McFarland, California

STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

McFarland ROSE PRODUCTION, a division of PETOSEED CO., INC., a wholly-owned subsidiary of Case GEORGE BALL, INC., Respondent, 76-CE-73-2 and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	. 76-CE-69-F 76-CE-73-F 76-CE-73-1-F 6 ALRB No. 18

DECISION AND ORDER

On September 12, 1977, Administrative Law Officer (ALO) Joel Gomberg issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondent, and Charging Party each timely filed exceptions with a supporting brief. The General Counsel filed a brief in reply to Respondent's exceptions.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO as modified herein, and to adopt his recommended Order as modified herein. [1/]

[1/] Respondent excepts to the ALO's conclusion that it violated the Agricultural Labor Relations Act (Act) by discharging a crew for engaging in protected concerted activity, i.e., refusing to work in a wet field because of dangerous conditions. We affirm the ALO's findings and conclusions, as we find they are supported by a preponderance of the evidence, and in particular by credibility

(Fn. 1 continued on p. 2)

Bias Allegations

In its exceptions to the ALO's Decision, Respondent for the first time in this case argued that the ALO should have disqualified himself from consideration of the case and moved that the Board so disqualify him. Respondent claims that. Mr. Gomberg's involvement in certain events in 1970', in which a party represented by Respondent's counsel Frederick Morgan was also involved, rendered Mr. Gomfaerg biased or prejudiced against Respondent, or could create the appearance of such bias, even though Respondent did not itself have any involvement in those events. Mr. Morgan claims that his recollection of those events only became clear enough after the hearing in this case for him to perceive their potentially prejudicial impact on Mr. Gomberg. Our regulations require that a request for disqualification of an Administrative Law Officer "must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding." ' 8 Cal. Admin. Code Section 20263 (c). We therefore reject Respondent's motion as untimely. See Powell Valley Electric Cooperative, 236 NLRB No. 118, 98 LRRM 1401 (1978); Automobile Transport, Inc., 223 NLRB 217, fn. 1, 92 LRRM 1330 (1976). We note in any event

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(Fn. 1 cont'd. from p. 1)

resolutions made by the ALO. To the extent that such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24'(1978); SI Paso Natural Gas Co., 193 NLRB 333, 78 LRRM 1250 (1971) ; Standard Dry Wall Products, 91 NLRB 544, 26 LRRM 1531 (1950). We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

that the occurrences on which Respondent based its arguments of impropriety and the appearance of bias in Mr. Gomberg's service as judicial officer are too remote in time and have too little connection with the present case to constitute a showing of impropriety or of the appearance of bias.

Summary of Bargaining History

Shortly after the UFW was certified as the collective-bargaining representative of Respondent's employees on March 2, 1976, it requested that Respondent meet and bargain regarding the employees' terms and conditions of employment. After initially refusing to meet, Respondent agreed and negotiations commenced on April 7. Six meetings were held between then and September 20, 1976, and the parties reached agreement on several non-controversial proposals.

On September 21, Respondent declared an impasse and negotiations came almost to a standstill. The UFW filed an unfair labor practice charge on October 12, alleging that Respondent was in violation of its statutory duty to bargain in good faith. No further meetings were held until June 3, 1977, despite a formal request by the UFW in late January 1977 to resume negotiations and Respondent's agreement at that time to resume bargaining. The parties did not meet during February because of scheduling conflicts. During March, April, and part of May, Respondent simply refused to meet. With the hearing on the unfair labor practice charge imminent, negotiations resumed on June 3. From then until the hearing began on July 11, 1977, the parties met six times, but failed to reach agreement on major issues such as

union security, hiring hall, and wages.

Bargaining Issues

The ALO concluded that Respondent violated Labor Code Section 1153(e], which requires employers "to bargain collectively in good faith with labor organizations certified [as representatives of their employees]." Section 1155.2(a) defines bargaining collectively in good faith as:

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

The basic principles we must apply in refusal-to-bargain cases are set forth at some length in our recent decisions in 0. P.• Murphy Produce Co., Inc., 5 ALRB No. 63 (1979) and Montebello Rose, Inc./ Mt. Arbor Nurseries, Inc., 5 ALRB No. 64 (1979). As those, cases indicate, the essential question we must answer is whether. Respondent undertook negotiations with "a bona fide intent to reach an agreement if agreement [was] possible." Atlas Mills, 3 NLRB 10, 1 LRRM 60 (1937). To make this determination, we must examine the totality of Respondent's conduct, both at and away from the bargaining table, to discover whether Respondent discharged its statutory "obligation ... to participate actively in the deliberations so as to indicate a present intention- to find a basis for agreement." Cox, The Duty to Bargain in Good Faith, 71 Harv. L.R. 1401, 1413 (1958); NLRB v. Stevenson Brick

& Block Co., 393 F.2d 234, 68 LRRM 2086 (4th Cir. 1968); Milgo Industrial, Inc., 229 NLRB No. 13, 96 LRRM 1347 (1977).

Spring Season

Respondent has a year-round work force of some two dozen employees, but it has well over one hundred additional employees during the spring budding season and the harvest season in the fall. As the budding and harvesting are crucial to the profitability of its operation, Respondent's vulnerability to job action by its employees and its interest in good employee relations are at their height during these seasons. As discussed below, Respondent took unilateral action during both these seasons in 1976 in order to maintain good employee relations, thereby impermissibly bypassing the Union.

Respondent's employees selected the UFW as their collective bargaining representative in an election held on November 28, 1975. Respondent challenged the election results, but on March 2, 1976, this Board certified the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees. By letter dated March 8, 1976, the UFW requested Respondent to commence bargaining and to furnish certain information pertinent to the negotiations. Respondent replied that it was considering contesting the certification in court. However, on April 2 Respondent agreed to meet for negotiations, and the first session was scheduled for April 7. Meanwhile, in a report sent in March to the Board of Directors of George Ball, Inc., (Ball), McFarland's parent corporation, Respondent's President John Parker stated that Respondent's challenge to the

election results was "primarily a delaying tactic." In a subsequent report to Ball, Parker reiterated Respondent's intention to delay negotiations, stating, inter alia, "Our strategy has been primarily one of delay.... Our future strategy will be to delay as much as possible and negotiate the best contract possible." In another part of the same report, Parker stated "... we will continue to delay negotiations as much as possible and negotiate the best and most reasonable contract possible when we do have to negotiate."

Respondent argues that its strategy of delay amounted merely to a passive negotiating posture, a "wait-and-see" attitude which would permit the Union to set the pace of the negotiations. We find that this characterization does not accurately reflect Respondent's approach to negotiations, which was in fact oriented to an active, though often subtle, frustration of the bargaining process. But even if Respondent had taken a merely passive posture, as it claims it did, the requirements of the law would not have been met, for the obligation to bargain in good faith requires a "serious desire to reach agreement,"' Chevron Oil Co., 182 NLRB 445, 447, 74 LRRM 1323 (1970) mod. 442 F.2d 1067 (1970), 77 LRRM 2129; NLRB v. Insurance Agents' Intl. Union, AFL-CIO, 361 U.S. 477, 485, 45 LRRM 2704 (1960); Akron Novelty Mfg. Co., 224 NLRB 998, 1001, 93 LRRM 1106 (1976); and "reasonable effort ... to compose ... differences with the union." NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 32 LRRM 2225 (1st Cir. 1953). Mere passivity falls short of the duty which the law imposes, for "it is the obligation of the parties to participate

actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 12 LRRM 508, 517 (9th Cir. 1943). (Emphasis in original.)

A ranch committee came into being at some point before the first negotiating session on April 7.[2/] The committee was composed of certain supervisors and employees selected by them to represent the work force in discussing matters relating to employment. The committee met once in March, 1976. It was disbanded by Respondent after the April 7 meeting, at which the Union objected to its existence. In meeting with this committee during March, Respondent displayed its desire to negotiate with its employees concerning their working conditions through a channel other than the representative freely elected by the employees themselves. Attempts to bypass the certified collective bargaining representative conflict with the policy of the Act, which is to promote collective bargaining as the primary means of achieving stability in agricultural labor relations. When employees have chosen a union as their collective bargaining representative, it is not permissible for their employer "to deal with the union through the employees, rather than the employees through the union." NLRB v. General Electric Co.,

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[2/] There was conflicting testimony by Respondent's witnesses as to when the committee was established. Whether that took place in the fall of 1975, as one witness stated, or in March, 1976, as another testified, has no bearing upon any of the legal issues before us. We need not, therefore, resolve this conflict in testimony.

418 F.2d 736, 759, 72 LRRM 2530 (2nd Cir. 1969) cert, denied, 397 U.S. 965, 73 LRRM 2600 (1970). The duty of an employer to deal directly with the elected representative is exclusive, implying "the negative duty to treat with no other." Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944).

Respondent further displayed its inclination to bypass the UFW when it implemented new bonus and incentive plans in mid-April 1976. The UFW excepts to the ALO's failure to find that implementation of the plans constituted a per se violation of Section 1153(e) and (a). Respondent excepts to the ALO's treatment of its implementation of the plans as evidence that Respondent lacked a good-faith intention to bargain to contract. We find that Respondent committed a per se violation of Section 1153 (e) and (a) by implementing the plans as it did, and that this violation is evidence of a bad faith approach to negotiations.

Respondent argues that the plans were established in 1975 before the representation election, and that for this, reason no notice to the Union nor any bargaining about the plans was required before their implementation. Respondent further argues that even if notice and bargaining were required, the Union did receive de facto notice and had an opportunity to bargain about the plans at the April 7 meeting. We reject the contention that the plans were established in 1975, as Respondent brought forth no evidence that the plans had been formulated in writing, funded, or formally announced to the employees at any time in '1975. On the basis of testimony in the record and the ALO's credibility resolutions, we find that the Union received de facto notice of

the plans when an employee gave the UFW negotiator a copy of a pamphlet Respondent had distributed to the employees in which the plans were described. Respondent itself gave the Union no formal announcement of the plans prior to the April 7 meeting even though it had told at least some of its employees about them. The Union was effectively denied a real opportunity to bargain about the plans at that meeting, which was attended by employee members of the Union's negotiating team, since employees already knew about the plans. If it had blocked implementation of the plans, the Union would have seemed to be depriving the employees of the additional income which the plans represented and which the employees already were expecting to receive. By putting the Union in such an undesirable position, Respondent failed to provide an opportunity for the meaningful negotiating which the obligation to bargain in good faith entails. Master Slack Corp., 230 NLRB 1054, 96 LRRM 1309 (1977); NLRB v. Citizens Hotel Co., 326 F.2d 501, 55 LRRM 2135 (5th Cir. 1964). We conclude that Respondent's unilateral implementation of the plans was a per se violation of Section 1153(e) and (a).

The April 7 meeting lasted for about two hours. The Union submitted an extensive contract proposal which was discussed in a general, preliminary way. Respondent supplied some of the previously-requested information and the Union asked for more, which Respondent provided within the next several months. We agree with the ALO's conclusion that the relatively minor inaccuracies in the information Respondent supplied did not interfere with bargaining and did not constitute a violation of

Section 1153(e).

Respondent submitted counterproposals by letter to the Union on April 23, accepting six articles of the Union's proposed contract, proposing modification of some other articles, and rejecting others outright. A second meeting, lasting three hours, was held on May 7, at which the parties reached agreement on three additional proposals. A memorandum summarizing the meeting, prepared by the attorney-negotiator who represented Respondent at the meeting, states in part:

> Generally speaking, the company is in a position any way it wishes. I believe we can make a reasonable economic package consistent with the company's plans to raise wages.... In addition, the union indicated, without promising, they would be agreeable to a two year contract. Of course, we could bargain to impasse on the economic issues and see what happens. [3/]

As a memorandum prepared by an attorney-negotiator who represented the Respondent in only one bargaining session, this document is not an official company communication like the reports of President Parker mentioned above, and it does not necessarily constitute direct evidence of Respondent's policies or the attitude of Respondent's officers. The memorandum suggests, however, that among the members of Respondent's negotiating team consideration was being given to strategies at odds with bargaining in good

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[3/] Respondent objected on hearsay grounds to the introduction of this memorandum into evidence at the hearing. The ALO overruled the objection, admitting the memorandum as evidence of the declarant's state of mind at the time it was written. We affirm the ALO's ruling. Evidence Code Section 1250 provides an exception to the hearsay rule for evidence of a declarant's then-existing state of mind. We note, in addition, that Evidence Code Section 1220 provides for the admission of a statement offered against the declarant in an action to which he is a party in either his individual or representative capacity.

faith toward an agreement, namely, raising wages without regard to the UFW's position, or orchestrating the negotiations toward an impasse on economic issues. The memorandum is but one element in the totality of evidence on which we base our judgment that Respondent failed to demonstrate a serious and sincere intention to bargain to agreement.

At the third meeting, held May 24, 1976, Respondent "clarified" and qualified its earlier acceptance of the part of the union-security provision which required Respondent to discharge any employee whom the UFW determined was not in good standing in the Union. Respondent also rejected the health insurance plan which the UFW had proposed. One of Respondent's objections was that the plan would not allow a covered employee to be treated by a physician of his or her choice. The Union explained that this was a misapprehension and that the plan did in fact permit freedom of choice. Respondent nonetheless continued to raise the same objection in subsequent negotiating sessions.

After the third meeting, the UFW suggested that sessions be held in the evening so that more employees could attend. It also suggested meeting on consecutive days in order to accelerate the progress of negotiation. Respondent rejected both suggestions. Its reason for rejecting the idea of meeting on consecutive days we find particularly unpersuasive. Its leading attorney-negotiator, Mr. Frederick Morgan, maintained that in his previous experience of negotiating with the UFW consecutive sessions had not proved fruitful. The record indicates that Mr. Morgan at this time had had very little prior personal experience negotiating with the

UFW; Respondent itself had been involved in only three fairly short bargaining sessions with the Union. In view of this very limited history, Respondent's excuse for rejecting consecutive sessions appears to have been part of a strategy of delay rather than an honest assessment of the most productive way to proceed with negotiations. From April 7 until September 20 the parties met six times, an average of only one meeting per month. When an employer does not make itself available for negotiations at reasonable times, an intent to delay negotiations may be inferred. 0. P. Murphy Produce Co., supra; Insulating Fabricators, Inc., supra; Solo Cup Company, 142 NLRB 1290, 53 LRRM 1253 (1963), enf'd. 332 F.2d 447 (4th Cir. 1964). The number of meetings and the amount of time between meetings are factors to be considered in determining whether an employer bargained in good faith or engaged in surface bargaining. Radiator Specialty Co., 143 NLRB 350, 53 LRRM 1319 (1963), enf'd. in part, 336 F.2d 495, 57 LRRM 2097 (4th Cir. 1964). "[P]arties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations as they display in other business affairs of importance. 'Labor relations are urgent matters too."' A. H. Belo Corporation, 170 NLRB 1558 (1968), 69 LRRM 1239. (Emphasis in original.)

On May 25 Respondent distributed a typed statement to its employees discussing the bargaining issues on which the parties were furthest apart, union security and an economic package (including wages and benefit plans). At the fourth meeting, on June 18, and the fifth, on July 29, progress appears to have been

made on several issues of a non-economic nature, notwithstanding the fact that Respondent on June 14 submitted several proposals modifying concessions it had made in April. After the June 18 meeting, Respondent distributed another typed statement to its employees setting out the proposals it had made in negotiations as to wages, health insurance, and holidays, and stating its opposition to the UFW's positions on union security, assessment deductions, and hiring hall.

According to testimony credited by the ALO, whose credibility determination we find supported by the record, supervisor T. Hinojosa on July 30 told several employees that they would receive higher wages if the Union were not representing them. [4/] We conclude that that remark constituted a violation of Section 1153(a) of the Act in that it tended to interfere with employees' rights to organize and bargain collectively through the Union, rights guaranteed by Section 1152. Although not alleged as a separate violation in the complaint, it is related to violations which were alleged and it was fully litigated. Anderson Farms Company, 3 ALRB No. 67 (1977); Monroe Feed Store, 112 NLRB 1336, 36 LRRM 1188 (1955).

The ALO found that the typed statements distributed by Respondent were not in and of themselves evidence of bad faith

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[4/] The same supervisor encouraged an employee to submit a declaration known to be untrue in connection with an ALRB investigation of challenged ballots in the November 1975 representation election at Respondent's operation. We deem that conduct too remote from the bargaining issue here before us, however, to consider it in assessing the good faith or bad faith with which Respondent approached negotiations.

bargaining. However, the ALO did find them to be unacceptable when examined in light of Hinojosa's statement. We disagree with the ALO's treatment of this issue because the record does not indicate any coordinated effort on Respondent's part to discredit the UFW in" the eyes of the employees. Hinojosa's statement represents an attempt by a single member of Respondent's supervisorial staff to undermine employee support of the UFW, but it does not render illegal the otherwise lawful written communications absent some evidence connecting the oral statement with the writings.

Respondent's President John Parker testified that the July 29 meeting "was pleasant, a lot of discussions, and no real problems and it went along very smoothly." Agreement was reached on a number of proposals and movement toward agreement took place on several others. On August 19, the UFW sent Respondent revised proposals on five articles and requested another bargaining session. On August 26, Respondent's representative sent the UFW a revised wage proposal, stating, "Since we will shortly be hiring people, we would like to hire in at these new rates, subject, of course, to continuing our negotiations with you over wages and all other contract terms. In other words, we assume you have no objection to using these new rates pending the conclusion of our contract negotiations...." In late August, Mr. Parker sent another report to the Ball Board of Directors, which stated, in the labor relations section,

> Negotiations with the UFW are close to being at impasse. The remaining issues are such that, unless the union drastically changes its position., any real agreement seems unlikely.

Mr. Parker's statement that negotiations were close to being at impasse clashes with his testimony that the July 29 meeting "was pleasant, a lot of discussions, and no real problems." It is also inconsistent with the implication in Respondent's representative's August 26 letter that negotiations were proceeding toward, and could be continued to, a successful conclusion. The remark about impasse in the report is consistent, however, with the statement cited earlier from a memo prepared by a representative of Respondent after the second bargaining session, "we could bargain to impasse on the economic issues and see what happens." It is also consistent with a desire on Respondent's part to insure that the employees would stay on the job during the all-important fall harvest by raising wages regardless of the progress of negotiations.

Fall Season

By letter dated September 9, the UFW rejected Respondent's wage proposal, stating that wages "should be part of a total Collective Bargaining Agreement." A few days later, the parties agreed by telephone to meet on September 20. Respondent's representative rejected four of the five proposals submitted by the Union on August 19. At the September 20 meeting, little if any progress was made. The UFW was represented by a negotiator who had not been involved in the negotiations previously. When the meeting became acrimonious and the prospect of achieving agreement on disputed matters, especially Respondent's wage proposal, waned, she left. The following day, Respondent's representative, Mr. Morgan, wrote to the UFW representative that

negotiations were apparently at an impasse.

The UFW replied by letter dated September 29, stating that as long as the parties were far apart on the major contract items, such as hiring, union security, seniority, and the three proposed benefit funds, "it would be meaningless to discuss wages." The Union further stated that it did not consider the negotiations at an impasse, and requested that Respondent communicate in writing its position on the benefit plans.

In early October, Respondent raised wages to levels substantially in accord with its August proposal. The UFW filed a charge on October 12 alleging that Respondent was in violation of its duty to bargain in good faith. Although the parties communicated with each other during the ensuing months, no further meetings were held for nine months, i.e., until June 1977.

Where a genuine impasse exists, an employer is 'permitted to make unilateral changes in working conditions, including wages, consistent with offers the union has rejected in the prior, course of bargaining. Almeida Bus Lines, Inc., 333 F.2d 729, 56 LRRM 2548 (CA 1, 1964). The legality of such changes turns on whether the asserted impasse was genuine or spurious: was it a deadlock based on irreconcilable positions conscientiously held, or was it a contrived breakdown of negotiations resulting from one party's manipulation of the bargaining process?

> 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). See also Montebello Rose, Inc./Mt. Arbor Nurseries, Inc., supra.

A deadlock in some areas is not sufficient reason for an impasse to be declared if there is still room for movement on major contract items, 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), since further negotiations in areas where movement can be made offer the possibility that ways will be discovered to compromise on disagreements which had seemed intractable. Furthermore, "A deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct." Northland Camps, Inc., 179 NLRB 36, 72 LRRM 1280 (1969).

Turning to the factual situation in which Respondent declared an impasse, we find that the parties had met only five times before the September meeting and had reached agreement on some seventeen of the thirty-eight proposed contract provisions which they considered applicable to Respondent's operation. They were far apart as to the health-insurance plan sought by the Onion, a key provision of which (the freedom of an insured to be treated either by a physician of his choice or at a UFW-supported clinic) Respondent repeatedly appeared to misunderstand despite the Union's explanations. Much room for discussion remained with respect to significant provisions in the proposed contract, such as seniority, grievance and arbitration procedure,

health and safety, leaves of absence, and economic matters. The most recent meeting, that of July 29, had progressed smoothly, according to the testimony of Respondent's President, and provided no reason to believe that negotiations were in danger of deadlocking. There is evidence in the memorandum which one of Respondent's representatives prepared after the second bargaining session, quoted on page 9, supra, that as early as May 7 there existed "the company's plans to raise wages." Respondent acknowledges that it wanted a wage increase for the fall harvest season, but at the September 20 session, according to President Parker's own testimony, he told the UFW that agreement on the UFW's proposed health plan was not at all likely before the harvest. The Union, then, was being asked to give away a major element of its bargaining leverage with no corresponding concession on Respondent's part.

On the basis of all of the evidence before us we find that Respondent's declaration of impasse was a device for raising wages in time for the harvest season without entering into a comprehensive agreement. We conclude, as did the ALO, that the declaration of impasse and Respondent's subsequent wage increase were not based on a good-faith belief that impasse had in fact been reached and are therefore evidence of Respondent's bad-faith bargaining. The unilateral wage increase is also a per se violation of Section 1153(e) and (a) of the Act. Cheney.California Lumber Co. v. NLSB, 319 F.2d 375, 53 LRRM 2598 (9th Cir. 1963); Alsey Refactories Co., 215 NLRB 785, 88 LRRM 1071 (1974).

We reject Respondent's argument that the wage increase

was justified by business necessity. As the ALO accurately noted, this excuse for unilateral changes is of dubious legal standing. German, Basic Text on Labor Law (St. Paul, Minn. 1976), p. 444. To the limited extent that business necessity may provide a defense, it requires that a genuine deadlock has been reached in negotiations. NLRB v. Southern Coach & Body Co., 336 F.2d 214, 57 LRRM 2102 (5th Cir. 1964). No such deadlock existed here.

We also reject Respondent's contention that the UFW, by walking out of the September 20 meeting, waived its right to object to the wage increases. The UFW representative at the September 20 meeting testified that the emotional tenor of the meeting became so hostile that progress was impossible, and that she left the meeting so that the parties could "cool off." [5/] The Union's position that wages had to be dealt with as part of a comprehensive economic package was consistently maintained, both before and after September 20. In view of the experience in April

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[5/] Relying upon NLRB v. Lambert, 250 F.3d 801, 41 LRRM 2345 (5th Cir. 1968), Respondent argues that by walking out of the September 20 meeting and making no formal request for further bargaining until January 1977, the Union incurred responsibility for the breakdown of negotiations. Lambert is readily distinguishable from the present case. There, the refusal of the court to find that an employer had caused the breakdown o-f negotiations was based on factors quite different from those present in this case. In Lambert, there was testimony that the Union representative announced at the last session that "there would be no more bargaining," and that the Union took no further action in respect to the matter of bargaining for three years. Here, the Union representative indicated in her parting remark that the parties should stay in contact, the Union almost immediately thereafter wrote Respondent that it did not believe the negotiations were at impasse, and the Union sent Respondent detailed information to clarify questions about its proposed health plan.

1976, when Respondent implemented bonus and incentive plans with no formal antecedent notice to the Union, this was a reasonable position for the Union to take. Within ten days of the meeting the Union wrote to Respondent that "the company wage proposal is not acceptable in its present form.." In the face of all of these facts, for us to construe the Union's departure from the meeting as a waiver of its right to object to Respondent's unilateral wage raise would be to dilute the strict requirements of the waiver doctrine almost beyond recognition, which we decline to do. See New York Mirror, 151 NLRB 834, 58 LRRM 1465 (1965) and cases cited therein.

Respondent also argues that the UFW should be estopped from asserting that the Respondent's declaration of impasse and subsequent wage increase were illegal. This estoppel should result, Respondent contends, from bad-faith, bargaining on' the UFW's part which consisted, Respondent argues, in the Union's refusal to reach any agreement on wages unless agreement was also reached on three benefit plans of which one, the Martin Luther King Fund, was at most a permissive subject of bargaining. Respondent would have us find that the Union's insistence on treating all the economic items as interrelated parts of one economic package, to be agreed upon as a whole, amounted to an ultimatum that the King Fund be accepted. The evidence, however, indicates that little serious bargaining had taken place "before September 20 about any of the economic items. Respondent had not tested the firmness of the UFW's position on the King Fund in the give-and-take of actual bargaining. Respondent had received no

ultimatum from the Union that a contract was impossible unless the King Fund were included. We agree with the ALO, therefore, that Respondent has not demonstrated that the Union bargained to impasse on this plan. Accordingly, despite Respondent's request that we do so, we find it unnecessary to make a determination whether the King Fund was a permissive subject of bargaining.

Respondent's Conduct After Asserted Impasse

Respondent did not alter its posture toward negotiations in the months following its declaration of impasse and unilateral increase of wages. Although in written communications with the UFW, Respondent stated that it was willing to "bargain upon reasonable request," it never backed up its asserted willingness to bargain by suggesting a definite time and place for meeting or a topic for discussion. Mr. Morgan was unresponsive to clarifications offered by UFW representatives as to aspects of the Union's health and pension-plan proposals. Respondent held to its stance of disclaiming responsibility for the failure of negotiations. We therefore find that Respondent's statements of willingness to bargain were not made in good faith, but were an attempt, with litigation in view, to make the UFW appear responsible for the breakdown in negotiations.

On January 29, 1977, the UFW made a formal request that negotiations be resumed. At that time, Respondent believed that when the Union's one-year certification expired on March 2 no further bargaining obligation would apply. The Union suggested several meeting dates in mid-February, but none were acceptable to Respondent. Mr. Morgan finally agreed to meet on February 25,

but warned that his schedule might present a conflict. Mr. Morgan did in fact cancel the February 25 meeting due to unresolved conflicts in his schedule. An attorney's busy schedule provides no valid excuse, however, for a party's failure of diligence in arranging and attending negotiating sessions. NTLRB v. Exchange Parts Company, 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965). An employer has the responsibility of providing a representative who is available to meet 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).

Respondent after March 2 admittedly refused to meet, contending that the expiration of the certification year was a legal bar to negotiations with the UFW. The end of the certification year, however, does not end the duty to bargain and we therefore conclude that Respondent's conduct during this period was in violation of Section 1153(e) and (a). Montebello Rose Co./ Mt. Arbor Nurseries, Inc., supra; Kaplan's Fruit and Produce Co., 3 ALRB No, 28 (1977). Even after the UFW s certification was extended,, on March 30, Respondent continued to refuse to meet, basing its refusal on the fact that it had filed a motion for this Board to reconsider its order extending certification. Finally, on May 10, some six weeks after issuance of this Board's decision in Kaplan's Fruit and JProduce Co. , sjgpra, in which we held .that the duty to bargain does not lapse with the expiration of 'the certification year, Respondent agreed to meet again with the UFW.

The parties were still bargaining on July 11, 1977, the

day the hearing in this case began. It is Respondent's conduct during that entire period, from March 16, 1976, when Respondent first rejected the UFW's request to bargain, until the commencement of hearing, that we scrutinize, and, unlike the ALO, we conclude that there was a continuing violation of the law during the entire period. After a hiatus in meetings, the parties resumed bargaining on June 3, 1977, and continued meeting at least until July 11, 1977. The parties introduced little evidence concerning the negotiation period after June 3, 1977, other than that they met and agreed on a few contract items. Apparently because of the limited record evidence concerning the negotiations after June 3, the ALO found no violation occurred during that period, although he concluded that Respondent bargained in bad faith during the preceding 15 months. The ALO therefore recommended that the make-whole period end on June 3, 1977.

In his dissent, Member McCarthy follows the ALO's approach and suggests that the scanty record precludes the Board from finding that bad faith bargaining continued through the period from June 3 to July 11, 1977. The dissent cites absolutely no precedent for its novel theory, dissecting the bargaining relationship into separate segments and requiring a finding of bad faith in each component part. Furthermore, the dissent's theory does not accurately reflect the nature of surface bargaining. Surface bargaining is a violation which occurs over an extended period of time and it cannot be analyzed by examining individual bargaining sessions or positions in isolation from the totality of the parties' conduct (see cases cited on page 4, supra,

and Aa-H-Ne Farms, 6 ALRB No. 9 [1980]).

In order to prove bad-faith bargaining, the General Counsel need not introduce evidence of bad faith for every single meeting between the parties. A finding of surface bargaining is dependent not upon evidence of specific unlawful acts every tine the parties meet but, instead, upon a pattern or course of unlawful conduct which precludes the attainment of agreement or genuine impasse between the parties. Thus, the General Counsel carries his burden of proof fay demonstrating, with reference to the totality of the circumstances, that a respondent has surface bargained over the relevant period as a whole. We find the General Counsel has met that burden in this case, [6/]

Concerning the period from June 3, 1977, until July 11, 1977, the record indicates nothing more than Respondent's willingness to begin meeting again after a complaint issued and shortly before the commencement of the unfair labor practice hearing, plus the parties' reaching agreement on a few items. This conduct is not significantly different from Respondent's conduct during the preceding 15 months in which we found surface bargaining; during that period of time, Respondent also met with the UFW and reached agreement on some items. Thus, Respondent's

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[6/] The inclusion of the make-whole remedy in the ALRA, a provision absent from the NLRA, does not persuade us to depart from the totality-of-the-circumstances principles long followed by the NLRB and the federal courts. While the make-whole remedy means that a different result attaches to finding a violation, we can discern no intent by the legislature to depart from the NLRB's analytical approach to whether a violation has occurred,,.

actions during the weeks immediately preceding the hearing do not represent a significant break with its past unlawful conduct or the adoption of a course of good-faith bargaining. Respondent's willingness to meet and agree on some contract items is conduct perfectly consistent with surface bargaining which, by definition, is an approach which resembles good faith but is in fact calculated to frustrate agreement. NLRB v. Herman Sausage Co., 275 F.2d 229, 45 LRRM 2829 (5th Cir. 1960). After a lengthy period of surface bargaining, conduct resembling "hard bargaining" may be all that is necessary to prevent the execution of any agreement or to cause acceptance of such an unsatisfactory agreement that the union's support among employees will be seriously eroded. Thus, the record must indicate a more significant change in bargaining posture than Respondent's above-described conduct before we will find that surface bargaining has ended. [7/]

Respondent maintains that the Union was guilty of bad-faith bargaining, and that the failure of the parties to reach a contract was caused by the Union's misconduct rather than by deficiencies in Respondent's approach to negotiations. Respondent argues that a comparison of its own conduct with that of the Union according to eight criteria establishes the Union's bad faith and Respondent's good faith. The eight criteria are continuity of

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[7/] In requiring a significant departure from past unlawful conduct, we impose no standard higher than the good faith required by Labor Code Section 1155.2(a), and we do not require any party to "capitulate" on bargaining issues. H. K. Porter v. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970). We require only that the parties bargain with each other in compliance with the requirements of the Act.

bargaining team, willingness to make concessions, willingness to adopt reasoned positions on disputed issues, willingness to break the impasse, willingness to provide information relevant to bargaining, willingness to present counterproposals and to correspond in a timely fashion, willingness to discuss key issues, and willingness to disclose bargaining priorities. We note that many of these criteria overlap quite substantially. They 'have been carefully tailored, moreover, to highlight the strengths Respondent believes it has been able to identify in its own case. They do not include well-established criteria for evaluating an employer's overall approach to negotiations, such as direct dealings with employees in derogation of the certified bargaining representative, unilateral changes in terms and conditions of employment, and refusals to meet at frequent intervals or for extended bargaining sessions.

A labor organizations' bad-faith bargaining may be a defense to a charge of refusal to bargain against an employer. Continental Nut Co., 195 NLRB 841, 79 LRRM 1575 (1972); Times Publishing Company, 72 NLRB 676, 19 LRRM 1199 (1947). However, we reject Respondent's contention that an evaluation of the UFW’ s conduct even according to the eight criteria mentioned above leads to the conclusion that the Union bargained in bad faith.

Although Respondent did maintain greater continuity in its bargaining team, its chief negotiator, Frederick Morgan, was often unavailable to meet at times suggested by the UFW. The Union, not Respondent, sought longer and more frequent meetings. Each of the UFW's representatives, moreover, was well prepared.

Each had authority to commit the Union to agreements reached in the negotiations. While greater continuity of representation on the Union's part would have been desirable, there is little if any evidence that changes in its negotiating team disrupted or delayed the progress of negotiations.

In arguing that the Union was unwilling to discuss key issues or to disclose its bargaining priorities, Respondent takes one or two comments out of their bargaining context and imposes a strained and narrow interpretation upon them. For example, refusals by the Union to bargain about wages as an isolated issue, apart from a comprehensive agreement, were part of its bargaining strategy and not, as Respondent suggests, literal refusals "to discuss key issues." Similarly, Mrs. Huerta's remark at the third meeting on May 24 that the UFW had no priorities other than its entire proposed agreement was not so much a refusal to state priorities as it was a signal that the Union had not included inflated, "give-away" provisions in its proposal as mere bargaining chips.

The aggressive stance taken by Respondent at the second meeting in rejecting outright, without explanation, at least six of the Union's major proposals, and accepting others only with substantial modification, put the Union in the position of having to seek concessions. The Union responded by insisting that wages not be negotiated in isolation from other provisions. In view of the direction in which Respondent pushed negotiations right from the start, the Union's reluctance to yield on issues such as wages does not support an allegation that it bargained in bad

faith. Rather, the Union adopted a strategy reasonably calculated to meet the challenge posed by Respondent's approach to the negotiations. Within this context, moreover, the Union did show flexibility in its response to Respondent's proposed modifications of several proposals, including health and safety, seniority, and discipline and discharge.

Respondent argues at length that it, in contrast to the UFW, constantly displayed "willingness to adopt 'reasoned'' positions on disputed issues." Many of the disputed issues on which Respondent made reasoned compromises were of secondary consequence, such as new or changed classifications, leaves of absence, and holidays. Compromises and concessions in areas like these may be consistent with surface bargaining, for it is the essence of surface bargaining to create the impression of serious bargaining while actually making no real effort to conclude an agreement. See, e.g., NLRB v. Herman Sausage Co., 275 F.2d 229, 45 LRRM 2829 (5th Cir. 1969); A. H. Belo Corporation, supra; NLRB v. General Electric Co., supra.

Respondent cites only two of the UFW's positions as evidence of its asserted unreasonableness: its insistence on the Martin Luther King Fund, which we have previously discussed, supra at pp. 20-21, and its position on the "good standing" element of the union-security provision. The Union explained the provisions in its constitution which protect members against abuse of the good-standing provision, and pointed out that such a provision* has been invoked only very rarely in the Union's history. The UFW's position on good standing, then, cannot fairly be described

as "unreasoned."

We have considered and rejected the evidence that Respondent displayed sincere "willingness to break the impasse" in the months after September 20, 1976. It was the Union, not Respondent, which made a clear and specific request to resume negotiations in January 1977.

As to willingness to provide information relevant to bargaining, both parties were somewhat tardy in fulfilling requests for specific items of information. Both, however, substantially complied with requests for information and did so in a timely enough manner that negotiations were not impeded.

Respondent contends that during the 1976 negotiations the UFW "was at least negligent and guilty of 'sloppy work'" when on several occasions it failed to communicate proposals or counterproposals by the time it had promised them. The evidence supports Respondent's contention, as the Union did fail to meet a number of the commitments it had made to have certain documents in Respondent's hands by a given time. We find that there is no excuse for such repeated shortcomings. But we do not draw the further inference Respondent suggests, for negligence and sloppiness, to the degree the UFW was guilty thereof, are not tantamount to bad-faith bargaining. The evidence as a whole shows that the UFW desired and worked toward an agreement and that Respondent did not. As the ALO observed, there is no evidence that if the Union had done everything perfectly Respondent's strategy would have changed in any material respect. See Alba Waldensian, Inc., 167 NLRB 695, 66 LRRM 1145 (1967).

The Remedy

Labor Code 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 Respondent McFarland Rose Production failed and refused to bargain in good faith with the UFW, we shall order Respondent to meet with the UFW, on request, and to bargain in good faith, and to make whole its agricultural employees for the loss of wages and other economic losses they incurred as a result of Respondent's unlawful conduct, plus interest thereon computed at seven percent per annum. Adam Dairy, 4 ALRB No. 24 (1978). Because the illegality of Respondent's conduct is a continuing pattern of delay and bad faith not made up of separate distinct acts, Montebello/Mt. Arbor, supra, we shall order the make-whole to commence on March 16, 1976, [8/] the date on which Respondent first rejected a request by the UFW to meet and negotiate. [9/] 0. P. Murphy Produce Co., Inc., supra. The make-whole period

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[8/] Member Ruiz, for the reasons stated in his concurring opinion in 0. P. Murphy, 5 ALRB No. 63 (1979), would begin the make-whole period on March 11, 1976, the date Respondent presumably received the UFW's letter requesting negotiations.

[9/] The fact that the UFW filed its unfair labor practice charge in this matter on October 12, 1976, does not preclude us from finding that Respondent's violation of the Act began more than six months prior to that date. As we ruled in Montebello/Mt.' Arbor, supra, the limitations period set forth in Labor Code ,Section 1160.2 begins to run only when the charging party has actual or constructive notice of the unlawful conduct. We find here that the UFW did not have either actual or constructive notice that Respondent was bargaining in bad faith until September 21, 1976, the date Respondent claimed negotiations had reached an impasse.

extends from March 16, 1976, until Respondent posts the Notices, takes the other remedial action provided for herein, and begins good-faith bargaining and continues such bargaining to the point of a contract or a legitimate impasse.

We shall also extend the UFW's Certification as the exclusive collective bargaining representative of the agricultural employees of McFarland Rose Production for one year from the date of issuance of this Decision.

ORDER

Pursuant to Labor Code Section 1160.3 the Respondent, McFarland Rose Production, a division of Petoseed, Inc., a wholly-owned subsidiary of George Ball, Inc., its officers, agents, successors, and assigns is HEREBY ORDERED to:

1. Cease and desist from:

(a) Changing any term or condition of employment of its agricultural employees without first affording the UFW a reasonable opportunity to bargain with respect thereto.

(b) Refusing or failing, through general course of conduct, to bargain collectively with the UFW as the certified exclusive bargaining representative of its agricultural employees.

(c) Discharging or otherwise discriminating against any agricultural employee for participating in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

(d) In any like or related 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 by the UFW, rescind the wage increases and bonus and incentive plans implemented since November 28, 1975, and bargain collectively with the UFW with respect to such increases and plans.

(b) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its agricultural employees, and if understanding is reached, embody such understanding in a signed agreement.

(c) 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 dba Rancho Dos Rios, 4 ALRB No. 24 (1978), for the period from March 16, 1976, until such time as Respondent commences to bargain in good faith with the UFW and thereafter so bargains to contract or impasse.

(d) Immediately offer to the following employees full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges:

Rogelio Avila Jose Galvan
Jose Socorro Baca Roberto B. Galvan
Luis Bautista Rodolfo B. Galvan
Roberto Galvan Chavez Efren Garcia
Oscar Esparza Jesus M. Oropeza
Adolfo B. Galvan Rafael 0, Reyes
Adolfo D. Galvan Daniel Sanchez, Jr;
Adolfo 0. Galvan Daniel M. Sanchez.

(e) Make whole each of the employees named above in subparagraph 2(d) for all economic losses they have suffered as a

result of their discharges, including any loss of pay resulting from the Respondent's failure and refusal to bargain in good faith, by payment to each of them of & sum of money equal to the wages he or she would have earned from the date of his or her discharge to the date on which he or she is reinstated or offered reinstatement, less his or her respective net interim earnings, together with interest thereon at the rate of seven percent per annum.

(f) 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 to all the aforementioned employees under the terms of this Order.

(g) 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.

(h) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

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

(j) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of

issuance of this Order to all agricultural employees referred to in paragraph 2(d) above and to all employees employed during the payroll period immediately preceding March 16, 1977.

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

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

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective bargaining representative of

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Respondent's agricultural employees, be extended for a period of one year from the date of issuance of this Order. Dated: April 8, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Dissenting in Part:

I concur in the majority's finding that the period from March 16, 1976, to June 3, 1977, was characterized by surface bargaining. However, the record does not demonstrate bad faith on the part of the Respondent after the meetings resumed on June 3, 1977. Unable to point to specific evidence of bad faith bargaining .during that period, the majority presumes that Respondent's earlier bad faith approach to bargaining continued beyond June 3, 'and therefore applies the make-whole remedy on an open-ended basis. I dissent from that holding and agree with the ALO that the make-whole remedy should not extend beyond June 3, 1977.

Unlike the situation in AS-H-NE Farms, 6 ALRB No. 9 (1980), the majority now applies an open-ended make-whole remedy without relying on any evidence of bad faith during the period which immediately preceded the hearing and in which the parties appeared to be bargaining in earnest. Under the majority's approach, the make-whole remedy will be applied on an open-ended

basis in any case where: (1) the employer has, for any significant length of time during the negotiations in question, engaged in surface bargaining, and (2) the employer has not displayed a "significant change in [its] bargaining posture" prior to the hearing on the refusal to bargain charge. The majority bases its approach on the totality of circumstances concept. However, that concept is used by the NLRB only for the purpose of determining whether a refusal to bargain has occurred. [1/] It does not tell us that we may apply make-whole on an open-ended basis and at the same time ignore the fact that after a certain point in the bargaining process there is no longer any evidence of bad faith bargaining.

As noted by the ALO, the parties agreed to a number of substantial articles after June 3, 1977, including seniority, leaves of absence, and a grievances, arbitration procedure. By July 10, the date of the last negotiating meeting on the record, agreement had been reached on 28 out of 37 proposed articles, including a union-sponsored medical plan to which the Respondent had previously offered strong opposition because it favored its own medical plan. The evidence does not show that Respondent's position on any of the remaining issues was unreasoned; indeed, the ALO found that the General Counsel produced virtually-no evidence tending to establish that Respondent was bargaining in bad faith on and after June 3, 1977. Nevertheless, the majority finds that Respondent's bargaining efforts after June 3, 1977, were not

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[1/] In surface bargaining cases the NLRB employs only cease-and-desist orders and does not examine the bargaining process with an eye toward application of make-whole. See Ex-Cell-0 Corp., 185 NLRB No. 20, 74 LRRM 1740 (1970).

sufficient to demonstrate the "significant change in bargaining posture" it requires of an employer who has been found to have engaged in surface bargaining earlier in the bargaining process.

Even though hard bargaining is, by definition, good faith bargaining and therefore entirely legal, the majority tells us that, after a period of surface bargaining, "conduct resembling hard bargaining'" becomes illegal. I believe that a party which engages in surface bargaining subjects itself to a finite make-whole liability, but it does not forfeit the right to maintain a firm but fair bargaining posture.

Given the degree of progress that had been achieved by the end of the July 10 meeting and yet found insufficient by the majority, Respondent could only have met the majority's higher standard by unilaterally removing obstacles to an agreement—that is, by capitulating on key issues, notwithstanding the fact that its position on those issues had been firmly but fairly maintained. As discussed in my dissenting opinion in AS-H-NE, supra, the Board contravenes Labor Code Section 1155.2 and violates applicable federal precedent when it directly or indirectly compels a party to abandon a legitimately held bargaining position. [2/] NLRB v. American National Ins. Co., 343 U.S. 395, 405 (1952).

[2/] In H. K. Porter Co. v. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970) , the Supreme Court emphasized the primacy of the policy of free collective bargaining. It denied enforcement of an NLRB order which arose from a refusal to bargain violation and which would have imposed a substantive contractual term on one of the parties to the negotiations. The alleged merits of the remedy were regarded by the court as irrelevant; the conflict the remedy created with the policy of free collective bargaining was sufficient reason to reject it.

There is no reason to believe that the harm caused by a period of surface bargaining cannot be adequately remedied by a make-whole order applicable only to that period, along with a cease-and-desist order and an extension of certification. As for the possibility that without an open-ended make-whole order the Employer might resume surface bargaining after the refusal to bargain charge has been heard, the probability of incurring and defending another refusal to bargain charge, and its attendant expense, would be a significant deterrent. Moreover, having obtained from this Board an order which calls for good faith bargaining, the General Counsel can go directly to the courts for enforcement of the order should the Employer resume surface bargaining.

In short, the majority's approach conflicts with one of the basic policy underpinnings of the Act and goes beyond what is needed as a remedy in this case. I would limit the make-whole order to the bargaining period from March 16, 1976, to June 3, 1977.

Dated: April 8, 1980

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

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

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

Because this is true, we promise you that:

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

WE WILL offer:

Rogelio Avila
Jose Socorro Baca
Luis Bautista
Roberto Galvan Chavez
Oscar Esparza
Adolfo B. Galvan
Adolfo D. Galvan
Adolfo 0. Galvan
Jose Galvan
Roberto B. Galvan
Rodolfo B. Galvan
Efren Garcia
Jesus M. Oropeza
Rafael 0. Reyes
Daniel Sanchez, Jr.
Daniel M. Sanchez

their old jobs back and will reimburse each of them any pay or other money they lost because we failed or refused to rehire them.

WE WILL bargain in good faith with the UFW with .the intent and purpose of reaching an agreement on a collective bargaining contract concerning your wages, working hours, and other terms and conditions of employment.

WE WILL pay all of the employees who worked for us at any time from March 16, 1976, to the present the amount of money they lost because we refused to bargain in good faith with the UFW.

Dated: McFARLAND ROSE PRODUCTION

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.

6 ALRB No. 18 40.

CASE SUMMARY

McFarland Rose Production, 6 ALRB No. 18
a division of Petoseed Co., Inc., Case Nos. 76-CE-69-F
a wholly owned subsidiary of 76-CE-73-F
George Ball, Inc. 76-CE-73-1-F
76-CE-73-2-F

ALO DECISION

The ALO concluded that Respondent violated Section 1153(a) by discharging a harvesting crew for engaging in protected concerted activities. The ALO also concluded that Respondent violated Section 1153 (e) and (a) from April 12, 1976, to June 2, 19.77, by engaging in surface bargaining with the UFW. The ALO relied upon the Respondent's general course of conduct during negotiations, which included among other things: Delaying the commencement of negotiations and entering into them with a strategy of delay; failing to provide the UFW with reasonable notice of, and a meaningful opportunity to bargain about, new bonus and incentive plans; bypassing the certified bargaining representative and dealing directly with employees; declaring a spurious impasse and unilaterally raising wages; and refusing to meet in bargaining sessions after the expiration of the UFW's certification year. The ALO found that Respondent did not bargain in bad faith after June 2, 1977. The ALO therefore recommended imposition of the make-whole remedy only from April 12, 1976, six months before the charge was filed on October 12, 1976, to June 2, 1977.

BOARD DECISION

The Board upheld the ALO's conclusion that Respondent violated Section 1153(a) by discharging a harvesting crew for engaging in protected concerted activities. The Board examined the totality of Respondent's conduct on the record as a whole and found that Respondent violated Section 1153 (e) of the Act by engaging in surface bargaining throughout the entire course of negotiations. The Board rejected the ALO's finding that no bad faith had been proved for the last stage of negotiations, ruling that Respondent's willingness to meet and agree on some contract items in the weeks just prior to the hearing, though giving the appearance of "hard bargaining," did not show a significant change from Respondent's past unlawful conduct.

Evidence of Respondent's bad faith was found in its -internal reports and memoranda which indicated an intent to use delay as a tactic and to engineer a spurious impasse. Further evidence of bad faith was found in Respondent's failure to provide an available negotiator and its refusal to meet with the Union at reasonable intervals. In addition, the Board found per se violations of Section 1153(e) in Respondent's unilaterally raising wages, bypassing the exclusive representative by dealing directly with the employees, and refusing to meet after the Union's initial certification year expired.

REMEDY

The Board ordered Respondent to cease and desist discharging or otherwise discriminating against any agricultural employee for

engaging in protected concerted activities, from changing any term or condition of employment of its agricultural employees without first affording the UFW an opportunity to bargain with respect thereto, and from failing or refusing to bargain with the UFW, and to post, read, and mail a remedial notice to its employees, and to meet and bargain, on request, in good faith with the UFW. The Board ordered Respondent to offer to reinstate the discriminatees to their former or substantially equivalent jobs and to make each of them whole for any loss of pay or other economic losses resulting from Respondent's unlawful acts and conduct. Respondent was also ordered to make all of its employees whole for any economic losses suffered as a result of its refusal to bargain. The make-whole period extends from March 16, 1976, until Respondent takes all the remedial action ordered by the Board and commences and continues good-faith bargaining to the point of a contract or a bona fide impasse.

DISSENT

Member McCarthy would affirm the ALO's finding that the record does not show bad faith after June 3, 1977. He would therefore limit the make-whole award to the period from March 16, 1976, to June 2, 1977.

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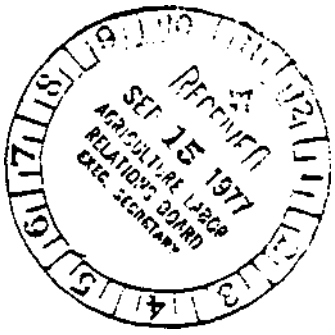
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Hatter of: Case Nos. 76-CE-69-F McFARLAND ROSE PRODUCTION 76-CE-[illegible]-F a division of PETOSEED CO., 76-CE-73-1-F INC., a wholly owned 76-CE-73-2 subsidiary of GEORGE BALL DECISION OF ADMINISTRATIVE INC. LAW OFFICER and Respondent, UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)

Nancy Kirk of Fresno, for the General Counsel

Gilmore F. Diekmann, Jr., and Robert J. Stumpf, Bronson, Bronson & McKinnon, San Francisco, for Respondent

John Denvir, Stephen Hopcraft, and Glenn Rothner of Delano, for the Charging Party

STATEMENT OF THE CASE

JOEL GOMBERG, Administrative Law Officer: This matter was heard by me on July 11 through 14, July 13 through 20, July 2.5 through 29, and August 1 and 2, 1977, in Bakersfield and Delano, California. The Complaint (GC Ex. 1-E) , dated April 27, 1977, and subsequent amendments are based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter "UFW") . The Complaint was amended three times before

the start of the hearing, pursuant to Section 20222 of the Board's regulations. (GC Ex. 1-J, 1-K, and 1-M.) During the hearing, I granted several motions to amend the Third Amended Complaint. These amendments have been reduced to writing as General Counsel Exhibits 1-P, 1-Q, and 1-R. The charges and amended charges were duly served on Respondent. The Third Amended Complaint, as amended at the hearing, alleges violations of Section 1153(a), (c), (d), and (e)^ of the Agricultural Labor -Relations Act (hereafter the "Act"), by McFarland Rose Production (hereafter ''Respondent" or the "Company"). The hearing was held pursuant to orders consolidating the various charges against the Respondent (GC Ex. 1-J and 1-I-J).

All parties were given a full opportunity to participate in the hearing. The UFW intervened, as a matter of right, pursuant to Section 20266 of the Regulations. The parties waived oral argument. The General Counsel[3] and Respondent filed post-hearing briefs pursuant to Section 2027S of the Regulations.

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1. All references to the Board's regulations are to Title a, California Administrative Code.

2. All statutory references herein are to the California Labor Code unless otherwise specificed.

3. In addition to a post-hearing brief, the General Counsel filed additional material on the make-whole remedy, in the form of its brief in support of its adaptions to the Administrative Law Officer's Decision in Romar Carrot Co., Case Ho. 76-CE-35-H. The Respondent had no objection to my consideration of this material, although it was not timely filed.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent admitted in its answer (GC Ex. 1-F) that it is a California corporation and an agricultural employer within the meaning of Section 1140.4(c) of the Act. However, the testimony of John Parker, General Manager of the Company, established that McFarland Rose Production is not incorporated, but is, rather, a division of Petoseed Company, Inc., a wholly owned subsidiary of George Ball, Inc. Based on this testimony, I granted the motion of the General Counsel to amend the Complaint and the caption to conform to proof (GC Ex. 1-Q). I find that the Respondent is an agricultural employer as that term is defined in the Act.

The Respondent also admitted that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The Third Amended Complaint as amended at the hearing alleges that Respondent:

(1) Refused to bargain collectively in good faith with the UFW, in violation of Section 1153(a) and (e) of the Act;

(2) Discriminatorily discharged Rafael Gonzalez in violation of Section 1153(a),(c), and (d) of the Act;

(3) Refused to rehire Sally de la Rosa in violation of Section 1153(a) and (c)of the Act,

(4) Discharged sixteen employees on January 3, 1977, for engaging in concerted activity protected by Section 1152 of the Act, in violation of Section 1153(a) ;

(5) Constructively discharged Jose Socorro Saca because 'he participated in the concerted activity in (4) above, in violation of Section 1153(a). The Respondent generally denies that it violated the Act. With respect to the allegation of bad-faith bargaining, Respondent asserts that whatever de<u>ainimis</u> bad faith it may have engaged in was more than outweighed by the UFW's bad faith. As affirmative defenses, Respondent asserts that Rafael Gonzalez was discharged for good cause and without, unlawful motive, that Respondent did not refuse to rehire Sally de la Rosa, that the sixteen employees were not discharged, but, rather, voluntarily quit or were economic strikers, and that Jose Socorro Baca voluntarily quit.

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4. The Third Amended Complaint (Paragraph 9(b)> also alleged that Respondent refused to rehire Teresa Medina and Elodia Lara, in violation of the Act. I granted Respondent's motion to dismiss these allegations, at the conclusion of the General Counsel's case, because no evidence had been introduced to support them.

A. The Operation of the Company

The Respondent grows, harvests, grades, packs, and ships roses. The growing and harvesting is done on fields owned by the Company, northwest of Wasco. Until the fall of 1976, the grading and packing work was done in a shed leased by the Company, just north of its headquarters in McFarland. When the lease on the shed expired, and could not be renewed, the Company leased a shed in Wasco, where operations began in the fall of 1976. The shipping shed is still located in McFarland, along with Company offices.

The Company operates under the direction of John Parker, its General Manager. Mr. Parker reported to Darrell Messick, a vice-president of George Ball, Inc., until June 1, 1977. Mr. Parker now reports to Alien Huff, President of the Ball Seed Company. Petoseed, Inc., another member of the Ball corporate family, handles accounting and personnel record-keeping for the Company. Among Mr. Barker's duties is the responsibility to file quarterly and annual reports with the George Ball, Inc., board of directors.

The Company has about two dozen permanent employees who work all year. These employees are characterized by Mr. Parker as being the "backbone" of the workforce. A large number of seasonal employees are hired during the spring budding season and the fall harvest. In the budding work, semi-skilled employees first remove thorns from budwood which has been stored in a shed during the winter. Then, highly skilled budders graft the budwood onto rose plants. The grafts are secured with a rubber band by tiers who work

in teams with the budders. The budding season generally runs from April to July.

During the fall harvest season, which runs from late October until early January, upwards of 165 people are employed, including the permanent workforce. A substantial percentage of these employees work in the packing and grading operations. These employees are not agricultural employees within the meaning of the Act. [5] The only skilled work performed by fall seasonal employees is de-eyeing, which takes place in the same shed as the grading and packing.(De-eyeing consists of the removal of all but two or three "eyes" or potential buds, from budwood. It is this budwood which is grafted in the spring.)The other agricultural, employees among the fall harvest seasonal workers include budwood cutters and the harvesting or "pulling" crew.

The other supervisors include Duncan Hanson, the Production Manager, who is responsible for all field and shed operations, and reports to John Parker; David Anderson, the Assistant Manager, who reports to Mr. Parker on management issues and to Mr. Hanson on production matters; and Pat Patterson, the shipping foreman and office manager. Reporting to Mr. Hanson are two. full-time foremen with hiring and firing authority. They are Eutimio(Time) Hinojosa, who is in charge of field operations, and Robert Gallardo, who

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3. See McFarland Rose Production Co., 2 ALRB No. 44(1976), and footno- te 18" infra, p.85 I took administrative notice of the Board's decision at the hearing.

directs the work in the sheds. Additionally, there are five employees who .act as lead men during the fall season: Nellie Heredia, Julian Perez, Isabel Olguin, Lazaro Hinojosa, and Rafael Barron. Each of these employees is a supervisor within the meaning of the Act, although the part-time lead men acquire supervisorial status only during the fall season.

B. The Bargaining Relationship Between the UFW and the Company.

1. The period from the Representation Election until the first bargaining session.

The ALRB conducted a representation election among Respondent's employees on November 28, 1975. The UFW received a substantial majority of the non-challenged ballots. The Respondent challenged the ballots of 39 employees who worked in the grading and shipping sheds on the ground that, because the Respondent processed roses grown by other companies, the employees were not employed in agriculture. The Respondent also filed objections to the conduct of the election on the ground that these 39 employees were allowed to cast challenged ballots, that the UFW stacked the election by arranging for certain employees to be hired for the primary purpose of voting in the election, and that the Board's

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6. The Tally of Ballots shows the following: UFW --36, No Union - 11, Challenges - 63, Void Ballots - 1.

7. Although election stacking" is an independent unfair labor practice under Section 1154.6 of the Act, there is no evidence that Respondent filed a charge against the UFW on this issue.

challenged ballot procedure was violative of the secret ballot.

On March 2, 1976, the Board upheld Respondent's position on the grading, shipping, and packing operations, ruling that those persons working in processing were nof. agricultural employees. The Board summarily dismissed the Respondent's election petition without a hearing and certified the election. McFarland Rose Production Co., supra.

Shortly before the certification, John Parker filed a quarterly report with the George Ball board. In the "Labor Relations" section of the report, Mr. Parker noted that: "Conklin (another local rose grower) and McFarland are both contesting their elections and have not been certified. This is primarily a delaying tactic and it is expected that Conklin and McFarland will be certified within the next few months. . . ." (GC Ex. 76.) Mr. Parker and Fred Morgan, the Company's labor lawyer and negotiator, testified that they felt their positions were valid but expected that the Board would rule against them. Mr. Morgan said that he felt quite confident about prevailing on the bargaining unit issue but, because of the large margin in the election, -was not too hopeful about winning on the objections issues.

Within three weeks of the certification, Mr. Parker reiterated the theme of delay in an annual report to the Ball board:

> LABOR RELATIONS - McFarland's election was certified valid by the Agriculture (sic) Labor Relations Board on March 12 (sic), 1976 with our shipping and grading operations.

> excluded from the bargaining unit. Our strategy has been primarily one of delay as well as trying to get the grading and shipping operations excluded from the bargaining unit. We should be able to get through the 1976 budding season before starting negotiations with the UFW. Our future strategy will be to delay as much as possible and negotiate the best contract possible. (GC Ex. 62.)

Later, in the same report, Mr. Parker, in a worried tone,, explained that:

> LABOR - The current labor situation is the major problem we are facing. . . . While there is no acceptable solution to this problem we will continue to delay negotiations as much as possible and negotiate the best and most reasonable contract possible when we do have to negotiate. . . . Also, having the grading and shipping operations excluded' from the union contract will help since these operations employ 707. of the labor force during the peak period of Nov.-Dec.-Jan. (GC Ex. S3.)

Excluding the grading and shipping operations was undeniably of critical importance to the Respondent. The Company went to extreme lengths to fortify its position before the Board, including subornation of perjury. During the Board's investigation of the challenged ballots issue, ALRB agents visited Rafael Gonzalez, a McFarland employee, at his home. The agents, based upon discussions with Mr. Gonzalez, drafted a declaration for his signature. The declaration, on its face, indicates that a Board agent, fluent in Spanish, read the declaration to Mr. Gonzalez, who affirmed the contents under penalty of perjury (UFW Ex.
1).

Mr. Gonzalez testified that he had been advised by Time

Hinojosa, before the visit of the Board agents, not to say that he had been working as a tractor driver, and to Lie about the length of time he had worked for the Company. Mr. Hinojosa denied talking to Mr. Gonzalez about the declaration until after it had been signed. " According to Mr. Hinojosa, Mr. Gonzalez came to him and said he had signed something without understanding its contents and without, having it read to him. He asked Timo to inform Mr, Hanson of what had happened. On cross-examination, however, Mr. Hinojosa admitted that Mr. Gonzalez had said that the Board agent did translate and explain the declaration,

On December 18, 1975, Mr. Gonzalez was called to the Company office and asked to sign a second declaration. Mr. Hinojosa translated "the important parts" for Mr. Gonzalez. Mr. Hinojosa thought the "important" portions were paragraphs 2 and 3, which read as follows:

> 2. Agents of the Agricultural Labor Relations Board visited me in my home and had me sign a statement. At the time, I did not know what I was signing because I cannot read the English language. The agents did not explain to me what I was signing.
>
> 3. The employees working in the McFarland Rose Production grading and packing sheds do not perform work in the fields. (UFW Ex. 2.)

Mr. Gonzalez testified that he signed the declaration on Time's advice. He signed under penalty of perjury.., Mr. Hinojosa declared under penalty of perjury that he read an accurate translation to Mr. Gonzalez. Both men admitted that paragraph 3 is untruthful, in that there was some inter-

change between the sheds and the fields, and that they knew it was untruthful at the time it was signed. Mr. Gonzalez also admitted that paragraph 2 was untruthful.

While there are conflicts in the testimony, it is clear that the Company asked Mr. Gonzalez to sign a declaration, through its agent, Mr. Hinojosa, which it knew to be false. I find it difficult to resolve the issue of whether Mr. Hinojosa induced Mr. Gonzalez to swear falsely in the first declaration. Mr. Gonzalez' claim to credibility is that he testified truthfully about twice perjuring himself. Beyond that, his testimony concerning his discharge was often evasive and he was impeached successfully on cross-examination. Mr. Hinojosa's testimony was equally unreliable, both on this issue and on other matters.[9] The fact remains that the Respondent solicited a false declaration on the-key issue of interchange between the grading and packing operations and the fields.

After the UFW's certification, its President, Cesar Chavez, wrote to the Respondent, requesting the Company to bargain with the UFW and to supply information relevant Co bargaining (GC Ex. 2). Mr. Morgan responded for the Company about a week later, and refused the request to bargain, on

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8. In McFarland Rose Production, supra, the Board noted the employer's contention that only four shed employees ever worked in the fields. 2 ALRB No. 44, at p.2.

9. See Sections B.9 and C.3, infra.

the ground that the Board had made a "serious error with respect to the coverage but claimed that the error was harmless."(GC Ex. 3.) Mr. Morgan explained that he was referring to the Board's practice of permitting challenged voters to cast ballots subject to the determination of the validity of the challenges. Mr. Morgan was considering whether to test the Board's certification by refusing to bargain and then appealing to the Court of Appeal. He advised Mr. Parker that, given the Board's funding problems, such a course could delay the onset of negotiations for many months, Mr. Parker testified that he had no doubt that the UFW was favored by a majority of employees in the bargaining unit, but that he wanted to test the decision nonetheless. Mr. Morgan said that he felt that the other dismissed objections were also meritorious, although he could not even recall 'the content of the "election stacking" objection, I find that the Company's witnesses were not credible in testifying that they believed that the certification was wrong on the merits,

Some time during March, 1976, the Company established a committee of employees to meet with management to present grievances. The committee's members were selected by the Company and without notice to the UFW. One meeting was held in March, but Mr. Anderson could not remember any details. At the. first bargaining session, the UFW requested that the committee be disbanded. The Company, on advice of counsel, abolished the committee.

Finally, on April 2, 1976, nearly a month after the first UFW bargaining request, Mr. Morgan responded that, "the

company has decided that it will proceed to bargain, even though we have substantial doubts as to the validity of some of the Board proceedings." (GC Ex. 5.) Mr. Morgan testified that the existence of the "make-whole" remedy had no bearing on his decision to bargain, rather than to delay the onset of negotiations through appeals. According to Mr. Parker, the Company decided to meet with the UFW, while adopting a passive approach. The Company would respond, but would not push the process. If the UFW were reasonable, and would allow the Company to maintain management control, a contract was possible.

2. The first bargaining session: April 7, 1976.

The first session was held in Delano on April 7, 1976, and lasted approximately three hours. Richard Chavez, the Delano Field Office Director, and Ben Haddock represented the UFW. Mr. Morgan and David Anderson represented the Respondent.

The UFW submitted a lengthy contract proposal, containing 41 articles, based largely on negotiated contracts with other agricultural employers. Its contents were discussed briefly and in generalities. The Respondent agreed to present written counterproposals and positions in about two weeks.

Mr. Chavez received some information from the Respondent. He requested further information about the relationship between the Respondent and Fetoseed, Inc. Mr. Morgan said he was not sure what the relationship was, but would find out and let the UFW know. Mr. Chavez also requested

information about employee interchange between the fields and the sheds. According to Mr. Chavez, Mr. Morgan stated that the issue had been resolved by the Board. Mr. Morgan testified that he requested a legal opinion from the UFW legal staff on the status of the shed employees. There was some discussion between Mr. Andersen and Mr. Chavez concerning interchange.

The other major item discussed at the meeting was the Respondent's intention to implement a new incentive plan for budders and tiers and to pay these employees a bonus based on the previous season's work. There are serious factual disputes between the parties with respect to the announcement and implementation of the bonus and incentive.

According to Mr. Parker, the Company began discussing the need for an incentive plan as early as May, 1975, when he was still working in West Chicago, Illinois, as manager of the Rose Department for the Sail Seed Company. It was hoped that an incentive system would solve the Company's problem of unusually low bud takes. Other meetings were held during the summer and fall. The details of the incentive plan were finalized some time in the fall of 1975.-

The Company wanted to make a bonus payment to its budders and tiers in the spring of 1976, but its record-keeping was not set up in such a way that the bonus payment could be made pursuant to the formula of the incentive plan. So it was decided to set aside $2500.00 for the annual budding party and the bonus. Whatever was left over from

the party would be paid to the employees as a bonus, each payment to be based upon the number of live plants budded by the employee during the past season. The incentive plan provided for future bonuses to be computed according to a more complex formula based upon hours worked and percentage of live buds.

When Mr. Parker first testified, as an adverse witness for the General Counsel, he could not remember if the bonus and incentive had been announced to the employees before the first negotiation session. He stated that Duncan Hanson was the employee most familiar with the announcement and that Mr. Hanson and Mr. Hinojosa actually made the announcement. Although both men were called as witnesses by the Respondent, neither was asked any questions about the bonus or the incentive. Mr. Anderson testified that the incentive plan was announced to the employees on April 13, 1976, and that the bonus was paid without a prior announcement on April 16, the day before the budding party. He also thought there may have been some informal announcements to the employees in 1975.

Mr. Parker testified that he discussed the upcoming implementation of the bonus and incentive plans with Mr. Morgan and that Mr. Morgan advised him that they should be discussed with the UFW. According to Mr. Morgan, Mr. Anderson explained the workings of the bonus to Mr. Chavez and Julian Perez, a budder and member of the employee negotiating team. There was about a 20 or 25-minute discussion,

in which Mr. Anderson used Mr. Perez as an example of how the plans worked. Mr. Morgan said that he didn't-understand the explanation, but that Mr. Perez seemed to. According to the company negotiators, Mr, Chavez had little to say about the plans, seemed to like the incentive and had no objections to them. Mr. Morgan stated that, although the Company had already decided to implement the plans, they were not presented as a fait accompli and were to be considered as a bargaining proposal.

Richard Chavez held a series of five or six meetings with McFarland employees before the first bargaining session. At one of these meetings, approximately a week before the bargaining session, one of the employees brought him some documents explaining the incentive plan (GC Ex. 69). Mr, Chavez said that he was upset, checked with the the UFW legal office, and decided not to object, because the plan "put me on the spot." If the UFW objected, it would appear to be taking money out of the employees' pockets, Mr. Chavez conceded that the bonus and incentive plans were discussed at the first session, and that he did not press the matter because he felt it was too late. He testified that the. Company did not offer to bargain about the plans and that he did not request bargaining.

Julian Perez said that the bonus paid in 1976 was a surprise and was much larger than previous bonuses which were not paid every year. He testified that the bonus was paid and the new plan described on the same day. He thought the date was in early April, but agreed that it was close

to the time of the budding party. Seven of the bonus checks, all dated April 14, 1976, were introduced into evidence (R Ex. J).

On rebuttal, Dolores Huerta testified that she drove Richard Chavez to the first bargaining meeting. As they arrived, Ben Haddock handed Richard Chavez the incentive plan documents. On cross-examination Mrs. Huerta stated that Mr. Chavez did not have the documents with him prior to arriving at the meeting site.

The preponderance of the evidence establishes that the bonus and incentive plans were not formally announced to the employees prior to the first negotiation session. Unlike most Company communications to employees, [10] the incentive plan documents are not dated. Although I do not believe that the plans were announced before the meeting, I find credible Richard Chavez' testimony that a copy of the plan document was circulated to employees earlier, especially in light of the failure of Mr. Hinojosa and Mr. Hanson to testify on this issue. Evidence Code §412.

3. The second bargaining session: May 7, 1976. After the first meeting, Mr. Morgan began to prepare the Company's counterproposals, in consultation with his clients. Before finishing, Mr. Morgan left for a vacation. He turned his materials over to Edwin L. Currey, Jr., ah : associate in his law firm. The counterproposals were sent to the UFW on April 23, 1976, under Mr. Parker's signature

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10. See GC Ex. 12, 21, 2b, and 38.

(GC Ex. 7). The Respondent agreed to the following articles: Right of Access to Company Property, Discrimination, Workers Security, Rest Periods, Modification, and Savings Clause-. The following articles were rejected outright without explanation: Hiring, Mechanization, Jury and Witness Pay, Credit Union Withholding, Robert F. Kennedy Farmworkers Medical Plan (hereafter "RFK Plan"), Juan de la Cruz Pension Fund, and Martin Luther King Fund. The Company presented substantial proposals of its own on Health and Safety, Hours of Work and Overtime, and Wages. As to the other articles, the Respondent indicated areas of agreement and disagreement, and in some cases made counterproposals on disputed clauses.

At the second meeting, the UFW was represented by Dolores Huerta, a Union vice-president and the UFW's most experienced negotiator, and Ben Haddock. Richard Chavez had been transferred to another assignment. Mr. Parker, Mr. Currey, and Mr. Andersen represented the Company.

Mrs. Huerta and Mr. Parker characterized the meeting- as pleasant'. It lasted about three hours and there was agreement on three additional articles: Recognition, Credit Union Withholding, and Records and Pay Periods.

Mrs. Huerta testified that she requested information from Mr. Currey about budding before discussing wages. Mr. Parker testified that Mrs. Huerta only requested information about working foremen,which was supplied.

The parties discussed a wide range of non-economic issues. They agreed to meet again in several weeks.

Mr. Currey's notes of the meeting were introduced by the General Counsel. According to Mr. Currey:

> The bargaining lasted approximately three to four hours and we made a number of "concessions" which have to do with the non-controversial parts of the union proposals. There was no substantive agreement on economic matters ....
>
> Generally speaking, the company is in a position any way it wishes. I believe we can make a reasonable economic package consistent with the company's plans to raise wages. . . In addition, the union indicated, without promising, they would be agreeable to a two year contract. Of course, we could bargain to impasse on the economic issues and see what happens. (GC Ex. 90.)

4. The third bargaining session: May 24, 1976.

The third meeting was the only session in 1976 attended by both Mr. Morgan and Mrs. Huerta. Mr. Parker, Mr. Anderson, and Mr. Maddock were also present. The pleasant atmosphere of the first two sessions was conspicuously absent this time around.

There was, for the first time, serious, in-depth discussion on many of the proposals on the bargaining table. The two most significant items, for purposes of this case, were Union Security and the RPK Plan. In its April 23, 1976, response to the UFW's proposed Union Security article, the Company had agreed to the concept of a union shop, but opposed check-off of union dues on economic grounds, and checkoff of assessments on legal grounds. The Company maintained the same position at the May 7 meeting, although Mr. Currey privately recommended in his post-meeting memorandum that the dues check-off be agreed to (GC Ex. 9u). At the May

24 meeting, Mr. Morgan agreed to accept dues check-off, but, for the first time, opposed the provision which would require the company to discharge any employee who was found, in the sole discretion of the UFW, not to be a member in "good standing" of the Union. Mr. Morgan explained that the Company could not agree to cede such power to the UFW. Mrs. Huerta stated that the provision was very important to a new union, that it was in every contract negotiated by the UFW since 1966, that there were procedural safeguards in the UFW constitution to protect members from arbitrary expulsion, and that the UFW had never requested that any employee be discharged because he was in bad standing. Mr. Parker testified that the Company had "reservations" about the good standing provision when it drafted its original response of April 23, 1976, but that it was not-"clearly • pointed out" until May 24, The objection was not discussed at the May 7 meeting.

The Company's original rejection of the RFK Plan had' not been discussed prior to the May 24 meeting. The Company offered to maintain the health insurance coverage it was currently providing for its permanent workers, which, it felt to be superior to the RPK Plan in many respects. It refused to extend health insurance coverage to its seasonal workers because of cost.

The discussion of the RFK Plan became heated, acrimonious, and so bitter that, for the last hour or so, the participants did little more than glare sullenly at each

other. Finding this approach unsatisfying, Mr. Morgan left for the airport. While the exact content of the "conversation" is in dispute, its outline is fairly distinct. Mr. Morgan let loose a barrage of objections to the RFK Plan, ranging from questions as to its legality and the competence of the Union to administer it, to charges that it was undemocratic because it did not permit participants a free choice of physicians, and to attacks on the person for whom the plan is named.

Mr. Parker testified that the Company's concern about the freedom of choice issue was a serious one, that it was raised several times in 1976, that the Union responded to his concerns, that he couldn't remember the nature of the response, and that it was not until after the last 1976 bargaining session that it became clear to him that the RFK Plan did in fact provide for freedom of choice. Mrs. Huerta testified that she explained that the RFK Plan and the UFW-operated health clinic in Delano were distinct entities. Members of the plan could choose any physician and need not go to the clinic. She also offered to provide Mr. Morgan with material on the legal status of the plan. I find it inherently incredible that the UFW would not have responded to the Company concerns with respect to freedom of choice, especially since the plan did not restrict the freedom of choice to choose physicians.

Before the meeting ended, Mrs. Huerta requested that future sessions be held at night to permit employees to attend without missing work. Mr. Parker testified that, he

opposed the request because he felt that the presence of employees would lead to more Union caucuses and consequent delay. He also lacked the physical stamina to meet at night,

2. The period between the third and fourth bargaining sessions; May 25 to June 17 .

After the May 24 meeting, Mrs. Huerta met with Company employees, related the events of the session, and advised them that the negotiations were likely to be long and difficult. She contacted UFW supporters in Chicago to put pressure on the George Ball corporate officials to soften the Company's bargaining positions. Mrs. Huerta believed that there may have been one or two picketing sessions at George Ball.

Mr. Parker testified that he obtained a copy of a document which he believed had been circulated to Company employees the day after the meeting(R Ex. B). He wanted to respond to it. Mr. Morgan informed him that he could make factual communications to employees so long as they aid-not disparage the UFW. Mr. Parker prepared GC Exhibit 12, read it to Mr. Morgan, who approved it, and distributed it to the employees. The document explains that there are three basic issues in dispute in the negotiations: (1) 'The ''good standing" clause; (2) check-off of Union assessments; and (3) economic issues. As to economic issues, the document speaks of the institution of a new "budding incentive bonus," but does not indicate that the bonus plan had been negotiated with the UFW.

On the issue of deduction of assessments, the communication states:

> The union is also demanding chat when the union decides to make assessments against a worker's pay that the company will have to deduct the money from the worker's check and send it to the union.
>
> If a worker wants to give part of his wages, other than regular dues, to the union, that is up to the worker as an individual, but the company will not agree to a contract forcing us to deduct these assessments from our employee's wages.

Mr. Parker testified that he was aware, by the time of the May 24 meeting, that, according to the UFW proposal, an authorization form, signed by an individual worker, would be required before any deduction from an employee's paycheck could be made by the Company. He testified that General Counsel Exhibit 12 was a factual summary of the provisions of the proposal on this subject.

On May 29, Mrs. Huerta wrote to Mr. Morgan to request that negotiation sessions be scheduled on consecutive days to provide more time for bargaining, and requested that another meeting be set (GC Ex. 14). The letter was not received by Mr. Morgan until June 7 (R Ex. I) . Mr. Morgan responded on June 3. He rejected the request for longer meetings because, "Negotiating meetings with you for a period longer than that time (approximately six hours) have not been productive in the past and will not, in my opinion, be productive in the future." (GC Ex. 17.) A meeting was. set for June 18.

On June 14, the Company sent the UFW counterproposals on a number of outstanding issues. The Company offered to maintain its present health insurance coverage for permanent

workers and to institute Western Growers Plan 22 for seasonal employees.

According to David Anderson, the UFW had requested information on the cost to the Company of the current health insurance coverage. About the time of the Company counterproposal, certainly before the June 13 meeting, Mr. Anderson contacted the Petoseed Personnel Manager to obtain this information, as Petoseed handled all of McFarland's accounting. Mr. Anderson decided to run a comparison of the costs of the Company proposal as against the SFK Plan, The comparison was reduced to writing and introduced at the hearing (H Ex. K), although there is no indication that it or its contents were ever presented to the UFW. According to Mr. Anderson's calculations, the current (Perm Mutual) coverage for permanent workers cost the Company $7,420.00 in 1975. Using 1975 figures, Plan 22 would have cost an additional $13»485.00 for seasonal employees, for a total cost of $20, 905.00. The cost to the Company of the RFK Plan would have been 16 1/2 cents per hour for each employee. Although Respondent's Exhibit K is a bit ambiguous on its face, it is clear that the RFK Plan would have cost the Company $4,620.00 for its permanent employees and $l6,500,00 for its seasonal employees, for a total of $21, 120.00, or $215.00 more per year than the Company proposal. It was stipulated at the hearing that the HFK Plan covered all dependents without additional charge, while the Penn Mutual policy required an additional 525,00 per month for dependent coverage, payable by the employee,

6. The fourth bargaining session: June 18, 1976.

Mrs. Huerta had been reassigned by the time of this meeting. Ben Haddock, who had attended all previous meetings, and was, according to the Company negotiators, fully prepared for the task, became the chief UFW negotiator. Mr. Parker, Mr. Anderson, and Mr. Morgan again attended for the Company. This session, unlike the previous meeting, was conducted cordially.

The parties reached final agreement on the Mechanization, Supervisors, Location of Company Operations, and Recognition articles. There was agreement, either at this meeting or the subsequent one, that the UFW's proposed articles on Union Label, Travel and Out of Town Allowance, Camp Housing and Family Housing were not applicable to the Company.

There was discussion but no significant progress toward resolving the differences on the Union Security and Hiring provisions.

Discipline and Discharge was discussed, apparently for the first time. In its April 23 response, the Company had expressed only minor reservations concerning the UFW proposal. At this meeting, Mr. Morgan informed Mr. Maddock that the Company was opposed to the presence of a Union steward at the time an employee was discharged and to presenting the reasons for discharges in writing. Mr. Maddock said that the provisions were important to avoid unnecessary discharges and related disputes, while Mr. Morgan feared that their inclusion would serve only to promote litigation.

The UFW rejected the Company's proposal on medical plans, maintaining that the employees very much wanted the RFK Plan, particularly because most employees already used the Union clinic, which accepted the plan's reimbursement as payment in full for all charges in most cases. Mr. Haddock testified that Mr. Morgan again raised the freedom of choice issue, and that Mr. Haddock again explained. Mr. Haddock felt that Mr. Morgan was confusing the clinic and the plan. The UFW gave Mr. Morgan copies of the RFK, Plan trust documents (GC Ex. 92 and 93) and the Company gave the UFW a summary of the benefits under Plan 22 (R Ex. M). Mr. Morgan had stated chat he wanted proof that the plan was obligated to pay benefits to covered employees.

Mr. Morgan testified that he asked Mr. Maddock if the UFW needed any further information and that there were no requests or complaints about information. The meeting ended amicably with all parties feeling that progress was being made.

7. The period between the fourth and fifth bargaining sessions; June 19 to July 28.

Mr. Parker, desirous of informing the employees of the status of the negotiations, prepared a memorandum, and after clearing it with Mr. Morgan, distributed it (GC Ex. 21(E) and (S)). The memorandum set out the Company's proposals on wages, health insurance, and holidays, while reiterating its opposition to the "good standing" and assessment deduction clauses. It also added the Company's objection to the hiring hall as one of the three (now four) basic UFW pro-

posals with which it could not agree.

On June 23, the Company submitted a number of new proposals (GC Ex. 22) and Mr. Morgan, in a cover letter to Mr. Maddock, stated that agreement on most of the outstanding non-economic issues "should be fairly simple," provided that the UFW was willing to compromise on such issues as "union security, the hiring hall, and discharges for failure to maintain good standing in the union. We are willing to negotiate on any of these matters, but our position is becoming firmer with each meeting. . . ." Mr. Morgan further indicated the Company position that the RFK and other benefit plans should be in a successor agreement, rather than in the initial contract, because the RPK "plan imposes no obligations on the union and gives no contractual protection to the workers, to say nothing of being greatly inferior to .the company proposal." (GC Ex. 23.)

Ben Maddock responded on July 10, 1976, requesting another negotiation session. He reiterated the UFW's and the employees' insistence on the RFK Plan (GC Ex. 74).

8. The fifth bargaining session: July 29, 1976.

The participants at this meeting were the same as at the previous session. There was near or complete agreement on New or Changed Classifications, Health and Safety, Successors and Assigns, and Holidays. There was no agreement, but there were productive discussions, on Seniority and Leaves of Absence.

There was little discussion on the sticky matter of

union security. The Company again rejected the RFK and other benefit plans with little discussion. Mr. Morgan said there had been movement, but that if it did not continue, the Company might retract its agreement to a union shop.

Although Mr. Haddock testified that he was upset by the Company's communication to its employees of June 22, because "it was driving a wedge between us and the workers," he did not mention his displeasure to the Company.

9. The period between the fifth and sixth bargaining sessions: July 30, 1976, to September 19. 1976.

Julian Perez, a permanent employee, part-time lead person, and known strong UFW supporter, testified during the General Counsel's case-in-chief that on July 30, 1976, as he was handing out paychecks, Time Hinojosa said to a. group of five or six employees that "if we would lay off the union stuff, he would pay us what they were paying at Jackson and Perkins." (Jackson and Perkins is a large Kern County rose grower paying wages somewhat higher than Respondent' s.)

Mr. Hinojosa denied categorically that he made any such statement on July 30 or any other date, and said that he had never made anti-union statements to employees. Mr. Hinojosa testified that he distributed copies of Mr. Parker’s June' 22 communication with respect to the Company's wage offer and the status of negotiations to the employees, but that he could not remember being asked any questions about it. Luis Castaneda, an employee identified by Julian Perez as having

been present during Mr. Hinojosa's remarks, strongly denied having heard Mr. Hinojosa say anything of that nature.

On rebuttal, the General Counsel called a number of witnesses on this issue. According to Octavio Gonzalez, when Timo came around with the checks, at about 2 p.m., Mr. Gonzalez asked him when the employees were going to get a raise. Timo allegedly replied that the Union couldn't get the employees a raise, but that if the employees hadn't favored the Union they would be making as much as Jackson and Parkins paid. Mr. Gonzalez said that Luis Castaneda was in the area, but not too close, and that he had not worked on July 30. He had come in during the afternoon and was wearing dress clothes. Mr. Gonzalez further testified that Timo had said, in June 1976, that if employees talked to Union organizers, they would probably not have a job any more.

Mr. Hinojosa's son, Jose Juan Hinojosa, corroborated Mr. Gonzalez' testimony. Jose was working in the same crew with Julian Perez and Octavio Gonzalez. According to Jose, his father said, in response to a question about wages, that "the low wages are on account of the union. The union doesn't let us increase the wages. If it were not for the union, you'd be making as much as at Jackson and Perkins." Jose also confirmed that Luis Castaneda had not worked that day, but was "dressed up like going out, with new boots."

Another employee, Jesus Torres, testified on direct examination that Timo said "if we weren't involved in a strike we'd get the same as Jackson and Perkins." On cross-

examination., Mr. Torres said that Mr. Hinojosa said "if we didn't support the union, the chances were we'd get the same as Jackson and Perkins."

All three employees said that Mr. Hinojosa hadn't made them any promises and all three placed Robert Gallardo at the scene, although Mr. Gallardo claimed he had left that morning to go on vacation in Mexico.

I find that the employees' testimony is more credible than Time's. Jose Hinojosa was an especially clear and firm witness who contradicted his father on a number of matters while Timo was in the hearing room. Jose is still working for the Company.

On August 19, Ben Haddock mailed UFW proposals on five articles (Grievance and Arbitration, Discipline and Discharge, Leaves of Absence, Maintenance of Standards, and. Hours of Work and Overtime) to Mr. Morgan, along with a request for another bargaining session (GC Ex. 28 and 29). On August 26, Mr. Morgan sent Mr. Maddock "a slightly revised wage proposal." The Company wanted to implement the new rates at the beginning of the fall season, subject to continuing negotiations. Mr. Morgan assumed that "you have no objection to using these new rates pending the conclusion of our contract negotiation, and we can handle these like we would the wages for the tiers and the budders."(GC Ex. 31.) Mr. Morgan testified that he was referring to the UFW's non-objection to the bonus and incentive plan in April. Mr. Parker said that the new wage proposal was sent to the UFW well in advance of the beginning of the.

fall season to give the UFW plenty of time to evaluate it.

At just about this time Mr. Haddock was transferred to another assignment. He had attended every session to date. Responsibility for the negotiations was turned over to Barbara Macri. She received Mr. Morgan's letter and forwarded it to David Burciaga, head of the UFW Negotiations Division.

Mr. Burciaga wrote Mr. Morgan on September 9, informing him that Barbara Macri would be replacing Ben Maddock and "that the Union does not approve of any wage changes. We believe that wage changes should be negotiated and made part of a total Collective Bargaining Agreement." (GC Ex. 32.)

Ms. Macri phoned Mr. Morgan on September 13. Mr. Morgan was quite upset about the change in UFW negotiators, noting in a letter to Ms. Macri later in the day that she would be "the fourth person so designated by the union." Mr. Morgan was further dismayed by the 21/2 week delay in getting a UFW response to his request for a meeting. (This was the only occasion in 1976 in which the Company requested a bargaining meeting.) Mr. Morgan rejected the August. 19, UFW proposals, with the exception of the Grievance and Arbitration proposal, which was accepted in large part. Mr. Morgan characterized the proposals as a "rehash" of previous positions. A meeting was set for September 20 in Delano (GC Ex. 33).

10. The sixth bargaining session: September 20, 1976

Like the May 24 session, this final meeting of 1976.

was marked by rancor. Ms. Macri testified that she had reviewed the negotiation files with Ben Maddock and was prepared for the meeting. A full-time employee of the UFW since late 1969, Ms. Macri had worked closely with Mrs. Huerta on previous negotations with other employers, and had particular expertise in the areas of grievances and the hiring hall. She had known JuaraGarcia, a Company employee and member of the employee negotiating committee, for several years.

Ms. Macri said that she entered the meeting hoping to discuss the proposals of July 19, which had been rejected, to better understand the Company's objections. Mr. Parker, Mr. Andersen, and Mr. Morgan again represented the Respondent.

Ms. Macri agreed to submit a new proposal on Grievance and Arbitration. She presented a new proposal on New or Changed Classifications, which Mr. Morgan was reluctant to discuss, because it had not been presented in writing prior to the meeting. There was discussion on the timing of submission of disputes to arbitration. At first the Company wanted a 90-day period to experiment before submission, but Mr. Morgan then offered to go down to 60 days. When Ms. Macri said that 60 days was still too lengthy a period for seasonal employees, Mr. Morgan reverted to his prior 90-day stance.

The Company negotiators said they were very eager to get UFW approval for an October 1 wage increase and were hopeful that approval would be forthcoming despite Mr.

Burciaga's letter. The Company sought UFW permission to institute the new wage rates with the understanding that they would be subject to further bargaining. Mr. Parker, said he doubted there could be any resolution on the benefit fund proposals before the hiring season began.

The UFW negotiating team caucused to discuss the issue. When the meeting resumed, Ms. Macri stated that the workers were insisting on the RFK plan, that fringe benefits were more important than wages, and that the UFW would not agree to the wage proposal apart from resolution of the other economic issues.

Exactly what happened next is, to some extent, in dispute. But there is general agreement that Mr. Morgan said that the UFW position on the wage proposal was selfish, that Mr. Parker said he couldn't understand how the UFW could possibly refuse a 40-cent per hour wage increase, and that the Company questioned the UFW and Ms. Macri's competence to represent the employees. Mr. Morgan further said that Ms. Macri was unprepared for the negotiations, although he admitted at the hearing that he knew nothing of her background. Ms. Macri said that 100% of the employees wanted the RFK Plan, Mr. Morgan stated that he knew as much as Ms. Macri about farm workers. Although Mr. Parker understood Ms. Macri to be talking about the three benefit funds in general, he could remember no specific discussion of the funds other than the RFK Plan. Several members of the employee negotiating committee were present at the meeting.

After the argument about wages, the parties briefly discussed Discipline and Discharge, Leaves of Absence, on which some serious bargaining apparently occurred, and Maintenance of Standards.

The UFW refused to discuss Hours and Overtime until, the ocher economic issues were resolved. According to Ms. Macri, Mr, Morgan accused her of not really wanting a contract.

Ms. Macri said the meeting was unproductive, that either side could be in touch, and left. There were no substantive agreements at the meeting.

Mr. Morgan testified that Ms. Macri had seemed unprepared and had taken the discussion personally. Ms. Macri characterized Mr. Morgan's remarks as insults and said it was her practice not to prolong contentious meetings, but to allow time for both sides to cool off.

11. The period from September 21, 1976, to January Z8, 1977.

During this four-month period there were no bargaining meetings and no requests for meetings were made by either side. As this period progressed the parties appear to have conducted themselves more with an eye toward litigation than bargaining.

Mr. Morgan promptly wrote to Ms. Macri on September 21, the day after the meeting, to reiterate the Company's positions and to inform her that negotiations were apparently at an impasse. Therefore, the Company intended to put its August wage proposal into effect (GC Ex. 34).

Mr. Parker testified that he had had no serious understanding of the legal effect of an impasse or of its existence until .he talked to Mr. Morgan after the conclusion of the September 20 meeting. However, in a report to the Ball board written in August, Mr. Parker had declared:

> LABOR RELATIONS - Negotiations with the UFW are close to being at an impasse. The remaining issues are such that, unless the union drastically changes its position, any real agreement seems unlikely. McFarland has notified the UFW of our intent to raise "our starting wages from $2.75/hr. to $3.15/hr. and we are now waiting to hear back from the union on this proposal. It appears likely that the union will attempt to strike during the harvest, shipping season. We are presently working on contingency plans to deal with this possibility. (GC Ex. 78.)

Mr. Parker stated that a potential strike was not a factor in his decision to implement the wage increase. Fall was the usual time to give employee raises, and, because several other rose growers in the county were going to raise their wages, it was necessary for McFarland to keep pace to stay competitive. Without an increase, he feared that he might not be able to attract skilled workers and might lose some of his permanent employees. Mr. Parker testified that the only skilled workers employed during the fall season were the de-eyers, although workers tended to improve their performance in all job categories as they gained experience.

Mr. Morgan testified that it was his opinion that there was a general impasse in bargaining. Specifically, the parties were deadlocked on wages, the benefit funds,

holidays, union security, and hiring. He told Mr. Parker that the wage increases could be instituted, but that he should do so only if it were essential. Mr. Morgan testified that the RFK Plan was still a substantial economic issue despite the Company's offer to extend coverage to seasonal employees. The Company's position on the benefit funds was absolutely firm. According to Mr. Morgan an impasse had quite clearly been reached on the RFK Plan on May 24. Mr. Morgan accepted as a fact by September 20 that the employees preferred the RPK Plan to the Company's proposals.

Ms. Macri reiterated the UFW's opposition to the wage increase in a letter to Mr. Morgan. She conceded that the parties were far apart on the major contract issues, but suggested that he contact the attorney for the three benefit funds for answers to any legal questions (GC Ex. 35). Ms. Macri testified that she did not believe that the parties were at impasse because there had been no opportunity for good-faith bargaining to reach a deadlock.

On October 1, Mr. Morgan wrote to Ms. Macri, stating that the Company's rejection of the benefit funds "in no way depends, on their legal status." Mr. Morgan testified that he didn't feel that it was necessary to pursue obtaining information on the legal aspects of the funds during the impasse. The letter informed Ms. Macri that the Company, intended to institute the higher wage (GC Ex. 36).

The wage increases were implemented effective October 2, and were announced to the employees in a memorandum from

Duncan Hanson dated October 1 (GC Ex. 38("£) and (S)). The UFW filed its first unfair labor practice charge in this case on October 12 (GC Ex. 1-A).

On October 15, Ms. Macri sent Mr. Morgan a comparative evaluation of the costs and benefits of the various medical plan proposals on the bargaining table. She concluded that the total cost of the UFW proposal (the RFK Plan for all employees) would save the Company nearly $3,500.00 a year over its proposals (GC Ex. 39). She further stated that, according to UFW records, a substantial majority of Company employees used the UFW medical clinic in Delano. She claimed that S27 of the permanent workers, those covered by the Company plan, had made use of the clinic. At the hearing. Mr. Parker testified that he had no reason to doubt Ms. Maori's figures. Mr. Morgan testified that he was surprised by nothing in her letter.

On October 18, Mr. Morgan sent another long letter to Ms. Macri about the benefit funds (GC Ex. 4-0). He declared that the parties had been at an impasse on the funds for many months, questioned the legality of the plans, stated that the Company's position had nothing to do with the plans', legality, and complained that the attorney for the funds had not supplied him with information. Along with the letter, Mr. Morgan enclosed an unfair labor practice charge against the UFW, alleging that:

> Since on or about April 6, 1976 . . . (the UFW has) refused to bargain collectively in good faith with McFarland Rose Production, particularly in bargaining to an impasse over non-mandatory

> and unlawful demands , including the bargaining proposal for the Martin Luther King and the Juan de la Cruz Plans, by changing its bargaining agents, and giving its bargaining agents no authority.(GC Ex. 89.)

A week later Mr. Morgan sent Ms. Macri yet another letter setting out fourteen objections to the RFK Plan. "Therefore," wrote Mr. Morgan, "our rejection of your proposal stands." Then he indicated that the RFK Plan was not the most important issue, and that if it were the only obstacle to agreement, he would recommend that his clients-reevaluate their position (GC Ex. 42).

On November 9, Frank Denison, the attorney for the RFK Plan, sent Mr. Morgan a lengthy response to Mr. Morgan's letter, pointing out that many of the concerns he raised were answered by the terms of the trust documents which Mr. Morgan had received on June 18. Mr. Morgan thanked Mr. Denison for the letter, indicating it was in response to his request for information of April 7, 1976. Mr. Morgan was asked on direct examination if he had requested information from the UFW on April 7. He mentioned a couple of items but said nothing about the RFK Plan. All parties agreed that there was no substantive discussion of the UFW proposals on April 7. There is no evidence in the record to indicate that such a request was made on April 7.

Later in November Mr. Denison asked Mr. Morgan to specify his concerns with respect to the other two funds (GC Ex. 46). Mr. Morgan rejected Mr. Denison's offer of information on December 14, stating that "these are matters

for the collective bargaining parties."(GC Ex. 50.)

Sometime around the end of 1976, the UFW filed a petition to extend its certification, pursuant to Section 1155.2(b) of the Act. Mr. Morgan requested an extension of time to file the Company's response, in a telegram to the Executive Secretary of January 13, 1977. In his request Mr. Morgan stated that "the UFW will suffer no prejudice under such, an extension. It was the union which broke off the last negotiating session, and it has never requested another meeting. The employer continues to stand ready and willing to resume negotiation in good faith at any time." (GC Ex. 52.)

12. The period from January 29. 1977, to June 2. 1977.

In January, 1977, Richard Chavez once again became director of the UFW office in Delano. On January 29, he wrote Mr. Morgan requesting a meeting date during the week of February 14. No meeting was held and no proposals were submitted until June 3.

Although expressing skepticism about the UFW's interest in bargaining, Mr. Morgan quickly agreed to meet. Because of various problems in scheduling on the part of Mr. Parker and Mr. Morgan, no meeting could be arranged until February 25. Mr. Morgan testified that he might have been available to meet prior to February 14, but that he was not asked and did not volunteer the information. In confirming the February 25 date Mr. Morgan warned Mr. Chavez that he would be litigating an ALRB case in Salinas (Rod McLellan) which might run over onto the 25th. On February 24, Mr. Morgan sent a telegram to Mr. Chavez cancelling the meeting because

he was litigating another case (Kuramura) in Salinas. Apologizing, Mr. Morgan promised to contact Mr. Chavez soon and set up another meeting. Mr. Morgan wanted "to emphasize the fact that the Company remains willing to negotiate in good faith." (GC Ex. 59.)

Allyce Kimberling, who works as a paralegal for the UFW in Salinas, testified that she was representing the union in the Kuramura case. She stated that Mr. Morgan volunteered on February 25 that: "Even if this hearing isn't worth much, at least I didn't have to meet with Richard Chavez in Bakersfield." Mr. Morgan admitted making the remark, but said-that it was an offhand remark, made late at night, to inject some levity into a tedious process of inspecting records.

Mr. Morgan explained at the hearing how he came to have a double scheduling problem in Salinas, with hearings set in both the Kuramura and Rod McLelLan cases, how he went to Sacramento twice to try to untangle the matter directly with the General Counsel, and how he felt, at the time he scheduled the February 25 meeting, that the Kuramura matter would probably be continued, even though the hearing had been set on January 28 for February 23 and successive days (GC Ex. 86.)

The certification of the UFW expired on March 2, 1977. On March 6, Mr. Morgan regretfully informed Mr. Chavez that "We believe that since the certification year has expired, it would not be lawful for us to bargain at this time, absent some action on your petition.'' It was unfortunate that Mr. Chavez had insisted on the February 25 date rather than "an alternate firm date the following week." (GC Ex. 60.) Mr.

Morgan, explained at the hearing that, although he was not certain, it was his opinion that Sections 1153 (f) and 1155.2 (b) of the Act, taken together, made it unlawful for the Company to continue to bargain with the UFW. He feared that his client might be committing an unfair labor practice if it continued to bargain. He sought help from the General Counsel and the Executive Secretary, but none was forthcoming.

Mr. Parker testified that he was aware in February that the certification year was about to end, and that he doubted that an agreement could be reached in one meeting, given the differences between the parties.

On March 9, Mr. Morgan sent another letter to Mr. Chavez explaining that he had not drafted the telegram of February 24, and that the associate who did draft it was unaware of the imminent expiration of the certification year. The Company made no effort to inform the UFW of its legal opinion concerning its bargaining obligation at any time before March 8.

The Board granted the UFW's motion to extend certification on March 30, 1977. On April 6, Dolores Huerta renewed the UFW's bargaining request (GC Ex. 62). The Company then filed with the lioard a motion for reconsideration of the extension. On April 14, Mr. Morgan replied, and refused to meet, stating that "We would prefer not to meet until we get some ruling on that motion." (GC Ex. 63.) Mr. Morgan testified that he felt the Board's order extending certification was an abuse and that filing a motion for reconsideration of the order negated the Company's duty to bargain. Therefore,

the Company was justified in not bargaining until the Board acted.

In Kaplan's Fruit and Produce Co.., 3 ALRB No. 28, decided on April 1, 1977, the Board held that an employer's obligation to bargain with a certified labor organization did not expire at the end of the certification year, even in the absence of an extension of certification. Six weeks, later, on May 10, 1977, Mr. Morgan wrote to the UFW expressing a willingness to bargain in light of Kaplan. Mr. Morgan explained that he had been out of the country on vacation, and had not become aware of the Kaplan decision until early May.

Mr. Parker testified that he received the initial complaint in this case (GC Ex. 1-E), dated April 27, 1977, and the initial notice of hearing (GC Ex. 1-G), dated May 9, 1977, before Mr, Morgan informed him of the Kaplan decision, but that the issuance of the Complaint and notice was unrelated to the decision to resume bargaining.

13. The 1977 bargaining sessions: June 3, 1Q, and 22 and July a, 9, and 10.

Mr. Chavez, in a letter of May 19, suggested a number of possible meeting dates, including two in May. The Company selected June 3 to meet.

The parties held three bargaining sessions in June. The hearing in this case commenced on June 28. All parties represented to me that progress was being made in the negotiation and that, while there were still substantial differences, a two-week continuance might lead to a contract and settlement

of the unfair labor practice charges. The motion for continuance was granted and the parties met again in July. More progress was made, but no agreement was reached.

Very little testimony was presented concerning the 1977 bargaining meetings. Mrs. Huerta and Mr. Parker agreed that concessions had been made on both sides Mrs. Huerta was of the opinion that there were no "real" obstacles to an agreement. She testified that Mr. Morgan retracted the Company's prior agreement to a union shop clause, stating that UFW should have accepted it earlier.

By the close of negotiations on July 10, 1977, there had been formal agreement on 23 articles of a proposed agreement, including the RFK Plan, as originally proposed by the UFW (R Ex. L). The parties agreed that four articles of the original 41-article UFW proposal were inapplicable to the Company and would not appear in any contract(R Ex. H). On July 10, the Company restated its rejection of the Martin Luther King and Juan de la Cruz Plans and submitted its "final" proposals on the other seven articles not yet agreed upon (R Ex. H). The Company's "final" proposal on wages does not appear in Respondent's Exhibit H. It was embodied in an oral modification of General Counsel Exhibit 73. It is Respondent's position that the parties are at an impasse; the UFW did not express an opinion on this issue.

C. The Non-Bargaining Issues.

1. The discharge of Rafael Gonzalez. Rafael Gonzelaz was hired to work at McFarland in

November, 1973, by Time Hinojosa. He apparently worked without incident until he was apprehended by the U.S. Border Patrol and deported, probably late in 1974. Mr. Gonzalez was rehired some time in mid-1975. The facts concerning the declarations he signed after the representation election are set out in Section IIB.l of this decision.

Mr. Gonzalez had worked in a variety of jobs at the' Company, both in the fields and in the sheds, by the time of the election. Near the end of 1975, he was working in the processing shed, under the supervision of Robert Gallardo. hr. Gallardo testified that Mr. Gonzalez' work performance began to deteriorate, that he moved Mr. Gonzalez from position to position without any improvement, and that he was prepared to fire him. Mr. Gallardo spoke to Mr. Hinojosa who agreed to try Mr. Gonzalez back in the fields.

According to Mr. Hinojosa, it was a constant effort to get Mr.- Gonzalez to do his fair share of the work. Mr. Gonzalez drank beer during working hours on several occasions, in violation of Company policy, and Mr. Hinojosa had been told by several employees that Mr. Gonzalez had bragged about his ability to get away without doing much work.

On July 9, 1976, according to Mr. Hinojosa, Mr. Gonzalez and three other employees were drinking beer by the edge of the field about 2 p.m., an hour before quitting time. The men refused Mr. Hinojosa's orders to return to work, saying they had finished their work. Mr. Hinojosa fired Rafael Gonzalez and the three other employees.

Mr. Gonzalez denied much of Time's testimony. He admitted that he and the three others were resting by the side of

the fields before 3 p.m., but denied that they were drinking beer. He claimed that Time had separated the four of them from two other employees in the crew, earlier in the day, and had forced them to perform more work than was customary. As a result of this speed-up, the men had finished early and were resting.

On the following Monday, Mr. Gonzalez tried to get written reasons for the discharge, but was unsuccessful. He was told that he had been fired for drinking beer.

2. The alleged failure to rehire Sally de la Rosa.

Sally de la Rosa first worked for McFarland in 1973, as a de-eyer. She worked the whole season. In 1974, she was telephoned by Timo Hinojosa, who informed her that the de-eying was about to begin. She worked the entire season. Mrs. de la Rosa testified that Timo telephoned her in the fall of 1975, again to inform her of the availability of work. Mr. Hinojosa denied that he called any employees in 1975, because the supervision of the shed employees had been turned over to Robert Gallardo. Mrs. de la Rosa worked the entire season in 1975.

Mrs. de la Rosa was a strong UFW supporter during the election campaign and was known as such by McFarland management. She attended at least one of the bargaining sessions.

When the Company was unable to renew its lease on the shed in McFarland, it leased another shed in Wasco, some time near the middle of 1976. Mrs. de la Rosa testified that she knew the de-eyeing would take place in Wasco, but that she did not know the location of the shed.

When Mrs. de la Rosa was not contacted by the Company to return to work in 1976, she assumed that she was not wanted. She had heard rumors that the Company didn't want to rehire union supporters. Although Mrs. de la Rosa knew how to contact the main Company office in McFarland, she made no effort to do so. She did not work at the Company during the 1976 season.

Mr. Gallardo testified that Mrs. de la Rosa was a good or average worker and that he would have been happy to rehire her in 1976. Although he didn't telephone any of the 1975 employees, he did ask Julian Perez and Juana Garcia, both UFW supporters, to spread the word. In 1975, there were 26 employees in the de-eyeing crew. Only two of them were rehired in 1976. Mr. Gallardo said that he expected that it would take a while for the employees to find the new shed, so he decided to set aside ten positions for the former workers. It was Company policy to give hiring preference to good workers with seniority. Although he was surprised that only two of the 1975 workers had returned, he made no additional effort to recruit them. Mr. Gallardo could think of no reason why the workers didn't return, unless it was because they wanted to start new trouble." Two members of Mrs. de la Rosa's family worked in the Company shipping shed in McFarland during the fall 1976 season.

3. The refusal of the digging crew to work on January 3, 1977.

The Company employs a crew of between 15 and 20 men to harvest rose plants. A tractor first loosens the earth to

enable the men to pull out the plants. A worker can ordinarily pull out three or four plants at a time.

The morning of January 3, 1977, was thoroughly unpleasant. It was cold and, more important to the crew, the ground was muddy and slippery. Under such conditions, it is hard to get a firm footing, and a worker is more likely to slip and fall, or injure his back while pulling, than would be the case in dry weather.

Several weeks earlier, under similar weather conditions, Timo Hinojosa had let the crew leave early. As the workers arrived on January 3, they began to discuss the situation among themselves. They were generally aware of some previous back injuries among crew members (UFW Ex. 4, 5, and 6). The men informed Rafael Barron, the crew's lead man, that they didn't want to work because of the mud.

When Timo arrived, he told the men that they should try to work, but if they didn't want to work they could go home for the day. Shortly thereafter, while the men were still standing around, Dune an Hanson arrived. He and Timo discussed the situation. Mr. Hanson was worried that three rows of plants, whose roots had already been exposed by the tractor, might freeze if allowed to remain outside overnight. Further, if more plants were not harvested, the workers in the grading shed would run out of work by noon. Third, if the weather got even worse, it might not be possible to resume the harvest for several weeks. And there were only a few days' work remaining in the season. Although it was a close decision, Mr. Hanson told Timo to inform the workers that the work had

to be done, and to explain why.

After this discussion, Timo addressed the workers again. Exactly what he said, and what he meant by what he said, is hotly disputed. According to Timo, he urged the workers to stay and work, but said that if they weren't going to work they should go home. Ail but one or two went home. The 16 men who refused to work are named in General Counsel Exhibit 91. Timo was disappointed but expected the men to return the next day.

The generally consistent testimony of a half dozen members of the crew, including Jose Hinojosa, who did not go home, is that Timo at first agreed that it was too wet to work. After talking with Duncan Hanson, Timo told them that they had to work, and that if 'they didn't they should go home, because they had no more jobs. He also, said that if the workers wanted more money they weren't going to get it. Everybody agreed that Timo never used the word "fire." Jose Hinojosa thought that his father had fired the crew. "Ke said not to come back. To me it's the same thing."

After the crew left, women employees were brought in from the sheds to harvest the plants. None had ever done this kind of work before. A few employees were obtained from the State Employment Service and the harvesting was completed by the end of the week.

The Company sought legal advice from its attorney oh the situation and was informed that it could not hire replacements. Mr. Hinojosa and Mr. Hanson testified that they expected and hoped that the crew would return the next day,

because the work had to be done. They had no intention of firing the crew, even though it had refused to work.

On January 4, at least one member of the crew, Jose Socorro Baca, did come back to the fields. He testified that Timo told him to get his check. "Then I knew I was fired." Time denies having seen Jose Baca on January 4. Rafael Barren testified that Jose Baca arrived at 7:30 or 8 a.m., well after starting time, and asked to work, Mr. Barren told him he'd have to speak to Timo, which, he said, was Company policy for workers who arrived late. Jose Hinojosa testified that he and Jose Baca arrived at the field at about the same time on January 4, about ten minutes before the starting time. Mr. Baca was laughing. "I just wonder if he'll (Timo) give me a job."

Rogelio Avila Romero testified that he also returned on January 4. He spoke to Timo, who allegedly said: "What did you come back for? I had intended to give you a steady job." Because this was rebuttal testimony, there was no opportunity for Timo to give his version. He did testify that no member of the crew was asked to return.

I credit the testimony of the employee witnesses and discredit that of Timo Hinojosa and Dun can Hanson. Both men, and particularly Timo, went to great lengths to say that no matter of employee insubordination would lead to discharges. They said they were eager for the crew to return, but rebuffed Jose Baca, one crew member who tried. There is no dispute that Mr. Baca did return to the field, and, again, I found Jose Hinojosa's testimony especially persuasive.

4. The alleged constructive discharge of Jose Baca.

Mr. Baca had also worked as a budder during the 1976 season. Of 17 budders, he and another employee, Rafael Gutierrez, ranked fifteenth and sixteenth in terms of the percentage of their grafts that took, according to David Anderson. The Company had decided not to rehire the worst budder if he returned. He did not Duncan Hanson had told Timo Hinojosa to tell Jose Baca and Rafael Gutierrez that their work would nave to improve, but that they would be rehired. Timo so informed Mr. Baca when he began work on April 1, 1977. According to Mr. Baca, Mr. Hinojosa added that if he made any mistakes he'd be fired. Mr. Hinojosa denied making the statement. Mr. Gutierrez also returned to work, was told he'd have to improve, and stayed the whole season. Mr. Baca quit after one day's work because he feared that he would be fired.

DISCUSSION, ANALYSIS, AND CONCLUSIONS

I. The Bargaining Issues.

Section 1153(e) of the Act makes it an unfair labor practice for an agricultural employer "to refuse to bargain collectively in good faith" with a labor organization certified by the Board as the exclusive bargaining agent of its agricultural employees. The content of the duty to bargain is set out in Section 1155.2(a) as:

> the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Both provisions are virtually identical to their NLRA counterparts and have been the subject of an enormous body of NLRB and court case law over the past 40 years. The law recognizes two main categories of bargaining violations: (1) So-called "per se" violations, which constitute a failure to bargain in fact, standing alone, and regardless of motivation, and to which there are very limited legal defenses, and (2) bad-faith bargaining, which involves a determination by the trier of fact, after consideration of the entire record, that the conduct of the party, both at the bargaining table and away from it, is, taken as a whole, inconsistent with its statutory duty to bargain with an open mind and "with a bona fide intent to reach an agreement if agreement is possible." Atlas Mills, 3 NLRB 10, 21, 1 LRRM 60 (1937).

This case involves allegations of both per se and bad-faith violations.

A. Respondent's Conduct Prior to the Violation Period

The UFW filed its first unfair labor practice charges against the Respondent on October 12, 1976. Section 116Q.2 of the Act provides that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." While Respondent's conduct prior to April 12, 1976, therefore cannot constitute an unfair labor practice, evidence of such conduct is admissible and relevant as background to "shed light" on subsequent acts. NLRB v. Anchor Rome Mills, 228 F.2d 775 (5 Cir., 1956); H. K. Porter Co. 153 NLRB 1370, 59 LRRM 1462 (1965), aff'd. sub, nom. United Steel Workers v. NLRB, 363 F.2d 272 (B.C. Cir. , 1966) , cert, den. 335 U.S. 851(1966); and NLRB v. MacMillan Ring-Free Oil Co. 394 F.2d 26 (9 Cir., 1968), enforcing in part 160 NLRB 877, 63 LRRM 1073 (1966).

John Barker's reports to the Ball board, along with his explanatory testimony and that of Mr. Morgan, clearly establishes that the Company, if not. dragged kicking and screaming, went to the bargaining table with the intent to bargain only passively, not give up any management prerogatives, and to delay negotiations as much as possible. Mr. Parker conceded that, despite his technical objections to the Board's challenged ballot procedure and his feeling that the election may have been "stacked" by the UFW, he had no reason to

assume that the results of the representation election did not reflect the true desires of the majority of the Company's agricultural employees. After the election had been certified, with the Respondent prevailing on its argument that the grading and packing operations were "commercial" and not "agricultural" in nature, it still took Mr. Parker and Mr. Morgan a month to decide to bargain with the UFW, rather' than assert their technical objections to the courts, simply to delay the onset of negotiations. Respondent argues that the decision to enter into bargaining should be seen as an indication of good faith. However, Mr. Morgan, as an experienced labor attorney, knew that if the Company ultimately was unsuccessful in its attempt to overturn the certification, as he expected it would be, the duty to bargain would not have been suspended pending court review. Kingsbury Electric Cooperative, Inc.. v. NLRB, 319 F.2d 387 (8 Cir., 1963)(good faith not available as a defense in bargaining cases where based upon an erroneous view of the law); and Old King Cole, Inc.. v. NLRB. 260 F.2d 530 (6 Cir., 1958)(filing of a petition for review does not act as a stay of NLRB certification). As a result, the Company would have been liable to the Board's potent remedies for its delaying tactic. See Resetar Farms, 3 ALRB No. 18 (1977).

The Company's campaign to exclude the "commercial" shed operations from the bargaining unit, including, as it did, the signing of a perjured declaration by Rafael Gonzalez, tells something of its unwillingness to accept the requirements of the Act and the Board's authority. Indeed, Mr.

Parker testified that tie expected to lose on the shed issue because of the anti-employer nature of the Board.

Finally, Mr. Parker directed that an employee Ranch Committee be established in March, 1976, subsequent to the UFW's certification, for the purpose of discussing employee complaints. One meeting .was held in March. The Committee was disbanded, upon the UFW" s demand, after the April 7,' 1976, meeting. This episode demonstrates that the Company had not accepted the cardinal principle of exclusive representation by the UFW. Establishment of the Ranch Committee was a clear attempt to bypass the UFW and undermine its authority on the very eve of bargaining, and, had it occurred during the violation period, might have constituted an independent violation of Section 1153 (b) of the Act. Sunny-side Nurseries, Inc., 3 ALRB No. 42 (1977).

The pre-bargaining and pre-violation period conduct of Respondent demonstrates an unyielding hostility toward the fundamental principles of good-faith collective bargaining. Respondent clearly entered negotiations unreconciled to the UFW victory and with the intent to delay and frustrate bargaining as much as possible.

B. The Implementation of the Bonus and the Incentive Plan.

The Budders and Tiers incentive plan was announced on April 13, 1976, and the bonus for 1975 work was paid on April 16, just after the beginning of the violation period. Both the incentive and the bonus constitute wages and are mandatory subjects of collective bargaining.

The General Counsel argues that the Company actually instituted the incentive and the bonus prior to the first bargaining session, by informally communicating the contents of the plans to some employees in March. According to this reasoning, the plans were put into effect unilaterally by the Company, without an offer to bargain with the UFW, and thus constitute a per s_e violation of the duty to bargain in good faith, pursuant to the doctrine of NLRB v. Katz, 369 U.S. 736 (1962).

The Respondent contends that the plans were instituted in the fall of 1975, negating any duty to bargain or, in the alternative, that they were not implemented until after the April 7 negotiation session, where the UFW either agreed to their institution, or waived its right to bargain.

John Parker and David Anderson testified that the plans had their genesis in the summer of 1975, and were in final form by that fall. But there is no substantial evidence that any announcement was made to employees before the UFW certification. The decision to implement the plans was not memorialized in any manner in 1975. I conclude that the Respondent had the duty to bargain with respect to the plans prior to their Institution.

While the General Counsel urges that this issue be analyzed in terms of a per s_e_ violation, I find that the context is too complex to be viewed in such a manner. Katz prohibits unilateral changes in mandatory subjects of bargaining without notice to the union. Here, the Company undoubtedly informed the UFW of its desire to institute the

changes in advance of their implementation. As I view it, the issues are whether the Company gave the UFW sufficient notice and whether the Company's conduct at the bargaining table on April 7 constituted an offer to bargain or the presentation of a fait accompli.

The test governing the first issue, according to Cone Mills Corp., 372 F.2d 595 (4 Cir., 1967), cited by the Respondent, is ". . . whether in the light of all the circumstances there existed reasonable opportunity for the Union to have bargained on the question before unilateral action was taken by the employer." 372 F.2d at 599. Here, the UFW was presented with two complex plans, each computed according to a separate formula, at its first bargaining session ever with the Company, and was told that they were to be instituted almost immediately. After less than a half hour of discussion, Julian Perez, an experienced budder, seemed to understand the incentive plan, although it was complicated for him, but Mr. Morgan did not understand it. Later in the year, after the parties had some bargaining experience with each other, the Company thought it was important to send the UFW its revised wage proposal well in advance of its intended implementation in order to give the UFW plenty of tine to evaluate it. The Company could have easily notified the UFW a month in advance of the April' 7 meeting of the contents of the plans and its desire to implement them, but it chose not to do so.

It seems to me that, in light of all these circumstances, the UFW was not afforded a reasonable opportunity to bargain

on the bonus and incentive plans prior to their implementation. While Respondent's conduct on this issue may not constitute a violation of the Act standing alone, its actions appear inconsistent with a desire to bargain meaningfully, and are rather consistent with a fixed intent to unilaterally change its employees' wages while observing in an exceedingly grudging manner, and almost as an afterthought, the bare form of its legal obligations to bargain.

As to the issue of whether the UFW waived its right to bargain about the bonus and incentive plans, or whether it in fact approved them, the considerations just discussed largely govern. Without having been afforded a reasonable opportunity to bargain meaningfully the UFW could hardly be held to have waived its rights or agreed to the plans. Mr. Chavez' testimony that he felt there was little he could do on April 7 without appearing to be taking money out of his constituents' pockets is persuasive on this issue. See C & C Plywood Corporation, 163 NLRB 1022, 64 LRRM 1488 (1967), Nor is there any evidence that the Company sought to share credit for the bonus and incentive with the UFW.

C. Respondent's Subsequent "Clarifications" of its April 23, 1976, Proposals

In its April 23 response to the UFW's initial proposal, the Company stated that several proposals were "satisfactory" or "acceptable" "except for" certain provisions. As to union, security, the proposal was satisfactory except for the check-off provision, with explicit reference to the deduction

of assessments. Discipline and Discharge was acceptable except that the Company wanted to limit the number of hours a Union steward could spend on Union business to three per week. Similarly, the proposal on Leaves of Absence was acceptable except for two limitations which the Company demanded.

Mrs. Huerta testified that she was encouraged by the April 23 proposals. None was discussed in detail on May 7.

On May 24, however, the Company began a process of "clarification" and elaboration of its responses on Union Security, Discipline and Discharge, and Leaves of Absence. For the first time, Mr. Morgan informed the UFW of the Company's objection to the "good standing" provision of the Union Security provision. In its May 13 and May 24 proposals, the Company placed much more stringent limitations on leaves of absence. In its June 14 proposal, and at the June 18 meeting, the Company expressed its opposition to giving the reasons for discharges to the UFW in writing and to permitting the presence of & Union steward at discharges.

Mr. Parker testified that he was aware at the time the April 23 proposals were drafted that the Company opposed the "good standing" clause and had serious reservations about the Discipline and Discharge and Leaves of Absence articles. However, he felt that the April 23 response was good enough as a "starting point" for negotiations. Respondent also makes a legal argument that the April 23 language does not imply acceptance of provisions by omission.

Mr. viorgan, an experienced labor attorney, was deeply

involved in the formulation of the April 23 proposals. The common-sense reaction to an acceptance with specified exceptions is that the exceptions constitute the only areas of disagreement. If the Company had failed to make its position clear on only one or two matters, or on relatively minor matters, this issue would be insignificant. But it occurred on a number of proposals other than those I have mentioned, and on issues of great significance to the parties. Indeed, there is still no agreement on the Union Security and Discipline and Discharge items.

At best, the Company's failure to state its true position in its April 23 proposals is a demonstration of very sloppy work, inappropriate to a serious business transaction.“ . . . (T)he Respondent's good faith . . . may be tested by considering whether it would have acted in a similar manner in the usual conduct of its business negotiations." Reed &Prince Mfg. Co.. 96 NLRB 850, 853, 28 LRRM 1606 (1951),enforced sub, nom. NLRB v. Reed & Prince Mfg. Co. , 205 F.2d 131 (2 Cir., 1953), cert, den. 346 U.S. 887 (1953). At worst, the Company's concealment of its positions on critical bar gaining issues for one or two months constitutes deliberate misrepresentation of its true views, wholly inconsistent with its bargaining obligation, and at a time when the Company was concerned about a strike.

D. Respondent's Direct Communications with its Employees Regarding Bargaining.

An employer has the right under NLRB case law and Section 1155 of the Act to communicate directly with employees con-

earning labor negotiations. Qneita Knitting Hills, Inc., 205 NLRB 500, 83 LRRM 1670 (1973). But the communications must be truthful, must not bypass the bargaining representative, and must not make threats or promises of benefits in return for abandoning the union. NLRB v. Exchange Parts Co., 373 U.S. 405 (1964).

John Parker distributed two memoranda concerning negotiations with the UFW to employees through Timo Hinojosa. The first, dated May 25, 1976, sets out Respondent's position on the Union Security article, including its opposition to the "good standing" clause, which had first been communicated to the UFW only the day before. It also took note of its new bonus plan, without in any way sharing credit with the UFW or indicating that it was the result of bargaining.

The memorandum of June 22, 1976, sets forth the Company's most recent wage and benefits proposals, without indicating that it had rejected the RFK. Plan, and reiterates its opposition to the Union Security proposal. For the first tine, it notes the Company's opposition to the hiring hall as one of the three major demands of the UFW with which it cannot comply.

Neither of these memoranda, taken singly or together, is objectionable, despite their lack of complete objectivity and accuracy. The employees, after all, knew where these, memoranda were coming from.

When combined with Timo Hinojosa's statements of July 30, 1976, however, these communications no longer appear benign. Mr. Hinojosa, while distributing paychecks, told

employees that they had not gotten a raise because of the Union, and, were it not for the Union, they would be making as much as employees at Jackson and Perkins. The clear message to a reasonable employee was that things would be better without a union. The Union was holding a contract up on account of failure to agree to union security and a hiring hall, both non-economic issues, and depriving the workers of more money. After all, the Company had already paid a bonus without the Union. In combination, then, the communications constitute a sophisticated approach to discredit the UFW as selfish and not caring about the employees, charges made explicitly at the September 20 bargaining session.

E. The RFK Plan.

The duty to bargain collectively in good faith necessarily requires that bargaining positions be maintained honestly and that they be supported by reason. Because the Act specifically protects the right of a party to collective bargaining not to agree to a proposal or make any concession, the NLRB and the courts have generally not examined the substantive positions of the parties in determining the presence or absence of good faith. However, when an employer rejects,

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11. The General Counsel has not alleged that Time's statements constitute an independent violation of Section 1133(a) of the Act. In Dust-Tex Service, Inc., 214 NLRB 396(1974), the NLRB found similar statements to be "an attempt to solicit the employees to abandon the Union' in violation of Section 8(a)(l) of the National Labor Relations Act.

without a reasoned explanation, proposals which are predictably unacceptable to the union, and which would have no adverse economic impact on the employer, the courts have looked upon such conduct as "evidencing a predetermination not to reach an agreement." Sweeney and Co., 176 NLRB 208, 212 (1969), enforced 437 F.2d 1127(5 Cir., 1971). See also Fitzgerald Mills Corp. 133 ALRB 877, 882, enforced 313 F.2d 260(2 Cir., 1963), cert, den. 375 U.S. 384 (1963).

The Company's erratic, unreasoned, and contradictory course of conduct with respect to the RFK. proposal in 1976 is simply not consonant, in the context of the negotiation, with an intent to reach agreement if possible. [12]

The UFW's proposal called for the Company to contribute to the RFK Plan at the rate of 16 1/2 cents per hour for each hour worked by covered employees. The Company's response of April 23 was straightforward: The proposal was rejected, but the Company would maintain its medical coverage for permanent-employees.

On May 24, when the Plan was first discussed, the Company objected to extending medical coverage to seasonal workers, on economic grounds, and questioned the obligation of the Fund to use employer contributions to provide benefits. There were also questions concerning freedom of choice, the rela-

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12. That the Company ultimately agreed to the RFK Plan nearly a year later, when an unfair labor practice hearing was upon it, cannot establish its good faith in rejecting the plan in 1976. Rather, the opposite is true, because, other than the imminence of the hearing, there had been no objective change in the proposal, the plan, or its cost, between 1976 and 1977.

tionship of the Plan to the Union clinic, and disparaging remarks by Mr. Morgan about the Plan being "a monument to Robert Kennedy" and the Union's competence.

By June 18, the Company had proposed the Western Growers Plan 22 for seasonal workers, although Mr. Morgan claimed that an impasse had existed with respect to the proposal since May 24. The Company had also made a cost comparison of the UFW and Company proposals and concluded that the UFW proposal would cost slightly more than $200 a year more than its own. Yet, the Company never divulged this information to the UFW and continued to maintain, both at the bargaining table and at the hearing, that medical coverage was still a substantial economic issue.

Even though the RFK Plan trust documents had been given to him at the June 18 meeting, Mr. Morgan continued to voice doubts about the obligation of the trustees to provide medical benefits. Article II, Section 5 of the trust provides that:

> The assets of the Trust Fund shall never inure to the benefit of any employer or union and shall be held for the exclusive purpose of providing benefits to Participants....
>
> All of the income of the Robert F. Kennedy Farm Workers Medical Plan shall be set aside to provide for the payment of ... benefits ... (GC Ex. 92.)

At the critical bargaining session of September 20, the Company reiterated its firm objection to the RFK Plan. The UFW caucused to consider whether to agree to the Company's proposal to implement its wage increases on October 1. Ms.

Macri informed the Company that 1007, of the workers wanted the RFK, Plan, that it was more important than wages, and that fringe benefits were inseparable from the wage issue. While the Company has sought to construe the UFW position as lumping the three benefit funds together, there is no dispute that only the RFK Plan was discussed in detail in 1970, and that it was clearly pressed much more forcefully than either of the two other funds). The Company then accused the UFW of being selfish for opposing the wage increase, but remained firm in its rejection of the RFT Plan.

In three letters to Ms. Macri in October, 1976, Mr. Morgan set out "reasons" for the rejection of the RFK Plan. He made it perfectly clear that he accepted that the workers wanted the RFK Plan, that, while he had some legal concerns, these in no way were responsible for the Company's position, and that the Company's firm rejection of the Plan was not the most important issue and should not stand in the way of an agreement. Economics is never mentioned as a reason for opposing the Plan.

The Company's position on the RFK Plan was an unreasoned one. It was predictably unacceptable to the UFW, because the Company knew that the workers were vitally interested in having the plan included in the contract. The UFW answered

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13. Two employees testified at the hearing that most of the employees went to the UFW clinic for medical services, even though they had to pay, because of the clinic's convenience and its Spanish-speaking doctors.

each of the objections raised by the Company that were specific. Some of the fourteen concerns raised by Mr. Morgan in his letter of October 25, 1976, were inherently not susceptible to answers. [14]

In Alba-Waldensian, Inc., 167 NLRB 695(1967), enforced 404 F.2d 1370(4 Cir. , 1963), the ALRB held that an employer whose many objections to a union check-off clause were answered by the union, but still maintained its intransigent opposition, was engaged in bad-faith bargaining. The NLRB noted that "Good-faith bargaining does not require the making of concessions but it does require that parties justify positions taken by reasoned discussions and at least make a good-faith effort to reach a solution of their differences." 167 NLRB at 696. No such effort was made by the Respondent in this case. See also Tex-Tan Welhausen v. NLRB , 419 F,2d 1265 (5 Cir., 1969)("obduracy and obstinacy may be weapons of bargaining, but where they are used not in the interest of bargaining but in its frustration, we cannot give them refuge. . . ." 419 F.2d at 1268).

F. The October 1976 Wage Increase.

The General Counsel views the Company's institution of the October 1976 wage increase, over the objection of the UFW, as unilateral conduct constituting a per se violation of the Act. It argues that there was no impasse in bargain-

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14. See Frank Denison's letter of November 13, 1976, to Mr. Morgan (GC Ex. 46).

ing at the time the wage increase was put into effect.

The Respondent argues that: (1) The UFW refused to bargain at all on the subject of wages, thereby waiving its bargaining rights; (2) the negotiations were at impasse; (3) the. wage increases were motivated by the economic necessity of paying competitive wages; and (4) the UFW unlawfully conditioned bargaining on wages upon the Company's acceptance of its proposal concerning the Martin Luther King Plan, a permissive subject of bargaining. I conclude that each of the Company's asserted defenses is without merit.

1. Waiver.

Waiver of a party's bargaining rights is not to be lightly inferred. Morris, The Developing Labor Law, 333 (1971). Here, it is clear that the UFW did refuse to enter into any substantive discussions on the Company's wage proposal, as an interim measure, outside the context of a full collective bargaining agreement, unless there was also agreement on fringe benefits. The distinction is critical. The Company was not putting its wage proposal forward as part of a larger agreement; it wanted to implement the change by itself, without regard to the other 40 proposals. Mr. Parker testified that he told Ms. Macri at the September 20 meeting that it would be extremely unlikely that an agreement could be reached on the RFK Plan prior to the fall harvest season. Here, the UFW was eager to discuss economic issues, but it would not agree to the Company's implementation of its proposal on one economic issue, apart from the other economic issues. Under these circumstances

the UFW can hardly be held to have waived its bargaining rights or to have refused to bargain. To hold otherwise would render meaningless the Act's general prohibition of unilateral employer changes in mandatory subjects of bargaining.

2. Impasse.

An impasse in bargaining generally suspends the duty to continue bargaining. During an impasse, a party is free to implement unilateral changes in wages consistent with its offers to the union. Taft Broadcasting Co. , 163 NLRB 475'(1967), enforced sub, nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir., 1968). Impasse in collective bargaining has been described as a "state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc.. 318 F.2d 472 (5 Cir., 1963). It is equally clear that "a deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct." Northland Camps, Inc., 179 NLRB 36, 72 LRRM 1280 (1969). See also Dust-Tex Service, Inc. . 214 NLRB 378, 88 LRRM 1292 (1974).

Assuming arguendo that the Company had not been bargaining in bad faith prior to October 1, the record would still not justify a reasonable party to believe that the negotiations were at an impasse. First, there had been only three prior negotiation sessions at which the substantive

proposals had been seriously discussed. [15] Both parties characterized the second and third of these sessions as productive. Although the parties were still far apart on many issues, their discussions continued to be fruitful and proposals were still being exchanged. Ms. Macri presented the Company with a new proposal on New or Changed Classifications at the September 20 meeting.

Furthermore, the Company demonstrated a fixed intention to implement the wage increases regardless of the UFW's response. Mr. Currey's May notes speak of the Company's plan to raise wages. Mr. Parker testified that he was very concerned about getting UFW approval for the raise, that it was the most important item for him at the September 20 meeting, and that he couldn't believe that the UFW would turn down 40 cents an hour more.

The Company's conduct at the bargaining table on September 20 demonstrates that when the UFW refused to approve the wage increase, it deliberately precipitated the "impasse." The Company refused to alter its firm rejection of the RFK Plan. It denigrated Ms. Macri and the UFW as selfish in the presence of several employees, which is, in itself, indicative of bad faith, as an attempt to "embarass and undermine the union in the eyes of its employees." Kellwood

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15. Mr. Morgan had rejected the UFW's request for bargaining sessions on consecutive days, along with a gratuitous comment that, based on his prior experiences with Ms. Huerta, which consisted of the meeting, such, sessions would not be productive.

Co. v. NLRB, 434 F.2d 1069 (3 Cir., 1970).Mr. Morgan apparently succeeding in goading Ms. Macri to walk out of the meeting. Unilateral changes in wages by an employer are not justified when it engages in such conduct.

Respondent's contention that there was an impasse on the issue of wages begs the question. There is never an occasion for unilateral action unless the union has rejected the Company's offer. If, as Respondent argues, it is free to make whatever changes it desires whenever the Union and the Company disagree on whether the change should be made immediately, apart from a full contract, the entire collective bargaining process is reduced to a meaningless exercise.

3. Necessity.

Respondent argues that its wage increase was justified, even in the absence of an impasse, by economic necessity. It is doubtful that such a defense exists. Goman, Basic Text on Labor Law. 444 (1976).

The only case cited by Respondent on this point, Furrs, Inc. 137 NLRB 387, 61 LRRM 1388 (1966) , involves a wage increase instituted after a union waiver of its bar-gaining rights and where other employees in the same company were also receiving the same increase. Assuming the existence of such a defense to unilateral action, Respondent has not met its burden of proving economic necessity in this case. The evidence is that when raises were given they were implemented in the fall, that several other rose growers were about to raise their wages, and that the Company feared the loss of

its skilled and permanent workers if no raises were given. But the Company has admitted that the only skilled seasonal workers employed in the fall were the de-eyers. Only two of the 26 de-eyers from 1975 returned in 1976, and the Company made no serious effort to get them to come back.-And, aside from Mr. Barker's generalized concern, there is no evidence that any of the permanent workers was planning to quit if he didn't receive more money. No explanation was put forward to justify the necessity of giving the permanent employees a raise without awaiting a contract. The only evidence with respect to comparative wages dealt with the starting rate. Presumably most permanent workers were earning more than the base wage. Furthermore, Mr. Barker's report to the Ball board in August (GC Ex. 78) strongly suggested that the wage increase was being adopted, not so much to keep up with competitors, as to head off a strike. The UFW was resisting the wage increase, not because it wanted to keep wages down, but because the raise would make negotiating a contract, especially on the remaining economic issues, more difficult.

4. The Martin Luther King Plan.

The Respondent accurately notes that a party's insistence to impasse on a permissive subject of bargaining is a per se violation of its duty to bargain. NLRB v. Borg-Warner, 306 U.S. 342 (1953). Respondent goes on to argue that the UFW bargained to impasse on the Martin Luther King Plan and that the plan is a permissive subject.

Very little testimony, and no documentary evidence, was presented relative to the Martin Luther King Plan by either party. The Respondent has clearly failed to present sufficient evidence to prove its defense that the plan is not a mandatory subject of bargaining. Its argument is conclusory in nature, offering only the most feeble effort at analysis. Nor has Respondent demonstrated that the UFW bargained to impasse on the plan. The testimony reveals that the plan was only lightly touched upon in bargaining. While Ms. Hacri spoke of the "funds" on September 20, the specific discussion focused entirely on the RFK Plan.

I conclude that, even in the absence of bad-faith bargaining by Respondent, its defenses in support of the October wage increase are not justified by the evidence. In addition, of course, the evidence clearly indicates that Respondent had been engaged in bad-faith bargaining at, and prior to, the September 20 meeting. See Section I-J, infra, pp. 79-32. The October 1976 wage increase is a per se violation of Section 1153(e) of the Act.

G. Respondent's Delays and Subsequent Refusals to Bargain in 1977

When Richard Chavez requested that formal bargaining be started again, in his letter of January 29, 1977, the Company was aware that the certification year had only another month to run. Mr. Morgan testified that, in his legal opinion, the Company would probably have no obligation to bargain after March 2, 1977. Mr. Parker stated that he thought there was

little chance of negotiating an agreement before that date. And, Mr. Morgan's letter of February 4 expresses "skepticism" about the UFW's intentions.

Mr. Morgan kept his legal opinions to himself. Although it may have been possible to set up a meeting prior to February 18, Mr. Morgan did not suggest it. A meeting was, scheduled to take place on February 25, five days before the end of the certification year. After Mr. Morgan cancelled the meeting, he at first said the Company would continue bargaining, but quickly refused, telling Mr. Chavez that he should have agreed to a firm meeting date the week after February 25, which would have been after the expiration of the certification year.

Mr. Morgan's explanation of his inability to meet in February was a variation of the time-honored, but legally disreputable "busy lawyer”’ defense. Mr. Morgan did have a scheduling problem. He was committed to try two unfair labor practices simultaneously during the week of February 23. He struggled successfully to resolve the conflict between these two hearings, but there is no indication that he tried to avoid the conflict between the hearings and the bargaining session. Indeed, he never even told the UFW that two hearings were involved until he cancelled the February 25 meeting... Clearly, his remarks to Ms. Kimfaerling reflected Mr.'Morgan's true state of mind toward bargaining with the UFW just as the certification year was coming to a close. Taken together with the events of the next several months, Mr. Morgan's

conduct demonstrates a bad-faith intention to avoid negotiations in the expectation that the end of the certification year would end the obligation to bargain entirely. See Federal Pacific Electric Co., 203 NLRB 571, 33 LRRM 1201 (1973).

In March, Mr. Morgan announced that the Company would not bargain with the UFW unless its certification were extended. His argument was based upon an interpretation of the Act which the Board rejected as "both incorrect and highly mischievous" in Kaplan's Fruit and Produce Co., 3 ALRB No. 28 (1977).

Mr. Morgan explained, and Respondent's brief also argues, that the Company could well have been found guilty of an unfair labor practice had it continued formal bargaining with the UFW, if the UFW were no longer "certified." The Company was, therefore, on the horns of a dilemma, facing serious liability no matter what it decided to do. The contention that the Company was in any real danger of legal.

liability for continuing to bargain with the UFW simply cannot withstand serious analysis.

The obligation to bargain arises only from statute. The Act provides that its procedures shall be the exclusive means of redressing unfair labor practices. Section 1160.9. In order for the Company to have been subjected to any liability for continued bargaining, somebody would have had to file an unfair labor practice charge against it. It is theoretically possible that a disgruntled employee would have pursued such a course. It is also possible, but only in the sense that

anything is possible, that the General Counsel would have issued a complaint against the Respondent for continuing to bargain with the UFW without waiting for the Kaplan's decision. I have no doubt that had this scenario actually come to pass, the Company would have happily stipulated to an order requiring it to cease and desist from the "unlawful" bargaining. That is the maximum liability the Company could have been subjected to if it had chosen to continue bargaining. Although an erroneous legal opinion does not constitute a defense to a refusal bargain, Old King Cole, Inc., v. NLSB , supra, I do not find it necessary to conclude that Respondent's refusal to bargain in March, 1977, standing alone, constitutes a violation of the Act. It is, however, a factor to be considered in determining the Company overall bad faith, especially in the context of what happened next.

On March 30, 1977, the Board extended the UFW's certification for an additional year. Yet, incredibly enough, the Company continued to refuse to resume bargaining just because it had filed a motion for reconsideration of the Board's order. Mr. Morgan felt that the order was an "abuse" and that the Company was justified in. not bargaining until the Board had ruled on his motion. The Respondent has, of

16. The Board has recently rejected a similar argument, In Jackson _and Perkins Co., 3 ALRB Ho. 36 (1977) , the respondent argued that it was acting in good faith in violating the Board's access rule because the rule was at the time under constitutional challenge in the California Supreme Court. The respondent was represented by Mr. Morgan.,

course, cited no authority in support of this "defense." The issue is glossed over in Respondent's Brief: "The problem was not resolved when the Board granted the UFW's motion for an extension on March 30, since the Company filed a motion to vacate the order. . ." (Respondent's Brief at p. 16.) Mr. Morgan's conduct on this issue reveals an unrelenting hostility on the part of the Respondent toward the Act, the Board, and its processes.

Section 1142(b) of the Act unambiguously declares that when the Board has delegated certain functions to its regional offices, any action taken by the regional office may be reviewed. However,"(a)ny such review made by the board shall not, unless specifically ordered by the board, operate as a stay of any action taken." Clearly, where the Board itself has issued an order, as in the extension of certification herein, it is frivolous to argue that a motion for reconsideration (a procedure administratively created by the Board) suspends the duty to bargain. NLRB precedent is unmistakably clear on this issue. Winchester Spinning Corp. , 171 NLRB 317, 68 LRRM 1460 (1968); Tyler Pipe and Foundry Co., 171 NLRB 308, bb LRRM 1153 (1968).

I conclude that the Respondent's refusal to bargain with the UFW from March 30, 1977, to June 3, 1977,[17] is a per se violation of Section 1153(e)of the Act.

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17. The Company agreed to resume bargaining on May 10, 1977, but there is no evidence suggesting that good-faith bargaining had begun prior to June 3, 1977. Given the Respondent's refusal to bargain after the extension of (contd.)

H. The 1977 Bargaining Sessions.

The General Counsel has produced virtually no evidence tending to establish that the Respondent was bargaining in bad faith on and after June 3, 1977 , other than the Company's retraction of its original agreement to a union shop clause. On the other hand, the parties agreed to a number of substantial articles in June and July, 1977, including Seniority, Leaves of Absence, and Grievances and Arbitration. I conclude that the General Counsel has not proved that the Respondent was in violation of Section 1153(e) of the Act on and after June 3, 1977.

I. The UFW's Requests for Information.

The Respondent has allegedly not supplied requested information in a timely manner to the UFW on three matters:(1) Budding production records; (2) the relationship between the Respondent and its parent company, Petoseed, Inc.; and (3) the interchange of employees between the sheds and the fields. Because each of these requests was made orally,

17. (contd.)

certification, its reliance on Kapian's is irrelevant. In addition, the Company's argument that it did not learn of the decision in Kaplan* s for six weeks because Mr. Morgan was on vacation or suspect both factually and as a matter of law. Mr. Morgan did not go on vacation until mid-April and should have received the decision by then. More significantly, it is an elementary professional responsibility for an attorney to have an associate be responsible for important matters during his absence. Of. Mr. Currey's participation in the May 7, 1976, bargaining session. Any other rule would favor the defense attorney on permanent vacation.,

determination of the specific content of the request and the Company's compliance turn, at least in part, on credibility of the witnesses. I found Mr. Anderson, who attended every bargaining session, to be the witness with the best memory on the information issues.

Dolores Huerta testified that she requested the budding information in May, 1976, and that it was not supplied until June, 1977. Mr. Anderson denied that any request was made by Mrs. Huerta until June, 1977, although some information on budding was given to Mr. Chavez on April 7, 1976, in connection with the discussion of the bonus and incentive plans. There is insufficient evidence to conclude that the Respondent refused to supply budding information to the UFW.

It is undisputed that Mr. Chavez asked for information concerning the relationship between McFarland Rose Production and Petoseed, Inc., on April 7, 1976. Mr. Morgan responded that he didn't know the answer. Mr. Morgan later told Ben Maddock that there was no "operational" relationship between the two companies. Mr. Morgan testified that he is still unsure of the precise nature of the relationship. At a minimum, Petoseed handles personnel records and accounting chores for McFarland.

I conclude that the Company, by Mr. Morgan's own admission, did not provide the UFW with a clear statement of the relationship between Petoseed, Inc., and McFarland. I reject the Respondent's contention that such information was irrelevant. Mr. Andersen's testimony established the relevance of the information to bargaining on economic issues, particularly

the RFK Plan. The UFW could not have known the exact relevance of the information without knowing what the relationship in fact was.

As to the interchange of employees between the shed and the fields, Mr. Anderson testified that he had a 15-minute conversation with Mr. Chavez on April 7, 1976, in which he drew diagrams and generally explained the interchange. Mr. Morgan requested Mr. Chavez to ask the UFW legal staff for a legal opinion on the status of the shed workers. Mr. Chavez testified that the Company refused to discuss the issue,, saying it had been decided by the Board in McFarland Rose Production, supra. Respondent does not now take such a position. Clearly, as the facts concerning the interchange alter, the status of the employees in the sheds may also alter, and such information is relevant.

I find that some information on the subject was provided on April 7, 1976, and that the UFW did not ask for more information at any later time.

Generally, the Company has complied with all of the UFW's requests for information. The response on the Petoseed issue may have been incomplete and inaccurate, but I do not believe that any failure to supply information on this subject was motivated by bad faith or that it interfered with bargaining. Although the issue is & close one, I conclude that the Respondent has not violated Section 1153(e) of the Act by refusing or failing to supply requested information to the UFW.

J. Sammary and Conclusions with Respect to the Bargaining Issues.

The NLRB has recognized that cases involving allegations of "surface bargaining" are among the most difficult issues it is called upon to decide. As the NLRB noted in Borg-Warner Controls. 198 ALRB 726, 60 LRRM 1790 (1972) :

> We fully recognize that such cases present problems of great complexity and ordinarily, as is the present case, are not solvable by pointing to one or two instances during bargaining as proving an allegation that one of the parties was not bargaining in good faith. In fact, no two cases are alike and none can be determinative precedent for another, as good faith "can have meaning only in its application to the particular facts of a particular case. " NLRB v._ American National Insurance Co. , 343 U.S. 395 , 410.

Resolution of the issues is somewhat less difficult in this case for two reasons: (1) I have found that the Respondent committed independent violations of its duty to bargain in its unilateral increase of wages in October, 1976, and in its outright refusal to bargain after the UFW' s certification was extended on March 30, 1977; and (2) the existence of direct evidence of Respondent's bad-faith intent in the form of John Parker' s reports to the Ball board and his subsequent explanatory testimony.

The task of the trier of fact in a case of this type was summed up by the NLRB in "M" System, Inc. , 129 NLRB. 527, 47 LRRM 1017 (1960) :

> Good faith, or the want of it, is concerned essentially with a state of mind. There is no shortcut to a determination of whether an employer has bargained with the requisite good faith the statute commands. That deter-

> mination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's state of mind is to be gleaned not only from his conduct at the bargaining table, but also from his conduct away from it--for example, conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the Union manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation. 129 NLRB at 547.

The evidence in this case reveals that the Respondent delayed negotiations with the UFW for a month in March, 1976, for the admitted purpose of deciding to attempt to delay their onset even longer by bringing an essentially technical appeal before the courts. It was Mr. Parker's admitted strategy to delay negotiations as much as possible and to adopt a "passive" approach. Collective bargaining requires active efforts to attempt to reach an agreement; passive, participation, is insufficient. NLRB v. Montgomery Ward & Co. > 133 F.2d 676 (9 Cir. ,1943); and Exchange Parts Co. , 139 NLRB 710, 713, 51 LRRM 1366 (1962), enforced 339 F.2d 829 (5 Cir., 1965).

During the period when the parties were meeting, the Company generally observed the forms of collective bargaining, as the previous discussion has demonstrated, but was continually taking actions at and away from the bargaining table to undermine the UFW's prestige and position with its constituents, and engaging in-bargaining strategies inconsistent with-a good-

faith approach. Looked at as a whole, the Company consistently carried ut its initial strategy of delay, sometimes in a sophisticated manner and sometimes not, and never found it necessary, at least until June 3, 1977, when the hearing was imminent, to pursue the alternative course of negotiating the best possible contract.

Beyond defending its own conduct, the Respondent argues that the UFW's failure to bargain in good faith outweighs its own errors. Certainly, the conduct of the Union is a factor to be taken into account in the "totality of the circumstances." And clearly, the UFW's conduct in this case was not always exemplary, and was far from textbook perfect. For example, the UFW had four different chief negotiators in a five-month period. (Perhaps professional negotiators should have ignored Mr. Morgan's goading.) It did not always answer its correspondence quickly enough and it was sometimes slow to schedule new meetings. And, had the Company entered into good-faith bargaining in February, 1977, the UFW's failure to request more bargaining for more than four months might have been of come consequence. None of this can in any way excuse the Respondent's bad faith. None of this conduct can reasonably be considered evidence of bad faith. And there is no evidence that, had the UFW done everything perfectly, the Company's strategy would have changed in any material respect.

I conclude that, in addition to its per se violations of Section 1153(e) of the Act, Respondent has failed to bargain in good faith with the UFW from April 12, 1976, through June 2, 1977, in violation of Section 1153(e), by, inter alia: (1)

filing objections to the certification of the election.....
for the primary purpose of delay and soliciting a perjured declaration in support of its effort to exclude certain of its shed operations from the bargaining unit; (2) establishing an employee grievance committee in March, 1976, around the time of the UFW's certification; (3) delaying the onset of negotiations-and entering into them with an acknowledged strategy of delay; (4) failing to provide the UFW with reasonable notice of, and a meaningful opportunity to bargain about, its proposal to institute a bonus and incentive plan; (5) bargaining in bad faith on the RFK Plan, a mandatory subject of bargaining; (6) deliberately misrepresenting or failing to make its true positions on major contract items known for several months; (7) engaging in belligerent and insulting conduct at the bargaining table with employees present, in denigration of the UFW, and to frustrate the bargaining process; (8) impliedly promising employees, through direct communications, that their wages would be raised were it .not for the UFW; (9) delaying negotiations in February, 1977, near the end of the certification year; (10) refusing to bargain after the end of the certification year until March 30, 1977, in reliance upon an erroneous legal opinion; and (11) the per se conduct referred to above.

II. The Non-Bargaining Issues.

A. Rafael Gonzalez.

The Third Amended Complaint originally alleged that Rafael Gonzalez had been discharged for his suspected sup-

port and activity on behalf of the UFW," in violation of Section 1153(c) of the Act (GC Ex. 1-M), The record is devoid of any evidence that Mr, Gonzalez was a member of the UFW or that he was involved in any union activity. Nor is there any evidence that, in discharging Mr. Gonzalez, the Respondent was acting under the mistaken belief that Mr. Gonzalez was in any way involved with the UFW. The General Counsel has made no argument in support of a Section 1153(c) violation in its brief.

The Complaint was amended at the hearing to allege that Mr. Gonzalez was discharged "because he has given testimony to the ALRB," in violation of Section 1153(d) of the Act (GC Ex. 1-R). The parties are in agreement that the declarations signed by Mr. Gonzalez in 1975 (UFW Ex. 1) constitute "testimony" within the meaning of Section 1153 (d). See NLRB v.. Serivener. 405 U.S. 117 (1972).

The General Counsel argues that Respondent fired Mr. Gonzalez "in retaliation for (his) declaration concerning the shed. Gonzalez was dangerous to the company: he had given damaging information to the ALRB and could expose the company's fraudulent attempts to get the shed excluded from the bargaining unit." (GC Post-Hearing Brief at p. 135.) The Respondent characterizes the allegation as "far-fetched," given the timing of the discharge (more than seven months after the'. second declaration was signed), because Mr. Gonzalez was fired, not in isolation, but along with three other employees, none of whom apparently gave testimony to the Board, and because the Respondent ultimately prevailed in its attempt

to exclude the processing shed from the bargaining unit, after Mr. Gonzalez signed a declaration supporting Respondent's position. (Respondent's Post-Trial Brief at pp. 43-44.)

I agree with Respondent's contentions on this issue. The General Counsel has failed to produce evidence sufficient to establish a prima facie case on the issue of Respondent's unlawful motivation. Obviously, if the Respondent wanted to avoid exposure of its unsavory tactics in soliciting a perjured declaration from Mr. Gonzalez, the last thing it would have wanted to do is discharge him. The actual and foreseeable result of the discharge is that Mr. Gonzalez has come forth and "exposed" the Company. I do not, of course, in any way condone Respondent's behavior in soliciting the declaration, but there is simply no evidence which would support an inference that the discharge was motivated by Mr. Gonzalez' statements in his declarations.

Because the General Counsel has not established a prima facie case of violation of Section 1153(d), I find it unnecessary to examine Respondent's purported business justifications for the discharge. I will recommend that Paragraph 9(a) of the Third Amended Complaint be dismissed.

B. Sally de la Rosa.

There are no serious factual disputes concerning this charge. The issue is what inferences should reasonably be drawn from the facts.

The Complaint alleges that Respondent refused to rehire Sally de la Rosa because of her union activities, in violation

18 of Section 1153(a) and (c) of the Act. The evidence clearly establishes that Mrs. de la Rosa was an active UFW supporter and that Respondent had actual knowledge of her union activities

Mrs. de la Rosa admitted that she never asked to be rehired by Respondent in 1976. The General Counsel is attempting to make out a rather complicated "constructive" refusal to rehire Mrs. de la Rosa. First, Respondent moved its processing shed, in which de-eyeing takes place, from McFarland to Wasco without notifying or bargaining with the UFW about
19 the relocation. Second, the Respondent made little or no effort to contact the 26 de-eyers from 1975, and only two actually worked for Respondent in 1976. Third, Mrs. de la Rosa had heard rumors that the Respondent would not rehire UFW supporters, so she did not bother to go through the motions of applying for work and being rejected.

There is a certain degree of plausibility in this scenario and it may even be true, but it does not constitute evidence

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18. The General Counsel concedes, erroneously, I believe, that Sally de la Rosa is not an agricultural employee within the meaning of the Act. De-eyeing, although it takes place in the same shed as Respondent's "commercial" grading and packing operations, is clearly agricultural work, done only for the Company's rose plants, and is completely separate from grading and packing. The Board's decision did not imply that all employees working in the shed should be denied the protections of the Act.

19. The General Counsel argues in its brief, for the first time, that the Company had a duty to bargain with the UFW about the relocation of the shed. Ho such allegation was made in the Complaint and the Respondent had no opportunity to litigate the matter. I have, therefore, given this contention no weight.

of a violation of the Act. First, Mrs. de la Rosa knew how to get in contact with the Company in McFarland. Second, her two sons were hired to work for the Company. Third, there is no evidence in the record that any of the 1975 de-eyers applied for work and was turned away.

While the failure of the Respondent to make a serious effort to recall the 1975 workers, especially in light of its oft-expressed assertions that it gave preference to seniority workers, is a fact giving rise to suspicion, the Company made no effort to hide the location of the Wasco shed. Indeed, Julian Perez, a strong UFW supporter, helped Robert Gallardo move equipment to the shed. It is not an implausible speculation that the Company was secretly delighted to be rid of UFW supporters like Sally de la Rosa. Then again, Respondent's management may have been upset and puzzled. But, to establish a violation of the Act, there must be evidence that at least one of the 1975 employees, in an effort to test out these theories, actually applied for employment and was rejected. I conclude that the General Counsel has failed to establish that Respondent refused to rehire Sally de la Rosa. I will recommend that Paragraph 9(b) of the Third Amended Complaint be dismissed.

C. The Harvesting Crew.

The Complaint alleges that the 16 members of the harvesting crew who refused to work on January 3, 1977, were discharged for engaging in concerted activities protected under Section 1152 of the Act. Respondent correctly concedes in its brief

that the refusal to work because of muddy field conditions was protected activity for which the employees could not have been lawfully discharged under Section 1153(a) of the Act. NLRB v. Washington Aluminum Corp., 370 U.S. 9 (1962).

The only issue in dispute, a question of fact, is whether the employees were discharged or whether they voluntarily quit their jobs.

The Respondent argues that there was no intent on Time Hinojosa's part to fire the men. Although there may have been some confusion in the minds of the men because of an ambiguity in Mr. Hinojosa's remarks, it was incumbent upon the men to return to work to clarify the situation. Because the men did not return, and because there was less than a week of work remaining, the Company reasonably concluded that the entire crew had quit.

This argument ignores both the fact that the crew was made up of 16 separate human beings, who would have had to make 16 simultaneous and independent decisions to quit, and the evidence, which establishes that one or two of the men, unlike the de-eyers, did return to the field to clarify the situation. It is no doubt possible that one, some, or most of the men would have decided to quit; the probability that all of the men would have simply decided not to return to work on January 4 is nil. The cases cited by the Respondent involve voluntary quits by one employee, not an entire crew.

More importantly, to the extent that resolution of this issue depends upon a credibility determination, the employees' testimony is inherently more credible than the Company's, and

Jose Hinojosa's testimony is far more credible than his father's. The credible evidence is that Timo told the men to work or they "would have no more jobs."

There is no doubt that Jose Baca returned to the fields on January 4. The credible testimony of Jose Hinojosa and Mr. Baca establishes that he arrived before work began. Although Mr. Baca testified that Timo told him to get his paycheck, the Company did not introduce evidence that Mr. Baca was not paid on January 4, a Tuesday. The normal payday is a Friday. [20]

I conclude that the 16 employees named in General Counsel Exhibit 91 were discharged for participating in concerted activities protected by Section 1152 of the Act, in violation of Section 1153(a) of the Act.

D. Jose Baca.

The General Counsel has not briefed its contention that Timo Hinojosa constructively discharged Jose Baca on April 1, 1977, because of his participation in the walkout of January 3. Essentially, the allegation hinges on Mr. Baca's testimony that he quit after only one day of work because Timo threatened to fire him the first time he did anything wrong.

Duncan Eanson and David Anderson testified credibly that,

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20. The Respondent did introduce paychecks on the bonus issue. That it failed to do so here strengthens the inference that Mr. Baca was given his final check when he returned. Mr. Hinojosa testified that when he fired employees, he paid them immediately, in compliance with legal requirements.

in instructing Timo to warn Mr. Baca that his work would have to show improvement, they were relying on budding records which showed that Mr. Baca's live bud percentage was quite low. While Mr. Hinojosa's warning may have been stronger than Mr. Anderson and Mr. Hanson intended, the Company certainly had the right to caution Mr. Baca about his work performance. Cf. Wabash Transformer Corp., 215 NLRB 101, 88 LRRM 1511 (1974), Given Mr. Hinojosa's behavior on other occasions, if he had not wanted Mr. Baca to work for the Company, it is likely that he would have refused to rehire him, as he did on January 4, rather than taking the more sophisticated approach of inducing him to quit after being rehired. I will recommend that Paragraph 9(d) of the Third Amended Complaint be dismissed,

THE REMEDY

Having found chat Respondent has engaged in certain unfair labor practices in violation of Section 1153(a) and (e) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

With respect- to the 16 members of the harvesting crew unlawfully discharged on January 3, 1977, I will recommend that the Respondent be ordered to offer each of then full reinstatement to their former or substantially equivalent jobs, effective with the beginning of the 1977 harvest season. I shall further recommend that the Respondent be ordered to make whole each of the 16 employees for any losses they may have incurred as a result of Respondent's discriminatory discharges, by payment to them of a sum of money equal to the wages they would have earned from the date of their discharges to the date they are reinstated or offered reinstatement, less their net earnings, together with interest thereon at a rate of seven percent per annum, and that the loss of pay and interest be computed in accordance with the formula adopted by the Board in Simnyside Nurseries, Inc., supra.

I will order that notices be posted and read to employees in a manner consistent with Board decisions.

The General Counsel has also requested that the, Board exercise its power, under Section 1160.3 of the Act, to enter an order requiring Respondent to "make employees whole, when the board deems such relief appropriate, for the loss of pay

resulting from the employer's refusal to bargain ..." I requested all parties to address the issue of the appropriateness of the "make-whole" remedy in their briefs. The General Counsel has filed a lengthy brief on this issue, which is identical to briefs filed by him in several other cases presently pending before the Board. The Respondent has limited its treatment of the proposed remedy to arguing that it is not appropriate in this case, because of the UFW's alleged misconduct in bargaining.

No evidence specifically pertaining to the make-whole remedy was received at the hearing, I informed the parties, on the record, that my decision would be limited to determining the appropriateness, period, and general parameters of the remedy, and that the details of the remedy, if ordered, would be left to negotiations among the parties, or, if necessary, a subsequent make-whole specification hearing.

The legislative history of the Act's make-whole provision and the NLRB's reluctance to exercise its inherent power to order a make-whole remedy in Section 3(a)(5) cases are fully set out in the General Counsel's Brief and are well known to the Board. Suffice it to say that the make-whole remedy was consciously included in the Act as a “progressive step" and with full knowledge of the ALRA's lack of such a provision.

The General Counsel argues persuasively that the Board should utilize the make-whole remedy in every case where the Board has found a violation of Section 1153(e) in which economic loss has been sustained by the employees, regardless

of the employer's motive. I agree. Although the Act makes the award of the make-whole remedy permissive "where the board deems such relief appropriate," there is no reason to believe that the Legislature intended the power to be used only rarely or when the violation has been gross. Section 1160.3 also permits the Board to order discharged employees reinstated "with or without backpay" (emphasis added), yet the Board and the NLRB, which operates under an identical provision, routinely issue backpay awards in virtually all discharge cases, without regard to the employer's bad faith. The fact of employee financial loss is the only operative factor. The failure to order reinstatement with back pay in discharge cases would clearly penalize the employee, but it would not necessarily reward the employer for breaking the law. In most cases another employee is hired to take the discharged worker's place. But a similar failure to order that employees be made whole in bad-faith bargaining cases not only penalizes the employees, but necessarily rewards the employer. Any economic loss to the employees is inescapably the employer's gain.

The facts in this case vividly demonstrate the need for such a general rule of appropriateness of the make-whole remedy, both as a general deterrent to employers, and as a specific deterrent to Respondent not to resume bad-faith bargaining. Here, the Respondent delayed the onset of bargaining while it actively considered whether to challenge the UFW's certification in the courts by refusing to bargain. The Respondent knew that to pursue such a course, even though its objections were technical and exceedingly unlikely to be

upheld, would result in a lengthy delay. Yet, the decision was made to bargain, not in good faith, but with an admitted strategy of delay and frustration of the negotiation process. It must be presumed that Respondent was aware of the existence of the Board's make-whole power. In a limited sense, then, the Board's remedial authority did, in all likelihood, deter the Respondent from challenging the Board's certification, even though it did decide to enter into the more easily camouflaged strategy of bad-faith table bargaining.

While the General Counsel has not proved that the Respondent has been bargaining in bad faith since June 3 , 1977, if the Board were not to enter a make-whole order, it might well decide to revert to its original strategy. After all, Respondent did not alter its conduct until the hearing in this matte: was imminent. Even the Board's order extending certification was insufficient to get the Respondent back to the bargaining table. Thus, the award of a make-whole remedy in this case will help to assure that future bargaining between these parties will be conducted in good faith.

The record in this case clearly establishes that the Respondent was concerned about the possibilities of a strike. Indeed, at the first bargaining session the Company specifically asked if the UFW intended to engage in economic pressure. The UFW promised not to do so as long as negotiations seemed to be making progress. It took several months for the Company's bad faith to become apparent to the UFW. By that time, the logical time for a strike had passed. If a make-whole remedy is not awarded in this case, and if the Respondent's

bad-faith bargaining has not eroded the UFW's economic strength and prestige among the employees, a strike may be the logical result. A failure to make the employees whole would thus be inconsistent with the policy of the Act ''to ensure peace in the agricultural fields." Section 1 of the Act.

I do agree with the Respondent, however, that it should be open to an employer to establish that the union's contributory misconduct is so egregious that the make-whole remedy would inappropriately reward the union for its own failings. Whatever the merits of recognizing such a defense in exceptional cases, the UFW's departures from perfection in this case do not remotely approach the level of misconduct or inattention to the requirements of serious bargaining necessary to establish it. See discussion at p. 31, supra.

The General Counsel urges that the make-whole remedy be applied beginning March 8, 1976, the date of the UFW's first bargaining request. While I agree that the Respondent was violating Section 1153(e) no later than March 3, the first unfair labor practice charge in this case was not filed until October 12, 1976. The make-whole period will therefore begin on April 12. 1976. The period will run through June 2, 1977.

With respect to the content of the remedy, the term "loss of pay," as used in Section 1160.3, is susceptible to many definitions. At a minimum, it should include wages and fringe benefits which are used to compensate employees either individually or collectively. Labor Code §200; Ware v.

Merrill, Lynch, Pierce, Fenner and Smith, Inc., 24 Cal. App.3d 35 (1972). The Act speaks in terms of making “employees" whole. The remedy should include reimbursement of medical plans, for example, if the General Counsel can establish that the employees could have reasonably expected to obtain such benefits in good-faith bargaining, whether or not an individual employee suffered any loss during the period. Clearly, the failure of an employer to bargain in good faith damages employees as a group as well as individually.

A more difficult problem is raised by such benefit plans as the Martin Luther King Plan. From an economist's point of view, any economic concession by an employer would be considered as compensation to the employees, because if the money had not been used for one purpose, it still would have been part of the economic package in some form. But whether, as a matter of law, employer contributions to a fund providing food to hungry children in Somalia, say, would be considered "loss of pay" is very doubtful. For purposes of the make-whole remedy, I believe that the General Counsel must prove that the benefits in question are used primarily for the benefit of the employees and their families.

Because the Martin Luther King Plan is a common item in UFW contracts, and because the Respondent has argued that it is not a mandatory subject of bargaining, albeit without supporting evidence, I recommend that the Board maintain its jurisdiction in this case and direct the parties to brief this issue. If, on the one hand, the plan is a permissive subject of bargaining, and the UFW insists upon it to impasse,

the UFW will be guilty of an unfair labor practice. If, on the other hand, the plan is a mandatory subject of bargaining, then the Respondent will be in violation of Section 1153(e). Reed and Prince Mfg. Co., supra. Additionally, if the plan is a permissive subject, it would be quite difficult for the General Counsel to prove that the employees could reasonably have expected to gain it in negotiations, since the Company would have been under no obligation to bargain about it. Resolution of this matter, before one party or the other commits an unfair labor practice, will clearly be of great value in furthering the policies of the Act.

In determining the details of the make-whole remedy, the burden should be on the General Counsel to establish what the employees could reasonably have been able to gain economically through good-faith bargaining. Contracts currently in effect between the UFW and other agricultural employers in similar crops or the same geographical area would certainly be of great relevance. The Board should' establish a rebuttable presumption that employees would have achieved the mean level of economic advantages secured in these relevant contracts. Any party would have the opportunity to present evidence tending to establish that the employees in this case would have achieved benefits of greater or lesser value.

The Complaint also seeks attorney's fees and litigation costs for the General Counsel and the UFW. This issue was not briefed by any party. No claim has been made that the Respondent's litigation posture, taken as a whole, is

frivolous. The requests are denied. Western Conference of Teamsters, 3 ALRB No. 37 (1977).

Finally, the UFW seeks reimbursement for its costs in engaging in fruitless negotiations with the Respondent. Again, this issue has not been briefed. Whether the Board has the authority to make unions whole when an employer has bargained in bad faith, and, if it does, how such authority should be exercised, are issues which should only be resolved after thorough argument. The request is denied.

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

ORDER

Respondent McFarland Rose Production, a division of Petoseed, Inc., a wholly-owned subsidiary of George Ball, Inc., its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, and 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 all 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 Section 1153 (c) of the Act.

(b) Refusing to bargain collectively in good faith with the UFW or its authorized representatives at reasonable times and conferring in good faith with respect to wages, hours, and other terms and conditions of employ-

ment, 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 Respondent to agree to a proposal or require the making of a concession.

2. Take the following affirmative action:

(a) Immediately offer to the following employees full reinstatement to their former or equivalent jobs, effective with the beginning of the fall 1977 harvest season, without prejudice to their seniority or other rights and.' privileges: Rogelio Avila, Luis Bautista, Roberto Galvan Chavez, Daniel M. Sanchez, Jesus H. Oropeza, Daniel Sanchez, Jr., Adolfo D. Galvan, Rodolfo B. Galvan, Jose Galvan, Rafael 0. Reyes, Adolfo 0. Galvan, Adolfo 3. Galvan, Roberto B. Galvan, Jose Socorro Baca, Oscar M. Esparza, and Efren Garcia.

(b) Make each of the employees named above in subparagraph 2(a) whole for all losses they may have suffared as a result of their discharges, including any loss of pay resulting from the Respondent's failure to bargain in good faith, by payment to them of a sum of money equal to the wages they each would have earned from the date of their discharges to the dates on which they are each reinstated or offered reinstatement, less their respective net earnings, 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 No. 42 (1977).

(c) Upon request, bargain collectively in good faith with the UFW, at reasonable times, 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 Respondent to agree to a proposal or require the making of a concession.

(d) Make whole those persons employed by Respondent at any time during the period from April 12, 1976, through June 2, 1977, for any losses in pay they may have suffered as a result of Respondent's failure to bargain in good faith, in accordance with the "Remedy" section of this decision..

(e) 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 reports, and other records necessary to analyze the back pay due to the foregoing named employees and to determine the amounts necessary to make whole employees for the loss of pay they may have suffered as a consequence of Respondent's failure to bargain in good faith.

(f) The Regional Director of the Fresno Regional Office shall determine and designate the locations where the attached notice to workers, in English and Spanish, shall be posted by the Respondent. Copies of said notice, on forms provided by the Regional Director, after being duly signed by the Respondent, shall be posted by the Respondent for a period of 90 consecutive days during the 1977 peak harvest period. The Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(g) A representative of the Respondent or a Board agent shall read the attached notice to workers to the assembled employees in English and Spanish. The reading shall be given on company time to each crew of Respondent's employees employed at Respondent's peak of employment during the 1977 season. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees, if any, to compensate them for time lost at this reading and question-and-answer period. The time, place, and manner of the readings shall be designated by the Regional Director. The Board agent is to be accorded the opportunity to answer questions which employees might have regarding the notice and their rights under the Act.

(h) Respondent shall hand out the attached notice to workers to all present employees and to all hired in 1977, and mail a copy of the notice to all employees not currently employed who worked at any time during the period from April 12, 1976, through June 2, 1977.

(i) The Respondent shall notify the Regional Director in writing, within 20 days from the .receipt of this Order, of what steps have been taken to comply herewith. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter, in writing, of what further steps have been taken to' comply herewith.

IT IS FURTHER ORDERED that allegations contained in the Third Amended Complaint not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

DATED: September [2/] , 1977.

AGRICULTURAL LABOR RELATIONS BOARD

By: _____

JOEL GOMBERG
Administrative Law Officer

Appendix A

NOTICE TO WORKERS

After a trial where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we discriminaterily discharged workers for acting together to help one another as a group, and that we refused to bargain in good faith with the UFW. The Board has told us to send out and post this notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law of the State of California which gives 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 help and protect one another, and

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

Because this is true, 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.

Especially:

WE WILL NOT fire you or lay you off because you act together to help and protect one another as a group.

WE WILL offer Rogelio Avila, Luis Bautista, Roberto

Galvan Chavez, Daniel M. Sanchez, Jesus M. Oropeza, Daniel Sanchez, Jr., Adolfo D. Galvan, Rodolfo B. Galvan, Jose Galvan, Rafael 0. Reyes, Adolfo 0. Galvan, Adolfo B. Galvan, Roberto B. Galvan, Jose Socorro Baca, Oscar M. Esparza, and Efren Garcia their old jobs back if they want them, beginning in this harvest, and we will pay each of them any money they lost because we discharged them.

WE WILL bargain in good faith with the UFW in an honest effort to agree upon a collective bargaining contract and we will give back pay to all of our workers who were employed between April 12, 1976, and June 3, 1977, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

Dated: _____

McFARLAND ROSE PRODUCTION

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.

Appendix B

The following exhibits are in evidence:

1. General Counsel Exhibits 1-A through 1-R, 2-A,2 through 14, 16 through 36, 38 through 48, 50, 52, 54 through 67, 69 through 84, 86, and 88 through 97.

2. UFW Exhibits 1, 2, 4, 5, and 6.

3. Respondent's Exhibits A through M.

The following exhibits ARE NOT in evidence:

1. General Counsel Exhibits 15, 37, 51, 53, 68, 65, and 87. There is no General Counsel Exhibit 49.

2. UFW Exhibit 3.

As is fully indicated in the record, some exhibits were admitted for limited purposes. In particular, most of the correspondence between the parties to the negotiations was not admitted for its internal truth, but to establish state of mind.