McFarland, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MONTEBELLO ROSE CO . , INC . , MOUNT ARBOR NURSERIES, INC. and THOMAS L. FLYNN, Receiver for Mount Arbor Nurseries, Inc., Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-28-F 76-CE-37-F 76-CE-37-1-F 76-CE-71-F 76-CE-72-F 5 ALRB No. 64

DECISION AND ORDER

On January 6, 1978, Administrative Law Officer (ALO) Mark E. Merin issued the attached Decision in this proceeding. Thereafter, Respondents[1/] Montebello Rose Co., Inc. (Montebello) and Mount Arbor Nurseries, Inc. (Mount Arbor), the General Counsel and the United Farm Workers of America, AFL-CIO (UFW) , each filed exceptions and a supporting brief. Respondents and the General Counsel each filed a reply brief.

The Board has considered the record and the ALO's

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[1/] We hereby grant General Counsel's Motion to Amend the Complaint and include, as a Respondent, Thomas L. Flynn, Receiver- for Mount Arbor Nurseries, Inc.

Decision[2/] in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions[3/] of the ALO, and to adopt his recommended Order as modified herein.

The ALO concluded that Montebello and Mount Arbor violated Labor Code Section 1153(e) and (a)[4/] by engaging in surface bargaining during the period in which the UFW was certified as the collective bargaining representative of their agricultural employees and, following the expiration of the certification year, by refusing to meet and bargain with the UFW. Respondents except to these conclusions. They assert that they bargained in good faith during the certification year and would have obtained a contract with the UFW but for the occurrence of an impasse in negotiations and the UFW's failure to bargain in good faith. Respondents admit that they refused to bargain with the UFW following the expiration of the certification year, but they argue that this conduct did not violate the Act because the expiration of

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[2/]Respondents argue that we should disregard the ALO's opinion because, without notifying Respondents, the ALO telephoned the General Counsel and requested a copy of an exhibit which the General Counsel had introduced, and the ALO had admitted, into evidence at the hearing. We do not consider this communication to be prohibited by 8 Cal. Admin. Code Section 20700. Furthermore, while it may have been more proper for the ALO to make his request by letter with a copy to Respondents' counsel, his failure to do so was not prejudicial to any party and does not reflect upon the ALO's fairness or competency.

[3/]The ALO concluded that Montebello discharged Richard Escalante and Pedro Armendariz in violation of Labor Code Section 1153 (c) and (a). We affirm this conclusion but we do not rely upon Armendariz' membership on the UFW negotiating committee as evidence that Montebello had knowledge of his union activities.

[4/]Unless otherwise noted, all statutory references in' this Decision are to the California Labor Code.

the certification year extinguishes the duty to bargain.

Res Judicata

Before turning to the merits, we first address Respondents' contention that the doctrine of res judicata precludes us from considering the bargaining issues of this case. Respondents base their argument upon our rulings in Case Nos. 76-RC-127-F and 76-RC-128-F,[5/] in which we denied the UFW's requests for extensions of certification filed pursuant to Section 1155.2(b) and 8 Cal. Admin. Code Section 20382. Those sections state that the Board may extend a labor organization's certification for up to one year based upon a finding that an employer has not bargained in good faith. We reject Respondents' contention that our denial of a motion for extension of certification is res judicata on the issue of an employer's good-faith or bad-faith bargaining in the unfair labor practice context.

The doctrines of res judicata and collateral estoppel may not be utilized to prevent a party from litigating an issue unless the party was permitted to litigate the issue in a prior proceeding. Bernhard v. Bank of America, 19 Cal. 2d 807 (1942). The General Counsel was not a party to the extension of certification proceedings and was not, therefore, entitled to present its position to the Board. Res judicata or collateral estoppel thus cannot bar the General Counsel from litigating the issue of Respondents' good faith or bad-faith bargaining in this proceeding.

[5/]We take administrative notice of our rulings in those two cases.

Furthermore, we do not find res judicata or collateral estoppel applicable in this case because of the many differences between extension of certification and unfair labor practice proceedings. The parties to an unfair labor practice proceeding are afforded a far greater opportunity to present evidence on the issue of an employer's good-faith or bad-faith bargaining than are the parties to an extension of certification proceeding. Unfair labor practice hearings are adversary proceedings, conducted much like court trials. Extension of certification determinations, on the other hand, are generally made on the pleadings without the presentation or cross-examination of witnesses.[6/] Compare Section 1160.2, Section 1160.3 and 8 Cal. Admin. Code Sections 20200-20298 with Section 1155.2(b) and 8 Cal. Admin. Code Section 20382.

The procedural differences between the two proceedings result, in part, from the different remedies available in each. In extension of certification proceedings, the Board may order no more than a one-year extension of a labor organization's certification. The effect of this order is to prevent any person from successfully petitioning the Board to conduct a representation election among the employer's agricultural employees for the additional period. In unfair labor practice proceedings, however, the Board may impose a wide variety of remedies pursuant to its powers under

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[6/] For this reason, a Board order extending a labor organization's certification pursuant to Section 1155.2 (b) and 8 Cal. Admin. Code Section 20382 is not admissible as evidence of a refusal to bargain in an unfair labor practice proceeding. 8 Cal. Admin. Code Section 20382(g).

Section 1160.3, including make-whole awards which could result in a substantial monetary liability and cease-and-desist orders enforceable in the courts.

Thus, the purposes of res judicata would not be served by precluding the General Counsel from litigating the bargaining issues in this unfair labor practice proceeding. In Bernhard the Court said:

> The rule [of res judicata] is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. 19 Cal. 2d at 811.

In view of the differences in the procedures and remedies in extension of certification and unfair labor practice proceedings, it cannot be said that the parties in this case have had "one fair trial" on the issue of Respondents' good-faith or bad-faith bargaining.

The principles of res judicata are applicable to administrative agencies but they must be flexibly applied, for many administrative procedures differ significantly from court litigation. Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, 55 Cal. 2d 728 (1961); Davis, Administrative Law Text, Section 18.03 (3rd ed. 1972). We are here faced with just such an instance and, therefore, we will not bar the General Counsel from litigating the question of Respondents' good-faith or bad-faith bargaining merely because the UFW failed in an earlier attempt to obtain an extension of its certification. The Bargaining Issues

We now turn to the merits of the cases before us.

Section 1153 (e) states that it is an unfair labor practice for an employer to refuse to bargain in good faith with the certified collective bargaining representative of its agricultural employees. Good-faith collective bargaining is defined in Section 1155.2 (a) as follows:

> ... to bargain collectively in good faith is 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, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. 7/

We are called upon to determine whether Montebello and Mount Arbor have fulfilled their obligation to bargain in good faith with the UFW.

Montebello and Mount Arbor met several times with the UFW, exchanged and discussed proposals, and reached agreement in some areas. Our inquiry does not end there, however, for an employer cannot fulfill its obligation to bargain in good faith merely by meeting with the certified representative of its employees. "Collective bargaining ... is not simply an occasion for purely formal meetings between management and labor while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining agreement" and "a serious intent to adjust differences and to reach an acceptable common ground." NLRB v. Insurance

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7/ This language is almost identical to that appearing in Section 8(d) of the National Labor Relations Act.

Agents' International Union, 361 U.S. 477, 45 LRRM 2704 (1960). We must decide whether Montebello and Mount Arbor negotiated in a good faith attempt to reach a collective bargaining agreement with the UFW or, instead, conducted negotiations "as a kind of charade or sham", for such a " [sophisticated pretense in the form of apparent bargaining ... will not satisfy a party's duty under the Act." Continental Insurance Company v. NLRB, 495 F.2d 44, 86 LRRM 2003 (2nd Cir. 1974) .

Our task is a difficult one. We must judge whether Respondents bargained in good faith by examining the totality of the circumstances including the parties' conduct and statements at and away from the bargaining table. In so doing, we must treat the facts as an interrelated whole, for while some conduct standing alone may constitute a per se violation of the Act, other conduct, innocuous in and of itself, may support an inference of bad faith when examined in light of all the evidence. Continental Insurance Company v. NLRB, supra.

The history of Respondents ' collective bargaining relations with the UFW may be divided into three distinct periods. The first encompasses the period between the certification of the UFW as the collective bargaining representative of Respondents' employees and the date Respondents commenced to meet with the UFW in joint negotiations. The second encompasses the period between the first joint negotiating session and the UFW's first request for a meeting following the expiration of the certification year. The third involves the period from that request to the time of the

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hearing.[8/] We shall deal with each period in turn, keeping in mind that the incidents occurring in one must be considered in conjunction with those occurring in the others. As our more detailed discussion below will indicate, we find that Respondents' conduct reveals an intent to frustrate negotiations, to avoid reaching agreement and, ultimately, to undermine the employees' support of the UFW.

Period 1; December 3, 1975 - May 12, 1976

On December 3, 1975, the Board issued two certifications whereby it certified the UFW as the collective bargaining representative of the agricultural employees of both Mount Arbor and Montebello. On December 6, Cesar Chavez, the President of the UFW,

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[8/] Respondents have requested us to consider an additional period. They have moved to reopen the record to offer into evidence copies of collective bargaining agreements which were apparently executed by the parties in the spring of 1978, some months after the issuance of the ALO's Decision, and a copy of a letter, sent by their negotiator to the UFW after the close of the hearing which invited further bargaining between the parties. As neither the UFW nor the General Counsel has opposed the motion, we hereby receive into evidence: (1) as Respondents' Exhibit NN-1, the contract between Montebello and the UFW; (2) as Respondents' Exhibit CC-2, the contract between Mount Arbor and the UFW; and (3) as Respondents' Exhibit EE, the aforesaid letter from Respondents' negotiator to the UFW.

Although this evidence is relevant, we note that the contracts were signed two and one-half years after the commencement of bargaining. During that period, negotiations broke down for a period of over one year. The parties did not begin the series of negotiations which culminated in these contracts until the close of the hearing and the contracts were not signed until after the issuance of the ALO's Decision. It is readily apparent that the contracts are not the product of the bargaining conduct which was litigated at the hearing. We also note that the signing of a collective bargaining agreement is not conclusive on the issue of good-faith or bad-faith bargaining; the Board must still examine the totality of the circumstances. Carpenters, Local No. 1780, 244 NLRB No. 26, 102 LRRM 1150 (1979).

wrote to each company requesting the commencement of negotiations and certain information relevant to collective bargaining.

Jay Jory, Mount Arbor's negotiator, and Sylvan Schnaittacher, the UFW's negotiator, began to meet in mid-December. At the first meeting, Jory and Schnaittacher discussed the UFW's initial proposal and continued to do so at meetings on December 30, 1975, and January 15, 1976. By the January 15 meeting, Schnaittacher was emphasizing the UFW's desire for a counterproposal from Mount Arbor. On January 23, 1976, Mount Arbor presented counterproposals on five of the forty-one articles contained in the UFW's first proposal. Schnaittacher protested Jory's failure to provide a complete counterproposal. Despite repeated requests, Mount Arbor did not present its first complete counterproposal until March 19, 1976. We agree with the ALO that Mount Arbor's failure to present a complete counterproposal until March 19 and its submission, on that date, of a counterproposal calculated to disrupt the bargaining process evidenced bad-faith bargaining.[9/]

[9/] In large part, the ALO based his finding that the March 19 counterproposal "belie[d] a sincere desire to reduce differences and to arrive at an agreement" on the contents of letters sent by Jory to Mount Arbor's Vice-President, Rex Whitehall, concerning the proposal. Respondent objects to the use of these letters, arguing that they are protected by the attorney-client privilege.

The General Counsel subpoenaed all communications related to negotiations with the UFW sent between Respondents and Jory. Respondents petitioned the ALO to revoke the subpoena, asserting that the sought-after communications were protected by the attorney-client privilege. The ALO ordered Respondents to produce the documents in question for an in camera inspection so that the ALO could determine which communications or portions thereof related to

[fn. 9 cont. on pg. 10]

We also conclude that, in April 1976, Mount Arbor further evidenced its surface bargaining by changing the wages of its budders without prior notice to or bargaining with the UFW about the change. Prior to the 1976 budding season, budders received a bonus if they experienced a 90 percent success rate in their work. In April 1976, Mount Arbor added the bonus to the budders' regular wages, thereby eliminating the 90 percent success rate requirement.

[fn. 9 cont.]

the request for or provision of legal advice. Following the ALO's inspection of the documents, those communications found not to involve the request for or provision of legal advice were ordered produced. Many of these were admitted into evidence over Respondents' continuing objection.

We affirm the rulings of the ALO in this matter. Although confidential communications between an attorney and client are privileged and need not be produced, California Evidence Code Section 954, the dominant purpose of the communication in question must be the furtherance of the attorney-client relationship. Holm v. Superior Court, 42 Cal. 2d 500 (1954). Thus, a communication to or from an attorney is not privileged if the attorney is acting in a nonlegal capacity, e.g., as a labor negotiator. (We note that this approach has been followed in other jurisdictions in analogous circumstances. Merrin Jewelry Co. v. St. Paul Fire and Marine Ins. Co., 49 FRD 54 (S.D.N.Y. 1970); Olender v. United States, 210 F.2d 795 (9th Cir. 1954); United States y. Vehicular Parking, 52 F. Supp. 751 (D. Del. 1943).)Therefore, the ALO acted properly by providing an in camera inspection to determine which communications were sent to or from Jory in his capacity as an attorney and which were sent or received merely in his capacity as Respondents' labor negotiator. The ALO revoked the subpoena insofar as it covered communications which involved Jory in his capacity as an attorney.

We reject Respondents' argument that the roles of attorney and labor negotiator are inseparable. In addition to being inaccurate, such an approach would unfairly reward those employers and labor organizations able and willing to hire attorneys as negotiators. Parties hiring attorneys as negotiators would be able to protect all their communications relating to negotiations while parties using nonattorneys as negotiators would be subject to very broad discovery orders. We note, however, that on the facts of this case, the issue assumes little importance as the evidence of Respondents' bad-faith bargaining is overwhelming and we would reach the same conclusions even without reference to the communications in question.

This conduct violated Section 1153(e) and (a) because it constituted a unilateral change; an employer may not unilaterally alter the wages or working conditions of its employees but must, instead, notify and bargain with the certified collective bargaining representative prior to instituting the change. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

Initially, Montebello failed to answer the UFWs December 6 letter requesting relevant information and the commencement of bargaining. It was not until the UFW threatened legal action on December 30 that Montebello's representative, William Callan, met with Schnaittacher. Montebello and the UFW held negotiating sessions and discussed the Union's initial proposal on January 21 and February 4, 1976. At the February 4 meeting, Callan agreed to submit a counterproposal. However, Callan never again contacted the UFW and the UFW failed in its repeated attempts to reach Callan. Finally, on April 21, 1976, Jory wrote to the UFW stating that Montebello had retained him to handle its labor negotiations. He stated that Montebello desired to negotiate jointly with Mount Arbor and that he expected Montebello to adopt all of Mount Arbor's bargaining positions.

Thus, at least between February and April 1976, Montebello failed to discharge its duty to provide a representative who was available to meet with the UFW at reasonable times and with reasonable regularity, Milgo Industrial, Inc., 229 NLRB 25, 96 LRRM 1347 (1977), enf'd 567 F.2d 540, 97 LRRM 2079 (2nd Cir. 1977); Exchange Parts Company, 139 NLRB 710, 51 LRRM 1366 (1962), enf'd 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965), and to provide the UFW

with a counterproposal in a reasonably diligent manner. Lawrence Textile Shrinking Co., Inc., 235 NLRB No. 163, 98 LRRM 1129 (1978). This conduct is evidence of Montebello's bad-faith bargaining.

Respondents argue that their conduct prior to April 22, 1976, cannot be an unfair labor practice because the UFW did not file refusal to bargain charges until October 22, 1976. This argument is based upon Section 1160.2 which reads, in relevant part, "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board ...." We do not agree that Section 1160.2 precludes us from finding Respondents' conduct prior to April 22, 1976, to be an unfair labor practice.

Section 1160.2, like its counterpart, Section 10(b) of the National Labor Relations Act, is a statute of limitations designed to prevent the litigation of stale claims. Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960). General principles applicable to statutes of limitations govern the use of this provision. Following these general principles, the National Labor Relations Board and the courts have held that the limitations period begins to run only "when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]." NLRB v. Allied Products Corp., 548 F.2d 644, 650, 94 LRRM 2433 (6th Cir. 1977).[10/] The National Labor Relations Board, for example, does not begin the

[10/] This principle is recognized by the California courts. See Arndt v. Workers' Compensation Appeals Board, 56 Cal. App. 3d 139, 128 Cal. App. 3d 139, 128 Cal. Rptr. 250, 255-256 (1976).

six-month period until the charging party has actual or constructive notice of the unlawful conduct in refusal to bargain cases dealing with unlawful unilateral changes. S & W Motor Lines Inc., 236 NLRB No. 113, 98 LRRM 1488 (1978); Southeastern Michigan Gas Co., 198 NLRB 1221, 81 LRRM 1350 (1972), enf'd 485 F.2d 1239, 85 LRRM 2191 (6th Cir. 1973) .[11/]

The underlying principle of these cases is particularly appropriate in surface-bargaining cases. Because an employer's surface bargaining, especially when conducted by a skilled negotiator, will resemble good-faith, hard bargaining for a period of time, the union may not become aware of the employer's underlying bad faith until more than six months have elapsed since the employer embarked on its course of illegal conduct. Furthermore, if the limitations period began to run before the union had actual or constructive notice of the employer's underlying bad faith, in order to preserve the possibility of a full make-whole remedy, unions would be compelled, in every case, to file an 1153(e) charge six months after the first request for bargaining. The filing of such a charge would tend to disrupt any harmonious negotiating relationship which the parties had built up prior to that time. This result would be directly contrary to the purposes of the Agricultural Labor Relations Act because it would

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[11/] The National Labor Relations Board will also toll the six-month period when the respondent has fraudulently concealed its unlawful conduct. NLRB v. Don Burgess Construction Corp., 596 F.2d 378, 101 LRRM 2315 (9th Cir. 1979).However, a finding of fraudulent concealment is not necessary to toll the limitations period; it is enough that the charging party was not on-actual or constructive notice. S & W Motor Lines, Inc., supra.

destabilize collective bargaining relationships. Finally, the make-whole provision of Section 1160.3 clearly indicates the Legislature's intention to fully remedy an employer's refusal to bargain. Beginning the limitations period when a union has actual or constructive notice of an employer's bad faith is consistent with this intention. We will, therefore, follow the principles enunciated by the courts and the National Labor Relations Board in the cases cited above. We hold that, in surface-bargaining cases, the limitation period of Section 1160.2 begins to run when the charging party acquires actual or constructive notice of the respondents' underlying bad faith.[12/]

To apply the above principles to the facts of this case, we must determine when the UFW obtained actual or constructive notice of Respondents' underlying bad faith. We recognize the difficulty in making such a determination in surface-bargaining cases since an employer, by meeting and conferring with a union, maintains the appearance of good-faith bargaining, thereby masking its illegal conduct. The underlying bad faith is difficult to discern without the advantage of hindsight. We must emphasize that

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[12/] In surface-bargaining cases, the National Labor Relations Board follows the general rule that Section 10 (b) precludes its finding an unfair labor practice as to events occurring more than six months prior to the filing of the charge, but it uses these earlier events to shed light on matters arising within the six-month period. Boise Implement Co., 106 NLRB 677, 32 LRRM 1530 (1953), enf'd 215 F.2d 652, 34 LRRM 2788 (9th Cir. 1954). However, the National Labor Relations Board has not rejected the approach we adopt in this case. It appears that the national Board has not addressed the issue because the application of this approach would have no effect upon the Board's remedy. The National Labor Relations Board does not apply make-whole to remedy surface-bargaining violations but, instead, relies upon remedies such as cease-and-desist orders.

the determination of the point in time when the charging party obtains actual or constructive notice of a respondent's bad faith is entirely different from the determination of the period of time in which a respondent bargains in bad faith. The former determination is based solely upon the information available to the charging party during the course of the negotiations. The latter determination is based upon the Board's view, with the benefits of hindsight, of the totality of the circumstances.

We find that Mount Arbor put the UFW on Notice of its underlying bad faith on June 10, 1976, when it declared an artificial impasse (see discussion infra at p. 18). Mount Arbor began to meet with the UFW soon after the UFW requested the company to bargain. In the ensuing months, Mount Arbor went through the motions of bargaining and maintained a sufficient appearance of good faith that, without the benefit of hindsight, the Union could not reasonably have been on notice of Mount Arbor's underlying bad faith until June 10. The charges were therefore timely filed on October 22, 1976, and Section 1160.2 does not preclude us from finding *a* Section 1153 (e) violation based on conduct which occurred from the date of the Union's initial request for bargaining on December 6, 1975.

We find that Montebello also put the UFW on notice of its underlying bad faith on June 10, 1976. It is certainly true that, as discussed above, Montebello clearly evidenced bad-faith bargaining between February 4 and April 21, 1976. However, Montebello's conduct during that period is not determinative of the notice issue. On April 21, 1976, Jory assumed the collective

bargaining responsibilities for Montebello. Jory's letter which informed the UFW of this change implicitly indicated Montebello's abandonment of its prior, objectionable bargaining tactics. The UFW could have reasonably expected Montebello to commence bargaining in good faith after retaining Jory. If the UFW had filed a charge in the face of this letter, the bargaining relationship between Jory and the UFW could have been seriously damaged. Therefore, we find that, for purposes of Section 1160.2, Jory's letter placed Montebello on the same footing as Mount Arbor. The UFW filed the charge against Montebello the same day it filed the charge against Mount Arbor; the charge was thus timely filed and, again, Section 1160.2 does not bar our consideration of the issues, or our finding of violations occurring at any time during the negotiations period.

Period 2; May 13, 1976 - February 2, 1977

On May 13, 1976, the parties conducted their first joint negotiation session. Jory represented both Respondents and Dolores Huerta assumed the collective bargaining responsibilities for the UFW. Between May 13 and June 10, the parties met several times, exchanged proposals and reached agreement on a variety of items. They made substantial progress toward resolving their differences in key areas such as hiring and seniority. On other issues, notably those contained in the economic package, little discussion took place although the parties did exchange proposals. The parties discussed at length the issue of union security but were in substantial disagreement over dues checkoff and discharge for loss of good standing in the Union.

At the May 26 meeting, the parties targeted May 24 as the date by which they expected to reach agreement on all outstanding issues. Meetings were scheduled throughout the month of June including June 16, 17, 22 and 23. These last meetings, however, were not held. At the June 10 meeting, Respondents abruptly announced that the parties were at impasse. They presented their "final offer" and urged Huerta to put it before the membership for a ratification vote. Huerta rejected the proposal. Jory stated that future negotiations would be pointless and Respondents' representatives left the meeting.

During the ensuing months, the parties exchanged several letters but did not resume substantive negotiations. While Jory repeatedly requested a "constructive response" to Respondents' final offer, the UFW stated that it would not accept the take-it-or-leave-it proposal. On January 29, 1977, however, the UFW wrote to Jory and unconditionally requested the resumption of negotiations.

In the fall of 1976, Mount Arbor raised its employees' wages to the levels it had previously offered to the UFW during negotiations. Montebello raised its employees' wages in the fall of 1976 to a level above what it had previously offered to the UFW. The UFW was not notified or consulted in advance of either of these wage increases. Also, following the Board's denial of the UFW's request for an extension of certification, Jory wrote to both Mount Arbor and Montebello suggesting that they consider "preparing communications to the employees which, while making no promises, urge them now to give the Company a chance in view of the fact that the Union fulfilled few, if any, of its promises in a year's time."

Although Mount Arbor did not follow this advice, Richard Barwick, General Manager of Montebello, informed his employees that the UFW had failed to obtain an extension of certification and urged them to give the company a chance to meet the employees' desires without the participation of the Union. This action was taken prior to the expiration of the certification year.[13/]

The ALO concluded that Respondents' conduct throughout this period evidenced bad-faith bargaining. He found that the parties had not reached a bona fide impasse on June 10 and that Respondents were therefore not entitled to break off negotiations. He attributed any deadlock to Respondents' bad-faith bargaining posture, particularly its position on topics such as union security. Finally, he found that Respondents' conduct during the ensuing months when the parties exchanged letters constituted a continuation of Respondents' bad-faith bargaining rather than a sincere effort to facilitate negotiations and reach agreement.

Respondents except to the ALO's aforesaid conclusions. They argue that the parties were at impasse on June 10 and that Respondents repeatedly demonstrated their good faith by attempting to get the parties back together after negotiations broke down.

Impasse. We turn now to the issue of whether the parties were at impasse on June 10, 1976, when Respondents presented their final offer and declared that further negotiations would be

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[13/]During this period, Montebello laid off several members of the UFWs negotiating committee. We affirm the ALO's conclusion that this conduct violated Section 1153 (c) and (a) and we note that this conduct is evidence of Montebello's intent to frustrate negotiations by removing the UFW's employee-representatives.

pointless. A bona fide impasse is reached when the parties to collective bargaining negotiations are unable to reach agreement despite their best, good faith efforts to do so.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists. Taft Broadcasting Co., 163 NLRB 475, 478, 64 LRRM 1386 (1967).

Our examination of the record, in light of the above-listed factors, convinces us that the ALO properly found that the parties were not at impasse and that Respondents' premature declaration of impasse was indicative of its intention to frustrate negotiations and avoid signing a contract with the UFW.

As a general rule, contract negotiations are not at impasse if the parties still have room for movement on major contract items, even if the parties are deadlocked in some areas. Schuck Component Systems, 230 NLRB 838, 95 LRRM 1607 (1977); Chambers Manufacturing Corporation, 124 NLRB 721, 44 LRRM 1477 (1959)., enf'd 278 F.2d 715, 46 LRRM 2316 (5th Cir. 1960). Continued negotiations in areas of concern where there is still room for movement may serve to loosen the deadlock in other areas.

We find that, as of June 10, 1976, the parties had room for movement on several important issues such as hiring, seniority, wages and pensions, and that impasse had therefore not been reached. On several of these issues, the parties had been able to narrow their differences in previous meetings. Had bargaining continued, further movement and ultimate agreement on many points

could very likely have been accomplished.

For example, between May 13 and June 10, 1976, the parties made substantial progress toward agreement on contract language covering hiring and seniority despite their widely diverging views on the topic. Each party compromised on several points and, on June 9, the UFW presented new proposed language which incorporated much of the discussion of the previous weeks. Although the parties were still making progress in negotiations, Respondents precluded resolution of their remaining differences by breaking off negotiations two weeks before the parties' own target date for reaching a complete agreement.

On other issues, particularly economic items, Respondents first declared an impasse and then presented their "final offer" before the parties fully discussed their differences or explored possible areas of compromise. For example, Respondents presented their final wage proposal prior to any in-depth discussion on wages. On March 19, 1976, Respondents proposed keeping wages at their then-current levels. On May 13, 1976, Respondents offered a modest wage increase and the UFW responded with its own wage proposal the following day. Between that time and Respondents' action on June 10, little discussion of wages took place. The Respondents' premature declaration of impasse aborted the negotiating process long before the possibilities for movement and agreement on economic issues were adequately explored.

Respondents, citing Television & Radio Artists v. NLRB, 395 F.2d 622, 67 LRRM 3032 (D.C. Cir. 1968), assert, however, that the deadlock on issues such as union security rendered continued

negotiations pointless notwithstanding any movement which might have been available in other areas. As of May 13, 1976, the parties were unable to agree on two key aspects of the proposed union security clause: dues checkoff and discharge for failure to maintain good standing. As to dues checkoff, the UFW desired a contract provision whereby the Employer would automatically deduct employees' union dues from their paychecks. The UFW explained that it had used other methods of dues collection in the past and found them to be inadequate. Respondents opposed the inclusion of a dues checkoff provision in the contract ostensibly because of the clerical costs. Jory asserted that the extra work would require Respondents to hire additional clerical personnel and that they were unwilling to incur that expense. On good standing, the UFW proposed a clause which would require employees, as a condition of continued employment, to maintain membership in good standing in the UFW. Respondents opposed such a provision to the extent it allowed the UFW to require Respondents to discharge an employee for conduct other than the failure to pay dues and initiation fees. Respondents stated that they maintained this position because the proposed clause would be illegal under the National Labor Relations Act[14/] and because they desired to protect their employees from any arbitrary action by the UFW.

[14/]Although Section 1153 (_c) permits a union security clause which requires employees to be members of a union where membership is defined as "the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing", Section 8 (a) (3) of the National Labor Relations Act limits the definition of membership for purposes of union security clauses to the tender of initiation fees and periodic dues.

We believe that the deadlock on union security was not so severe that successful negotiations in other areas of importance, discussed above, could not have been carried on toward a successful completion of negotiations. Had good-faith negotiations occurred on issues where disagreement was less intense than it was on union security, the pattern whereby the parties had gradually been resolving other differences might well have carried over into this area. Respondents' unwarranted declaration of impasse, however, precluded even the possibility of agreement occurring.

Furthermore, we agree with the ALO that the deadlock on the issue of union security resulted from Respondents' bad-faith bargaining posture. Therefore, such a deadlock may not be considered the basis of a legally cognizable impasse. Valley Oil Co., 210 NLRB 370, 86 LRRM 1351 (1974). It is a basic principle of both the Agricultural Labor Relations Act and the National Labor Relations Act that:

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding of bad faith, to require the employer to contract in a way the Board might deem proper. NLRB v. Herman Sausage Co., 275 F.2d 229, 45 LRRM 2829 (5th Cir. (1960) .

It is equally true, however, that:

> ... if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations. NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 32 LRRM 2225 (1st Cir. 1953) .

Our examination of the positions taken by Respondents on the issue of union security convinces us that Respondents' conduct was not

consistent with good-faith bargaining.

We find that Respondents displayed an unwillingness to bargain in good faith about a dues checkoff provision because their professed reason for opposing and refusing to compromise on the provision, i.e., the cost of such a system, was pretextual. The UFW was thereby prevented from attempting to address Respondents' true concerns. "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1959). We believe that the cost factor was not the true reason for Respondents' unwavering opposition to the provision because neither Respondent made any serious effort to estimate the amount of additional work required by a dues checkoff system despite the UFW's arguments that the additional burden was not great. Richard Barwick and John Camp, the General Managers of Montebello and Mount Arbor, respectively, and the company representatives responsible for the negotiations, did not substantively discuss the issue with their office staffs, despite their lack of experience in the area. Respondents never explored possible compromises with the UFW to out down the total amount of paperwork, e.g., by eliminating other paperwork requirements of the contract proposal, or by introducing other cost-cutting measures which could have made the acceptance of a dues checkoff provision more attractive. Thus, Respondents insisted that they would not accept a dues checkoff provision because of the added clerical burden without having made any effort to determine what the burden would be. Respondents' arbitrary and unyielding rejection of the UFW's dues

checkoff proposal is thus revealed not as an honestly-held concern, but as a method by which to frustrate negotiations and avoid signing a. contract.

Respondents' unwavering opposition to the proposed good standing provision is also inconsistent with the duty to bargain in good faith. While an employer may certainly maintain its bargaining positions to the point of impasse, it is an indication of bad faith for an employer to advance "patently improbable" justifications for its stance. Such conduct prevents the other party from seeking possible areas of compromise. Glomac Plastics, Inc. v. NLRB, 592 F.2d 94, 100 LRRM 2508 (2nd Cir. 1979); Queen Mary Restaurants v. NLRB, 560 F.2d 403, 96 LRRM 2456 (9th Cir. 1977). Respondents' concern that the proposed good standing provision would not be lawful under the National Labor Relations Act is patently improbable because it has little if any relevance to the negotiations between Respondents and the UFW; those negotiations are not controlled by the federal labor law. The lack of any logical relationship between the stated concern and the negotiations leads us to conclude that Respondents' justification was pretextual, i.e., a ploy to frustrate negotiations rather than an honestly-held concern. Respondents' second justification for their position, their desire to protect their employees from arbitrary action on the part of the UFW, is equally infirm. It demonstrates a failure to accept a basic principle of the Agricultural Labor Relations Act: the certified collective bargaining representative is the exclusive representative of the employees, and the employer may not assume that role. Respondents'

position, viewed in conjunction with their overall conduct, demonstrates a rejection of the Union's role in collective bargaining and, therefore, a rejection of the principle of collective bargaining- itself. "Conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the union, in the Board's view, manifests the absence of a genuine desire to compromise differences and to reach agreement in the manner the Act commands." Akron Novelty Mfg. Co., 224 NLRB 998, 1001, 93 LRRM 1106 (1976).

Respondents argue that their good faith is forcefully demonstrated by their repeated attempts to break the "impasse" during the summer of 1976. We do not agree. Respondents' argument is based upon letters which Jory wrote to the UFW demanding a "constructive response" to their offer of June 10. When Respondents first presented the June 10 offer, Jory clearly stated that it was a final offer and that he was requesting the UFW's complete acceptance or rejection. The letters do nothing to dispel the impression that Respondents had already provided all they were willing to and that absent acceptance of the offer by the UFW, further meetings were pointless. The letters were merely a continuation of Respondents' bargaining posture as of June 10, a bargaining posture we have already found to be evidence of bad-faith bargaining. Therefore, we agree with the ALO that the letters are simply an attempt to force concessions from the UFW by capitalizing upon Respondents' previous unlawful conduct of declaring an impasse where none existed.

Wage increases. We turn next to the issue of Respondents'

wage increases in the fall of 1976. As stated above, Mount Arbor raised its employees' wages to the level it previously offered to the UFW; Montebello raised the wages of its employees to a level above that previously offered to the UFW. Neither Respondent notified or consulted with the UFW prior to instituting these changes. We conclude that this conduct constituted a per se violation of Section 1153 (e) and (a). An employer may not by-pass the certified collective bargaining representative of its agricultural employees by unilaterally instituting changes in wages or other working conditions. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

Respondents argue that the wage increases were lawful because they were instituted following the occurrence of an impasse in negotiations. While an employer "acquires a limited right to fix [wages and working conditions] unilaterally" after bargaining to a bona fide impasse, Bi-Rite Foods, Inc., 147 NLRB 59, 65, 56 LRRM 1150 (1964), Respondents may not justify their wage increases on that basis in this case. As we previously found, the parties did not bargain to a bona fide impasse and, therefore, Respondents were not entitled to unilaterally change their employees' wages. Pay'n Save Corp., 210 NLRB 311, 86 LRRM 1457 (1974). Furthermore, even after impasse, an employer may change wages and working conditions only within the confines of its prior offers to the union. Bi-Rite Foods, Inc., supra. Thus, even if a bona fide impasse had occurred, Montebello's wage increase would be unlawful as Montebello raised wages to a level above that which it previously offered to the UFW.

Communications with employees. We turn next to Respondent Montebello's communications with its employees on November 16, 1976. Following the Board's denial of the UFW's motion for extension of certification, Jory wrote to both Mount Arbor and Montebello informing them of the Board's action and suggesting that they encourage the employees to "give the Company a chance in view of the fact that the Union fulfilled few, if any of its promises in a year's time." In response to this letter, Barwick told Montebello's employees about the Board's action, requested the employees to give the company a chance before signing cards for another election, and promised to present a complete contract package to the employees for their consideration. This occurred during the certification year. We conclude that this conduct was a violation of the Act, and we find that it is persuasive evidence of Montebello's overall desire to by-pass and undermine the UFW if at all possible. Imperial Outdoor Advertising, 192 NLRB 1248, 78 LRRM 1208 (1971); Oldfield Tire Sales, 221 NLRB 1275, 91 LRRM 1047 (1976).

Respondents concede that this conduct might well be unacceptable under the Act but argue that it was an isolated incident having no bearing on Respondents' overall conduct. We do not agree. We find that Jory's advice and Montebello's implementation of that advice exemplifies Respondents' overall approach to bargaining. Jory erroneously believed that Respondents' duty to bargain would cease at the end of the certification year. He followed a consistent pattern of bargaining which unlawfully frustrated negotiations and precluded the signing of a contract.

He then advised Respondents to urge their employees to abandon the UFW as the end of the certification year approached. The ultimate goal of this approach to collective bargaining was the undermining of the Union and it is obviously the antithesis of bargaining in good faith.

Period 3; February 3, 1977 - date of hearing

After the close of the certification year, Respondents refused to meet with the UFW on the grounds that they no longer had an obligation to bargain. The end of the certification year, however, does not end the duty to bargain and we therefore conclude that Respondents' conduct during this period was in violation of Section 1153 (e) and (a). Kaplan's Fruit & Produce, 3 ALRB No. 28 (1977).

The UFW's Alleged Refusal to Bargain in Good Faith

We turn finally to Respondents' contention that the failure of the parties to reach agreement during the certification year was due not to Respondents' conduct, but to the bad-faith bargaining of the UFW. As Respondents point out, a labor organization's bad-faith bargaining may preclude fruitful negotiations and thereby render it impossible for the Board to determine whether the employer has discharged its duty to bargain in good faith. Thus, a labor organization's bad-faith bargaining may be an affirmative defense to a refusal to bargain allegation against an employer. Continental Nut Co., 195 NLRB 841, 79 LRRM 1575 (1972); Times Publishing Company, 72 NLRB 676, 19 LRRM 1199 (1947). We reject Respondents' contention in this case., however, as we find that the UFW has not bargained in bad faith.

Respondents argue that the UFW's alleged bad-faith bargaining is demonstrated by conduct such as disrupting negotiations by repeated substitution of negotiators, failure to respond to counterproposals and the retraction of previously reached agreements. However, Respondents do not accurately portray the UFWs conduct; viewed as a whole, the UFW's conduct does not constitute bad-faith bargaining.

For example, Respondents assert that the UFW impeded the progress of negotiations by utilizing five different negotiators, In fact, the UFW used two primary negotiators, Schnaittacher and Huerta. Furthermore, when Huerta replaced Schnaittacher, she was fully prepared and the negotiation process was not delayed or disrupted. Richard Chavez also served as a negotiator, but he played a minimal role. At the March 29 meeting, Schnaittacher introduced Chavez as his replacement although Chavez did not participate in the negotiations at that meeting. By the time of the next meeting, May 13, Huerta had already assumed responsibility for the negotiations. In the interim, Chavez and Jory negotiated an agreement by telephone whereby the UFW agreed not to strike during the budding season in exchange for certain retroactivity provisions in any contract subsequently executed by the parties. Chavez thus did not participate in the contract negotiations to any significant extent. Contrary to Respondents' argument, we find that neither Cesar Chavez nor David Burciaga served as UFW negotiators in this matter. Their participation was limited to a letter which each wrote to Jory after the June 10 breakdown in negotiations reiterating the UFW's rejection of Respondents' final offer and

stating their belief that Respondents' conduct constituted bad-faith bargaining.

We also find that at no time did the UFW fail to respond to the counterproposals of Montebello or Mount Arbor. In January 1976, Mount Arbor presented its first counterproposal on five contract items. In response, Schnaittacher emphasized the need for a full counterproposal. He did not, as Respondents suggest, condition future bargaining on the presentation of a complete counterproposal; in fact, the parties met on February 5, 1976, and continued the negotiation process even though Mount Arbor still had not submitted a complete counterproposal. Respondents also argue that the UFW failed to respond to their June 10 counterproposal. However, at the negotiation session, Huerta rejected that proposal and thereafter the UFW repeatedly stated that it would not accept Respondents' take-it-or-leave-it offer.

We reject Respondents' argument that the UFW repeatedly retracted agreements reached by the parties. The record reveals that Respondents, in their counterproposals, adopted some provisions of the UFW's proposals. In and of itself, however, this does not establish an agreement reached by the parties. Particularly in complex articles such hiring, seniority or grievance/arbitration, one party may not bind the other simply by agreeing to part of the proposed article while rejecting substantial portions of it. On the whole, the exchange of proposals and counterproposals by the parties constituted the ordinary give-and-take of collective bargaining rather than the retraction of previously reached agreements.

On the basis of the above and the record as a whole, We find that while the UFW did not bargain with textbook precision, its conduct during the course of the negotiations did not constitute bad-faith bargaining, was not a failure or refusal to bargain in good faith, and was not the cause of the parties' inability to reach a contract.

The Remedy

Section 1160.3 authorizes the Board to order a respondent to cease and desist from committing an unfair labor practice and to make employees whole "... for the loss of pay resulting from the employer's refusal to bargain." Having found that Respondents Montebello and Mount Arbor failed and refused to bargain in good faith with the UFW, we shall order them to meet with the UFW, on request, and to bargain in good faith, and to make whole their agricultural employees for the loss of wages and other economic losses they incurred as a result of Respondents' unlawful conduct, plus interest thereon computed at seven percent per annum. Adam Dairy, 4 ALRB No. 24 (1978). Because the illegality of the conduct is a continuing pattern not made up of separate distinct acts,[15/] we will order the make-whole remedy to commence on February 4, 1976, for Montebello and on January 23, 1976, for Mount Arbor, the dates

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[15/] See Lundy Mfg. Corp., 136 NLRB 1230, 49 LRRM 1961, enf'd 316 F.2d 921, 53 LRRM 2106 (2nd Cir. 1963), cert. den. 375 U.S. 895, 54 LRRM 2393 (1963), in which the NLRB held that Bryan Mfg. Co., supra, "warrants the use of background evidence for the purpose of enabling us to decide what remedial measures are necessary to expunge the effects of the unfair labor practices which occurred within-the limitations period." 136 NLRB 1230, 1234. The Second Circuit upheld the Board, Judge Friendly agreeing that "It follows a fortiori [from Bryan Mfg.] that in such a situation the Board may look to earlier events to determine the appropriate remedy to be prescribed ...." 316 F.2d 921, 927.

upon which each Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful refusal to bargain in good faith. O. P. Murphy, 5 ALRB No. 63 (1979).

On January 23, Mount Arbor first manifested its overall bad-faith bargaining by commencing its delaying tactics concerning the counterproposal. On that day, instead of diligently working toward a comprehensive counterproposal, Jory presented only five articles and thereafter failed to present a complete counterproposal until March 19. On February 4, Montebello first manifested bad-faith bargaining by promising a counterproposal but thereafter rendering itself entirely unavailable for continued negotiations until Jory's letter of April 21. Although the UFW encountered considerable difficulty in reaching Montebello during December and January, the record does not indicate that this difficulty resulted from Montebello's bad faith.[16/] We will also extend the UFW s certification as the exclusive collective bargaining representative of the agricultural employees of Montebello and Mount Arbor for one year from the date of issuance of this Decision.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent Montebello Rose Co., Inc., its officers, agents, successors and assigns, is hereby ordered to:

[16/]Member Ruiz, for the reasons stated in his concurring opinion in O. P. Murphy, 5 ALRB No. 63 C1979), would begin the make-whole period for both Respondents on December 6, 1975.

1. Cease and desist from:

(a) Failing or refusing to bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code Section 1153 (e). and (a)_, and in particular, by making unilateral changes in the employees' wages and working conditions.

(b) Laying off or discharging any employee because of his or her union activities or union sympathies.

(c) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of those rights guaranteed 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 agreement is reached, embody such agreement in a signed writing.

(b) Make whole its agricultural employees 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, 4 ALRB No. 24 (.1978), for the period from February 4, 1976, until such time as Respondent commenced to bargain in good faith with the UFW and thereafter bargained to contract.

(c) Offer Pedro Armendariz, Richard Escalante, Ruben Torres and Jose Rubio full reinstatement to their former positions or comparable positions, without prejudice to their seniority or

other rights and privileges beginning with the earliest date following issuance of this Order when there are positions available for which they are qualified.

(d) Make whole Pedro Armendariz, Domingo Avina, Richard Escalante, Uvaldo Ramirez, Jose Rubio and Ruben Torres for any loss of earnings and other economic losses they have incurred by reason of Respondent's discrimination against them, together with interest thereon at the rate of 7 percent per annum.

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

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

(g) Post at its premises copies of the attached Notice for 60 consecutive days at times and places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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

(i) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent from February 4, 1976, to

January 1, 1978.

(j) Arrange for a representative of the Respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of the 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 the Respondent to all nonhourly 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 after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of the agricultural employees of Montebello Rose Co. , Inc. , be and hereby is extended for one year from the date of issuance of this Order.

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ORDER

Pursuant to Labor Code Section 1160.3, Respondent Mount

Arbor Nurseries, Inc., its officers, agents, successors and assigns, and Thomas L. Flynn, Receiver for Mount Arbor Nurseries, Inc., are hereby ordered to:

1. Cease and desist from;

(a) Failing or refusing to bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its agricultural employees in violation of Labor Code Section 1153 (el and, in particular, by making unilateral changes in the employees' wages and working conditions.

(b) In any other manner interfering with, restraining or coercing agricultural employees in the exercise of those rights guaranteed 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 agreement is reached, embody such agreement in a signed writing.

(b) Make whole its agricultural employees 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, 4 ALRB No. 24 (1978), for the period from January 23, 1976, until such time as Respondent commenced to bargain in good faith with the UFW and thereafter bargained to contract.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records

relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

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

(e) Post at its premises copies of the attached Notice for 60 consecutive days at times and places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed by Respondent from January 23, 1976, to January 1, 1978.

(h) Arrange for a representative of the Respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of the 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 the Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and< answer period.

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

It is further ordered that the certification of the United Farm Workers of America, AFL-CIO, as the collective bargaining representative of the agricultural employees of Mount Arbor Nurseries, Inc., be and hereby is extended for one year from the date of issuance of this Order.

Dated: October 29, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES OF MONTEBELLO ROSE CO., INC.

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found that we discriminated against certain workers because of their union activities by discharging some and laying off others. The Agricultural Labor Relations Board also found that we did not bargain in good faith with the United Farm Workers of America, AFL-CIO, in violation of the law. The Board has told us to post this Notice and to mail it to those who worked at the company between February 4, 1976, and January 1, 1978.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
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; and
5. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

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

WE WILL NOT fire you or lay you off because you exercise any of your rights, as discussed above.

WE WILL offer Jose Rubio, Ruben Torres, Richard Escalante and Pedro Armendariz their old jobs back if they want them and we will pay each of them, as well as Domingo Avina and Uvaldo Ramirez, any money they lost because we discharged or laid them off.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from February 4, 1976, to the date we began to bargain in good faith for our current contract, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

Dated: MONTEBELLO ROSE CO., INC.

By:_____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

NOTICE TO EMPLOYEES OF MOUNT ARBOR NURSERIES, INC.

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found we did not bargain in good faith with the United Farm Workers of America, AFL-CIO, in violation of the law. The Board has told us to post this Notice and to mail it to those who worked at the company between January 23, 1976, and January 1, 1978.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives all farm workers these rights:

1. To organize themselves;

2. To form, join or help unions;

3. To bargain as a group and to 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; and

5. To decide not to do any of the above things. Because it is true

that you have these rights, we promise that:

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

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from January 23, 1976, to the date we began to Bargain in good faith for our contract, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

Dated:

MOUNT ARBOR NURSERIES, INC.

By:_____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Montebello Rose Co., Inc., Mount Arbor Nurseries, Inc. and Thomas L. Flynn, Receiver for Mount Arbor Nurseries, Inc. (UFW)	5 ALRB No. 64 Case Nos. 76-CE-28-F, 76-CE-37-F, 76-CE-37-1-F, 76-CE-71-F, 76-CE-72-F

ALO DECISION

The ALO concluded that Respondents, Montebello Rose and Mount Arbor Nurseries, violated Section 1153(e) and (a) by engaging in surface bargaining with the United Farm Workers. The ALO relied upon Respondents' general course of conduct in negotiations which included: (1) insisting on provisions predictably unacceptable to the UFW; (2) rejecting UFW proposals without exploring compromise or offering justifications for their positions; (3) declaring an artificial impasse; (4) refusing to bargain after the impasse unless the UFW accepted responsibility for the impasse; (5) unilaterally changing the wages of employees; and (6) refusing to bargain after the expiration of the certification year. The ALO also relied upon separate conduct of Montebello, which included by-passing the UFW and bargaining directly with its employees.

The ALO concluded that Montebello violated Section 1153 (c) and (a) by discharging two employees because of their union sympathies, rejecting as pretextual Montebello's defense that the employees were discharged for leaving work early. The ALO also concluded that Montebello violated Section 1153(c) and (a) by laying off members of the UFW negotiating committee because of their union sympathies and activities.

BOARD DECISION

The Board affirmed the conclusion of the ALO that Montebello and Mount Arbor engaged in surface bargaining in violation of Labor Code Section 1153 (e) and (a), and held that the make-whole period would commence at the date Respondents first manifested bad-faith bargaining. The six-months limitations period of Section 1160.2 was held not to commence running until June 10, 1976, the date on which the UFW was found to have acquired actual or constructive notice of Respondents' bad-faith, surface bargaining.

THE REMEDY

The Board ordered Montebello to offer reinstatement to, and to make whole, those employees whom it discharged or laid off in violation of Section 1153 (c) and (a). To remedy Respondents' refusal to bargain, the Board ordered Respondents to make whole their employees for the entire period during which Respondents failed and refused to bargain in good faith.

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* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

In The Matter of:

	CASE NOS. 76-CE-28-F
MONTEBELLO ROSE CO. , INC.	76-CE-37-F
and MOUNT ARBOR NURSERIES, INC.,	76-CE-37-1-F
	76-CE-71-F
Respondents,	76-CE-72-F
and	
	DECISION OF THE
UNITED FARM WORKERS OF	ADMINISTRATIVE LAW
AMERICA, AFL-CIO,	OFFICER
Charging Party.	

_____/

John E. Peterson and Howard A. Sagaser, of Thomas, Snell, Jamison, Russell, Williamson § Asperger, 10th Floor, Fresno's Townehouse, Fresno, CA 93721, for the Respondents.

Martin Fassler, 627 Main Street, Delano, CA, Counsel for the General

Jean Eilers, P.O. Box 130, Delano, CA 95215, Party for the Charging

STATEMENT OF THE CASE

MARK E. MERIN, Administrative Law Officer: This matter was first convened for hearing on June 13, 1977, in Fresno, at which time Mt. Arbor Nurseries, Inc. was the sole respondent. The initial complaint alleged that respondent committed an unfair labor practice in violation of section 1153 (a) and (c) of the Agricultural Labor Relations Act (hereinafter "the Act")[1/] ' by refusing, since on or about

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1/ Statutory references are to the California Labor Code unless otherwise indicated.

February 3, 1977, to bargain in good faith with the United Farmworker of America, AFL-CIO (hereinafter "UFW" or "Union") which had been certified as the collective bargaining representative of Mount Arbor Nurseries' agricultural employees on December 3, 1975. Respondent, in answer to the complaint, admitted refusing to bargain with the raising Union thereby raising the following legal issue which the parties had indicated, in motions and memoranda filed with the Board, they were prepared to submit directly to the Board for decision:[2/] Does the Act bar an employer from bargaining with a union after the expiration of the year following the union's certification?

At the opening of the hearing the General Counsel moved to amend the complaint to enlarge the period during which Mount Arbor allegedly refused to bargain in good faith to include the months from January 1, 1976 to the present, and to add charges of discrimination..... in violation of section 1153 (a) and (c) , against seven named employees. I granted the motion to amend but continued the hearing on the First Amended Complaint to permit the respondent time to prepare a defense. Since the obligation of the respondent to bargain at that time was a legal question ripe for Board determination, I permitted the parties to brief and submit directly to the Board that legal question for its ruling. The Board declined to consider the question, however, and returned it to the hearing officer for his consideration in light of Kaplan 3 ALRB 28 . The parties stipulated to and. the Board then ordered the consolidation for hearing of a companion case Montebello

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2/See Mount Arbor's "Motion for Stay of Proceedings Pending Outcome of Judicial Proceedings or in the Alternative that a Hearing be Dispensed and Briefs on the Legal Issue Submitted dated May 10, 1973, and General Counsel's Response dated May l7, 1977.

Rose Company, since respondents, represented by the same negotiators, lad bargained jointly with the Union following April 21, 1976 and had 30th refused to bargain subsequent to February 3, 1977.

The hearing was convened in Delano on July 25, 1977, and the consolidated cases were then heard by me from July 25 through July 29, August 1 through August 5, August 8 through August 12, August 15 through August 17, August 24, 25 and September 1.

Second Amended Complaints were served before the start of the hearings and before the close of the hearings a further motion to amend the complaints was granted.

Counsel from the law firm which represented Montebello and soth respondents in their joint negotiations represented them in this hearing and fully participated [3/] together with representatives from the General Counsel's office and the Union which intervened as a matter of right in accordance with section 20266 of the regulations.[4/]

More than a hundred exhibits were tendered, the majority of which were admitted during the hearings, and respondents and General Counsel filed extensive briefs in accordance with a schedule stipulated to by the parties. In addition, respondents submitted a rebuttal brief neither stipulated by the parties to be prepared nor provided for by statute or regulation which I have nonetheless read and considered. Upon all of the evidence, written and oral, including

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3/ Jay v. Jory, a member of the firm specializing in labor law, who had negotiated for respondents and was to be a witness in the hearing, voluntarily desisted from representing respondents at the hearing.

4/ References to the regulations are to Title 8 of the California Administrative Code.

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my observation of the demeanor of the witnesses and after consideration of the briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent Mount Arbor Nurseries, Inc. (hereinafter "Mount Arbor") admits, and I find, that it is a lowa corporation and an agricultural employer within the meaning of section 1140.4 (c) of the Act. Respondent Montebello Rose Company, Inc. (hereinafter “Montebello”) admits, and I so find, that it is a California corporation and an agricultural employer within the meaning of section 1140.4 (c) of the Act.

Respondents admit and I so find, that the UFW is a labor organization within the meaning of section 1140.4 (f) of the Act.

II. The Alleged Unfair Labor Practices

The Third Amended Complaint against Mount Arbor alleges that respondent:

1. Discriminatingly refused to rehire Rogelio Bravo, Jorge Sanchez, Ramiro Vasquez, Cecilia Vasquez and Alicia Vasquez in violation of sections 1155 (a) and (c) of the Act;

2. Refused to bargain collectively in good faith with the UFW in violation of sections 1155 (a) and (c) of the Act.

Mount Arbor denies that it discriminated against Rogelio Bravo or Jorge Sanchez and asserts that it offered to rehire Bravo but that he declined. The Company denies that it refused to rehire Ramiro Vasquez, Cecilia Vasquez and/or Alicia Vasque, and asserts it did rehire Ramiro Vasquez but did not rehire Cecilia or Alicia Vasquez because they did not request employment.

Mount Arbor admits that it refused to bargain with the Union after February 3, 1977, but denies that it either refused to bargain with the UFW or bargained in bad faith at any time prior (to February 3, 1977.

The Second Amended Complaint against Montebello further amended at the hearing, alleges that respondent:

Discriminatorily:

1. Discharged Pedro Armendariz and Richard Escalante, and laid off Domingo Avina, Uvaldo Ramirez, Ruben Torres, Jose Rubio and Diego Armendariz in violation of sections 1153 (a) and (c) of the Act;

2. Refused to bargain collectively in good faith with the UFW in violation of sections 1153 (a) and (c) of the Act.

Montebello denies that it discriminated against those it terminated and asserts that Pedro Armendariz and Richard Escalante were fired for leaving work early and drinking beer during the time they should have been working, and that Domingo Avina, Uvaldo Ramirez, Ruben Torres, Jose Rubio and Diego Armendariz were all terminated because cut backs in production necessitated a diminished work force.

The Company admits that it refused to bargain with the Union after February 5, 1977, but denies that it either refused to bargain or bargained in bad faith at any time prior to February 3, 1977.

A. The Operation of Mount Arbor Nurseries.

Mount Arbor grows rose bushes on land in McFarland, California, and harvests, grades, packs and ships some of those bushes to its Shenandoah, Iowa company headquarters and other bushes direct

to less than twenty customers located throughout the country.

John Camp manages the Kern County operations and has since the summer of 1976, before which time he was assistant manager. Camp reports to Rex Whitehill, the Company's Executive Vice President, in Shenandoah, who, in turn, reports to the President, Sam Welch.

At peak the company employs approximately 180 workers. In early December the "harvest" of the rose bushes begins and continues to the first week in February. Roses are harvested to fill contracts entered into with the handful of customers who specify variety and number months in advance. Teams of seven workers, who lave traditionally returned at the beginning of the harvest season, dig the roses. Support personnel load trucks, label bushes and perform esoteric functions in the packing shed.

The rose bushes are propagated from shafts of budwood grafted to root stock. Other varieties are grown from budwood rooted directly in the ground. Budwood cutters, working in crews on a piece rate basis, cut budwood, during the short season from mid November to the end of the month. Sticks six to twelve inches long are cut from rows of growing plants with the quantities of each variety determined by orders the company has received. The budwood is cut, counted into bundles of twenty-five sticks each, placed at the end of the row by the budwood cutters, and tagged by the crew chief who notes the variety and the crew responsible for cutting it. The budwood is preserved in cold storage until the spring when it is grafted onto root stock. Four man teams of budwood cutters in three or five crews accomplish the more skilled of the operations. Usually one person, the lead man, from each crew reports to the Company before

the budwood cutting season and indicates that he and other members of his crew are prepared to begin work. Grafting of rose bushes, or "budding" takes place in the season beginning towards the end of April which normally lasts eight to ten weeks. A length of budwood taken from cold storage is grafted onto a rooted plant by a two man team composed of a budder and a tier. The budder makes a slit in the plant and places a stick into the slice. The tier secures the stick with a rubber band. This process requires skill to insure the grafts take and the teams traditionally are paid on a piece rate basis. In addition, if the number of live buds exceeds a stated percentage, the workers receive, two or three months after the budding season, a bonus based on the number of plants budded during the budding season.

Mount Arbor owns 380 acres of land in the McFarland area and leases additional land as required. In 1975 it owned and leased a total of 620 acres while in 1976 and 1977 its total acreage was reduced to 520 acres.

B. The Operations of Montebello Rose Company

Like Mount Arbor, Montebello grows, harvests, grades, packs and ships rose bushes in McFarland, California. The corporation is a family-owned business whose president is Fred Mungia. Richard Barwick has been the company's general manager since March, 1975, and reports to Fred Mungia.

Montebello's growing cycle parallels that of Mount Arbor described above. At peak Montebello usually employs in excess of 100 workers. In the spring of 1975, the Company budded 160 acres of roses and in the fall planted 160 acres to be budded the following 1976.

In May, 1976, Montebello subleased for a year and one half 73 acres of land and sold the rose bushes growing on it to another rose grower in the area, Conklin Nurseries.

C. Chronology of the Bargaining Relationship Between Mount Arbor and the Union

Elections were conducted at both of respondents' companies on November 17, 1975. Respondents initially dealt separately with the Union but consolidated their bargaining with the UFW on April 21, 1976. In this decision the relationships between the Union and each of the respondents will be treated separately up to the time when the companies entered joint negotiations with the Union. [5/]

1. The period from the representation election at Mount Arbor to the first negotiating session.

On November 17, 1975, 81 Mount Arbor employees cast ballots in the Agriculture Labor Relations Board representation election for the UFW, 8 for the Teamsters and 12 for "no union." The results of the elections were certified on December 3, 1975.

On December 6, 1975, Cesar E. Chavez, president of the UFW, wrote Mount Arbor's general manager, John Camp, requesting a preliminary negotiations meeting and enclosing a request for information needed by the Union to formulate contract proposals and asking that the information be furnished to the Union by the

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5/This treatment is consistent with the desires of respondents" who requested that the hearing officer make separate findings of fact and conclusions of law as to each of the respondents since these actions were consolidated for the convenience of the respective parties and not because of any identity of interests of the respondents.

Company at its "earliest convenience."

Sylvain Schnaittacher, a labor negotiator with considerable negotiating experience, on loan to the UFW from the AFL-CIO, represented the union at the first meeting with the Company held at the airport marina in Fresno on December 16, 1975. The ranch negotiating committee also attended for the Union and John Camp together with attorney Jay V. Jory and his assistant, Pat Long, represented the Company.

Schnaittacher presented to Jory the union's initial contract proposal conatining 43 articles, exclusive of one on wages. The parties discussed the proposal generally and Schnaittacher explained the meaning of certain sections. The Union informed the Company of its intent to reach a rapid agreement. After some general remarks the parties arranged a second meeting which they held on December 30 at the Stardust Motel.

2. Second Meeting - December 30, 1975

At their second meeting at the Stardust Motel in Delano, attended by Schnaittacher, the ranch committee and Jay Jory, Jory asked questions about each of the articles, reacted to the proposal and gave his criticisms. Schnaittacher responded to Jory's questions and offered some substitute provisions together with revised positions based on experience gained from parallel negotiations. The company made no counter proposals.

3. Third Meeting - January 15, 1976

In addition to those who were present at the previous meeting, Rex Whitehall, Mount Arbor's vice-president from Shenandoah, Iowa, joined the negotiations. After reviewing what had been accomplished at the earlier meetings, the parties concentrated

on the grievance and arbitration procedure with the Union defending its request for an expedited procedure for hearing grievances. The Company would not offer the same terms to the Union which it understood were contained in an Interharvest Agreement negotiated with a group of produce growers but Jory indicated it might agree to expedite grievances of certain matters. The meeting recessed to permit the Company to caucus to prepare a list of matters which might be considered on an expedited basis.

Returning from the caucus, Jory announced that he was not happy because a number of matters presented by the Union were apparently non-negotionable. Schnaittacher testified that he thought the statement strange, possibly directed at the workers, but passed it off. Additional matters were discussed but the Company made no written counter proposals. Schnaittacher testified that he felt the Company understood, at the conclusion of the session, that since it had a full exposition of the Union's position the Company had to come forward with its counter proposal. The parties agreed to meet again on January 20, but that meeting did not take place because, as Patricia Long in Jory's office informed Schnaittacher, Jory was traveling in the east. Since some proposals were to be submitted nonetheless, Schnaittacher arranged to stop by Jory's office on January 23rd to pick up the Company's proposals and to deliver a copy of the Interharvest Agreement for informational purposes as he had offered.

4. Fourth (Informal) Meeting - January 25, 1976

On January 25, 1976, Schnaittacher picked up at Jory's office five articles of a proposed agreement and delivered a copy of the Interharvest Agreement. Jory then arrived. The articles

differed substantially from the UFW proposal and Schnaittacher, perusing it quickly, pointed out deficiencies and emphasized that the proposal was only a partial response. Schnaittacher wanted a complete counter proposal so that negotiations could continue. Jory indicated that the UFWs proposal was not complete either since it did not include a wage proposal. Schnaittacher offered to make a wage proposal but suggested it would only be pro forma and would not necessarily promote a settlement since it could become a battle flag which might be difficult to haul down later. Schnaittacher left, believing that Jory was convinced the Company had to submit a full counter proposal.

5. Fifth Meeting - February 5, 1976

The parties met again on February 5, 1976, but the Company still had not prepared a complete counter proposal. Schnaittacher expressed his disappointment and Jory suggested they again go through the Union's proposal in an attempt to firm up those articles where the parties agreed on language. They did agree to some standard provisions and discussed the Union's hiring proposal with Schnaittacher pointing out a problem which might concern more than one worker being sent for the same job if the company could hire from any source when told by the Union that it did not have enough people to meet the Company's needs. At the end of the meeting, Schnaittacher said that the union required a written counter proposal on all matters, including economics.

Jory acknowledged that it was up to the Company to present the Union with a full counter proposal. Subsequent to the

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February 5th meeting, Schnaittacher testified, he telephoned Jory several times to ask for the counter proposal but Jory each time explained why he had not yet drafted it. Jory, on March. 7, 1976, wrote Rex Whitehill in Iowa, enclosing a partial draft of a counter proposal and saying that the Union had been in almost daily contact with his office complaining of not having received the counter proposal. (Ex. 77) On March 19, 19.76, Jory called and informed Schnaittacher that the proposal was being sent down to Bakersfield. Schnaittacher picked up the counter proposal at the Bakersfield Greyhound Bus Station but felt that it could not possibly lead to agreement since the Company had proposed to keep wages unchanged, adopt the Western Grower's Medical Plan Number 30 instead of the Union's Robert F. Kennedy Health Plan, or for adoption of the UFW's Martin Luther King Fund.

6. Sixth Meeting - March 29, 1976

On March 29, the parties met again at Delano's Stardust Motel. Sylvain Schnaittacher announced that he was being reassigned to another area and introduced Richard Chavez who would replace him in the Mount Arbor negotiations, although Schnaittacher would act as the Union's spokesman during the March 29 meeting. Schnaittacher informed the company that the Union had discussed the Company's proposal but that it was not worthy of a counter proposal. He referred to the Grievance and Arbitration and to the Union Security articles as "disaster areas," and noted a lack of a meaningful economic response in the company's proposal. Schnaittacher informed the company that the Union had new language for the Hiring article relating to dispatching workers when the union could not supply enough workers and indicated that he would submit revised hiring procedures as well

as new language on vacations. He pointed out that the Company's Hiring proposal adopted some language which the Union had withdrawn. After less than an hour the meeting was adjourned.

7. The "No-Strike" Agreement

Schanittacher and Richard Chavez met again, after the March, 29 negotiations, with the ranch committee to whom Schnaittacher indicated his belief that it was necessary to obtain from the Company complete counter proposal before the Union offered its own complete counter proposal. At the same time, he was aware that the workers wanted a contract before the budding season and were talking about striking. Schnaittacher suggested to Chavez that he meet with the workers to blunt the strike move. Thereafter Schnaittacher had no further contact with the negotiations.

The company was also concerned about a strike. Jory had written to Whitehall and Camp on March 7 saying that the draft contract to be proposed, especially with the continuation of existing wages and benefits, "could result in a strike." After the March 29 meeting Jory wrote to Whitehill and Camp, summarizing the meeting saying, in obvious reference to his concern about the possibility of a budding season strike, that "(h)opefully, we have bought more time, although how much is the big question."

Richard Chavez prepared and sent to Jory on April 5, the two articles on Hiring and Vacations which the Union had agreed to revise. On April 7, Chavez met with 35 to 40 workers to discuss the negotiations. While there was no vote taken, the workers pushed hard for a strike. Chavez encouraged them to have patience and promised that he would contact Jory to see what could be worked out to satisfy them.

Chavez telephoned Jory, relayed the workers' sentiments and suggested that the parties could prevent a strike by agreeing that wage increases provided in a collective bargaining agreement would be made retroactive to April 15. Jory agreed and confirmed hi understanding of the arrangement by writing to Chavez on April 16 that "the bladders would continue to perform their duties during negotiations. . .(and) Mount Arbor Nurseries would pay any year-end bonus agreed to in such negotiations and incorporated in a collective bargaining agreement retroactively to cover all budding performed during the current budding season" which was then commencing.

By the time Chavez received Jory's April 16 letter, he had already been reassigned to other duties and Dolores Huerta substituted as negotiator for the Union. He turned the letter over to her and noted that the written agreement was not as he had understood it since it appeared to apply only to budders and not to all Mount Arbor workers.

On April 21, 1976, Jory informed Richard Chavez that Montebello Rose Company, up to that time negotiating separately with the Union, had decided to enter into joint negotiations with Mount Arbor and that Jory would be representing both companies. Montebello agreed to abide by the same "no strike" agreement negotiated between Mount Arbor and the Union and anticipated adopting as its own the counter proposal Mount Arbor presented to the UFW on March. 19. Further, Jory indicated that he was in the process of preparing a new counter proposal to remedy the areas found objectionable in Mount Arbor's first counter proposal. No meeting date was proposed although a telephone call to establish one was invited.

Sometime during the budding season, without consultation

with, the Union, Mount Arbor effectively raised wages for budders and tiers from $15.00 per 1,000 and $13.00 per 1,000 paid the previous year to $17.00 per 1,000 and $15.00 per 1,000 by paying the "bonus" to all budders and tiers at the time of budding instead of in October, at the time of the live bud count, thereby eliminating a requirement that 90 percent of buds survive to qualify the budder-tier teams for the bonus.

D. Chronology of the Bargaining Relationship Between Montebello and the Union

1. The Period From the Representation Election at Montebello to the First Negotiating Session

On November 17, 1975, 95 out of 111 voting Montebello employees cast ballots in the Agricultural Labor Relations Board representation election for the UFW and the UFW was certified as the winner on December 3, 1975.

On December 6, 1975, Cesar E. Chavez wrote Fred Mungia, president of Montebello, asking for a preliminary meeting at the earliest opportunity and requesting information required by the Union to prepare contract proposals. Sylvain Schnaittacher followed up the Chavez letter with telephone calls but had difficulty reaching anyone who accepted responsibility for negotiations. Cesar Chavez wrote Mungia a second time on December 30, 1975, and threatened legal action if the request for a meeting was not honored. Finally Schnaittacher reached William Callan of the Associated Farmers,[5/] who was given the responsibility for the negotiations.

[5/] Little precise information was introduced at the hearing about the nature or purpose of Associated Farmers but it appears that member-growers pay dues to and receive benefits, at least publications

The two arranged to meet January 2.1, 1976, at the Palm Gardens, in McFarland.

2. First Meeting - January 21, 1976

At the first meeting attended by Callan, Richard Barwick, the general manager of Montebello, Schnaittacher, and members of the UFW's local ranch committee, Schnaittacher presented the Union's initial proposal which he had helped develop during a several week period beginning in October of 1975. The proposal had been assembled for presentation to employers where the Union had been certified and was the same as the one presented to Mount Arbor. Schnaittacher's purpose in submitting the initial proposal was to elicit from the Company a meaningful counterproposal to which the Union might react. By the time the initial proposal was submitted, however, changes were already being made based on negotiations which had culminated in the Interharvest Joint Agreement. At the initial meeting with Callan and Barwick from Montebello, Schnaittacher acted as spokesman for the UFW and commented both on the proposal as submitted and on proposed changes reflecting the Union's parallel experience. The company proposed to study the proposal and to return with additional questions later, but made no response to any portions

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from the Association. William Callan organized a meeting of rose growers under Associated Farmers' auspices in the fall of 1975, attended by John Camp and Rex Whitehall from Mount Arbor, Richard Barwick and Mr. Fred Mungia from Montebello, as well as representatives from Armstrong Nurseries, Jackson and Perkins , McFarland Rose Company and Conklin Nurseries. Union activities in the rose field were discussed at the meeting chaired by Callan since, as Richard Barwick explained, the Companies anticipated attempts by the UFW to organize their workers. It appears that the assistance of William Callan who negotiated for Montebello at two sessions with the UFW, may have been a benefit of association membership. Richard Barwick assumed that Callan would represent Montebello in all negotiations without any fee other than the dues his Company paid to Associated Farmers.

of the proposal during the first meeting.

3. Second Meeting - February 4, 1976

The second meeting between the UFW and Montebello was held at the Palm Garden on February 4, 1976. The Union's proposal and additional amendments submitted by Schnaittacher, were discussed in detail. Montebello's questions, according to Schnaittacher, were rather searching on the question of hiring but there were few inquiries relating to economics. Schnaittacher emphasized and the Company agreed that it was up to the Company to make a counter offer.

Following the second meeting, Callan never contacted Schnaittacher. Schnaittacher many times attempted to reach Callan without success. From February 4, 1976 through April 21, 1976, when Montebello joined the Mount Arbor negotiations and indicated it anticipated adopting, the same position as Mount Arbor had, the Union never received any counterproposal from Montebello.

E. Chronology of the Joint Negotiations Between Mount Arbor and Montebello and the UFW

Dolores Huerta, First Vice President of the UFW, took over responsibility for the joint negotiations when Richard Chavez was reassigned. She had experience as a negotiator, having founded the Union's negotiations department in 1956 and having participated in many negotiations which culminated in contracts.

In preparation for the first joint session scheduled for May 13, 1976, Huerta reviewed minutes of the prior meetings, examined the previous proposals and discussed the status of the negotiations with Richard Chavez and Ben Maddox, Delano Field Office Director.

Huerta was informed of the agreement negotiated by

Richard Chavez and Jay Jory relating to retroactive payments to budders and learned from Chavez that Jory's April 16 letter did not correspond to his understanding of the agreement reached. She chose not to challenge the agreement, however, because the situation was then "explosive" with Union organizers reporting that the workers felt they were being held back by the Union and discouraged from striking and because she believed that the agreement would be superceded by a collective bargaining contract.

Reviewing proposals on the table before the May 13 meeting Huerta concluded that while the companies accepted much of the Union language, in some important articles they inserted language which altered the thrust of the proposals. She anticipated, however, that she would be able to explain the reasoning behind the Union's formulations and would win company support for the Union language.

1. First Joint Meeting - May 15, 1976

At the first meeting Huerta brought in amendments to the Union's proposed articles on Hiring, Seniority and on Grievance and Arbitration. The new article on Hiring added paragraph. H which, required the number of workers requested by the Company from the hiring hall to be "reasonably related to the amount of work, to be performed." In paragraph A of the article, the work "may" in the second line was changed to "shall." The first change was designed to prevent the Companies from requesting more workers than actually needed and to avoid workers being laid off faster than was the custom. The second change cleaned up an ambiguity which, suggested to some that the hiring hall was not mandatory. Huerta testified that before she proposed the above changes she determined from a review of the minutes and previous proposals that the parties had tentatively

agreed only to parts of the proposal on Hiring, and not to its entirety.

In its new article on Seniority the Union eliminated dual seniority in favor of a single seniority list with workers gaining seniority after working fourteen days. This proposal, according to Huerta, eliminated the difficulty of distinguishing between "regular and "seasonal" workers.

In the new article on Grievance and Arbitration, Huerta included a provision for a Joint Area Labor Relations Committee which she believed the rose companies would support. She also deleted the limit on the number of people on the grievance committee. Her reasoning behind this change was that it would permit as many people as possible to be trained to represent workers in grievance hearings.

A provision in prior proposals that only the Union could utilize the grievance procedure was revised to give the Company equal access. Finally the waiver of grievances brought more than 30 days after discovery was eliminated.

At the meeting Huerta indicated the Union would provide proposals on Wages, Leaves of Absence and Health and Safety articles. These were hand delivered on May 14. The Wage proposal specified budders would receive $18.00 per thousand second year plants and tiers $16.00 per thousand second year plants; de-eyers would receive $6.40 per thousand plants, Mt. Arbor diggers $3.25 per row per person Montebello diggers $40.00 per row per crew. The hourly rate would be $3.25 per hour with irrigators receiving $3.65 per hour and tractor drivers $3.80 per hour.

The Health and Safety article proposed establishing a committee of workers' representatives which would participate in the

formulation of rules and practices relating to the health and safety of workers.

The Leaves of Absence proposal provided that up to five workers who had been elected to or appointed to an office with the Union would be granted leaves of absence, upon request, without pay, and further provided that temporary leaves for Union business would be permitted upon reasonable notice to the Company.

At the time Ms. Huerta entered the negotiations she was under the impression that the parties had tentatively agreed to nine articles which she characterized as "routine": Workers' Security, Supervisors, New or Changed Classification, Rest Periods, Bereavement. Pay, Income Tax Withholding, Bulletin Boards, Location of Company Operations, and a Savings Clause.

2. Meetings from May 26 to June 10, 1976

Following the May 13th meeting the Union and the Companies met on four more occasions: May 26, May 27, June 9 and June 10. On May 26 the parties had set June 24 as a target date for the completion of their negotiations and the production of a contract. Meetings were anticipated for June 16, 17, 23, and 24, but other developments resulted in the cancelling of the anticipated meetings following June 10.

3. June 10, 1976, Meeting

The meeting on June 10, 1976, at the Stardust Motel in Delano began in the morning with the companies providing information on the number of hours worked by various categories' of workers so that vacation eligibility could be meaningfully negotiated. New company proposals on Seniority and Discrimination were provided and discussed. The companies indicated they would make new wage

proposals in the afternoon and wanted from the Union its views on the Vacation article, which the Union caucused over and provided.

Returning from their lunch break, Jory, for the companies, went through each article of the companies' proposal, making a few additions to reflect the earlier discussions, and announced that it was the companies' final offer for settlement, that they felt they were at impasse, that the companies wanted the Union to take the final offer to the workers for a vote and that if the Union wanted a contract it should accept the proposal. Jory gave the Union a week to accept or reject the final offer and told Huerta that the companies would be free to implement aspects of the proposal unilaterally if the Union rejected it. Huerta said that she did not need a week and rejected the final offer immediately. Jory announced that the negotiations were at a close and the parties departed.

4. Status of the Negotiations on June 10, 1976

Although the parties prior to June 10, 1976, had fully informed each other of their positions, there had been virtually no negotiations as of June 10, on wages and other parts of the economic package where movement was not only possible but predictable. Instead of reaching the economic issues, representations from the Union and companies primarily spent this time in negotiation sessions debating articles on Union Security, Hiring, Grievance and Arbitration Health and Safety, Seniority and Access to Company property, with movement in many areas evident. The respective positions of the parties and the movement which took place in these areas during the period of negotiations from May 13 to June 10 is set out below:

A. Union Security Article

The companies opposed the Union's proposed dues

check-off system on the ground that it would require too much paperwork. The Union had also proposed that companies terminate workers not in good standing with the Union, a provision which the companies opposed on the ground its enforcement might expose them to legal action and because they had too much interest in the welfare of their employees to agree to terminate workers whom the Union, it its sole discretion, decided were not in good standing.

Although the companies had not calculated the time required to accomplish the dues check-off and had not reviewed the Union's constitution which governed the grounds for expelling a member, they still opposed the two features of the Union Security article for which the Union continued to press.

B. Hiring Article

Between May 13 and June 10, the parties discussed the-Hiring article on several occasions. The companies wanted the hiring hall to be optional and asserted that the use of the word "may" at one point in an early Union draft was consistent with their position while the Union maintained it had always intended the hiring hall to be mandatory and had merely corrected a grammatical inconsistancy when it changed the "may" to "shall" in later versions. The companies wanted from the Union, two days before starting dates, lists of workers who would be sent to work and if such lists were not supplied, the Company wanted to be free to obtain workers from .other sources. The Union, on the other hand, offered to put into a side letter agreement a provision obligating workers to appear at the companies offices 24 hours before start-up to complete necessary paperwork. While the Union proposed to permit workers a "reasonable amount of time" to establish their ability to meet job requirements,

the companies proposal permitted workers only five days to qualify, even though the existing practice at Mount Arbor was to permit some workers up to two weeks to learn some special operations.

The companies proposed an addition to the Hiring article of a probation period during which time a discharge would not entitle the worker to grieve; the Union felt that termination should be for cause entitling even new workers to use the grievance procedure. Although the companies agreed to notify the Union during the operating season of a need for new or additional workers forty-eight hours before they were required and to specify whether the work was temporary or permanent, the Union wanted a more specific estimate of the amount of time the work would last to avoid putting it in a position of sending workers which the companies would not be required to hire.

As of June 10, with the Hiring articles discussed on both June 9 and June 10, the parties had eliminated a good number of their differences but problems still existed with notice and employee probationary periods.

C . Seniority Article

Between May 13 and June 10 there was substantial give and take on the Seniority provisions with the companies making concessions on posting job openings, special training rates, reasons workers might lose seniority and the elimination of the "permanent," "regular" and "seasonal" designations and the substitution- therefor of two seniority lists one for budders and tiers and another for all other workers.

D . Grievance and Arbitration Article

The parties bargained seriously between May 13 and

June 10 over the Grievance and Arbitration Article with resulting agreement on most of the sub paragraphs. Unsettled questions remaining on June 10, included whether there would be a permanent arbitrator or one selected from a Federal Mediation Service Panel; whether grievances which threatened the continuation of work might be settled on an expedited basis; and the extent to which grievance would be settled during working hours.

E. Right of Access Article

The Union wanted unlimited access to the companies' property to enforce the contract. The companies wanted to limit the number of Union representatives with a right of access to one person and later, after the Union orally offered to limit the number of persons with access to 10% of the work force, countered with an offer to permit two representatives access, whereupon the Union returned to unlimited access.

Discussed at a time when the issue of access to company property was both before the courts and soon to be voted on in the form of Proposition 14, the access article took on a significance beyond the specific contracts being negotiated and the parties were unable to make much headway. As of June 10, the Union was still proposing unlimited access.

F. Health and Safety Article

The Union replaced its original Health and Safety article on May 14, 1976, with one providing for a health and safety committee of workers which would participate in formulating rules and practices relating to the use of pesticides, garments, materials, and tools and equipment to the extent that they affected the health and safety of workers. Certain dangerous chemicals would be banned

and the companies would be required to give the committee prior notice of the use of economic poisons with the companies determining and announcing the length of time during which workers would not be required to enter treated fields.

Although the new article had been discussed on at least two occasions, on May 26th the companies countered with a proposal substantially similar to that originally submitted but withdrawn by the Union. That companies' proposal made no provision for an employees' health and safety committee and did not require prior notice to that committee of the application of pesticides.

G. Fund Contributions

The Union proposed employer contributions to three funds: Martin Luther King Fund which supports farm worker service centers and is exempt from federal taxes; Juan de la Cruz Pension Fund from which retired farm workers would receive pensions; and the Robert F. Kennedy Health Plan which would provide health services to covered employees. The companies rejected the three proposals on various grounds, offered to continue health benefit payments through a Western Growers' plan, and claimed that payments to the pension fund might subject it to legal liabilities. Despite availability of information which might have permitted more meaningful discussion of the merits of the funds and the obstacles the companies saw to making contributions, discussion of the fund contributions was limited to a few informational exchanges.

4. Following June 10, 1976

On June 11, 1976, Jory forwarded to the Union a complete copy of the final offer for settlement the companies had made and which the Union had orally rejected on June 10, and included a

cover letter reiterating his position that the parties were at impasse and that if the Union did not accept the offer by June 18, ,,-— the companies would consider themselves free to implement portions of their proposal, unilaterally.

On July 5, 1976, Cesar Chavez wrote Jory charging that the companies' "take it or leave it final offer for settlement" demonstrated they were not negotiating in good faith. Replying on July 12, Jory said negotiations could continue if the Union "demonstrate(d) that the impression it has created that the negotiations are at impasse is not the case."

The Union, responded on July 30, that if the companies were unequivocally to state that their position has been withdrawn, negotiations could resume.

Thereafter the parties neither met nor arranged to meet to continue negotiations and on October 2, 1976, the Union filed with the Board a Petition to Extend Certification under 1155.2(b), which petition was denied, after the companies' response, on November 10, 1976. The Union's motion for Reconsideration of the Order Denying Extension of the Certification, filed on November 10, 1976, was denied on January 14, 1977.

On November 16, 1976, after receiving approval from Jory, Barwick met with a group of Montebello workers including the entire cutting and planting crew and informed them that the Company would be prepared to improve their wages and provide other benefits if they would go without the Union. The acceptance by the workers of a deal with the company required, as a condition, that there be no Union. There was no acceptance of Barwick's proposal.

On January 29, 1977, Richard Chavez who had resumed the

position as head of the Union's Delano Field Office, wrote to Jory requesting the resumption, without condition, of negotiations. He received no reply; however, on February 4, 1977, the companies filed a Complaint for Declaratory Judgment in Kern County Superior Court (No. 145509) seeking a determination of whether or not they were obligated to bargain with the Union, as Chavez requested.

Aside from exploratory discussions between the parties of which the hearing officer was informed during the hearing, there were no negotiations between the parties since the June 10, 1976, session adjourned.

F. Mount Arbor Discrimination Allegations

1. Rogelio Bravo and Jorge Sanchez

Bravo first worked for Mount Arbor in 1968. Thereafter in 1974, 1975 and 1976, he was a seasonal worker for the company. In 1975 he did tying and also weeding and was sent by the company to Washington State and to Iowa to do some work at other company facilities. In 1976 he began work with the company towards the end of March and was assigned to do budding along with five other people who were also learning the process for the first time. He was paid by the hour for the first week and then assigned a partner, Jorge Sanchez Pena, and paid at the then effective piece rate - $17.00 per thousand buds with his tier getting $15.00 per thousand. He worked until the end of budding season.

At the start of the budding season in 1977, he reapplied for a position as a budder and was told that nineteen others had already applied and there were not sufficient positions available to hire him but that his name would be added to the list to be held in reserve if the need arose for additional budders. At the time he

applied he was offered a job on an hourly basis and informed that if there was a vacancy on the budding team he would be permitted to substitute in as a budder on piece rate, but he rejected that proposal.[6/] Because he saw his name written on the reverse side of a list of budders, he believed he was being discriminated against for past union activity which consisted of wearing a union button while on the job. He was never called for work at the company although Alejandro Oropeza, number two on the standby list after Rogelio Bravo, began work on an hourly basis and later was hired as a budder when another budder had to leave for personal reasons.

2. The Vasquez Family

Ramiro Vasquez worked both spring and winter seasons for Mount Arbor since 1964. Summer seasons he worked in the grape harvest. In 1975 he voted in the election at Mount Arbor and, after learning the Union had won, displayed a Union button. Betty Camp, the mother of then assistant-manager John Camp, noticed he was wearing a button and acted "surprised." The following day he, together with about 20 others, was layed off.

In April, 1976, he applied for and obtained work as a tier and worked until July when the work was finished. In the winter of 1976 he went with his wife Cecilia and daughter Alicia to file applications for work.

Alicia had worked for Mount Arbor in 1973, 1974 and 1975

[6/] Jorge Sanchez, the evidence showed, accompanied Bravo on at least one visit to the company to inquire about a job as a tier, working with Bravo. Normally budders and tiers are hired as a team. There was no evidence, however, that Sanchez was offered the same hourly arrangement as was offered to Bravo.

during the winter season. In 1975, like her father, she displayed her Union support by unveiling a button on the day of the election. She normally wore the red and black Union button concealed beneath her sweater. She believes her supervisor saw the button because she noticed he made a bad-facial expression.

Cecelia also worked for Mount Arbor first in 1973 and thereafter in 1974 and 1975. In 1975 she voted in the election and on that day after she learned the Union won she too unveiled her Union button.

According to Ramiro Vasquez, he entered the office alone, his wife and daughter remaining in the automobile, and sought a bilingual employee to assist him in renewing his and his family's; applications. He understood that his application would not be accepted, although he did not understand that his old application was being reactivated.

Thinking that he and his family were being rejected, he departed and only returned a few days later, going directly to the field, at the instruction of a foreman, where he was hired. His wife and daughter did not make any other approaches to the company and were never called to work.

While the alleged discriminatory refusal to hire the Vasquez family occurred on or about October 15, 1976, the charge to that effect was not filed until June 3, 1977.

G. Montebello Discrimination Allegations

1. Discharge of Pedro Armendariz and Richard Escalante

Pedro Armendariz started working for Montebello Rose Company in October, 1975, cutting brush. He assisted in the: organization of Montebello before the Union representation election

by passing out authorization cards and wearing a Union button saying "En Las Rosas - Si Se Pueda" everyday on his field jacket. A week or so after the election at a noon meeting at the Union's local headquarters, "40 Acres," Pedro was selected as alternate member of the ranch negotiating committee.

Pedro Armendariz had worked piece rate in grape vineyards in 1971 and 1972 and piece work harvesting potatoes in 1970. At the three or four different ranches where he worked on a piece rate basis, workers were permitted to leave the ranch when they finished their share of the work. He had left previous jobs at different times during the day and had never been discharged or critized for leaving work earlier than others.

On November 29, Pedro Armendariz joined Ruben Torres' crew cutting budwood beginning at seven o'clock in the morning. He and Richard Escalante worked as a team. They received assignments from their crew leader and completed them before receiving the next assignment. After completeing three assignments Pedro and Richard decided to leave and informed Torres that since they had finished they intended to return home. They left sometime between one-thirty and two o'clock that afternoon in Pedro's car which had a sticker on the left rear bumper bearing the Union's black eagle emblem and the word "Huelga."

They drove to Richard Escalante's home which is directly across from Montebello's office. Upon arriving at Escalante's home they saw Richard Barwick sitting in his truck in front of the office. About fifteen minutes later at a grocery store where they had gone for a case of beer, they again saw Barwick enter the store and buy a cigar. Armendariz and Escalante returned to

to Escalante's home where they were joined by Danny Escalante and Ruben Torres who told them that Richard Barwick had informed Diego Armendariz over the company's radio that he was firing Richard and Pedro. Armendariz and Escalante drove back to the field where they found Barwick who told them he had indeed fired them because "people who are sick don't drink beer,"

Barwick testified that the two men left that Saturday before the completion of their work day and that he expected them to work eight hours even while on piece rate. No company rules were produced and Barwick testified that none exist in writing although he instituted a rule against drinking on the job when he came in 1975 and fired a worker for breaking that rule. Barwick stated that he had inquired over his citizen band radio of Diego Armendariz, foreman, why Richard Escalante and Pedro Armendariz had left when he saw them at Escalante's house and was told that they were sick. Diego Armendariz was not questioned about any conversation he may have had with Barwick, but neither Pedro nor Ruben Torres indicated that either Pedro Armendariz or Escalante was sick or that either told Diego Armendariz he was sick.

According to company records, of approximately 10 budwood cutting crews, two other crews cut 2500 and 1950 pieces of bud-wood, respectively, while the crew on which Armendariz and Escalante were cut 4500 pieces on Saturday, November 29th.

Ruben Torres, crew chief, testified that he left at approximately 2:00 or 2:30 o'clock that day, about 15 minutes after Pedro and Richard left, after he wrote his name on tags inside and out of burlap bags containing the budwood his crew had cut. Jose Magana, who handed out budwood cutting assignments.

told Ruben Torres, as he testified, that the third list would be the last one handed out that day.

2. Termination of Diego Armendariz

Diego Armendariz worked full time for the company for thirteen years until being laid-off on February 17, 1976. At the time he was laid off he was a foreman with responsibility for supervising field work. He also hired field workers and had hired almost all of those who voted in the representation election on November 17, 1975.

Armendariz's support for the UFW was no secret; he not only hired the work force which voted in the Union but wore conspiculously on his hat a button supporting the Union during the days before and after the election. Two months later, when he was laid-off, Barwick explained that the company was reducing acreage substantially and that his services would no longer be required.

A charge that the company violated sections 1153 (a), (b) and (c) by terminating Diego Armendariz was filed more than eighteen months later, on June 2, 1977.

3. The June 4, 1976, Discharges of Members of the Negotiating Committee.

At a meeting in late November, 1975, at Forty Acres, Jose Rubio, Ruben Torres, Domingo Avina, Uvaldo Ramirez and Ana cleto Garza were selected to participate on the negotiating committee along with alternates Pedro Armendariz, Lupe Pruneda and Jose Magana. Rubio and Torres attended four negotiation sessions, Avina was present at all but one and Ramirez, according to the sign-in sheet circulated before negotiation sessions, attended at

least two meetings. All of these sessions Richard Barwick also attended.

On June 4, at a meeting called for that purpose, Barwick addressed the workers, informed them of acreage cut-backs, and read a list of those who were being laid off effective that afternoon. Rubio, Torres, Avina and Ramirez were four of the five men laid off; eleven men were retained in addition to managers and supervisors.[7/]

Among those men retained were at least three whose seniority according to company records, was less than that of the negotiating committee members laid off. Barwick testified that he considered not only seniority but special skill as well wen he determined whom to lay off on June 4, and. that of those retained with less seniority, Armando Hernandez was an experienced irrigator, Hipolito Cervantez was experienced at close row cultivating, and Juan Alaniz had experience working, in the shed as a loader.

Torrez had worked as a permanent employee since December, 1969, and did all types of work, including budding, irrigating and driving a tractor. Rubio. irrigated for the company in 1975 and 1976, and testified that he had about ten years of experience irrigating before he began work for Montebello in May, 1974. He worked full-time for the company since he was hired, with the exception of six weeks in the months of March and April in 1975,

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[7/] Fifteen women were also laid off but, according to testimony from Barwick, women traditionally did jobs reserved for; them and not open to the men laid off. I have not considered whether the women doing simple manual labor with less seniority then the men should have been laid off first and been replaced by men with greater seniority, although federal law appears to make suspect Montebello 's custom of reserving certain jobs for women.

He worked full-time for the company since he was hired, with the exception of six weeks in the months of March and April in 1975, and each week worked in excess of 50 hours.

Ramirez did not testify, but evidence introduced established that he worked full time for the company in 1975 and in 1976, up until June 4, and was contacted by Barwick and rehired on June 20.

Avina did a variety of work for the company where he had worked full-time for at least four years. He, too, was rehired on June 20, by Barwick who explained that he had cut back too severely and had to rehire some employees.

Three weeks following the June 4, lay-offs, the company added eleven employees and four more the following week, but neither Rubio or Torrez was contacted.

In 1975, none of the four negotiating committee members had been laid off even though fewer workers were then employed than were on the company's payroll after the June 4 layoffs. Almost all of those retained after the June 4, 1976, layoffs had not been employed by the company during the prior year when Torrez, Rubio, Avina and Ramirez were so employed.

ARGUMENT AND ANALYSIS AND CONCLUSIONS

I. Bargaining Issues

A. Introduction

The complaints in these consolidated actions allege the employers committed acts considered to be per se violations of the duty imposed by the Act to bargain in good faith and further the they failed to bargain in good faith. Because in many instances

the same conduct is alleged to be both a per se violation and an indication of bad faith, [8/] and because the specific allegations are more easily comprehended in context, this discussion will track the relationship of the parties chronologically, taking up some specific allegations of the complaints in that, as opposed to numerical, order.

B. Montebello's Negotiating Conduct From December 3, 1975 To May 15, 1976, Demonstrates Its Lack Of Good Faith.

Built into the definition of "good faith" bargaining is the obligation to "meet at reasonable times, . ." (.§1155,2). Parties discharge that obligation by making themselves available promptly after election results are certified and arranging meetings so that bargaining may proceed. Exchange Parts Co., 139 NLRB 710, 713-714; enforced, 539 F.2d 829 (5th Cir., 1965).

Montebello delayed designating a representative and arranging an initial meeting until threatened with an unfair labor practice charge and thereafter met with the union only twice in the ensuing five months, despite the union's repeated requests for meetings. From December, 1975, until May 13, 1976, when they met for the first time in joint negotiations with the union, Montebello made no counterproposals even though the union's initial proposal had been delivered to the company in January.

In defense of its conduct, Montebello makes three assertions:

1) General Manager Richard Barwick, because of his own inexperience, selected an inadequate representative, William Callan,

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[8/] "Bad faith" is used in this opinion to be that state of I mind inconsistant with, but more easily proved then, good faith. See decisions in Cox, "The Duty to Bargain in Good Faith," "1 Harvard Law Review 1401 at 1412 et seq. (1958)

believing him qualified to negotiate on the company's behalf; 2) when it became apparent to Barwick in April, 1976, that Callan was not qualified to' negotiate a contract, Barwick had Montebello join the negotiations Mount Arbor had underway with the union; and 3) regardless of the specifics of the company's conduct during the period, all allegations relating to events which preceded April 22, 1976, are time-barred pursuant to §1160.2 since the initial charge of failure to bargain in good faith was not filed until October 21, 1976.

The first two points made by the company neither sufficiently justify its conduct nor negate bad faith, but in view of my acceptance of the third argument, extensive discussions of those positions is not necessary.

The time bar, except for charges involving continuing violations (NLRB v White Construction Company, 204 F2d 950 (5th Cir., 1953) enforcing 97 NLRB 1082, (NLRB v Basic Wire Products,' Inc., 516 F2d 261 (6th Cir., 1975), or related to earlier charges precludes finding a per se violation based on conduct preceding the six month period before the filing of the charge. It does not, however, prevent viewing pre-bar conduct as background material for determinations of intent, motive and union animus relating to other alleged violations within the statutory period and I have so considered the conduct described. (NLRB v Anchor Rome Mills, 228 F2d 775 (5th Cir., 1956); H.K. Porter Co. , 153 NLRB 1370, 59 LRRM 1462 (1962), aff'd sub. nom. United States Steel Workers v NLRB, 563 F.2d 272 (D.C. Cir., 1966); Steves Sash and Door Company v NLRB, 401 F2d 676, 678 (5th Cir., 1968) enforcing, in pertinent part, 164. NLRB 468 (1961).

By ignoring the union's request for specific information (G.C. Ex. 9), by avoiding sufficient contact in negotiation sessions and by failing to offer counter proposals to the union prior to entering joint negotiations, the employer exhibited a hostile attitude toward good faith bargaining which require parties, at a minimum, to define their positions so that common ground may be reached. That attitude persisted from December 3, 1975 to April 22, 1976.

C. Mount Arbor's Negotiating Conduct From December 3, 1975 to May 13, 1976, Demonstrated An Absence Of Good Faith.

Between December 3, 1975, and May 13, 1976, Jay Jory and representatives of the company met with the union five times formally and once informally over an exchange of documents. Despite the union's early delivery of a complete proposal, with the exception of an article on wages, the company delayed almost six weeks before making its language on the first five articles available and did not deliver a complete counter proposal until March 19, 1976. In a letter to his client referring to the proposal being submitted, Jory indicated the obvious; that the proposal "containing existing wages and benefits, will almost certainly be rejected. . . "(G.C. Ex. 77) A delay of more than three months in the making of a complete counter proposal, and proposing the continuation of the status quo in such an important area as wages belie a sincere desire to reduce differences and to arrive at an agreement, essential elements of good faith bargaining, and have been held to be indicia of bad faith. Irvington Motors, 147 NLRB 565, 56 LRRM 125" (1964), enforced, 343 F. 2d 759, 58 LRRM 2816 (C.A.3, (1965), MacMillan Ring-Free Oil Co.,

160 NLRB 877, 63 LRRM 1073 (1966).

In response to the union's critique of portions of their counter proposal as "disaster areas," Mount Arbor, at the parties meeting on March 29, agreed to provide information on numbers of employees on hourly and piece rate pay and to give attention to other problem areas. Following that meeting, Jory wrote to Rex Whitehill and summarized the session: "Hopefully, we have bought more time, although how much is the big question." (G.C. Ex. 79) In the context of the rose industry the move to satisfy and avoid a strike of budders, the company increased the budders' wages by prepaying to all budders and tiers without any restrictions bonuses usually paid the following Fall to those budders and tiers who achieved a live bud count of 90% or better. This action on taken the part of the company was taken without consulting with or notice to the union.

Although Jory's conclusion was not explicitly stated, the implication was and events subsequent to the budding season corroborate, that the company believed the employer's duty to bargain would lapse on the anniversary of the December 3, 1975, certification. The objective of Mount Arbor and Montebello, after adopting the no strike agreement, became to give the appearance of good faith bargaining while easing through the budding season and thereafter to "bargain" as required to avoid unfair labor ;practice charges without, at the same time, entering into an agreement with the union during the "certification year."

Negotiation aimed at getting through a six month period <u>without</u> an agreement cannot be dignified with the appellation of "good faith bargaining." Such bargaining requires, that the

parties intend to reach agreement, if agreement is possible (Atlas Mills, 3 NLRB 10, 21: 1 LRRM 60 (1937)), and that they manifest that intent through conduct. The company's actions, far from indicating an intent to reach agreement, support the opposite conclusion. Instead of actively seeking to reduce differences, Jory proposed terms which he knew were unacceptable while accepting the union's language only in boilerplate articles, thus maintaining the pretense of movement. Such a charade, when coupled with other indicia of bad faith, has correctly been condemned as sham or surface bargaining. My Store, Inc., 147 NLRB 145, 56 LRRM 1176 (1964), enforced 345 F2d 494, 58 LRRM 2775 (CA 7, 1965), Cert. denied, 382 US 927, 60 LRRM 2424 (1965); Valley Oil Co. 210 NLRB 370, 86 LRRM 1351 (1974).

D. Joint Negotiations From May 13, 1976 Until The June 10, 1976 Declaration Of Impasse

In the period of joint negotiations, beginning with the May 13 meeting and ending on June 10 when Jory declared the negotiations at impasse, the parties met for several hours five times in negotiations attended by representatives of the employer, the union, the negotiating committee and additional observers on occasion. While language was agreed to in many articles, after serious give and take, still others were untouched by the negotiations (principally economic issues). In areas the union ; considered of prime importance - dues check-off, good standing, access to company property and fund contributions, for instance the companies' opposition to proposals on grounds of principle , and their refusal to reason to conclusions prevented resolutions of differences .

Union Security

Adamantly opposed to voluntary dues check-off, the companies insisted that it was not their responsibility to assist the union in the collection of dues, and that they did not have the staff to accomplish the necessary paperwork. The union explained to the companies that the dues check-off procedure would obviate the need for union personnel to collect dues on the companies' property and would eliminate the possibility of the companies having to discharge workers for failing to pay dues -an aspect of the Union Security article previously accepted by the companies - and thereby operate to stablize the workforce, presumably in the interest of the companies. The union also argued that little time would be consumed in the additional bookkeeping required and requested information which would permit the calculation of the time required to implement the check-off.

The union also proposed and the companies rejected that workers not in good standing with the union be terminated by the companies. While the union's constitution, as well as statutes, limit the freedom of the union to expel members and thereafter to require employers to discharge workers not in good standing, Jory asked the union to justify the proposed good standing provision and, when not satisfied with the union's reference to fears of political sabotage, opposed the provision, Jory's reason for opposing the provision was twofold: the companies wanted to protect their workers from the arbitrary acts of the union; and the companies feared liability should they comply with the good standing provision. The union dealt with the companies' concern by offering to indemnify them from any loss,

explaining that no member had ever been expelled, and pointing to provisions in its Constitution which limited the union's right to expel members. By continuing to reject the provision when safeguards against possible losses were offered, the companies effectively refused to bargain over the proposal. The NLRA's provisions on "good standing" may suggest possible difficulty with the union's good standing proposal, even though no section comparable to sections 8(b)(2) of the NLRA exists in the ALRA. Reading section 1154(b) of the Act together with 1154(a) (1), however, should lead one to conclude that the ALRA specifically envisioned unions setting their own membership standards consistent with 1153(c) of the Act and enforcing them by compelling discharge of non-members. The companies' opposition based on their expressed concern for the welfare of their employees, in light of the statutory provisions referred to above reserving to the union the right to set "good standing" requirements, I find disingenuous and exempleary of their attitude that the companies, not the union, would be the exclusive arbiter of what was best for the employees. Such a position, by suggesting that the union does not function in the interests of its members, tends to demean the union and to erode the workers' confidence in their representative. Perhaps not itself an unfair labor practice, such derogation of the representive's position evidences the employers' bad faith approach to bargaining.

Access to Company Property

Opposition to union personnel having access to company property before or during an organizational campaign may be consistent with a company's efforts to defeat a drive for unioniza-

tion. After the union has been certified, and certainly after a contract is negotiated, however, access serves a different function and may promote the efficient resolution of contractual disputes and permit the servicing of union members. Since access may advance the collective bargaining relationship between the union and the employer, the companies' rejection of unlimited access and their proposal to limit access first to one and then to two union representatives to serve up to 180 workers spread over hundreds of acres, reveals the companies' reluctance to examine the purpose underlying the access request and is typical of an obstinate refusal to seek resolution of differences through reason not fiat.

Fund Contributions

The companies' opposition to making contributions to the Robert F. Kennedy Medical Plan instead of to a western Growers Plan could not have been based on economic grounds as represented since no cost comparison had been made at the time the opposition was voiced. Instead, their opposition, as their opposition to good standing, was premised on a belief that the workers would be better off with the Western Growers Plan which provided benefits in Mexico then they would with the RFK Plan, even though the workers, through their union, expressed a different desire.

The companies opposed contributions to the Juan de la Cruz Pension Fund on the principal ground that it was not qualified under applicable Federal tax laws and payments made to the Fund by the employers would not be tax deductible. Ample evidence was presented at the hearing, primarily through Frank Denison,

counsel to the pension fund, that everything which could be done to obtain appropriate IRS and Department of Labor rulings had been done and that the interests of employees and contributing employers are being protected. Such evidence, however, was not provided to the companies when their objections were raised and I do not find that the employers either refused to bargain over this issue or that their objections and questions about the fund were merely obstructionist.

Differences exemplified by the negotiations on those subjects treated above are more philosophic than economic but prevented the parties from reaching serious discussions of the economic aspects of the proposed contract.

The companies' may have been willing to reach some overall agreement, but their unreasoning and adamant opposition to dues check-off, sufficient access to company property, good-standing, and fund contributions, among other issues, some of which are clearly mandatory subjects of bargaining, equates with a purpose to frustrate agreement and is not consonant with good faith bargaining. United Steelworkers of America v. NLRB, 129 US App. D.C. 80, 390 F2d 846, 849 (1967) cert. den. Roanoke Iron and Bridge Works, Inc. v NLRB 391 US 904 (1968).

E. June 10, 1976, Declaration of Impasse

Since the existence of an impasse both suspends the duty ; to bargain and permits the employer to change, unilaterally, wages and other conditions of employment consistent with its rejected offers to the union, the NLRB and the reviewing courts have given ; some attention to recognizing "genuine" impasses and distinguishing them from deadlocks created by a party in an attempt to conceal a

refusal to bargain or to accomplish some other illegal purpose. "A genuine impasse in negotiations," said the NLRB in Dust-Tex Service, Inc., 214 NLRB 60, 88 LRRM]292 (1974), exists when "despite the parties' best efforts to achieve an agreement, neither party is willing to move on its unreasonable position. . ." Naturally, a party which does not bargain in good faith with a view toward reaching agreement is not making its "best efforts" to achieve agreement and a deadlock caused by such a party has been held not to be a "legally cognizable impasse justifying unilateral conduct." NorthLand Camps, Inc., 179 NLRB 36, 72 LRRM 1280 (1969); Valley Oil Co. , supra.

In the morning of June 10, the parties discussed the Seniority article. Although the discussion was acrimonious and confused at times, the companies' appraisal was that the parties were not too far apart. New material was provided to the union on numbers of hours worked by different categories of employees and the companies asked for the union's reaction so that a wage proposal, partially dependent on the vacation policy, could be made to the union.

After a lunch break the companies returned and, expressing *a* desire to "review" their offer for settlement, read through the list of articles indicating whether they were standing on it "as proposed" or offering modifications. Changes were proposed in the article on Hours (providing for payment of overtime after 8 hours instead of after 9), the article on Vacations (reducing the number of hours needed to qualify from 1,500 to 1,300), and the article on Wages with separate schedules read out for Montebelle and Mount Arbor. At the conclusion of its "review" Jory

announced the companies' position, and was queried by Huerta in the following colloquy:

> "JJ: The company has spent a good deal of time and money to reach an agreement. We've tried to reach a compromise, and we feel at this point further discussions are futile. We've now given what we're willing to give you if you want an agreement; we urge you to take it to your workers to vote on it. I'll confirm our proposal in writing and hopefully get it in the mail tomorrow. We'll give you one week to give us a decision.
>
> DH: One week on what?
>
> JJ: If you refuse our proposal, you'd better be prepared that we'll unilaterally be _prepared to implement certain specific aspects. . .
>
> DH: Just a minute. You owe us a bit of courtesy. What do you mean?
>
> JJ: What I just told you is that we're at impasse. We're at the final proposal for settlement. If you want a contract, please accept it. The law says that when we have given you our firm, final offer after extensive negotiations, we're free to implement specific aspects that we have offered and you have rejected. We're not saying we're going to implement. . .we'll give you a week.
>
> DH: I'll tell you now we don't accept your proposal.
>
> JJ: Negotiations are at a close." (Ex. M(10), p.14)

Although presenting the companies' revised proposals on vacation hours and wages for the first time, Jory anticipated rejection of the companies' "final offer" and announced, in apparent execution of a strategy settled over lunch, "we're at impasse" even before the union had an opportunity to consider the new proposals. While Jory may have believed deadlocks in other areas, discussed at length above, justified his decision to declare an impasse even before the companies' wage proposal was examined, it is a settled principle that a stalemate on some

issues does not entitle a party to avoid bargaining on other unsettled issues. Chambers Mfg. Co. , 124 NLRB 721, 44 LRRM 1477 (1959), Pool Mfg. Co., 70 NLRB 540, 18 LRRM 1364 (1946).

Instead of actually being deadlocked after extensive hard bargaining, the parties were mid-way through their prearranged final negotiation schedule designed to lead to a contract by late June with many issues settled and the positions well defined on those articles where differences remained. But for the companies' unreasoning refusal to compromise their positions on articles of significance to the union, but having relatively little impact on the companies' operations, agreement on a considerable number of open issues was indeed possible. Under such circumstances the delivery of a "final offer" and the declaration of an impasse when significant portions of the proposal had not even been seriously discussed, amount to a refusal to bargain, a per se violation of the Act. A declaration of impasse at that point reinforces earlier conclusions that the company engaged in surface bargaining through the period from December 3, 1975 to May 13, 1975, since it more clearly appears that the closer the parties moved toward agreement, the more obstacles the company imposed to settling differences, a strategy only consistent with an intent to avoid agreement.

By giving the union a week to accept or reject the companies' final offer, and not inviting negotiation on any points] of difference, the companies took a "take it or leave it" position) which, when coupled with their threat to implement specific aspects of the proposal, amounted to attempted coercion and was a further indication of their bad faith. Federal-Mogol Corp. ,

212 NLRB 141, 87 LRRM 1105, enforced 524 F.2d 37, 91 LRRM 2207 (6th cir., 1975).

F. From June 10, 1976 To The Hearing

Following the breakoff of negotiations on June 10, Jory attempted to get the union to accept responsibility for creating an impasse and alter some of its positions as a precondition for further negotiations. The union, on the other hand, refused to meet on those terms and insisted that the companies withdraw their "take it or leave it" ultimatum. Since there was no genuine impasse when the companies ended negotiations the union's refusal to accept responsibility either for creating an impasse or the companies impression of an impasse is both understandable and proper. It would reward bad faith bargaining tactics if the employers were able to benefit from their ploy of creating an artificial impasse and thereby to extract concessions from the union which good faith bargaining could not produce.

Responding to the employers' letters the union charged the companies with bad faith bargaining and requested from the Board an Extension of Certification. The Board pursuant to j §1155.2 (b),"may extend the certification for up to one additional year" if it finds that an employer has not bargained in good faith with the currently certified labor organization." The Board refused to extend the certification. Thereafter, the employers publicly took the position that they were not obligated to bargain with the union after the end of the certification year.

Assuming that the employers maintained, in good faith, the erroneous legal position that they were not obligated to bargain further with the union, a position, rejected by the Board,

in Kaplan, 3 .ALRB 28, they still may not use such a belief as- a justification for their refusal to bargain. Old King Cole, Inc . v NLRB, 260 F.2d 530 (6th Cir., 1958). In this case, however, there are many indications, some of which have already been treated above, from which it may be concluded that 'the companies had bargained with the design to "get through the certification year" without reaching an agreement, and therefore lacked the requisite good faith. In addition to Jory's letter of February 14, referring to the end of the certification year (Ex. 73) and his letter of April 2, stating that the companies had bought more time (Ex. 79), on November 12, 1976, Jory wrote Barwick (Ex. 61) enclosing the Board's Order Denying Extension of Certification and noting "that the momentum in the entire matter of unionization of your employees is now going the Company's way." Jory advised Barwick, apparently in accordance with earlier discussions, that he could communicate with the company's employees and "urge them now to give the company a chance in view of the fact that the Union fulfilled few, if any of its promises in a year's time."

Barwick, following Jory's advice, assembled the company' workers on November 16, and told them that because the request foil extension of certification had been denied there would have to be another election. He. then asked the workers to "give the company a chance", and told them that Fred Mungia wanted to give them what they wanted without the union. He said the company would make a proposal directly to the workers and if -hey did not like it they could go ahead and vote the union back in. (Ex. 62).

Jory's November 12 letter and Barwick's communication with the workers not only disparaged the union but reflected the

company's refusal to accept unionization and the determination not to bargain further with the union even if it won another election. (His package to the workers "would be the best that Fred would do with or without the union.") An increase of wages or finge benefits might be defended as based on the belief that the parties were at impasse and unilateral changes could legally be made, but Barwick went far beyond any good faith actions and, by attempting to negotiate directly with the workers, by-passed the certified bargaining representative during the certification year, a clear violation of §1155 (e). Moisi & Son Trucking, Inc., 197 NLRB 198, 80 LRRM 1325 (1972); Plastics Transport, Inc., 193 NLRB 54, 78 LRRM 1185 (1971).

On January 29, 1977, after reassuming the position of head of the union's Delano field office, Richard Chavez wrote to Jory requesting that negotiations between Mount Arbor and Montebello and the union be resumed without any conditions. He receive no reply although on February 4, 1977, the companies filed a Complaint for Declaratory Judgment in Kern County Superior Court (No. 145509) seeking a determination of whether or not they were obligated to bargain with the union, as demanded.

A request to the Superior Court for a declaration of rights is not a substitute for good faith bargaining. To permit a party either to circumvent or to delay compliance with the requirement to meet and confer in good faith by frivolously resorting to the courts whose process is not suited for the rapid determinations required in the agricultural labor field would I seriously impede the functioning of the Board and undermine the effectiveness of the Act. The companies' arguments that they

feared liability should they bargain with the union after the- end of the certification year ring hollow in view of their prior conduct reflective of their desire to avoid bargaining and the many options available to insure against such liability. It is not necessary however, to speculate on how the companies might have shielded themselves from loss resulting from "illegal" bargaining with the UFW after February 3, 1977, since, as the Board analyzed in detail in Kaplan, supra, the legal argument supporting the companies' position cannot withstand even casual review.

G. Bargaining Issues - Conclusions

The statutory duty to bargain in good faith requires the parties to possess a particular state of mind, that is an intent to enter into an agreement/ if possible. Since intent, as a state of. mind, is principally ascertained from a review of conduct, the NLRB and reviewing courts, in judging whether or not parties have bargained with the required good faith, have examined the totality of their conduct, reflections of their state of mind, together with all inferences reasonably drawn from such conduct. Conduct away from the bargaining table is as significant as that at the table since a state of mind generally persists through the various settings in which it may be manifested.

Consideration of the employers' conduct in these consolidated actions leads to the unavoidable conclusion that the employers sought not to find a basis for agreement where agreement was possible, but rather to frustrate agreement by, among other things: insisting, unreasonably, on provisions predictably unacceptable to the union; refusing to accept provisions without adequately exploring them or justifying their refusal; and finally

declaring an artificial impasse as a legal justification for ending negotiations.

Under such circumstances and mindful of those acts within the limitations period I have already found to be per se violations, as well as conduct of the employers at and away from the bargaining table, I find that both employers since April 22, 1976, to the date of the beginning of the hearings on this matter have failed to bargain in good faith in violation of §1153(e) of the Act. My conclusion is based on the following conduct proved to my satisfaction during 21 days of hearings: at the table pursuing negotiations with a view toward avoiding a strike without reaching an agreement, i.e. maintaining a pretense of bargaining; bargaining in bad faith on mandatory subjects or bargaining including dues check-off and contributions to the Robert F. Kennedy Medical Plan; refusing to focus on reasons for their positions on permissive subjects of bargaining and failing to make positive efforts to find common ground for agreement in these areas; contriving an artificial impasse on June 10; and refusing to bargain after June 10, unless the union accepted responsibility for an impasse; and, away from the bargaining table, discriminatory discharging Montebello workers who were members of the ranch negotiating committee; altering the bonus payment plan for budders without prior notice to the union or giving the union an opportunity to bargain over that mandatory subject of bargaining; by-passing the union and dealing directly with Montebello workers in November, 1976, in an attempt to negotiate a contract directly with the workers in derogation 'of the authority and status of the union as the exclusive col-

lective bargaining representative; and making clear, through statements and inferences reasonably drawn from their conduct, that they intended to bargain with the union only to the degree necessary to get through the budding season and ultimately the certification year without agreement and thereafter to refuse to bargain with the union.

Respondents not only deny any wrong doing on their parts but assert that the union failed to bargain in good faith by changing negotiators several times, withdrawing concessions, keeping open all articles -- even those tentatively agreed upon,-- refusing to deviate from its "standard proposals," and undermining the authority of the companies' negotiators. No doubt the union's negotiating tactics and steadfast insistence on inclusion of articles which it obtained in other negotiations annoyed and frustrated the employers. The use of three different-negotiators may have caused some ground to be retraced on occasion and contributed to problems in communication, although only one negotiator represented the union during the period from the onset of joint negotiations until the declaration of impasse. None of these offenses, if such they be, rise to the level of the employers' slight to the negotiation process, however, or excuse the employers' bad faith. The assertion that the union did not desire to enter into agreement, a basis on which the employers defend their own actions, is not supported by the evidence and is contradicted by the union's many written proposals, oral and written modification, offers to explain rationales underlying their positions and eagerness to meet on a schedule calculated to produce an agreement by late June, 1976. Further-

more, and perhaps alone dispositive of the employers' argument, the companies dissuaded budders from striking during the employers' most vulnerable period in return for the employers' agreement to make any wage increase retroactive to April 15 in any collective bargaining agreement the parties signed. Such an agreement would not have been entered into by a union not intending to execute a collective bargaining agreement, but would operate to the benefit of an employer who refused to do so.

I have found nothing which would indicate that acts of the union excused the companies' bad faith.

II. Non-Bargaining Issues

A. Rogelio Bravo And Jorge Sanchez

Having already once worked piece-rate as a budder-tier team during the 1976 budding season, Bravo and Sanchez reasonably anticipated being rehired in the same capacities in 1977. Since they had the least seniority of any budder-tier team and applied last, they were not offered the same positions but rather placed on an alternates list and offered work on an hourly basis with the possibility of being moved into budding if openings occurred. Bravo had worn *a.* union button and openly supported the union the prior year but such limited conduct and the absence of any evidence that the company discriminated against him because of that support does not make out a violation of 1153(c) especially in light of evidence of the company's absence of discriminating motives. While Bravo was offered, but declined to accept another job on an hourly basis with the opportunity to transfer to a budding position should one open up, another worker accepted the

same proposition and was switched to piece work budding when one of the budders had to leave for a personal emergency. I therefore find that the Company did not commit unfair labor practices in refusing to employ Bravo and Sanchez as a budder-tier team in the Spring of 1977, and recommend the dismissal of paragraph 6 (a) of the Third. Amended Complaint which contains the allegations of such discrimination.

B. The Vasquez Family

There was no evidence that either Cecilia or Alicia Vasquez personally appeared at Mount Arbor to request employment in 1976. The only testimony presented from which the union argues that a discriminatory refusal to rehire may be inferred is that of Ramiro Vasquez who testified that while Cecilia and Alicia remained in the car he went into the Company's office, as he had in past year, to obtain work applications for himself and his wife and daughter but that he was refused permission to complete applications.

If the Vasquezes had been particularly active union supporters the above evidence in the absence of any rebuttal evidence might be sufficient to support a claim that they were being singled out for discriminatory treatment particularly if the Company varied its usual practice with respect to accepting applications. The only evidence of the Vasquezes identification with the UFW, however, was their own testimony that they had unveiled union buttons after the Union won the elections in November, 1975. Their isolated act of Union support has little significance in light of the overwhelming victory of the union in the election, the rehiring of Ramiro in April, 1976, and the

company's credible explanations of the application procedure.

I find convincing the testimony of Robert St. Clair, Mount Arbor's office manager that the company had revised its employment procedures so that it was not necessary for workers returning in 1976 to file new applications, but only to activate their old ones which Ramiro did when he visited the office. That he was hired a few days later without having to complete any new application substantiates the company's explanation. The company also asserted, and I find it creditable, that nothing was said in reference to-Alicia and Cecilia and that for that reason their past applications were not reactivated and they were not called to work in the Winter. Under these facts I find that the company did not discriminate against Ramiro, Cecilia, or Alicia Vasquez. Having disposed of the matter on its merits, it is not necessary to determine if the allegations in the complaint relating to them were barred by the six month limitation period in §1160.2. I am therefore recommending the dismissal of the allegation in paragraph 6 (b) of the Third Amended Complaint.

C. Discharge of Pedro Armendariz and Richard Escalante

The General Counsel claims Montebello discriminated against Pedro Armendariz and Richard Escalante when Barwick fired them on November 29, and that his explanation that he was enforcing his rule against drinking during working hours is a pretext to avoid liability.

Montebello argues that Barwick's actions were proper but that even if the firings were not justified there was no proof of anti-union animus and therefore no violation of section 1153 (c).

I am satisfied both that the firings were not fully justi-

fied and that Barwick's anti-union feelings were a factor in the decisions.

Barwick was interested in and followed closely the progress of the union at Montebello. In the month before the petition for the representation election was filed, Barwick participated in an Associated Farmers meeting of representatives from the rose industry discussing the status of union organizing efforts at their companies. After the petition was filed he asked for a count and learned from his foreman Diego Armendariz, father of Pedro Armendariz, that almost all of the workers supported the Union, a fact borne out by the election results. Barwick made rounds of the fields almost daily where he observed the workers and testified that he worked among them himself at times.

Pedro Armendariz, prior to and after the election had openly displayed a union button on his field jacket and a union bumper sticker on his car. These demonstrations of sentiment could not have escaped the notice of Barwick who kept in close contact with his work force. It is inconceivable that the selection of a ranch negotiating team and Pedro Armendariz' selection as an alternate, would not have been communicated to Barwick quickly, although Barwick denied knowing the composition of the negotiating committee, especially as the workers were discussing the committee formation the following day in the fields. Certainly Diego Armendariz, then a supervisor at the company, knew who was on the committee.

Despite Barwick's statement that he expected even piece rate workers to put in at least eight hours each day, no evidence of such a company rule was produced and the practices at the company

belie the existence of such a rule. On the day Armendariz and Escalante allegedly left early, two other crews cut less budwood than did their crew and Barwick acknowledged, after reviewing the quantities of budwood cut by these and other crews, that few workers put in a full day by his standards.

Even if Barwick had a rule against drinking on the job, that rule could not have application to Armendariz and Escalante who were not drinking on the job, but buying beer after they finished work on November 29. If their firings rest on their having left before having worked a full eight hours that Saturday, the sanction was so severe, disproportionate to the offense and exceptional as strongly to suggest that an improper motive contributed to the decision. That motive may be inferred from the totality of the circumstances in which Barwick found himself and the company he managed and which I find to be anti-union animus, a state of mind which became more apparent subsequently as the union's effort to initiate bargaining were rebuffed.

Where, as here, there is no valid ground for discharging a known union activist, within weeks of the union election victory one may consider that but for the role that activist played, he would not have been discharged. Frosty Morn Meats, Inc. , v NLRB 269 F.2d 617 (5th Cir., 1961). The choice of discharge "rather than some lesser form of discipline is one of the congeries of facts supporting the inference that Respondent was not motivated solely by disciplinary considerations." Evans Products Co. 22 NLRB 210. (1975), Therefore, *I* find that Richard Barwick discriminated against Pedro Armendariz because of his union activities and attempted to intimidate other workers and discourage support

for the union by discharging him without cause in violation of 1153(a) and (c).

Richard Escalante did not testify but evidence was offered to the effect that he accompanied and suffered the same fate as Armendariz. Any distinction Barwick could have made between the two employees would have revealed the underlying motive for Armendariz's discharge, a fact compelling him to treat the two similarly. Escalante, then, was fired for being too closely connected to Pedro Armendariz. If a worker may not safely associate with a union activist, organizational efforts are necessarily stymied and the rights guaranteed to all workers under section 1152 are infringed. I find, therefore, that the discharge of Richard Escalante violated section 1153 (a) and (c).

D. The Charge That Montebello Discriminatorily Discharged Diego Armendariz is Barred By Labor Code Section 1160.2

The discharge of a supervisor may constitute a violation of Section 1153 (a) of the Act when it interferes with the rights of non-supervisorial employees guaranteed by section 1152. Taladega Cotton Factory, 32 LRRM 1479, 106 NLRB 295 (1953), enforced 213 F2d 391, 34 LRRM 2196 (CA 5, 1954). In the case of the February 17, 197< discharge of Diego Armendariz, a supervisor strongly identified with the UFW and perhaps responsible, through his hiring practices, for promoting a union victory in the representation election, the evidence available at the time of discharge might have justified the timely filing of a charge against the company. No additional evidence was later discovered, however, which could explain or excuse a delay in filing of a charge until June, 1977. Allegations in the complaint relating to Diego Armendariz are, therefore, barred by

section 1160.2 of the Act in that the charge on which they were based was not filed within six months of the alleged unfair labor practice. I am therefore recommending the dismissal of the allegations contained in paragraph 6 (d) of the Amended Complaint.

E. Layoff of Ruben Torrez, Jose Rubio, Domingo Avina and Uvaldo Ramirez

Merely by being an ardent supporter of the UFW, an employee does not gain immunity from an appropriate lay-off or discharge for cause. NLRB v. Winn-Dixie Stores, Inc., 410 F.2d 1119 (5th Cir., 1969). If a discriminatory motive is a factor in the Company's decision, however, even valid grounds for discharge or lay-off will not be a sufficient defense to an 1153 (c) unfair labor practice charge. Singer v NLRB, 429 F.2d 172 (8th Cir., 1970). The General Counsel need not show that the proscribed motive was the dominant one, only that the employee would not have been laid-off but for the anti-union animus of the employer, NLRB v Whitfield v Pickle Co., 374 F.2d 576 (5th Cir., 1967), or that absent his union activities the employee would have been treated differently. Frosty Morn Meats Inc. v. NLRB, supra.

Here, the General Counsel established the discriminatory motive for the lay-offs of Torrez, Rubio, Avina and Ramirez when he showed that the four were among the most active members of the negotiating committee, had not previously been laid-off at that time of the year, and had seniority beyond those retained.

Montebello pointed to economic conditions and a loss of customers as justification for the lay-off of Torrez, Rubio, Avina, Ramirez and sixteen others on June 4, 1976. They attempted to justify the continued employment of eleven other men after the lay-offs in

preference over the negotiating committee members by insisting they either had greater seniority or a special skill. They also pointed to individuals, supposedly also on the negotiating committee, who were not discharged. While the evidence conflicts somewhat on the complete roster of committee members' it. is settled-that an employer' failure to discharge all union activists does not negate discrimination in connection with others. NLRB v. Nabors 196 F.2d 865 (5th 8 Cir.) cert. den. 344 US 865; NLRB v. Puerto Rico Telephone Company 357 F.2d 919 (1st, 1966).

Seniority could not have been the guiding principle, however, because at least three of the men retained had less seniority than the four members of the negotiating committee laid-off. Likewise, the "special skills" criteria for laying-off out of seniority sequence lacks credibility since Rubio, a skilled irrigator, was laid-off in-deference to Amando Hernandez, a less senior irrigator, without any comparison having been made between the skills possessed by the two men. Similarly, Torrez, with experience as a tractor driver, was laid-off while a part-time worker and college student, Hipolito Cervantes, was retained.[8/]

The company's attempt to rationalize its scourage of the negotiating committee members as other than a blatant act of discrimination against them because of their active role with the union is not credible. The rehiring of Avina and Ramirez some two weeks later, after the companies' declaration of impasse, shows principally

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[8/] Although the company argued that Cervantes could do closerow cultivating with a tractor while Torrez never had, there was no evidence to show either that such operation was required during the period following the lay-offs or that Torrez could not have quickly-learned the skill involved.

that the company was not guided by a sound appraisal of business needs at the time the lay-off decision was made but rather by some other impetus. That impetus, I conclude and so find, was impermissible anti-union animus displayed in the company's bad faith bargaining, as discussed herein, and further demonstrated in the discriminatory lay-offs of Ruben Torrez, Jose Rubio, Domingo Avina and Uvaldo Ramirez.

III. The Remedy

Having found that the employers engaged in certain unfair labor practices in violation of section 1153 (a), (c) and (e) of the Act, I shall recommend that they cease and desist from such practices, and take certain affirmative steps designed to effectuate the policies of the Act.

I recommend that Pedro Armendariz, Richard Escalante, Ruben Torrez, Jose Rubio, Domingo Avina and Uvaldo Ramirez, whom I have found to have been discriminatorily laid-off on June 4, 1976, be offered reinstatement to their former positions and compensated for time lost in accordance with the Board's formula prescribed in Sunnyside Nurseries, Inc., 3 ALRB 41, for the period beginning with their discharge or lay-off and ending when they are offered reinstatement. Avina and Ramirez, of course, should receive compensation only for that period from their lay-off on June 4, 1976, until their recall on June 20, 1976.

In its complaints, the General Counsel requested an order directing respondents to make the employees whole for the employers' failure to bargain in good faith, in accordance with section 1160.3 of the Act. Arguments in support of the application of such a make whole remedy were supplied by the General Counsel, but not addressed

in respondents' briefs. Although the Board has not yet established guidelines for the application of such a potent remedy as "make wh ” a diversity of views has surfaced in briefs to the Board on the question and in various opinions of administrative law officers.

Where an employer's bad faith bargaining has injured his employees by depriving them of economic gains which they would have obtained had the parties entered into a collective bargaining agreement, the issuance of a cease and desist order or even an affirmative order to bargain would not provide adequate relief to the affected employees and instead would provide to the employer benefits of his bad faith bargaining. The make whole remedy, therefore, much like the back pay award in cases of discriminatory discharge, acts both to deter illegal acts and to put employees in that situation they would have obtained absent the employer's bad faith. It is a remedy appropriate in all cases where bad faith is found and not off-set by equally egregious conduct on the part of the union.

I recommend that The Board make the employees in these actions whole by ordering payments to them of an amount equal to the difference between what they received in the form of direct and fringe benefits and what is paid to comparable employees at farms in the area where the union negotiated a contract at approximately the time that the employers' bad faith was manifest. In this case the employers' bad faith was evident well before the limitation period and continued unabated, though its expression was altered, until the hearing commenced. Since the first charge alleging bad faith bargaining was not filed until October 22, 1976, however, I recommend that the make whole remedy be applied retroactively to April 22, six months prior to the filing date.

The make whole remedy does not put the employees where they would have been but for the employers' bad faith if no provision is made for restoring the union to the position it would have occupied had there been no violations. While the Act speaks in terms of making employees whole, their economic status is determined in part by the union and its bargaining strength. A union whose resources are decimated by protracted negotiations attributable to employers' bad faith is not in as good a position to represent its employees after a cease and desist order is entered as one not forced to suffer such unnecessary expenditures of time and money. The contract negotiated by such a weakened union may not include terms as favorable to the employees as would otherwise have resulted. By requiring employers found to have engaged in bad faith bargaining to compensate the union for expenditures associated with negotiation sessions made necessary by such bad faith would further the purposes of the Act by making the employees whole while deterring insidious surface or bad faith bargaining. I am therefore, recommending that, subject to proof, the employers reimburse the union for costs and expenses associated with bargaining sessions following April 22, 1976.

Fees and costs were requested by the General Counsel but in view of the lack of Board precedent in the area of good faith bargaining, I do not believe that the respondents, by litigating the issues in this action, engaged in frivolous or vexatious conduct which should be penalized by the awarding of such fees and costs and I recommend the request be denied.

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

ORDER

A. Respondents MONTEBELLO ROSE CO., INC. and MOUNT ARBOR NURSERIES, INC., their officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in sub-division (c) of Section 1153 of the Act;

(b) Discriminating in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization; and

(c) Refusing to bargain collectively in good faith with the UNITED FARM WORKERS OF AMERICA, or its authorized representatives .

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

(a) Bargain collectively in good faith with the UNITED FARM WORKERS OF AMERICA, AFL-CIO;

(b) Make whole those persons employed by Respondents between April 22, 1976, and the date Respondents begin good faith bargaining with the union for any losses in pay they may have

suffered as a result of the Respondents' failure to bargain in good faith with the union, as those losses have been defined in the Remedy portion of this decision;

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, time cards, social security payment records, personnel records and report, and other records necessary to determine the amounts necessary to make whole employees for the loss of pay they may have suffered as a result of Respondents' failure to bargain in good faith, and to analyze the back pay due to those employees, named hereinafter, discriminatorily discharged or laid off;

(d) Respondents shall each post the attached applicable notice in English and Spanish in a conspicuous place on their properties for a period of 90 consecutive days during the 1978 peak employment period. Respondent shall promptly replace any notices which have been altered, defaced or removed.

(e) Respondents or a representative from the Board shall read the applicable attached notice to Respondents' assembled employees in English and Spanish. The notices shall be read on company time to each crew of Respondents' employees employed during the 1978 peak period of employment. The Board agent shall be given a reasonable amount of time at each reading to answer questions which employees may have about the substance of the notice and their rights under the Act. Piece rate workers shall receive compensation for time lost at a rate computed by taking the average hourly pay earned during the remainder of the day and applying that to the time consumed by the meeting including the question and answer period.

(f) Respondents shall hand out the applicable attached notice to all currently employed agricultural employees, to all workers employed during the 1978 peak season, and shall mail copies to all workers employed by the respondents during any part of the period from April 22, 1976, through July 25, 1977, and not currently employed or employed during the 1978 peak season.

(g) Respondents shall inform the Regional Director, in writing, within 30 days of the receipt of this Order and thereafter shall report every 30 days, in writing, on the steps taken to comply with this Order.

B. Respondent MONTEBELLO ROSE CO., INC. their officers, agents representatives, successors and assigns, in addition to the foregoing, shall take the following affirmative action which is deemed necessary to. effectuate the purposes of the Act:

1. Immediately offer to the following employees full reinstatement to their former or equivalent jobs, without prejudice to their seniority or to other rights and privileges: Pedro Armendariz, Richard Escalante, Ruben Torres, and Jose Rubio;

2. Make each of the employees named in paragraph B(l), as well as Domingo Avina and Uvaldo Ramirez, whole for all losses they may have suffered as a result of their discriminatory discharge or lay-offs by paying to them a sum of money equal to the wages they each would have earned from the date of their discharges or lay-offs to the dates on which they are each reinstated or offered reinstatement, less their respective net earnings during said period, together with interest thereon at the rate of seven percent per annum, such back pay to be computed in accordance with the formula adopted in Sunnyside Nurseries, Inc.. 3 ALRB 42 (1977).

IT IS FURTHER ORDERED that allegations contained in the Amended complaints not specifically found to be violations of the Act be, and hereby are, dismissed.

DATED: January 6, 1978.

MARK E. MERIN
Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found that we discriminated against certain workers because of their union activities by discharging some and laying-off others. The Agricultural Labor Relations Board also found that we did not bargain in good faith with the UNITED FARM WORKERS OF AMERICA, AFL-CIO, in violation of the law. The Board has told us to post this notice and to mail it to those who worked at the company between April 22, 1976, and July 25, 1977.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives all farm workers these rights:

1. To form, join or help unions;
2. To bargain as a group and to choose whom they want to speak for them;
3. To act together with other workers to try to get a contract or to help or protect one another; and
4. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

1. We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

2. We will not fire you or lay you off because you exercise any of your rights.

3. We will offer Jose Rubio, Ruben Torres, Richard Escalante and Pedro Armendariz their old jobs back if they want them

and we will pay each of them, as well as Domingo Avina and Uvaldo Ramirez, any money they lost because we discharged or laid them off.

4. We will in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed between April 22,1976, and July 25, 1977, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

5. We will compensate the union for the costs associated with having to participate in negotiation sessions while we were not bargaining in good faith.

DATED:_____

MONTEBELLO ROSE CO., INC.

By:_____
(Title)

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benefits because of our failure to bargain in good faith.

4. We will compensate the union for the costs associated with having to participate in negotiation sessions while we were not bargaining in good faith.

DATED:_____

MOUNT ARBOR NURSERIES, INC

By: _____
(Title)