged in the stoppage were willing to return to work. Specifically,
she conveyed this sentiment at the negotiation session

[87/] Once again the General Counsel failed to allege specifically :In .its complaint that Respondent in this particular violated the Act. As examination and cross-examination of witnesses on these particular points took place during the course of the hearing I find that these matters were "fully and fairly litigated by the parties." As such, a violation of the Act based on these matters may be found. See Anderson Farms Company, supra.

September 23 and October 4. However, despite Steeg's representations that the workers were willing to return to work, no actual bargaining took place over the mechanism by which Respondent would reinstate the participants in the stoppage. Rather, Respondent took it upon itself to implement procedures for reinstatement, without consulting with the UFW. These unlawful solicitations took place when, on the afternoon of September 14, Frances Arroyo attempted to telephone members of Crew One; [88/] on the morning of September 15, when Ed Colon and Darryl Voth representing Respondent attempted to offer 40 jobs to participants in the work stoppage, and on or about October 6 when Respondent again attempted to offer 40 jobs to employees.

Significantly, in a telephone conversation of September 16, Respondent representative, Dressier, stated to Marion Steeg that all workers could return to work on Saturday, the next day, if they so desired. As there was apparently no connection between Dressier's representations and the actual actions on behalf of Respondent's agents, and no bargaining over the return to work of individual strikers, I find that the Respondent, by soliciting strikers at various times to return to work, was seeking to undermine the status of the UFW as the collective bargaining representative of its employees, contrary to the dictates of § 1153(e).

In Harcourt and Company, Inc., 98 NLRB No. 142, 29 LRRM 1447 (1952), solicitation of individual strikers to return to work constituted unlawful interference when the solicitation was coupled with coercive statements. These statements included representations by agents of that employer that strikers would not eventually be reinstated and that the employer was not going to sign a contract with the union. Similarly, in the instant case Frances Arroyo told strikers on Tuesday, September 13, that they would all be fired, while on the previous day, Mike Murphy told employees that there would be no contract that season.

In American Steel and Pump Company, 121 NLRB No. 183, 42 LRRM 1564 (1958), a solicitation unaccompanied by coercive statements was held to violate the NLRA where either one or both of the following factors was present: the solicitation was an integral of a pattern of illegal opposition to the purposes of the Act, as evidenced by Respondent's entire course of conduct; and/or the solicitation was conducted under circumstances and in 'a manner reasonably calculated to undermine the strikers' collective bargaining representative and to demonstrate that the employer sought individual ,rather than collective, bargaining citing Texas Company, 93 NLRB 1358, 27 LRRM 1587 (1951). As previously analyzed. Respondent's course of conduct during its bargaining relationship with the UFW evidenced a pattern of illegal opposition to the purpose of the Act" in that Respondent refused to bargain in good

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[88/] As noted previously, I was highly skeptical of such assertions

faith with the UFW in violation of §1153(e). The solicitation was yet a further extension of this unlawful conduct. In addition, the manner in which the solicitation was conducted, in that the UFW was not consulted when jobs were offered, or when it was consulted, Respondent represented to the UFW that work would be available for all who applied, strongly indicates that the Respondent sought to bargain with individual employees, rather than the UFW, over the issue of their reinstatement. As such, I additionally find that Respondent engaged in further violations of §§ 1153 (e) and (a) of the Act by conducting these unlawful solicitations.

C. The Discharges of Salvador Hurtado and Clementina Chavez

It is concluded that Respondent did not violate §§ 1153 Cal and (c). of the Act by discharging Salvador Hurtado and Clementina Chavez. This finding is based on the central assumption that the plan to "pick dirty," although concerted, was not a "protected" activity within the meaning of §1152 of the Act.

It is indisputable that the reason for the discharge of Mr. Hurtado was his participation in the dirty picking plan. The intentional picking of inferior, unacceptable quality tomatoes was in violation of a company rule. Although the overwhelming bulk of Respondent's employees did, on September 12, engage in this activity, thus making it concerted, participants in the plan violated a stated company rule. Therefore, the Respondent committed no unfair labor practice in terminating those employees, like Mr. Hurtado, who engaged in such activity, (NLRB v. Thayer Company, 213 F.2d 748, 34 LRRM 2250 (CA 1, 1953)".)

As stated by the Supreme Court in NLRB v. Local 1229, I.B.E.W., 46 U.S. 464, 33 LRRM 2183, at 2187, (1953) ". . .an employee. . .cannot continue in his employment and openly or secretly refuse to do his work. He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." in addition, "nothing could be further from the purposes of the [NLRA] then to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability." (Citing Hoover Company v. NLRB, 191 F.2d 380, 389, 28 LRRM 2353.)

> "Unprotected activities. , .have generally involved situations where the employees have reported for work and, while receiving their usual wages, have repeatedly and without warning engaged in work stoppages, slow downs or sit-ins. Such actions disrupt production schedules and impede the employer from using replacement or temporary employees while the protesting employees continue to draw their wages. Thus, they are unprotected because they make it impractical for the

> employer to operate his business properly. Generally, in order to be protected the employee must choose either to be on the job and subject to the employer's rules or to be off the job and bear the commensurate economic burden. (Citations omitted.)" Shelley and Anderson Furniture Company v. NLRB, 497 F.2d 1-200, 86 LRRM 2619, 2621,(CA 9, 1974).

The plan to "pick dirty," while formulated in response to the Respondent's refusal to bargain in good faith, was ill-advised, and calculated to "injure or destroy [the] employer's business." The plan can be viewed as one analogous to a plan to engage in a work slowdown, which has uniformly been held not to be an activity which is protected. See NLRB v. Blades Manufacturing Company, 344 F.2d 9998, 59 LRRM 2210 (CA 8, 1965); Elk Lumber Company , 91 NLRB No. 60, 26 LRRM 1493 (1950). Like a slowdown, the plan to "pick dirty" was a "refusal on [the employees'] part to accept the terms of employment set by their employer without engaging in a stoppage, but to continue to work on their own terms." Such conduct provides a justifiable cause for discharge.(26 LRRM at 1494).

The fact that Hurtado was an active and vocal participant in other activities which might be deemed protected, such as his membership in the negotiating committee and thus was a known UFW adherent, is not entirely relevant. When fact with conduct which is not protected, an employer is not required to discharge or discipline employees on an all or none basis. No violation of the Act occurs where an employer, in such a situation, chooses to make examples of a select few. California Cotton Cooperative , 110 NLRB No. 222, 35 LRRM 1390,(1954). Accordingly, I find that the discharge of Salvador Hurtado on September 12 cannot be considered to be a violation of §§1153 (a) and (c) of the

Likewise, the discharge of Clementina Chavez can in no way be considered to be a violation of the Act. Her actions in throwing a tomato on the morning of September 12 and hitting fellow employee Ophelia Conchola cannot be construed to be activities "engaged in for the purpose of collective bargaining or other mutual aid or protection." NLRB v. Local 1229, I.B.E.W. , supra . As stated by the Supreme Court in that case , the courts have recognized the importance of "enforcing industrial plant "discipline and or maintaining loyalty as well as the rights of concerted activities/ [and] . . [have] refused to reinstate employees discharged for 'cause' consisting or insubordination, disobedience or disloyalty." .In such cases, the Court noted, it is necessary to identify the individuals involved and recognize -that - their discharges were for causes that were separable from the concerted activities of others whose actions might come within the protection of §7 [the Section of the NLRA on which ALRA Section 1152 is based]." (33 LRRM at 2185). The throwing of the tomato, in direct contravention of supervisor Arroyo's outstanding

order not to engage in such conduct, was "so indefensible as to warrant the employer in discharging a participating employee." Elk Lumber Company , 2 6 LRRM at 1494.

In addition, nowhere in the record does there appear any evidence that Ms. Chavez engaged or participated in protected concerted activities , other than her participation in the work stoppage following the act which gave rise to her discharge, and whether, in the event that she did, that such participation was known to the Respondent. The throwing of the tomato was an isolated occurrence, engaged in by a slight few who reacted improperly to the Respondent's conduct as the work stoppage began. It thus cannot be construed to be even a "concerted" activity within the meaning of the Act. Accordingly, the discharge of Clememtina Chavez was "for cause" and did not violate §§1153 (a) and (c) of the Act. See Golden Valley Farming, 4 ALRB No. 79 (1978); Sunny Slope Farms, 4 ALRB No. 74 (1978).

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IV. The Remedy

In addition to recommending that the Board order the Respondent to make its employees whole for any losses which they may have sustained as a result of Respondent's refusal to bargain, and the concomitant cease and desist orders and orders to post and circulate notices to its employees concerning Respondent's unlawful conduct. (See e.g., Adams Dairy, supra) I will recommend that the Board order that the Respondent be obligated to pay its employees back pay from September 13, the date on which they were discharged for participating in the work stoppage, to October 15, the date on which unconditional, full reinstatement was offered. As the imposition of the backpay remedy arises out of somewhat ambiguous circumstances, as the NLRB and the courts have interpreted analogous situations, I feel it is necessary to discuss and analyze pertinent precedents, in this regard.

Initially, it should be noted that employees who strike in protest of unfair labor practices are entitled to unconditional reinstatement with backpay. Mastro Plastics Corporation v. NLRB, 350 U. S. 270, 37 LRRM 2587 (1956). Under ordinary circumstances, the date from which backpay begins to accrue for unfair labor practice strikers is the date when they make an unconditional offer to return to work. Philip Carey Manufacturing Company v. NLRB 331 F. 2d 260, 52 LRRM 2174 (CA/2, 1963), cert. den. 375" U.S. 834, 54 LRRM 2312 (1964). A request for reinstatement made through a representative, such as union agent. NLRB v. I. Posner Inc., 304'F. 2d 773, 50 LRRM 2680 (CA 2, 1962)? California Cotton Cooperative, supra.

I have found that the assemblage of large groups of workers at the Oasis in the days following the beginning of the work stoppage demonstrated their availability and willingness to return to work. See Coca Cola Bottling Company of Miami, Inc., 237 NLRB No. 138, 99 LRRM 1162 (1978); Shelley and "Anderson" Furniture Company v. NLRB, supra. Respondent's failure to reinstate the striking employees after they expressed their willingness to . return to work constituted a further unfair labor practice under Sections 1153(a) and (c) of the Act. See Fugazy Continental Corporation, 231 NLRB No. 175, 97 LRRM 1157 (1977T

It might be argued, and with some merit, that the Respondent's employees never quite expressed, either by themselves or through their representatives, an unambiguous desire to return to work on an "unconditional" basis. Indeed, on the morning of September 13 the workers refused to return to work after they learned that Respondent was not going to reinstate Salvadore Hurtado, an employee whom I found was discharged for cause. Although the evidence demonstrated that at a meeting on the evening of September 13, employees decided to all return to work regardless -of whether or not Hurtado was rehired, there has been no showing that anyone expressed this attitude to agents of the Respondent.

Notable also is the lack of leadership which the UFW provided in this complex situation, fraught with legal pitfalls: it would have been a simple matter for Ms. Steeg or anyone else on behalf of the UFW to draft a letter to the Respondent setting forth the workers' unconditional offer to return to work, or at least orally to convey that sentiment either at the bargaining sessions or by telephone. Despite Steeg's representations to Dressier that the workers were willing to return to work, such representations were not unequivocal, particularly in light of the events of September 13. [89/]

Nevertheless, the Board has broad discretion in fashioning appropriate remedies where there have been violations of the Act.(See ALRA § 1160.3.) The Respondent's intransigent attitude toward collective bargaining fomented the dispute which culminated in the work stoppage. Accordingly, the lack of legal sophistication on the part of its employees in failing to unconditionally request reinstatement should not be a bar to their being made whole in the sense of backpay for losses which were directly attributable to Respondent's unfair labor practices.

Furthermore, I have found that Supervisor Frances Arroyo stated to assembled employees on September 13 that if they failed to return to work they would all be discharged. As such, all of the employees, with the exception of those who had been discharged for cause, became discriminatees within the meaning of Section 1153(c), and thus were entitled to back pay from the date of their discharges. It is well settled that such discriminatees need not request reinstatement in order to be entitled to it and backpay. Morristown Knitting Mills, 80 NLRB No. Ill, 23 LRRM 1139 (1948); Golay and Company v. NLRB, 371 F. 2d 259, 63 LRRM 2537, (CA. 7, 1966] ; Fugazy Continental Corporation, supra; NLRB v. Southern Greyhound Lines, 74 LRRM 2080, 426 F. 2d 1299 (CA. 5, 1970); Shelley and Anderson Furniture Manufacturing Company, Inc., v. NLRB, supra. As the 9th Circuit Court, stated in the Shelley and Anderson case, •86 LRRM 2622, "[E]ven if the record .did not substantiate a finding that the employees were unconditionally returning to work, where the employer is guilty of an unfair labor practice [in discharging said employees], he is required to offer unconditionally to reinstate the employees, regardless of whether they have applied for reinstatement. (Citations omitted)."

[89/] Such a lack of legal ken as would lead the UFW to convey to Respondent an unconditional offer to work appears endemic among .the various representatives of the parties herein. Representatives for Respondent were similarly unsophisticated in their counseling of the Respondent to openly engage in unfair labor practices as set forth above, such as the solicitation of strikers and the requirement that they sign a "no strike" pledge. Similarly, the General Counsel neglected to plead in its complaint several acts on the part of Respondent which would necessarily lead to a finding of unfair labor practice violations.

In the Southern Greyhound case 74 LRRM at 2093 and 2094, the court set forth the proposition that there was no such general rule requiring in every strike case that an unconditional offer to return be made before backpay can be justified. The rationale for refusing to award backpay for the time an-employee is on strike is that "the employee was the source of his own disemployment. He refused to work; his employer did not fire him." However a different situation arises where an employee is discharged. In this instance, an employee has no reason to notify his employer of an intention to return to work: "An application for reinstatement would have been a completely useless ritualistic act. It is this distinction which has given rise to the rule that the company itself must affirmatively offer reinstatement to an unlawfully discharged employee, regardless of whether or not the discharged employee makes application for reinstatement."

As dissenting NLRB members Fanning and Jenkins pointed out in the Vorpal Galleries case, 94 LRRM 1553, 227 NLRB No. 65 (1976), "The existence of the strike is no reason to shift the burden to employees to establish that they are available for employment. In either case, the employer has unlawfully discharged employees and by such discharges has made it appear to them that they will not be taken back. Hence the burden of undoing the wrong must rest on the wrong doer in either case. To hold otherwise permits an employer to undermine a basic Section 7 right, the right to strike. Therefore, an order requiring the Respondent to provide backpay to all the discriminatorily discharged strikers, save those who had been discharged for cause, is well supported by applicable precedent, even notwithstanding a finding that employees participating in the work stoppage did not make an unconditional application to return to work.

Respondent argues in its brief that the amount of backpay, if any is awarded, should be tolled as of September 15, when Respondent offered reinstatement to some forty employees, an offer which was rejected by the workers on the basis that reinstatement was not granted to all of the people who had participated in the work stoppage, citing Southwestern Pipe, Inc., 172 NLRB No. 52, 72 LRRM 1377 (1969). At the outset, it should be noted that the legal underpinnings for the Southwestern Pipe case were substantially eroded by the Fifth Circuit when the case was brought before that court by the Board seeking enforcement of its original order. (77 LRRM 2317 (CA. 5, 1971).) The better rule, in the opinion of this writer, is that enunciated by the NLRB in Draper Corporation, 52 NLRB 1477, 13 LRRM 88 (1943), enf. den. other grds.,15 LRRM 580 (CA. 4, 1944), wherein the Board held that a partial offer of reinstatement to striking employees did not toll an employer's obligation, in regard to backpay, from the day when such an offer was made.

> "The offer to abandon a strike does not
> cease to be unconditional merely because
> the offer contemplates a group return; and
> the employees making such an offer

> do not continue as strikers for that reason....The Act logically requires that employees be protected as a group in returning to work as well as in striking, and does not empower an employer to continue the 'striker' status of his employees by rejecting an offer of group abandonment of the strike. To hold otherwise would permit an employer to exploit the weaknesses of a losing strike, and would enable him to pit certain members of a group against other members of the same group by forcing the former to act as strike breakers, under penalty of loss of wages, and thereby cause them to become a party to the employer's unfair labor practices against the latter, in a situation where the basis of discrimination is the collective concerted activity of the entire group...The Board will not jeopardize the future exercise of the right to engage in concerted 'activity by permitting an employer to reconstitute plant personnel on a discriminatory basis...thereby depriving each individual employee of the security of collective association which, as the Act postulates, is fundamental to the organizational life of all the employees." 52 NLRB 1479, 1480. Accord: Robert S. Abbott Publishing Company, 139 NLKB 1328(1962); Ramona's Mexican Food Products, Inc., 83. LRRM 1705, 203 NLRB No. 102 (1973); Cactus Petroleum, Inc., 134 NLRB No. 126 (1961).

The more recent case of NLRB v. My Store, Inc., 468 F.2d 1146,-81 LRRM 2225,(CA. 7, 1972) rejected the holding in Southwestern Pipe, supra, and 0'Daniel Osmobile, Inc., 179 NLRB 398, 72 LRRM 1526 "(1969) , to the effect that where an employer makes staggered offers of reinstatement in good faith and strikers refuse them because they wish to return as a group, the offers toll backpay as to those strikers, though their right to reinstatement is unaffected. The court in the My Store case found these principles inapposite in a situation where the Respondent's motive in offering employment was made in bad faith and against a background where animosity to the union existed. Likewise, in the instant. situation, I found that the offer to reinstate some forty employees made on September 15 was not made in good faith, in that Respondent had hired replacements both on an individual basis and through the auspices of a labor contractor, and gave no indication that employees who participated in the work stoppage would displace those individuals who had been hired as the replacements. To the contrary, the testimony of Ed Colon, as well

as the arguments advanced by the Respondents' counsel in its brief, indicate that Respondent viewed the work stoppage as an "economic" strike, and would have used the forty reinstated employees to aid in breaking that strike. This conclusion is further buttressed by the numerous acts on the part of Respondent which indicate its anti-union attitude.

Respondent's bad faith in offering reinstatement to only forty employees on September 15 is further demonstrated by the representations made by Donald Dressier to the UFW negotiator that all of the employees who applied would be reinstated, an act which simply did not occur until Respondent's hand was forced by a court order on October 13. Likewise the offers to reinstate all employees on or about October the 4 were belied by the circumstances. When employees appeared at Respondent's packing shed, once again only forty jobs were offered. As the NLRB has stated in Hydro-Dredge Accesory Company, 215 NLRB No. 5, 87 LRRM 1559:

> "Respondent had wrongfully terminated its', employees. Its legal duty, in order to remedy this wrong, was to reinstate them to their former positions. For us to hold that some lesser invitation gave rise to a duty on the part of the employees to respond favorably to it would jeopardize the effectiveness of our remedies and invite deliberate violation of the law. Employers are not free discharge employees for union activities and them invite them to come back, hat in hand, and seek favorable consideration as possible employees if the employer chooses to reemploy them. Even though some employees may respond to such an invitation and be hired, as some did and were here, no employee has any legal obligation to respond to such an invitation, and none should be required so as to subject themselves to the employer's discretionary judgement as to their continued fitness for continued employment. All discriminatees have an absolute legal right to restoration to their former status and pay a right which we will not permit to be diluted by the imposition of conditions such as filing an application for employment or submitting to other screening processes designed to. apply to new job applicants. For us to toll
> backpay when such an impliedly conditional._
> offer or invitation is made would be to
> permit offending law violators to exculpate
> themselves from financial liability by imposing a
> unjustified conditions upon the victims of unlawful
> discrimination

policy which would not effectuate the
policies which we are called upon to
administer."

As this Board noted in Kyutoku Nursery,'Inc., 3 NLRB No. 30 (1977), page 5, "[i]n light of the differences in the ALRA and the NLRA and of particular conditions of agricultural labor, a weighing of interests of employees in concerted activities against the interests of employers may not always lead to the same results reached by the National Board under its Act." The Board then impliedly recognized that it might be necessary to grant greater reinstatement rights to strikers then they would have under NLRB precedent, "in order to protect the right to strike in the face of the ease with which strikers may be permanently or temporarily replaced in a seasonal industry with a highly mobile labor force." By analogy, therefore, it is urged that under this Act, strikers should not only enjoy greater reinstatement rights, but also greater rights to backpay in unfair labor practice strike situations. This is particularly so where, as here, it would be manifestly unjust to deprive workers of a remedy necessitated by their employer's extensive violations of the Act, merely because they lacked the legal sophistication to unambiguously manifest an "unconditional" offer to return to work and where offers of reinstatement were made piecemeal and, as I have found in bad faith.

Respondent argues in its brief that certain acts allegedly committed by strikers, including destruction or property and mass residential picketing, should militate against an order requiring a reinstatement of such employees. Notably, I have found that there was no evidence that the UFW actively participated in, ordered or condoned such acts. Furthermore, in the absence of proof identifying striking employees directly with the particular misconduct, the mere proximity to violence is insufficient to deprive a striker of his right to reinstatement or backpay, Moore Business Forms, 224 NLRB No. 50, 93. LRRM 1437 (1976), enf'd in part 97 LRRM 2773 (CA. 5, 1978); See also NLRB v. Marshall Carr Wheel and Foundry Company, 218 F.2d 409, 35 LRRM 2320 (CA 5, 1955); NLRB v. Cambria Clay Products Company, 215 F.2d 48, 34 LRRM 2471 (CA. 6, 1954). Therefore, I will recommend that Respondent be ordered to reinstate all of its employees, except those who have been discharged for cause.

V. Recommended Order

Respondent O.P. Murphy & Sons, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with the UFW as the exclusive representative of its agricultural employees as required by Labor Code Sections 1153(e) and 1155.2(a), and in particular (1) refusing to meet at reasonable times and confer in good faith and submit meaningful bargaining proposals with respect to wages, hours and other terms and conditions of employment; (2) refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining including production information; (3) making unilateral changes in terms and conditions of employment of its employees without notice to and bargaining with the UFW; (4) bypassing the UFW and dealing directly with employees on matters relating to wages, hours, or other terms and conditions of employment.

(b) Discouraging membership of any of its employees in the UFW or any other labor organization, by discharging, laying off, or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of those rights guaranteed them by Section 1152.

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

Ca) Upon request, bargain collectively with the UFW as the exclusive representative of its agricultural employees/ and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Furnish to the UFW the information requested by it relevant to the preparation for and conduct of collective bargaining, in particular production information.

(c) Revoke the unilateral changes in method of pay for checkers and dumpers, and restore the method of pay in effect prior to these changes, (i.e., the "eight hour guarantee") and make employees whole for any losses they may have suffered by reason of the unlawful changes,

(d) Make whole the agricultural employees employed by Responde for any and all losses they may have suffered as a result of the Respondent's refusal to bargain for the period from August 4,1977 [90/]

[90/] August 4, 1977, was not the date when Respondent's obligation to bargain with the UFW commenced but rather was the date when the 1977 harvest season began for Respondent. It is this date from which any actual losses incurred by its employees began to accrue as a result of 'Respondent's refusal to bargain in good faith.

to the date on which Respondent commences collective bargaining in good faith and thereafter bargains to contract or impasse, in accordance with the formulae set forth in Adam Dairy, 4 ALRB No. 24, and Perry Farms, 4 ALRB No. 25, as modified by Robert H. Hickam, 4 ALRB No. 73. The amount of said award is to be determined by the Regional Director.

(e) Offer to all of its agricultural employees as of September 13, 1977 with the exception of those who have been discharged for cause, immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay they may have suffered by reason of their discriminatory discharges, for the period from September 13, 1977 to October 15, 1977, calculated in the manner established by this Board in Sunnyside Nurseries, 3 ALRB No. 42.

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

(g) Execute 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 hereafter.

(h) Post copies of the- attached notice for 90 consecutive days at places to be determined by the Regional Director. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(i) Mail copies of the attached notice in appropriate languages, within 30 days from receipt of this Order, to all employees employed between August 4, 1977, and the date on which Respondent commences to bargain, in good faith and thereafter bargains to contract or impasse.

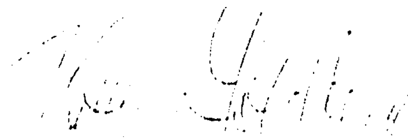
(j) A representative of Respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

(k) Notify the Regional Director in writing, within 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him 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 Farmworkers of America, AFL-CIO, as the exclusive bargaining representative for Respondent's agricultural employees be extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: November 28, 1978



MATTHEW GOLDBERG
Administrative Law Officer

After a he ing in which all parties esented evidence, the Agricultural Labor Relations Board has found the,; we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify our employees that we will respect their rights under the Act in the future. Therefore we are now telling each of you:

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

(1) To organize themselves;
(2) To form, join or help union's;
(3) To bargain as a group and choose whom they want to speak for them;
(4) To act together with other workers to try to get a contract or to help or protect one another;
(5) To decide not to do any of these things.

Because this is true we promise that:

(1) We will offer all agricultural employees employed as of September 13, 1977 full reinstatement to their former jobs or to equivalent jobs, and pay them back pay for any losses they had while they were off work for the period from September 13, 197.7, to October 15, 1977.

(2) We will revoke our changes in method of paying checkers and dumpers and will make each of them whole for any losses of pay which resulted from this change.

(3) We will bargain collectively with the UFW as exclusive representative of our employees concerning rates of pay, wages, hours, and other terms and conditions of employment, and sign a contract if we reach agreement.

(4) We will make those of you who were employed during the appropriate period whole for any losses of pay which resulted from our refusal to bargain in good faith with the UFW.

(5) All our employees are free to support, become or remain members of the UFW, or of any other union. We will not discharge, lay off, or in any other manner interfere with the rights of our employees to engage in these activities and other activities which are guaranteed them by the Agricultural Labor Relations Act. Because the UFW was selected by a majority vote of our employees as their exclusive representative for purposes of collective bargaining, we have an obligation to meet with the UFW at reasonable times and bargain in good faith about wages, hours, working conditions and other terms and conditions -of employment. Therefore, we will not make changes in terms and conditions of employment until we have first notified and bargained with the UFW, we will not bypass the UFW and attempt to bargain directly with employees, and we will not refuse to meet and bargain with them in good faith as required by the Agricultural Labor Relations Act.

Dated: O. P. MURPHY & SONS

By: ____________________________

(Representative) (Title)

This is an official notice of the Agricultural Labor Relations Board, an agency of the State of California. DO NOT REMOVE OR MUTILATE.