Santa Maria, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MASAJI ETO, dba ETO FARMS; and BUFORD & B. MACKIE FRAZIER, dba FRAZIER RANCH, Respondents, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos . 76-CE-21-M 76-CE-22-M 6 ALRB No. 20

DECISION AND ORDER

On August 10, 1977, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondents each timely filed exceptions with a supporting brief. The Charging Party and Respondent each filed a brief in reply to the other'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.

Summary of Bargaining History

The United Farm Workers of America, AFL-CIO (UFW), was certified as the collective bargaining representative of Respondent Frazier's agricultural employees on December 6, 1975, and of Respondent Eto's agricultural employees on January 22, 1976.

A UFW representative sent letters to Respondents Frazier and Eto on December 18, 1975, and January 29, 1976, respectively, requesting preliminary negotiations and also certain information concerning the operations of each Respondent. Neither Respondent answered the request. On March 10, 1976, the UFW representative reached Respondents' common representative by telephone, and the first negotiating meeting was set for April 13, 1976.

During the March 10 telephone conversation, Respondents indicated that they were interested in the UFW's "Master Agreement,"[1/] but did not accede to the Union's request to meet promptly for negotiations. The firm which represented both Respondents in these negotiations had also served as chief negotiator for the employers who were involved in the negotiations leading to the Master Agreement and was therefore familiar with the contents of that agreement. However, at the first bargaining meeting on April 13, Respondents' negotiator said there was some confusion about whether Respondents would sign the Master Agreement, but that they would "probably end up around there anyway." He took a copy of the Master Agreement to study. The next meeting was not held until three weeks later, on May 4, due to unavailability of Respondents' negotiator. Respondents there announced that they had problems with almost every article in the Master Agreement, and wished to "start from scratch." The UFW then presented Respondents with a contract proposal.

[1/]The Master Agreement was a collective bargaining contract negotiated earlier in 1976 between the UFW and a group of agricultural employers.

Five meetings took place between April 13 and June 24, 1976. On July 2, Respondents suspended negotiations, based on their stated belief that pending jurisdictional negotiations between the UFW and the Teamsters (1ST) would affect the bargaining strength of the parties. Unfair labor practice charges were filed by the UFW against each Respondent on July 29, 1976, alleging unlawful refusal to bargain in good faith regarding wages, hours, and conditions of employment. Meetings resumed at Respondents' request on August 12, 1976.

Between August 12 and October 19, 1976, four meetings were held. Having received a wage proposal from the Union on October 3, Respondents announced at the October 19 meeting that an impasse had been reached on all issues and that they would institute wage increases they had earlier proposed during the negotiations. Wages were raised the following day. The next meeting was held on December 2 but no further meetings were held until March 15, partly because of Respondents' refusal to meet due to the then-pending further jurisdictional pact meetings between the UFW and the Teamsters, and partly because Respondents' negotiator was involved as legal counsel for another client in an unfair labor practice proceeding.

Between March 15 and May 19, 1977, ten meetings were held. Agreement was reached on many issues, but there was still major disagreement on provisions concerning union security, hiring hall, and management's family members or supervisors doing bargaining-unit work. The hearing herein commenced on May 23, 1977.

Bad-Faith Bargaining

The present case does not present the situation of an employer's outright refusal to recognize or bargain with its employees' certified representative. Respondents Eto and Frazier and the UFW met on twenty occasions over a period of thirteen months, exchanging proposals and discussing bargaining subjects. But the Act requires more than meeting and going through the motions of negotiating. A. H. Belo Corporation, 170 NLRB 1558, 69 LRRM 1239 (1968). We must evaluate the evidence as a whole to determine whether Respondents were engaged in mere surface bargaining without a sincere desire to reach agreement, or whether Respondents bargained in good faith but were unable to arrive at an agreement acceptable to all parties. NLRS v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), 32 IBBM 2225, cert, den. 346 U.S. 887, 33 LRRM 2133.

Labor Code Section 1155.2 (a) defines good-faith-bargaining as follows:

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

The duty to bargain in good faith implies both "an open mind and a sincere desire to reach an agreement." NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943). Although the Act's good-faith standard does not "require the

yielding of positions fairly maintained," it does, at the same time, contemplate a willingness to "approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." Majure Transport Co. v. NLRB, 198 F.2d 735, 739, 30 LRRM 2441 (5th Cir. 1952).

The presence or absence of the intent to bargain in good faith must be discerned from the totality of the circumstances , including a review of the parties' conduct both at the bargaining table and away from it. Specific conduct which, standing alone, may not amount to a per se failure to bargain in good faith, may, when considered with all the other evidence, Support an inference of bad faith. Continental Insurance Co. v. NLRB, 495 F.2d 44, 86 LRRM 2003 (2nd Cir. 1974).

In this case, the ALO examined Respondents' conduct by dividing the entire span of negotiations into separate periods of time and scrutinizing Respondents' intent within each period. The ALO concluded that Respondents had bargained in bad faith during certain periods and had bargained in good faith during others.[2/] The ALO also concluded that Respondents had committed Section 1153 (e) and (a) violations by failing to provide relevant information requested by the UFW and by instituting unilateral changes in their employees' terms and conditions of employment. Respondents except only to the conclusions that they violated

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[2/]Throughout his decision, the ALO refers to Respondents' violation of Section 1153(e) and Section 1155.2(a) of the Act. We note that the correct reference is Section 1153(e) and (a) of the Act, and that Section 1155.2 (a) cannot be the basis of a violation as it merely defines collective bargaining.

their obligation to bargain in good faith during the periods from July 2, 1976 to August 12, 1976, and from December 2, 1976 to February 1, 1977, and to the imposition of a make-whole remedy covering these periods. Respondents do not except to the ALO's finding of per se violations of Section 1153 (e) and (a) in their failure to provide information requested by the Union, in their unilateral changes of their employees' terms and conditions of employment, and in their failure to meet and confer with the UFW from February 1 to March 15, 1977.

General Counsel excepts to the ALO's failure to find that Respondents engaged in surface bargaining, with no serious intention of reaching agreement, throughout the entire period of negotiations. General Counsel also excepts to the ALO's failure to find that Respondents committed per se violations of Section 1153(e) and (a) in addition to those per se violations he did find, by causing delays in negotiations, by refusing and failing to provide certain information requested by, the UFW regarding health-and-welfare plans, pension plans, profit-sharing plans or life insurance plans, and by delaying in providing other information about fringe benefits such as vacations and paid holidays. General Counsel also excepts to the ALO's failure to find that Respondent Eto violated Section 1153(e) and (a) by unilaterally raising employees' wages in January 1976.

We find merit in the General Counsel's exception to the failure of the ALO to find that Respondents violated their obligation to bargain in good faith throughout the entire period of negotiations. We reject the ALO's treatment of separate

periods in the bargaining as discrete units in evaluating Respondents' intent. Respondents' intent must be discerned from the totality of its conduct during the entire course of negotiations. NLRB v. Stevenson Brick & Block Co., 393 F.2d 234. 68 LRRM 2086 (4th Cir. 1968); B. F. Diamond Construction Co., 163 NLRB No. 25, 64 LRRM 1333 (1967); Montebello Rose Co., Inc., et al, 5 ALRB No. 64 (1979); O. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979). While we examine specific instances during the bargaining history in order to determine the subjective state of mind of the parties, all aspects of the parties' bargaining and related conduct are to be considered comprehensively, not as separate fragments assessed in isolation from one another. Abingdon Nursing Center, 197 NLRB 781, 80 LRRM 1470 (1972).

Over the entire course of contract negotiations, Respondents' conduct repeatedly demonstrated the absence of an intent to bargain in good faith and to reach agreement. In the course of discussing the evidence which, in its totality, convinces us that Respondents were engaged in surface bargaining throughout the negotiations, we shall deal with General Counsel's exceptions as to the alleged per se violations of Section 1153(e) and (a) which the ALO did not find, and with Respondents' exceptions to the ALO's conclusion that they failed and refused to bargain in good faith during the periods from July 2, 1976 to August 12, 1976, and from December 2, 1976 to February 1, 1977.

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Refusals to Meet, Delay in Arranging Meetings, and Frustration of the Bargaining Process

A. First Stage of Negotiations: Pattern of Delay, Refusal to Meet

The General Counsel excepts to the ALO's finding that-no demand for bargaining was made by the UFW until March 10, 1976, and to the ALO's failure to find that Respondents violated the Act by delaying commencement of negotiations. We find merit in these exceptions and we hold that the letters in which the UFW requested preliminary negotiation meetings with each Respondent constituted adequate requests or demands for bargaining. See A. G. Pollard Co. , 161 NLRB 1454, 63 LRRM 1488 (1966).

The UFW sent separate bargaining requests, to Respondent Frazier on December 18, 1975, and to Respondent Eto on January 29, 1976". Neither Respondent replied to the request until the UFW representative telephoned Respondents' representative on March 10, 1976. Respondents' representative failed to return several calls, and then said the earliest Respondents could meet with the UFW was April 13, 1976. The first bargaining session finally occurred two and one-half months after the initial request to Respondent Eto, and nearly four months after the request to Respondent Frazier. Furthermore, Respondents took from March 10, when they first discussed the possibility of signing the Master Agreement, to May 3, two meetings and almost two months later, to reject the Master Agreement and begin to bargain from a basic proposal, even though their negotiators were already quite familiar with

the contents of the Master Agreement.

While some time was undoubtedly required for Respondents and their representatives to discuss the Master Agreement and decide whether it was acceptable, we find that seven weeks was an unreasonably long period to achieve this. It was not until the third bargaining session that Respondents produced a written but incomplete counterproposal. The lack of diligence Respondents displayed in considering the Master Agreement and their delay in settling down to negotiations indicate that they did not equate their bargaining duty with other important business affairs. The pattern of delay, particularly in light of Respondents' subsequent conduct, is evidence of their lack of intention to bargain in good faith. Insulating Fabricators,. Inc., Southern Division, 144 NLRB 1325, 54 LRRM 1246 (1963), enfd. mem., 338 F.2d 1002, 57 LRRM 2606 (4th Cir. 1964); A. H. Belo Corporation, supra.

Five meetings, most of short duration, were held from April 13 to June 24. The parties discussed various issues and exchanged information, reaching agreement on some non-controversial items such as rest periods and bereavement pay.

On July 2, 1976, Respondents suspended negotiations, based on their asserted belief that the then-pending jurisdictional negotiations between the UFW and the Teamsters would affect the bargaining strength of the parties.[3/] Unfair labor practice charges

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[3/]Respondents contend that the UFW's proposed provision regarding successors would have permitted one union to turn its contract over to another. Respondents rejected the UFW's proposal with no counterproposal and no discussion of the parties' conflicting interpretations.

were filed by the UFW against each Respondent on July 29, 1976, alleging unlawful refusal to bargain in good faith regarding wages, hours, and conditions of employment. Meetings resumed at Respondents' request on August 12, 1976. The ALO concluded that Respondents' refusal to meet during that period constituted a per se violation of Section 1153(e) and (a). Respondents' exception to this finding is without merit.

As the UFW was the certified collective bargaining representative of Respondents' employees, Respondents were obliged to meet and bargain in good faith with the UFW concerning employees' wages, hours, and other terms and conditions of employment. The possibility that a jurisdictional pact might have been negotiated between the UFW and the Teamsters, essentially an internal union matter, cannot excuse Respondents' suspending negotiations herein.[4/] Parties to collective bargaining are required to negotiate within the context of then-existing conditions. We reject the notion that an employer which has been requested to bargain may put off its bargaining obligation while awaiting such developments. If a party were allowed to stall negotiations pending developments extrinsic to the negotiations themselves, the negotiating process would be subject to intolerable delays and frustration. By their outright refusals to meet, Respondents precluded the possibility of any negotiations taking place and thus committed a per se violation of Section 1153(e) and (a).

[4/]We note that Donald Dressier, a partner in the law firm which represented Respondents during negotiations, testified that eight growers represented by him negotiated contracts with the Teamsters while the jurisdictional pact talks were pending.

B. Second Stage of Negotiations; Spurious Declaration of Impasse

The initial and relatively unfruitful round of five meetings was followed by Respondents' illegal refusal to meet, from the beginning of July to mid-August, due to the IBT-UFW pact talks. During the second series of meetings, occurring from mid-August to mid-October, the parties met four times. Both parties made concessions on several points but failed to reach agreement on a single complete provision of the proposed contract. Respondents demanded economic proposals which the UFW was reluctant to put forward in the absence of agreement in other areas. By letter dated October 7, 1976, in response to Respondents' demand, the Union did make a wage proposal. Although there had been no substantial discussion of this proposal, Respondents at the next meeting, held October 19, declared that negotiations were at an impasse. We agree with the ALO that a valid impasse did not exist at the time.

Impasse occurs when the parties are unable to reach agreement despite their best good-faith efforts to do so. Bill Cook Buick, 224 NLRB 1094, 92 LRRM 1582 (1976). Whether a bargaining impasse exists is a matter of judgment. Factors such as bargaining history, good faith of the parties during negotiations, and the importance of the issue or issues in disagreement, are all relevant to the determination of whether a valid impasse exists. Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967). As a general rule, contract negotiations are not at impasse if the parties still have room for movement on

major contract items, even if the parties are deadlocked in some areas. Schuck Component Systems, 230 NLRB 838, 95 LRRM 1607 (1977); Montebello Rose Co., Inc., 5 ALRB No. 64 (1979)

We affirm the ALO's finding that, as of October 19, 1976, when Respondents declared an impasse, there was still room for movement on many issues, including seniority, grievance procedure, and hiring hall. Modified proposals concerning discharges and discipline, stand-by time, and grievance procedure were on the table, and the discussions indicated that further meetings might well have resulted in agreement being reached. The record also demonstrates that the parties were not even at impasse on the single issue of wages. The October 19, 1976 meeting was the first meeting in which wage proposals of both parties were on the table. There had been no discussion of wages, other than a review of the Respondents' wage proposals, and hence no genuine deadlock could have occurred. When Respondents raised their employees' wages on October 20, therefore, they committed a per se violation of Section 1153(e) and (a). Cheney California Lumber Co. v. NLRB, 319 F.2d 375, 53 LRRM 2598(9th, Cir. 1963); Alsey Refactories Co., 215 NLRB No. 146, 88 LRRM 1071 (1974). See also 0. P. Murphy Produce Co., 5 ALRB No. 63 (1979).

After the second series of meetings, which culminated in the contrived impasse on October 19, 1976, and a meeting held on December 2 at the request of the UFW, Respondents again unlawfully refused to meet because of the jurisdictional-pact talks and subsequently refused to meet until March 15 assertedly because Respondents' negotiator was involved in another proceeding. We

find that Respondents' refusal to meet due to the unavailability of the negotiator is evidence of bad faith bargaining. An employer cannot argue that its chosen representative had no time available to discharge the statutory duty to bargain. That duty is on the employer, and the employer cannot divest itself of the legal obligation by shifting responsibility to its agent. Franklin Equipment Co., Inc., 194 NLRB 643, 79 LRRM 1112 (1972); Insulating Fabricators, Southern Division, supra; NLRB v. Mil go Industrial, Inc., 229 NLRB 25, 96 LRRM 1347 (1977) enf'd. 567 F.2d 540, 97 LRRM 2079 (2nd Cir. 1977).

C. Third Stage of Negotiations

Following the extended period during which Respondents refused to meet, and after the complaint had been issued and the hearing date set, the parties met ten times in the two months before the commencement of the hearing in May 1977. They reached agreement on several articles but they remained divided on major non-economic items as well as wages and fringe benefits. Throughout the entire course of negotiations the UFW repeatedly indicated that it considered its proposals on the issues of hiring hall, union security, and the performance of bargaining-unit work by supervisors and management's family members to be essential to its ability to function as the employees' representatives. These issues were of central importance to Respondents also. Respondents were adamantly and categorically opposed to the UFW's proposals on these topics throughout the entire course of negotiations.

We find that Respondents continued to bargain in bad

faith during the third stage of negotiations. In the first few meetings after March 15, 1977, the parties reached agreement through compromise on a number of contract items, including income tax withholding, mechanization, management rights, records and pay periods, seniority, health and safety (not including medical insurance), leaves of absence, new and changed, job classifications, and worker security. While these areas of agreement may be significant, neither party regarded them as the crucial bargaining issues. At the meetings on April 20 and April 26, the parties dealt with the crucial issues of hiring hall, union security, and bargaining-unit work. Respondents presented proposed trade-offs whereby the Union would withdraw its proposals on these issues as well as on various economic items, while Respondents would make concessions on issues both parties considered to be of secondary importance. The UPW rejected these trade-offs, stating on one occasion that Respondents' proposal would "cut the guts out of the union." On May 18, the Union offered a package which contained, among other things, concessions to meet specific problems raised by Respondents at the April 26 discussion of the Union's hiring hall proposal. The thrust of these concessions was to waive the operation of the hiring hall until certain contingencies arose which would make a hiring hall more workable. Respondents answered the UFW with a counter-package very similar to their previous proposed trade-offs. Respondents rejected the contingency concept summarily, preferring to stand firm on their refusal to surrender any control over hiring. Respondents

also adamantly rejected a compromise offered by the Union on the issue of bargaining-unit work without undertaking serious discussion about the practicalities of the proposed compromise.

The NLRB has recognized that an employer is obliged to make some reasonable efforts to compose differences with the union if the Act is to be read as imposing any substantial obligation at all. NLRB v. Reed & Prince Mfg. Co., supra, 32 LRRM at 2228. We find that Respondents' package proposals, offered after a year of negotiations when Respondents were fully aware of the Union's positions on these crucial articles, show that Respondents were not making reasonable efforts to compose differences with the Union. Clear Pine Mouldings, 238 NLRB No. 13, 99 LRRM 1221 (1978). Respondents' summary rejection of the UFW's concessions on the hiring hall issue, and the UFW's proposed compromise on bargaining-unit work, made without reasoned discussion of the issues, further evidences Respondents' bad faith. The Udylite Corp., 183 NLRB 163, 76 LRRM 1850 (1970); Alba Waldensian Inc., 167 NLRB 695, 66 LRRM 1145 (1967); "M" System, Inc., 129 NLRB 527, 47 LRRM 1017 (1960).

Surface bargaining is a violation which occurs over an extended period of time; it cannot be analyzed by examining individual bargaining sessions or positions in isolation from the totality of the parties' conduct. A finding of a violation is dependent upon evidence of a pattern of unlawful conduct which precludes agreement or genuine impasse between the parties. McFarland Rose Production, 6 ALRB No. 18 (1980). In this case Respondents had, before the third round of meetings, engaged in

illegal surface bargaining during the previous two rounds of meetings, in which proposals were exchanged and agreements reached. They had also refused outright to meet with the UFW for long periods of time between these rounds. We must scrutinize Respondents' conduct during the last two months before the hearing in the context of their pattern of illegal bargaining. We find that Respondents' failure to engage in substantive discussion and reasoned bargaining over important contract items shows that Respondents had not made a significant departure from their past unlawful conduct nor adopted a course of good faith bargaining.[5/] McFarland Rose Production, supra. Viewing the totality of Respondents' conduct throughout negotiations and noting that the

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[5/]Contrary to our dissenting colleague's claim, we do not base our finding of Respondents' bad faith on a conclusion that Respondent's concessions did not go far enough in accommodating the-Union's demands, nor do we require Respondents to capitulate to the Union's demands in order to prove a significant break in their past illegal attitude. We require only that the parties bargain with each other in compliance with the requirements of the Act. McFarland Rose Production, supra.

Member McCarthy's analysis of Respondent's conduct isolates the third phase of negotiations instead of following the NLRB's practice of evaluating the totality of a party's conduct over the entire course of negotiations. His conclusion that Respondents bargained in good faith during the third phase of negotiations does not give adequate weight to the following factors: that more than a year of negotiations had taken place prior to this last round of meetings, and Respondents were well aware of the UFW's position on the major contract items when they presented their package proposals; that these sessions were taking place in the two months between the issuance of an unfair labor practice complaint and the commencement of the hearing on that complaint; that the reasons asserted by Respondents for rejecting the Union's compromise proposals on the issues of hiring hall and bargaining-unit work were of an abstract, categorical nature rather than practical; and that Respondent had been bargaining in bad faith, a finding in which Member McCarthy concurs, during the previous two rounds of meetings.

parties did not bargain to bona fide impasse or contract, we find that Respondents continued, during these last weeks before the hearing, to bargain in bad faith.

Per Se Refusals to Bargain

The conclusion that Respondents' conduct in its totality was inconsistent with a good-faith intention to bargain seriously to a contract is further supported by aspects of their conduct which in themselves constitute violations of the statutory duty to bargain regardless of motive or intent. We turn now to those violations.

A. Failure to Provide Information

In its initial letters to Respondents asking for a preliminary negotiations session shortly after certification, the UFW requested information concerning: (1) bargaining-unit employees and their spouses; (2) any health-and-welfare, pension, profit-sharing, or life-insurance program offered by Respondents; (3) other economic benefits, including paid holidays and vacations; and (4) non-bargaining-unit employees.

Respondent Frazier provided the Union with some information on its employees before the first negotiations meeting, but the information was incomplete. When the UFW requested an updated employee list on January 17, 1977 Respondent Frazier took until March 23, 1977, to deliver an updated but still-incomplete list, although its negotiator had stated that the company had experienced a complete turnover in its work force. Respondent Eto did not comply with the UFW's original request for information until March 23, 1977, and the information,

when finally provided, was incomplete.

An employer is obligated to provide a union with information which is relevant and reasonably necessary to the union's ability to carry out bargaining negotiations. Westinghouse Electric Corp., 239 NLRB No. 19, 99 LRRM 1482 (1978). Once the request for information is received, an employer is required to take action toward fulfilling the request, and the union is required to do no more to establish its right to have the information produced. Ellsworth Sheet Metal, Inc., 232 NLRB No. 109, 96 LRRM 1258 (1977).

We affirm the ALO's conclusion that Respondent Eto's " failure to furnish information on its employees for over a year after the Union's request, and Respondent Frazier's failure to produce a complete updated list, were per se violations of Section 1153(e) and (a) of the Act.

General Counsel excepts to the ALO's failure to conclude that Respondents violated the Act by failing and refusing to provide information., requested by the UFW, on health-and-welfare plans, pension plans, profit-sharing plans, and life-insurance plans. The ALO found that Respondents failed to supply the requested information, but found no violation since he concluded that the Union had no intention of deviating from its own fringe benefit proposals. We reject the ALO's reasoning and we conclude that Respondents' failure to provide such information violated Section 1153 (e) and (a).

Pensions, insurance programs, and other fringe benefits which may accrue to employees through the employment relationship

are within the definition of wages for purposes of collective bargaining. Connecticut Light and Power Co. v. NLRB, 476 F.2d 1079, 82 LKRM 3121 (2nd Cir. 1973). Respondents have a duty to provide information on such benefits, including health-and-welfare benefits, to the Union upon request and within a reasonable time. Cowles Communications, Inc., 172 NLRB 1909, 69 LRRM 1100 (1968). Even if Respondents provided their employees none of the fringe benefits about which information was requested, they were nevertheless obligated to inform their employees' certified bargaining representative of that fact.

The General Counsel also excepts to the ALO's finding that Respondents provided information about such benefits as paid holidays and vacations within a reasonable time. We find merit in this exception. No information was provided until the first bargaining session, nearly two and one-half months after the UFW requested the information from Respondent Eto, and nearly four months- after the UFW's request to Respondent Frazier. In these circumstances, we find a further violation of Section 1153(e) and (a) in Respondents' failure and refusal to provide the requested information within a reasonable time after the requests were made. Pennco, Inc., 212 NLRB 677, 87 LRRM 1237 (1974).

B. Unilateral Wage Changes

Respondent Eto raised its employees' wages as of January 19, 1976, without notifying the UFW about the changes. Election objections were pending as of that date. This Board certified the UFW as the collective bargaining representative of Respondent Eto's employees on January 22. As the National

Labor Relations Board (NLRB) has stated,

> ... an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determi nation has not yet been made.... Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions.... Mike 0'Connor Chevrolet, 209 NLRB 701, 85 LRRM 1419(1974)rev'd. on other grounds, 512 F.2d 684, 88 LRRM 3121 (8th Cir. 1975).

For the reasons stated by the NLRB, during the pendency of election objections an employer is obligated to give a union which has participated in a representation election notice about changes it wants to make in its employees' wages, hours, or conditions of employment, and an opportunity to bargain about the changes. Highland Ranch and San Clemente Ranch, Ltd., 5 ALRB. No. 54 (1979); W. R. Grace and Co., 230 NLRB 617, 95 LRRM 1459., (1977)' enf'd. in part, 571. P.2d 279, 98 LRRM 2001 (5th Cir. 1978).

The January 19 wage change was implemented more than six months before the filing of the unfair labor practice charges herein on July 29. The six-month limitations period for filing charges, set forth in Section 1160.2 of the Act, provides an affirmative defense which must be asserted by the party harged. Chicago Roll Forming Co., 167 NLRB 961, 971, 66 LRRM 1228 (1967), enf'd. 418 F.2d 346, 72 LRRM 2683 (7th Cir. (1967). Respondent Eto has not asserted the defense. However, neither the charge nor the complaint alleged the January wage increase as a violation of Section 1153 (e), the increase was not treated as a per se

violation of Section 1153 (e) during the hearing, and the ALO did not conclude that it was a violation. Under these circumstances we find that the issue of this wage increase has not been fully litigated as an independent violation of Section 1153 (e), Anderson Farms Company, 3 ALRB No. 67 (1977) ; Monroe Feed Store, 112 NLRB 1336, 36 LRRM 1188 (1955), and therefore that Respondent Eto was not on notice to assert the defense. Accordingly, we regard the increase merely as background evidence as to Respondent Eto's attitude toward bargaining with its employees' representative. Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 US 411, 45 LRRM 3212 (1960).

Both Respondents instituted wage increases effective on October 20, 1976, after the October 19, 1976, bargaining session, at which Respondents' negotiator declared that the parties were at impasse on all major issues and that the Respondents' wage proposal would be implemented. As discussed on page 11, supra, we affirm the ALO's conclusion that Respondents' unilateral wage increase on October 20, 1976, was a violation of the Act because there was no valid impasse.

We also affirm the ALO's conclusion that Respondent Eto violated Section 1153 (e) and (a) of the Act by unilaterally changing the wages of employees Bruce Corelitz in May 1976, and Charles Schimmel in April 1977, and by hiring employees Juan Pontoja Vargas in June 1976, and J. Miller, R. Tomkins , and S. Rodriguez in September 1976, at less than the current wage rate during the course of the negotiations, without notifying or

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bargaining with the Union.[6/]

The ALO found that Respondent Frazier did not bargain directly with its employees, in circumvention of its duty to bargain with the UFW, by negotiating with them as to whether they were to be paid for thinning fields on a contract basis or by the hour. We reject the ALO's suggestion that the UFW's failure to object to this conduct, when it learned of it at the first bargaining session, operated as a waiver. The NLRB and the courts have repeatedly held that a waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed. Kroehler Mfg. Co. , 222 NLRB 1269, 91 LRRM 1382 (1976); New York Mirror, 151 NLRB 834, 58 LRRM 1465 (1965), and cases cited therein. In the absence of evidence that the UFW explicitly and unequivocally waived its right to negotiate about these changes, we do not regard the UFW's failure to object to Respondent Frazier's unilateral action as a waiver. We find that Respondent Frazier violated Section 1153(e) and (a) of the Act in bypassing the certified collective bargaining representative and bargaining directly with unit employees. Chase Manufacturing, Inc., 200 NLRB 886, 82 LRRM 1026 (1972).

The Remedy

Having found that Respondents Eto and Frazier failed and

[6/]We reject the ALO's conclusion that Respondent Eto violated the Act by granting a wage increase to Hayward Giraud on April 12, 1976. This wage increase was based on Giraud's transfer from field work to tractor driving, and therefore does not constitute an unlawful unilateral change. NLRB v. Southern Coach & Body Co., 336 F.2d 214 (5th Cir. 1964), 57 LRRM 2102.

refused to bargain in good faith with the UFW, we shall order them to meet with the UFW, on request, and to bargain in good faith and to make whole their agricultural employees for the loss of wages and other economic losses they incurred as a result of Respondents' unlawful conduct, plus interest thereon computed at seven percent per annum. Montebello Rose Co./Mt. Arbor Nurseries, supra; Adam Dairy, 4 ALRB No. 24 (1978).

We find that Respondents were in a position to begin bargaining in good faith by March 10, 1976, and will therefore order the make-whole period to begin on that date.[7/] Both Respondents had received earlier requests to meet and provide information, to which neither responded. Although the UFW's representative requested in a March 10 phone conversation that negotiations begin as soon as possible, Respondents' representative failed to return several of her calls and finally indicated that Respondents could not meet with the Union until a full month later. Such dilatory tactics, later repeated by Respondents throughout the negotiations, caused the bargaining process to

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[7/]Member Ruiz, for the reasons stated in his concurring opinion in O. P. Murphy, 5 ALRB No. 63 (1979) , would begin the make-whole period on December 21, 1975, for Respondent Frazier and on February 1, 1976, for Respondent Eto, these being the dates on which each Respondent presumably received the UFW's letter requesting negotiations and information. Although the UFW filed a charge against Respondent Frazier on July 29, 1976, more than six months after December 21, 1975, Member Ruiz would find that the statute of limitations set forth in Section 1160.2 did not begin to run until the UFW had notice of Respondents' bad faith on July 2, 1976, when Respondents refused to meet due to the Teamster pact talks. See Montebello Rose Co., Inc., et al, 5 ALRB No. 64 (1979). Because the statute of limitations is tolled as to the remedy as well as to the cause of action, Allied Products Corp., 230 NLRB 858, 95 LRRM 1406 (1977), the make-whole remedy can begin to run from December 21, 1975.

begin so slowly that it was not until several months after the UFW's initial letters that the parties actually discussed substantive contract terms. We therefore find that the record evidence establishes that Respondents' lack of good faith commenced on March 10. The make-whole period extends from that date to the time when Respondents commence good-faith negotiations and bargain either to a contract or a genuine impasse.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent Masaji Eto, dba Eto Farms, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith as defined in Labor Code Section 1155.2 (a), with the UFW as the exclusive representative of its agricultural employees, and, in particular, 1) failing or refusing to: meet and bargain collectively at reasonable times, 2) making -unilateral changes in employees' terms and conditions of employment without prior notice to and bargaining with the UFW, and 3) failing or refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining.

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

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

(a) Upon request by the UFW, rescind wage increases

implemented since January 29, 1976, and bargain collectively with the UFW with respect to such increases.

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

(c) Upon request, provide to the UFW information which is relevant to bargaining.

(d) Make whole each employee employed in the appropriate bargaining unit at any time between March 10, 1976, and. the date Respondent Eto commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by each of them as the result of Respondent Eto's refusal to bargain, as such losses have been defined in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

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

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

(g) Post copies of the attached Notice in all

appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 60-day period, the period and places of posting to be determined by the Regional Director. Respondent shal-1 exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time during 1976 and 1977.

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

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

(k) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the

Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

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

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent Buford and B. Mackie Frazier, dba Frazier Ranch, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW as the exclusive representative of its agricultural employees, and, in particular; 1) failing or refusing to meet and bargain collectively at reasonable times, 2) making unilateral changes in employees' terms and conditions of employment without prior notice to and bargaining with the UFW, and 3) failing or refusing to furnish the UFW with relevant and necessary information requested for purposes of bargaining.

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

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 implemented on October 20, 1976, and bargain collectively with the UFW with respect to such increases.

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

(c) Upon request, provide to the UFW information which is relevant to bargaining.

(d) Make whole each employee employed in the appropriate bargaining unit at any time between March 10, 1976, and the date Respondent Frazier commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by each of them as the result of Respondent Frazier's refusal to bargain, as such losses have been defined in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

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

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

(g) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 60-day period, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time during 1976 and 1977.

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

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

(k) Notify the Regional Director, in writing, within 30 days after the date of issuance of this Order, what

steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

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

Dated: April 25, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Dissenting in Part:

While I am not in complete agreement with the majority's analysis relative to the first and second stages of negotiations, I concur in the majority's conclusion that Respondents engaged in bad faith bargaining during those periods.

With respect to the third stage of negotiations, I find no evidence of bad faith bargaining and would therefore confine the make-whole remedy to the two stages of negotiations prior to March 15, 1977.[1/] I reach this conclusion with due regard for the totality of the circumstances[2/] and in the belief that a party

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[1/] The ALO also concluded that Respondent was bargaining in good faith during the third stage of negotiations and therefore his recommended order did not provide for make-whole after March 15, 1977.

[2/] The totality of circumstances concept as applied by the NLRB, may warrant finding a refusal to bargain based on a series of incidents which, considered separately, might not amount to a violation. It may also be the basis for absolving an employer of bad faith bargaining when the union's conduct has had a detrimental

[fn. 2 cont. on p.]

which has engaged in surface bargaining does not lose its right to maintain a firm but fair bargaining posture during the remainder of the negotiations."[3/]

The majority concludes that during the third stage of negotiations, "Respondents had not made a significant departure from their past unlawful conduct nor adopted a course of good faith bargaining." I share the contrary view of the Administrative Law Officer:

> In a context in which the Respondents agreed to numerous changes in working conditions designed to improve the lot of the farm worker as well as proposing economic benefits for the workers in the form of substantial wage increases, paid holidays, vacations and a health and welfare program, the conclusion seems inescapable Respondents bargained in good faith, during the March 15 May 19 period. To hold otherwise because of Respondent's rejection of the Union security, hiring hall and family members working positions would he to cross the line dividing 'permissible inference' from 'impermissible compulsion. [Citing United Steelworkers of America, AFL-CIO v. NLRB (D.C. Cir. 1971), 441 F.2d 1005, 1010.][A.L.O.D., p. 58]

In support of its arguments that Respondents were bargaining in bad faith during the third stage of negotiations,

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[fn. 2 cont.]

effect on the bargaining process. The majority, however, has distorted the concept and uses it to support what is. in effect a presumption that once surface bargaining occurs, it continues throughout the remainder of the negotiations, and to justify application of the make-whole remedy on an open-ended basis. 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 my dissenting, opinions-in As-H-Ne Farms, Inc., 6 ALRB No. 9 (1980), and McFarland Rose __ Production, 6 ALRB No. 18 (1980).

[3/]Labor Code Section 1155.2 provides in pertinent part that the "[good faith bargaining] obligation does not compel either party to agree to a proposal or require the making of a concession."

the majority cites NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953), 32 LRRM 2225, cert. den. 346 U.S. 887, 33 LRRM 2133, where, to use the majority's paraphrasing, it was

> ... recognized that the employer is obliged to make some reasonable efforts to compose differences with the union if the Act is to be read as imposing any substantial obligation at all. [Emphasis in original.]

However, the majority overlooks the factual situation which confronted the court in that case. That situation, and the standard which the court applied, is best summed up in the following excerpts from the opinion:

> . . . Thus if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least partway, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all. [Emphasis in original.] [at p. 2228]

* * *

> The plain fact is that after months of negotiations, as the Board observed, 'practically all the Union could report to its membership in the way of progress was the 10-cent wage offer—freely given by the Respondent in an inflationary period of rising wages.' Even in minor matters, such as the Union's request for use of the Company bulletin board, and the Union's request that the second proviso of § 9 (a) of the Act be inserted in the recognition clause, the Company withheld assent. The Company's asserted justification for this is that it was 'bargaining technique'. But it may be wondered how the Company could in good faith ever

> expect to arrive at an agreement if the major proposals submitted by the Union are refused on principle and assent on the minor ones is withheld as a matter of bargaining technique.[4/] [at p. 2232]

I submit that Respondents' bargaining conduct during-the third stage of negotiations was exemplary in comparison to that of- the employer in Reed & Prince. Respondents had made numerous concessions and had reached agreement with the union in highly significant areas. The only real obstacles to an overall agreement were the issues of a hiring hall and the performance of bargaining unit work by family members of management personnel. The majority states that throughout the negotiations the UFW repeatedly indicated that it considered its proposals on those issues to be essential to its ability to function as the employees' representatives. While perfunctorily noting the importance of these matters to the Respondents, the majority regards Respondents' position on the union's proposals as being unreasoned. In fact, not only did Respondents make it clear throughout the negotiations that they regarded these matters as being of highest importance to their operations, they also gave a reasoned basis for not wanting to adopt the union's contingent hiring hall proposal and historically based limitation on family members -doing bargaining unit work.

The union did not yet have a hiring hall in the vicinity

[4/] It should also be noted that the NLRB's decision in Reed & Prince gave some weight to the employer's "rather unsavory labor relations history" and that the court gave its approval to taking such factors into account. Even with that background, the employer was not required to forego hard bargaining as the price of avoiding an unfair labor practice complaint.

of one of the Respondents and did not yet have contracts providing for a hiring hall with employers in the vicinity of the other. It offered to make the hiring hall provision contingent on a change in those circumstances. Quite naturally, Respondents indicated that they did not want to adopt a proposal whose specifics would be dependent upon the unique circumstances of any growers who in the future might agree to it. Moreover, they explained that their current hiring system worked well, while a union hiring hall system had no track record in the area. Respondents did offer to notify the union of vacancies and to not discriminate against persons referred by the union. Thus, Respondents gave a reasoned basis for not accepting the union's hiring hall proposal and made an attempt to address the union's concerns with a counterproposal of their own. The parties' dealings in this regard betray no evidence of bad faith bargaining.

As to the union's demand that bargaining unit work by family members be strictly limited to types of work done in the past by existing members of the family, Respondents provided a reasoned argument in opposition. They noted, for instance, that the union had agreed to unlimited bargaining unit work by family members at a growing operation near San Diego. When told that the San Diego operation was a large one where work by family members did not have as much impact on the bargaining unit, Respondents pointed out that their small operations were in greater need of the flexibility that unlimited family member work could afford.

Given these circumstances, I strongly disagree with the majority's conclusion that Respondents "fail[ed] to engage in

substantive discussion and reasoned bargaining over important contract items" during the final period of negotiations. For all intents and purposes, the parties found themselves at an impasse on two issues which each side considered crucial. Thus to require that Respondents do more to demonstrate that they had embarked on a course, of good faith bargaining is to require that they capitulate to the union on either or perhaps both of those matters of vital importance.

By placing Respondents in a situation where they could have avoided a finding of continuing bad faith only by conceding positions that they legitimately maintained, the majority disregards Labor Code Section 1155.2 and fails to follow applicable NLRA precedent which holds that "it is ... clear that the- Board may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." NLRB v. American Nat'l Ins. Co., 343 IT.S. 395, 405, 30 LRRM 2147 (1951). I would limit the make-whole-remedy to the two bargaining periods prior to March 15, 1977, the point after which no bad faith bargaining has been established on the record in this matter.

Dated; April 25, 1980

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES OF MASAJI ETO, DBA ETO FARMS

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

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

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and to choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of the above things.

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

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

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT change your working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from March 10, 1976, to the date we began to bargain in good faith for our contract, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

Dated: MASAJI ETO, dba ETO FARMS

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

NOTICE TO EMPLOYEES OF
BUFORD AND B. MACKIE FRAZIER, DBA FRAZIER RANCH

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found we did not bargain in good faith with the United Farm Workers of America, AFL-CIO, in violation of the law. The Board has told us to post this Notice and to mail it to those who worked at the company between January 1, 1976, and January 1, 1978. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and to choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of the above things.

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

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

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT change your working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from March 10, 1976, to the date we began to bargain in good faith for our contract, and who suffered any loss of wages or benefits because of our failure to bargain in good faith.

Dated:

BUFORD AND B. MACKIE FRAZIER,
DBA FRAZIER RANCH

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Masaji Eto, dba Eto Farms,
and Buford & B. Mackie Frazier,
dba Frazier Ranch (UFW)

6 ALRB No. 20
Case Nos. 76-CE-21-M
76-CE-22-m

ALO DECISION

The ALO concluded that Respondents violated Section 1153(e) by engaging in surface bargaining with the UFW, and recommended application of the make-whole remedy for two periods: July 2, 1976, to August 12, 1976, and October 20, 1976, to March 15, 1977, finding that no violation occurred during the interim period from August 12 to October 20, 1976. The ALO also found per se violations of Section 1153 (e) in Respondents' refusals to meet with the UFW, their failure to supply relevant information requested by the UFW, and the unilateral wage increases granted after the UFW's election victories.

BOARD DECISION

The Board examined the totality of Respondents' conduct, rejecting the ALO's treatment of discrete periods, and found that they had engaged in surface bargaining with no intent to reach agreement. Evidence of bad faith was found in Respondents' delay in responding to the Union's request to negotiate, their delay in deciding whether, to accept the Master Agreement, their failure to provide an available negotiator, and in their unreasonable proposals and unreasoned rejection of UFW proposals. Respondents were also found guilty of certain per se refusals to bargain: granting unilateral wage increases while election objections were pending, after a premature declaration of impasse, and during contract negotiations; failing to provide information; and bypassing the exclusive representative by dealing directly with the employees. The Board concluded that Respondents violated Section 1153 (e) and (a) of the Act by refusing to bargain in good faith.

REMEDY

The Board ordered Respondents to meet and bargain in good faith with the UFW and to make whole its agricultural employees for the economic losses resulting from Respondents' refusal to bargain with the UFW. The make-whole period was deemed to commence on March 10, 1976, six months before the charge was filed.

DISSENT

Member McCarthy would conclude that Respondents did not fail or refuse to bargain in good faith during the third stage of the negotiations and would therefore cut off the make-whole remedy as of March 15, 1977, basing that conclusion on his finding that Respondent made sufficient reasonable concessions during the last stage of bargaining. Further, Member McCarthy restated his position that reviewing the totality of Respondents' conduct does not require a finding of a violation for the entire course of negotiations when bad faith is shown for only part of the negotiations.

***

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

MASAJI ETO, dba ETO FABNB; and BUFORD & B. MACKIE FRAZIER, dba FRAZIER RANCH Respondents/Employers and UNITED FAPM WORKERS OF AMERICA, AFL-CIO Charging Party	Case Nos. 76-CE-21-M 76-CE-22-M

Appearances By:

Francis Fernandez, Esquire, of
Salinas, California, on behalf of
the General Counsel

W. Daniel Boone, Esquire, of the firm of
Peyton & Boone of Salinas, California, on
behalf of the Charging Party

Calvin Watkins, Esquire, of the firm of
Dressler, Stoll & Jacobs of
Newport Beach, California, on behalf of
the Respondents

DECISION

STATEMENT OF THE CASE

ROBERT LePROHN, Administrative Law Officer: This case was heard before me in Santa Maria, California, on May 23, 24, 25 and June 2 and 3, 1976. The hearing closed June 14, 1976, after receipt and admission into evidence without objection of three exhibits prepared by Respondents.
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Charges were filed against Respondent Eto Farms in Case No. 76-CE-21-M and against Respondent Frazier Ranch in Case No. 76-CE-22-M on July 29, 1976. The cases were consolidated for hearing by order of Regional Director Mayo issued January 3, 1977. Complaint issued January 4, 1977, alleging violations of Labor Code Sections 1153(a), 1153(e) and 1155.2(a). The charges and the complaint were duly served upon each Respondent. At the close of his case General Counsel filed a written First Amendment to Complaint, which was duly served upon Respondents' counsel, with the Administrative Law Officer.

At the outset of the hearing a motion to intervene, made by the United Farm Workers of America, AFL-CIO (UFW) as Charging Party, was granted. Each party was given full opportunity to participate in the hearing, and each party filed a post-hearing brief.

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

FINDINGS OF. FACT

1. Jurisdiction

Masaji Eto, dba Eto Farms, hereinafter called Eto, is a sole proprietorship engaged in agriculture in San Luis Obispo County, California, and is an agricultural employer within the meaning of Labor Code Section 1140.4(c).

Buford and B. Mackie Frazier are partners doing business as Frazier Ranch and are engaged in agriculture in Santa Barbara County, California. Frazier Ranch is an agricultural employer within the meaning of Labor Code Section 1140.4(c).

The United Farm Workers of America (UFW) is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The UFW is a labor organization within the meaning of Labor Code Section 1140.4(b).

2. The Alleged Unfair Labor Practices

Respondents are alleged to have violated Sections 1153(a), 1153(e) and 1155.2(a) in the following respects: engaging in a course of conduct constituting a failure to bargain in good faith with the certified bargaining representative of their employees; refusing to bargain by refusing to meet with UFW representatives; by refusing and failing to furnish requested information necessary and relevant to the UFW's performance of its duty as bargaining representative of Respondents' employees; and by effecting unilateral changes in the wages and/or classifications of farm workers.

3. The Employers' Operations

Both Eto and Frazier are members of the Grower-Shipper Vegetable

Association of San. Luis Obispo and Santa Barbara Counties. There are approximately 50 members of this Association in the Santa Maria Valley. Among its other functions the Association serves as the collective bargaining representative for its members. Grower-Shipper is a member of Western Growers Association and both Eto and Frazier are associate members of Western Growers.

A. Frazier Ranch:

Frazier Ranch grows and harvests lettuce, broccoli and beans. Other than Frazier employees are used in lettuce and beans. Frazier supplies the land for a fee.

Broccoli is machine-planted during July and August. It is harvested during October and November and from March until June. During the growing period it is necessary to irrigate and plow, and on occasion, hoe and thin the crop. The irrigating and plowing are done by Mackie Frazier; agricultural employees thin and harvest the crop.

Juan Uvalle serves as crew boss for Frazier. He is responsible for obtaining Frazier's crews and for negotiating the amount and manner of payment to be made for thinning a particular field. The crews set a price for which they will thin a field. If their price results in their earning less than if the field had been thinned on an hourly basis, they are paid the going hourly rate. The hourly rate is also the rate paid if no agreement can be reached on a price for the field. Alternatively the field is not thinned. Uvalle deals with the workers, he relays their price to Frazier who decides what is to be done.

B. Eto Farms:

Masaji Eto has been farming in the San Luis Obispo area since he left school. He has historically paid his field workers the rate prevailing in the Oceano-Arroyo Grande-Santa Maria area. Eto grows broccoli and romaine lettuce. Crops are planted in January and harvested from late April until September.

In January, 1976, he increased the field worker hourly rate to $2.95 per hour upon learning this was the prevailing rate.

He customarily hires some students from Cal-Poly in San Luis Obispo at less than full scale. As these students become more proficient and knowledgeable, the practice has been to bring them up to scale. The timing and amount of such increases has been at the discretion of Eto. There has been no set pattern.

During 1976 Eto hired Hayward Giraud at a rate he deemed commensurate with his skill. In April Eto felt that Giraud deserved a wage increase so he granted one. Giraud, again on the basis of merit, received another increase in May, 1976. Another person employed as a tractor driver also received an increase in May. In September, 1976, Eto hired three persons at $3.50 per hour. They were to do both loading and tractor driving. Neither these hirings or the assigned rate of pay was discussed with the UFW. Nor was information regarding these events conveyed to the UFW. The facts were discovered

during the course of the hearing when Mr. Eto produced his records.

Juan Vargas, the nephew of Eto's irrigator, was hired for a summer job at a rate of $2.50 per hour. Eto testified this was a child's rate established by the Department of Industrial Welfare. This job was Vargas' first job.

Eto participates in a program operated by the International Farmers Association of Berkeley. It provides him with foreign exchange persons who work on his farm for a period of one year. The Association sets a monthly salary which Eto pays. It has been his practice to augment this salary by an amount sufficient to equate their income to what would have been earned had they been paid the prevailing hourly rate. Such' an adjustment is made when the foreign workers have worked substantially more hours than anticipated. Such an adjustment occurred in August, 1976.

4. Chronology Of Events

December 8, 1975--April 13, 1976:

The UFW was certified at Eto Farms on January 22, 1976. By letter dated January 29, 1976, the UFW requested a "preliminary negotiations meeting" with Eto and sought a convenient date and location for such a meeting. The letter was accompanied by a "Request for Information" which sought the following information:

(a) The name, age, sex, date of birth, social security number, job classification, current wage and date of hire of each person in the bargaining unit. In addition, the name, age, date of birth and residence of the worker's spouse was requested.

(b) A copy of any health and welfare policy or plan offered the workers; a statement of the cost of such plan and its eligibility requirements; and a record of the claims experience for two years past.

(c) The same type of information was requested with respect to any pension, profit-sharing or life insurance programs provided by the Employer.

(d) With respect to paid holidays, vacations, sick pay, jury pay, overtime premiums, supplemental unemployment insurance, housing or any other economic benefits, Eto was asked to state how eligibility was determined, the amount of the benefit and the names of those receiving the benefits.

(e) Information regarding the wages, fringe benefits and compensation of non-bargaining unit employees was requested. The Union also sought the same information regarding farm workers employed by Eto at locations not covered by the certification. Eto did not supply the requested list of employees until March, 1977. Much of the other information was provided orally during the course of negotiations.

The certification of the UFW at Buford or B. Mackie Frazier issued December 6, 1975; and a letter and attachment identical to those described above was directed to Frazier on December 18, 1975. Sometime prior to the first

bargaining meeting, Frazier sent the Union a list which set forth the name, social security number, sex, age, date of birth, job classification, hourly or incentive rate, date of hire and address of each employee. This list was later updated in response to the Union's request.

On February 26, 1976, UFW representative Ann Smith arrived in Oxnard to commence negotiations with those employers with whom the UFW held certifications. She had no contact with either Respondent prior to her arrival. During the period between the initial request for a preliminary negotiations meeting and Smith's arrival in Oxnard, the UFW made no attempt to start negotiating with Respondents. From July and August, 1975, until late January, 1976, the UFW was engaged in negotiating a collective bargaining agreement which has come to be known as the Master Agreement. Smith participated in these negotiations and attended most negotiating sessions as well as UFW Executive Board meetings held in connection with the negotiations. The Master Agreement became the pattern UFW contract. In addition to those employers participating in the negotiations, the agreement was signed by some 25-30 companies during early 1976, including companies in the Oxnard area. The signatories were all members of the Western Growers Association.

Shortly after she arrived in Oxnard Smith attempted to contact Donald Dressler to set up a negotiation schedule for the Santa Maria companies.1/ Smith's reason for assuming Dressler represented Respondents does not appear in the record.2/ She first spoke with Dressler on March 10, 1976. She asked whether the Companies intended to sign the "Master Agreement." Dressler responded that he had not contacted them, but thought they would sign the Master. No date was set for an initial meeting.

On March 15, 1976, Smith and Dressler tentatively agreed upon April 13, 1976, as a first meeting date. Dressler suggested that Smith call him -in Santa Maria on March 19 to confirm the date and to give him a chance to see whom he would be representing and what they wanted to do.

As suggested, Smith called Dressler and was told that Dressler's associate, Charley Stoll, would handle the negotiations. Dressler said Stoll would be representing Eto and Frazier, and that it was unclear whether Waller and Roman would be represented. Smith testified that during this conversation Dressler said the Companies would sign the "Master Agreement." Dressler testified he was asked whether the Companies were interested in the "Master" and he acknowledged they were interested. He denies saying the Companies would sign the master.3/

1/Apparently the reference was to Eto, Frazier, Waller and Roman.

2/Dressler served as the chief negotiator for the employers participating in the negotiations. There is no evidence Stoll participated in the negotiations.

3/Since Smith's comments at the outset of the April 14, 1976, meeting are consistent with Dressler's testimony regarding "interest in signing the 'Master,'" I credit his version of the conversation. Moreover, since Dressler is an experienced, professional employer bargaining representative, -- (continued)

Thereafter Smith talked to Stoll and arranged for the first negotiation meeting.

April 13, 1976:

As the first meeting began, Smith stated she understood the Respondents were interested in signing the "Master." When Stoll asked whether the Union had a proposal, Smith said she thought it was already decided the Respondents would sign the master and that they were to talk only about local issues. Stoll said he understood from Dressler that Respondents were to receive a total package. He asked Smith about her conversation with Dressier, and she said she understood that with Eto and Frazier there was no question about signing the Master Agreement. She told Stoll that if he expected a proposal, it would be based on everything the UFW hoped for in a contract. "The Master Agreement . . . has concessions we wouldn't give in a proposal."

After a caucus Stoll said there was "a slight misunderstanding." He wanted to know the Union's total package. "We're not saying we're opposed to signing the Master Agreement. We'd probably end up around there anyway. We need time to study it and see the Local Issues and modifications you might want to make in the Master Agreement."

There was a discussion of the list of bargaining unit employees provided by Frazier and the need to have the specific date of hire as opposed to the year of hire. Smith then advised how she wanted the list prepared to provide the UFW with seniority dates. Smith also wanted this information from Eto who said he did not have all the dates.

The UFW was told that neither Employer had a previous contract with the Teamsters. Smith wanted a job description for the broccoli crew at Frazier's. She stated the job descriptions in the Master would cover the hoeing and thinning done by Respondents and that the cauliflower description in the "Master" would cover Eto's operations.

The manner in which Respondents market their products was discussed with reference to the UFW's Union label position. Neither Respondent markets directly.

Smith wanted a list of family members and the work which each did. Eto said his family had to work or he would not survive.

Smith noted that some employees paid a monthly amount for rent and utilities and some received turkeys and chocolates on holidays.

3/(continued)--it is unlikely he would have committed his clients to a collective bargaining contract without substantially more discussion with them than is shown by the record. In view of Stoll's assignment to the negotiations, a permissible inference, which I draw, is that Dressler had no contact with either Eto or Frazier prior to negotiations.

Eto said he provided rubber clothes and equipment and boots and gloves to his regular workers.

The manner in which workers are paid for thinning and hoeing was discussed as was Eto's involvement in a training program for students from different countries. Eto did not want those students covered by any contract. There was no Union response to this position.

Worker concern about proper payment for piece work at Frazier's was discussed. The problem; related to workers' receipt of a record of their poundage. Frazier stated the records were available and copies could be provided.

Respondents' hourly rate for hoeing and thinning was $2.95; the payment by the pound was $.01581. Smith was aware of these rates. She also verbalized some problems at Eto's regarding number of crews. The workers want three crews during peak. Frazier pointed out that if this were done people would earn less. The relationship of Frazier's operation to the Inglis freezer operation was discussed, and it was pointed out that broccoli cutting must be geared to Frazier's ability to get his crop received by Inglis.

During the course of the meeting the Respondents caucused and decided they would opt to adopt the Master Agreement concept on a go-slow basis.

The next meeting was set for May 4; Stoll was unavailable until that date. There is no evidence the Union objected to the time gap between meetings. 4/

May 4, 1976:

When the meeting started, Stoll said both Companies felt they wanted to start from scratch and tailor an agreement for their own small operations. There were seven, workers at Frazier's and 10 or 11 at Eto's. Respondents regarded the master as too cumbersome and as having many inapplicable provisions.

Smith wanted to know whether Stoll was going to say what he did not like about the Master or whether the parties were going to start from a new proposal. Stoll wanted to start anew with a proposal.

After a Union caucus Smith expressed her disappointment regarding Respondents' position. She said it would make things easier if Respondents adopted the master. She pointed out that other small companies had signed the agreement.

She gave Stoll a new proposal which consisted of some 55 pages, pointing out that parts of it were verbatim from the "Master." Union security was verbatim as were the health and welfare and pension plans. The plans were the same as the Master because the contribution rates were what the Union calculated was necessary to make the plans effective, regardless of the number of covered employees.

Smith suggested, and Stoll agreed, the parties were far apart on the

4/The findings regarding the April 12 meeting rest upon the UFW's minutes of the meeting.

hiring hall, the grievance procedure and seniority. Stoll said he thought things could be worked out. The meeting ended with Smith's observation that some things are a matter of principle and size makes no difference.

Stoll agreed to submit a written proposal at the next meeting. The meeting lasted about one hour.5/

May 12, 1976:

Respondents presented a written counterproposal which dealt with subject matters captioned as follows:

Recognition
Union Security
No Strikes
Discrimination
Seniority
Discharge
Right of Access to Company Property
Grievance and Arbitration
Management Rights
Maintenance of Standards
Holidays
Call Time Pay
Rest Periods
Bereavement Pay
Robert F. Kennedy Farm Worker Medical Plan
Duration of Agreement

The meeting took the format of a review of the provisions in the "from scratch" proposal presented Respondents by Cohen at the May 4 meeting and Respondents' response, if any, thereto.

Article 1--Recognition: Respondents adopted Union language which spelled out recognition of the UFW as the certified bargaining representative of their agricultural employees and: which set "forth the standard exclusions.

A provision extending the agreement to any other acquired properties and to any "agricultural joint venture, partnership, and any other form of agricultural business operation" of which either Respondent might be a part was rejected because it would interfere with certain existing share-crop relationships.6/

The UFW proposal setting forth its right and obligation to

5/The findings set forth with respect to the May 4 meeting are based upon the UFW minutes of the meeting which were introduced into evidence and upon the testimony of Peter Cohen who was present.

6/Article I(B) of General Counsel Exhibit No. 7.

negotiate wages, hours and conditions of employment and to administer any collective bargaining agreement reached was rejected as unnecessary. The Respondents also objected to incorporating the UFW's language to the effect that the Employer would not unlawfully assist a labor organization.7/

Respondents' counterproposal on recognition adopted two paragraphs from the Union proposal requiring them to inform their workers that no advantage will accrue from non-participation in Union activities and requiring them to encourage their workers to give "utmost consideration to supporting and participating in collective bargaining and contract administration functions.8/

A Union proposal that on-the-job conduct by non-bargaining unit persons which was disruptive of "harmonious working relations" could be treated as a grievance was rejected because the owners themselves work in the fields.9/

Article 2--Union Security: Respondents' counterproposal rejected the UFW's Union shop proposal. Their response agreed to the check-off and to providing the names, addresses, social security numbers and job classifications of each worker within a week after the contract was signed. This position constituted acceptance of Union proposals on these particular points.10/ Stoll stated the Respondents wanted to maintain an open shop because some of their workers had expressed a preference for not joining the Union.

Article 3--Hiring Hall: Respondents submitted no counterproposal on this issue. 'Etc and Frazier contended, the UFW would not be able to supply "enough workers. Frazier wanted to continue to use Uvalle; he noted a high turnover with workers leaving every day because of the difficulty of the work. Stoll pointed out that some of the best workers in the Valley were Teamsters who would not be coming through the UFW hall. Respondents for these reasons felt they needed to be free to choose their own workers. There was no response to these arguments.

Article 4--Seniority: Respondents' counterproposal called for a 30-day probationary period before seniority was acquired. Once the probationary" period was completed, the seniority date would be date of hire. Respondents' proposal set forth the reasons for which seniority would be broken and provided for recall in inverse order of layoff provided the ability to perform was equal.

This proposal was at odds with the Union's position in the

7/Article I(D), General Counsel Exhibit No. 7.

8/Union proposal Articles I(E) and I(F); Respondents' counterproposal (General Counsel Exhibit No. 8) Recognition (B) and (C).

9/Article I(G), ibid.

10/See Article 2(B), (C) and (E), General Counsel Exhibit No. 7.

following respects: the inclusion of a probationary period, the causes for a break in seniority, its failure to apply seniority to promotions, new jobs and other filling of vacancies, the short notice of recall provided, the frequency with which seniority lists would be furnished and the application of seniority provisions to "bumping."

The need for qualified tractor drivers rather than trainees was Respondents' explanation for rejecting the Union's proposal to apply seniority provisions to promotions. Respondents also stated the reporting requirements of the UFW proposal were unnecessary and unworkable because neither had sufficient staff to do the work.

Article 5--Grievance and Arbitration Procedure: Respondents objected to the UFW's proposal because it only covered grievances initiated by the Union. They wanted the procedure open for the filing of Employer grievances. While the Respondents' proposal encompasses Employer grievances, it spells out no procedure for handling them. Respondents also objected to processing grievances on Company time without loss of pay to the grievant or to the shop steward.

The Employers proposed a 10-day statute of limitations for the filing of grievances.

Respondents agreed with the Union's proposal that the arbitrator's award be final and binding, that it be reduced to writing and that the costs be equally shared.

There was discussion of the UFW proposal permitting the trustees of the proposed trust funds, its health and welfare, pension and economic development funds, to sue in state court to collect delinquent contributions.

Article 6--Right of Access to Company Property: The Employers' counterproposal on this issue was "somewhat in line" with the Union proposal. There was an area of difference regarding when Union representatives could come onto the property.

Article 7--Discipline and Discharge: The Employer counterproposal spelled out a series of causes for discharge and then set forth a catch-all "other proper causes" phrase. The Union proposal was a more standard "just cause" proposal. The Employers objected to the procedural provisions of the UFW proposal particularly the proposal requiring the presence of a Union representative when "formal charges" are made against a worker (Article 7-B) and the proposal that individual performance in relation to a piece rate shall not be conclusive evidence of the propriety of discipline (Article 7-E).

There does not appear to have been any discussion regarding whether proper cause and just cause were identical concepts.

Article 8--Discrimination: Agreement was reached on the language in the Union's proposal.

Article 9--Workers Security: Respondents rejected the Union proposal protecting employees who refuse to cross a picket line or to perform struck

work, arguing that these rights were already protected by law and that the addition of such language would unduly burden the contract. They were also concerned about such a provision because of the perishable crop problem.

Article 10--Leave of Absence: The Respondents had no counterproposal on this subject matter. Stoll stated the Employers were opposed to giving leaves of absence and did not presently do so. Their practice was to replace workers who took a leave. However, he said the Respondents were open to a proposal which would deal with leaves on an individual needs basis.

Article 11--Maintenance of Standards: Respondents submitted a counterproposal providing for no reduction in the "sum of wages and benefits" being received as of the execution of the agreement. The subject matter was apparently not discussed.

Article 12--Supervisors: Respondents rejected the UFW proposal _ precluding non- bar gaining unit employees from performing bargaining unit work. Their supervisors have historically performed some work as have Eto and Frazier and members of their families. They wanted to continue this' practice. The UFW voiced no great opposition to this idea and stated they needed to know what work had previously been performed by non-unit people in order to know how to modify their position.

Article 13--Health and Safety: The UFW proposal called for the establishment of a Health and Safety Committee to formulate rules regarding worker safety. It prohibited the use of certain chemicals as dangerous to the workers and to the environment and spelled out the circumstances under which others may be used.

The proposal required the Employer to provide adequate toilet-facilities- cool and potable drinking water, any tools and protective clothing necessary to perform required work, and adequate first aid supplies.

The Employers responded that the article was unnecessary since state and federal laws already provided the protections sought. No evidence was offered that the Employers' contention was inaccurate.

Article 14--Mechanization: Respondents rejected the UFW proposal on this subject matter with the statement they had no intention of mechanizing their operations, therefore the provision was unnecessary.

Article 15--Management Rights: The Union proposal reserved to the Employers "all of its inherent rights of management except as expressly and explicitly modified by this Agreement." The Employers' counterproposal particularized the rights management retained. The record does not show any discussion of the subject matter at the May 4 meeting.

Article 16--Union Label: At a previous meeting Respondents stated_ they did not market under their own labels. They proposed the section be deleted from the Union's proposal.
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Article 17--New or Changed Job Operations: The UFW proposal spelled out notice requirements, meeting requirements and arbitration requirements in connection with the establishment of new job classifications or any change in operation. Respondents made no counterproposal. It is unclear whether there was any discussion of the Union proposal.

Article 18--Hours of Work, Overtime and Wages: The Employers proposed to delete the UFW's overtime proposal because they were already sufficiently burdened by the requirements of state law.

Article 19--Reporting and Stand-By Time: Respondents proposed two hours' pay for workers called to work but not given work; the UFW proposal called for four hours' pay. Respondents proposed a four-hour minimum if the worker was put to work. The eligibility requirements were different in the two proposals. There does not appear to have been any discussion of this subject matter.

Article 20--Rest Periods: The parties agreed on the Employers' counterproposal of a 10-minute rest period during each four hours. The Union had proposed 15-minute periods. Ten minutes is the rest period in the Master Agreement, 11/

Article 22--Bereavement Pay: Respondents agreed to the UFW proposal.

Article 23--Holidays: The Employers proposed to observe two holidays, Christmas Day and Thanksgiving. They rejected the concept of paid holidays proposed by the UFW. The subject matter was not discussed.

Article 24--Jury Duty and Witness Pay: Respondents' response to this proposal was that it should not be part of any contract. Stoll noted it was a cost item.

Article 25--Travel Allowance: No counterproposal was made regarding this subject matter Stoll said the proposal had no application to Respondents ' operations.

Article 26--Records and Pay Periods: The UFW proposal called for maintenance of incentive rate records, production records for piece rate workers and records of wages and deductions. Respondents rejected the proposal because it would give the Union access to production records and because it was too onerous. Stoll said the Employers would work with the Union on things they needed to know.

Article 27--Income Tax Withholding: The Employers proposed that the subject matter not be included in the contract. They took the same position on the UFW's proposal for "Credit Union Withholding."

Article 29--Robert F. Kennedy Farm Workers Medical Plan:

11/See Respondents' Exhibit "K," Article 21.

Respondents agreed to a 16 1/2¢ per hour contribution into the Robert F. Kennedy plan on "seniority workers" as opposed to "all workers covered" by the agreement. Cohen stated the proposed plan was found in all UFW agreements. He also said the UFW would consider Respondents' approach provided the premium would be paid retroactively for the 30-day period during which one acquires seniority.

Article 30--Juan De La Cruz Farm Workers Pension Fund: Cohen _____ stated that the pension provision was in all contracts negotiated by the UFW." The record does not show discussion of the proposal beyond the notation that it was rejected.

Article 31--Martin Luther King Fund: This is an economic development fund. The proposed contribution was 5¢ per hour. In rejecting the proposal Stoll questioned whether the fund was beneficial to the workers.

Article 32--Reporting on Payroll Deductions and Fringe Benefits: "there was no discussion of this proposal. It was rejected by Respondents, and no counterproposal was made.

Article 33--Camp Housing: Respondents rejected this proposal as not applicable to their operations..

Article 34--Bulletin Board: The Employers' response to the UFW's proposal requiring the Employers to provide bulletin boards was that they would work with the Union.

Article 35--Family Housing: The UFW proposal states a recognition of the serious need for adequate family housing for migrant workers and commits the Employers to cooperate with the Union in encouraging direct governmental action at all levels of government in the construction of public housing for agricultural laborers.

Respondents rejected this proposal without explanation.

Article 36--Subcontracting: The Union proposed that the Employers would be permitted to subcontract if the workers lack the skills to perform required work and if the Employers cannot rent equipment necessary to perform required work. Respondents expressed opposition to any limitations on their right to subcontract. They suggested some reference might be made regarding the problem in the recognition clause.

Article 37--Location of Company Operations: Respondents expressed opposition to providing maps for Union representatives to assist in their access to- properties; however, Stoll stated there would be no problems regarding making Union representatives aware of the location of Employer properties.

Article 38--Modification: The UFW proposed that no provision of the contract reached could be modified or waived except by a mutually executed writing. Respondents suggested deleting the subject matter from the UFW proposal

Article 39--Savings Clause: The UFW's proposal that the contract include a standard brand savings clause was rejected without explanation.

Article 40--Successor Clause: Cohen did not include this subject in his run-through of the UFW proposals.

when the run-through was complete, Cohen said that many of the sections in the contract are matters of principle and do not involve any costs. Stoll said he wanted to reach an agreement. He also wanted a wage proposal from the Union.

The meeting lasted approximately two and a quarter hours.12/

June 8, 1976:

During the interval between May 12 and June 8 two scheduled meetings were cancelled because Stoll was ill. On the 8th Stoll and Cohen met earlier in the day to negotiate an agreement covering employees of another employer Stoll represented. No evidence was offered regarding the duration of that meeting.

The Union's meeting with Respondents started about 4:00 p.m. At the outset Stoll raised the problem Frazier was having with high turnover. The Frazier workers present laid the blame on the crew boss, saying that he brings inexperienced help and does not provide any training for them.

There was discussion of the Union shop, the inclusion of a probationary period in the seniority language, the hiring hall and the Union label. Respondents said the Union label proposal was inapplicable to their operations. Cohen said the Union wanted the language in the contract to cover the contingency of the Employers beginning to use their own label.

The meeting lasted approximately an hour. It ended because Stoll had to catch a plane. The parties agreed to meet on June 21, 1976.13/ No meeting was held on that date. The parties next met on June 24. No testimony was offered regarding how the change was effected.

June 24, 1976:

Acknowledging that no one was at fault, Cohen stated the parties needed more time for discussion so that we can understand each other better. Stoll agreed and proposed that the meeting set for July 6 and 7 start at 10:00 a.m.

Cohen said he wanted to discuss some of the more important points "in

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12/The findings with respect to what occurred at this- meeting are a composite of Cohen's testimony and the minutes of the meeting prepared by the UFW. The minutes were admitted without objection, and no Respondent witness testified about the meeting.

13/These findings are a composite of credited testimony by Cohen and notes of the meeting taken by Ted Laine, a representative of Respondents.

our contract," because he felt there had not been a thorough discussion of those issues. Stoll said that Cohen only wanted to bargain off the UFW proposal. He said bargaining was a two-way street. The Employers wanted a contract, but they wanted some say about what went into it. Cohen's response was "naturally." He then proceeded to discuss what the UFW regarded as some of the more important proposals.

Turning to the Recognition proposal Cohen said there was concern about Respondents' omission of joint venture coverage in their proposed section, noting the paragraph was particularly important since Respondents were not proposing a "successors" clause. The Union did not want to negotiate a contract only to have the workers deprived of its benefits by a change in the business entity. Cohen said the Union was not wedded to particular language, but would go along with anything which was acceptable to Union policy and seemed fair to the workers, Stoll asked whether it would be like the master agreement; Cohen responded more or less. Stoll said Respondents would consider the matter and asked about the "not supporting any competing labor organization" language. Cohen said it could be deleted.

He turned then to Respondents' omission from its proposal of language interdicting supervisors from denigrating or disparaging the Union. He said, the Union had problems with this and that they would not oppose language prohibiting Union disparagement of the Employer. Stoll said that position would be considered.

The discussion turned to Union Security. Cohen said a majority of the workers had freely voted for the UFW to represent theme He said that when a contract was agreed upon, all the workers would enjoy its benefits and protections and it was only fair to expert that everyone would carry his load by becoming a dues-paying member, "We don't buy the argument that new people at your companies shouldn't have to become members if they don't want to." The UFW position was that the basic principles of Union security must be part of any agreement ". . .we could in good conscience enter into." Cohen said the UFW had Union security in all their other contracts.

Cohen explained that the hiring hall the UFW proposed would be applicable only to new or additional workers. The people already working for Respondents would be called back to work directly. He urged Respondents to voice any problems they might have with the section's time limits and perhaps an accommodation could be worked out.

Cohen also responded to an Employer-voiced concern that the UFW would not be able to supply workers, noting that the UFW represented more than 500 vegetable workers in the Santa Maria Valley. He listed some paragraphs of the hiring hall section where the Union was prepared to move, recognizing in response to a Stoll question that any movement would be to bring the Union position more in line with the Master Agreement.

The UFW's problem with Respondents' 30-day probationary proposal was that the season is so short that the 30-day period would amount to half the season. The UFW retained its no-probationary-period position with seniority acquired after 14 days.

The Union argued that the higher-paying jobs should be opened to those workers who are qualified or who can learn the job in a short time without great expense to the Company. The demand was that these opportunities be afforded on a seniority basis.

The discussion of the grievance procedure was merely a recitation of the steps in the UFW proposal.

Cohen discussed the Union's Health and Safety proposal in terms of its impact upon industrial injuries. He said that the proposed committee's input would help keep injuries down.14/

The meeting lasted approximately two hours, from 3:30 to 5:30 p.m.

July 2, 1976:

Stoll telephoned Cohen and said he wanted to postpone the July 6 and 7 meetings because there appeared to be some movement in the jurisdictional pact meetings between the UFW and the IBT.15/ Cohen said those meetings had no impact on the negotiations between Respondents and the UFW. Stoll said Dressler said it would be a good idea not to meet for a while. Stoll contended the outcome of the pact negotiations could-affect the bargaining strength of the parties. Teamster control or "pull out" in the Santa Maria area would affect bargaining. In response to Cohen's statement of no impact because the UFW was certified, Stoll said the successor clause in the Master would permit one union to turn its contract over to another union.

Cohen objected to the postponement and verified his position by letter of July 6, in which he stated the suggested delay was totally unacceptable.

These findings are based upon credible testimony of Peter Cohen. Although Stoll was present at the hearing on various occasions, he was not called to testify. Moreover, Respondents admit to notifying the UFW on or about July 2, 1976, of their intention to postpone further meetings because of the negotiations between the UFW and the Teamsters regarding a jurisdictional pact.

July 29, 1976:

Unfair labor practice charges were filed by the UFW against each Respondent.

August 5, 1976:

Stoll telephoned Cohen expressing interest in a meeting. Cohen

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14/The findings with respect to the June 24 meeting are a composite of the Cohen testimony and the UFW notes of the meeting introduced into evidence without objection.

15/International Union of Teamsters, Chauffeurs, Warehousemen § Helpers of America.

requested that Stoll come to Santa Maria to meet and that the meetings last all day and for two or three days in a row. August 12 was agreed on.

August 12, 1976:

The meeting started at 3:30 p.m. with Stoll's presentation of. a-written counterproposal on the following items.16/

Recognition: Respondents modified their previous position and_ adopted the language of the Master Agreement.

Seniority:. Respondents increased the time period within which a worker could report back to work after layoff before incurring a break in seniority from 48 hours to three days, thereby adopting the UFW position.

There was no change in the Employer position regarding a 30-day probationary period before acquiring seniority.

Discharge and Discipline: Respondents proposed that discharge or_ suspension could be effected only after one warning "notice of the compliant[1]" except if the discharge or discipline was for dishonesty, drunkenness or gross insubordination. Warning notices would remain in effect for one year and had to be issued within 10 days of the claimed offense. The proposal required that any suspension or discharge be effected within five days of the claimed cause. It required that a discharge or suspension be grieved within five days of the event. The proposal required the Employer to serve the employee and the Union with written notice of the cause for discharge within five days after the event.

Holidays: The Employers modified their position on holidays to provide that any work performed on two observed holidays (Christmas and Thanks-giving) would be compensated for at the rate of time and one-half.

Medical Plan: The Employers changed their position regarding medi-cal benefits. They now proposed coverage under Western Growers Assurance Trust Plan 22 rather than the Robert F. Kennedy plan. Stoll contended Plan 22 offered the workers substantially better benefits than the Robert F. Kennedy plan. Plan 22 also provides for dental benefits and prescription drug benefits in the second year of the contract and vision care benefits in the third year. There is no evidence in the record regarding whether the Robert F. Kennedy plan provides such benefits.

Wages: The Employers proposed a wage of $3.10 per hour effective September 1, 1976; $3.20 per hour effective September 1, 1977, and $3.30 per hour effective September I, 1978. This was the first wage proposal by either party. It amounted to a 15¢ per hour increase.

Duration of Agreement: A contract expiring December 1, 1978, was_ proposed.

16/In addition to the items listed, Respondents' proposal contained the agreements reached on No Discrimination, Rest Periods and Bereavement Pay.

There was no change in the Employers' position on Union security, a no-strike clause, the grievance and arbitration procedures, management rights, maintenance of standards, call-in pay, or right of access to Company property.

When Stoll finished his presentation, Cohen said he appreciated the Employers' movement on some of the issues, but he did not understand their position on Union security or on the 30-day probationary period. He said the Companies would not go out of business if they agreed to Union security.

Responding to Cohen's statement that Respondents had never explained their reason for wanting a 30-day probationary period, Stoll said they needed that much time to be sure the new hires could do the work. He argued there was a 14-day probationary period in the "Master" so there was not too much difference. Cohen said there was no probationary period in the "Master."17/

The Union caucused. When Cohen returned, he said the Union needed more time to examine the proposal. He again said he was concerned about Union security, hiring and seniority, stating these are absolutely essential to a good contract, and there had been no movement on these crucial issues.

Cohen said the Union would consider the Employers' proposal very seriously and would prepare a response. He said the Union was still serious about its proposal and felt it had good reasons for what was being sought.18/

August 12--September 9:

The parties agreed to meet at 10:00 a.m. on August 25. This meeting was cancelled because Cohen was unable to attend. A meeting scheduled for September 2 was also cancelled DV mutual agreement. The carries next met on September 9.

During this interval Stoll sent Cohen a letter reviewing, Respondents' position on the following subject matters: hiring hall, worker security, leave of absence, supervisors doing bargaining unit work, health and safety, mechanization, Union label, new or changed operations, overtime work and pay, vacations, jury duty and witness pay, travel allowances, records and pay periods, credit union withholding, income tax withholding,, the pension fund, the economic development fund, reporting on payroll deductions, camp housing, subcontracting and a successor clause.

This itemization of position was a response to Cohen's contention by letter of August 28 that Respondents had made no response to the subjects listed. Stoll points out that many of the subjects had been discussed and Respondents'

17/ Article 4 in the Master Agreement states: "It is understood that the days prior to acquiring seniority do not establish nor shall be a probationary period."

18/The findings with respect to the August 12 meeting are a composite of credited testimony of Cohen and the UFW notes of the meeting which were introduced.

opposition verbalized during the course of meetings. Stoll noted that Cohen treats rejection of a proposal as no response.

Stoll's September 1 letter discussed the Respondents' change in position on health and welfare, contending that its current proposal was more costly to Respondents and more beneficial to its employees. Stoll stated the UFW had failed to respond as promised with a proposal with respect to all open issues and had failed to make any proposal on wages. Cohen testified the letter was inaccurate in that he had not agreed to make a complete proposal in response to Respondents' then current position.

September 9, 1976:

At the start of the meeting Cohen presented written modifications of the Union position on seniority, grievance and arbitration procedures, discharges and discipline, supervisors working, mechanization and reporting and stand-by time. Many of the modifications brought the Union position more in line with the Master Agreement provisions.

The Union submitted a new proposal on mechanization which Cohen agreed could be characterized as an escalation of their demand.

Respondents demanded a response to their wage proposal; the UFW did not want to deal with economics with so much of the contract unresolved. Other conditions such as job security and health and safety took precedence, in their eyes, over the economics of the negotiations.

Stoll stated that the UFW was misreading the Employers' position and were not responding to it but merely restating their proposals in Bakersfield (Master Agreement) language.

Respondents modified their proposal on reporting and stand-by- by increasing the amount of pay from two Hours to four hours as well as proposing that a call-out could be rescinded up to one hour before reporting time. The Union rejected this proposal. Cohen said the workers needed six hours' notice of revocation of a call-out. He also wanted piece workers paid on an average earnings basis. Stoll responded the Union was sticking to its position and not moving.

The parties again discussed the appropriateness of a probationary period before seniority is acquired. Stoll said seniority should be earned and the Employers did not want a person to be able to walk onto the job and receive all contract benefits without having earned them. They wanted their workers to have some commitment to the Company.

On the subject of the grievance procedure, the UFW said the procedure would work more smoothly if the first step involved discussions between the steward and the supervisor. Respondents' proposal did not include this step. Their proposal called for a Union-Management meeting as the first step.

On the question of supervisors and family members performing unit work.

the UFW objected that Respondents! proposal was a blank check, and they again proposed a side letter spelling out the work each supervisor and family member could perform. Stoll objected that the proposal was too rigid. His position was that the growers' existence depended on their having the freedom to do whatever work they wanted to do. Just as they had done in the past.

The differences between Respondents' health and welfare proposal and the Robert F. Kennedy plan were discussed; each party contended its plan afforded the workers better coverage. Cohen directed attention to the different concepts for providing coverage in the two plans. Stoll said Plan 22 cost 25* per hour.

Respondents increased their wage proposal by 25¢ per hour for each of the first two years of a proposed three-year agreement and by 30¢ per hour during the final year of the agreement. The rates proposed by Respondents were $3.35, $3.45 and $3.60 per hour for each contract year. A piece rate on romaine lettuce harvesting of 42¢, 43-3/4¢ and 4S 1/2¢ was proposed for each year. The field workers' hourly rate in the Master Agreement for 1976 is $3.10 per hour, for 1977 $3.225 and for 1978 $3.35 per hour. The same rates apply to the thin and hoe work.

Respondents expressed dissatisfaction with the failure of the UFW to have the courtesy to reply to their proposals on wages and holidays. Stoll said Respondents needed to know where the Union was on wages or the meetings were a waste of time.

September 21 was agreed upon as the next date for a meeting.

By letter of September 10 Stoll set forth an Employer modification of its position on call-in and stand-by pay. The letter also set out the Employers' proposals on both hourly and piece work wage rates. Stoll requested a UFW proposal on wages at the next bargaining session. The letter did not include a rate for tractor drivers.19/

September 21, 1976:

The Employers presented a proposal which covered the previous agreements reached on Recognition, Discrimination, Rest Periods and Bereavement Pay, and reiterated their wage proposal. The new proposal adopted the Union's position calling for a first-step grievance discussion between the steward and the supervisor. Respondents expressed a preference for a shorter grievance procedure; they proposed getting arbitrators from State Conciliation. The UFW suggested a panel of local arbitrators. Cohen expressed appreciation at Respondents' movement.

The UFW submitted modified positions on seniority, grievance procedure, no-strike language, leave of absence and reporting time. The Union made no

19/These findings are a composite of Peter Cohen's testimony and the UFW notes of the meeting which were put into evidence.

response on wages because so many contract provisions remained unresolved, and expressed concern-that Respondents kept insisting on a wage proposal when the Union regarded other contract provisions as more important.

Stoll said he would present new language on the authority of the arbitrator and the manner of compensating him which was consistent with the UFW proposals.

Respondents replied to the UFW's grievance procedure proposal by stating that they wanted grievances reduced to writing at the first step, something not called for by the UFW; that they did not want local arbitrators and were opposed to the UFW's expedited grievance procedure.

On leave of absence, Stoll said the UFW was in bad faith because it had escalated its demands. Respondents would not agree to payment of stand-by time when there was a machinery breakdown.

Respondents stated a preference for Company seniority as opposed to classification seniority proposed by the UFW and again voiced their opposition to posting of vacancies and their desire for a probationary period.

Cohen stated the hiring hall was an important issue, and he did not understand the Employers' opposition since only new hires would be dispatched from the hall. The Employers replied that the rate of turnover experienced by these Employers was so great there would be a complete turnover every two years. The low number of migratory workers in the area was cited by Respondents as a reason why the hall was unnecessary. The growers were not convinced it would work, and they disagreed about the whole concept.

Cohen characterized the Respondents' proposal for a wage increase as a move to undermine the Union.

Stoll said additional meetings would not do any good and would be a, waste of time unless the UFW was prepared to make some movement. He said the Employers disagreed with the Union's concepts on the hiring hall and Union security; the Employers want to be free to hire from any source. Stoll again pointed out that the UFW had made no wage proposal and had declined to respond to the Employers wage offer. He said the parties have been meeting for six months without such a response. Cohen responded that no agreement had been reached on any important items and that a wage proposal would undermine the UFW position. Stoll asked whether the failure to present a wage proposal was because they were waiting to see what happened in the Salinas negotiations.

Stoll said he thought it was a waste of time to just sit and go over the arguments again and again. He suggested they meet again when the UFW could tell them they have made some movement.

No date was set for a subsequent meeting.

By letter of September 24 Stoll confirmed the change in the grievance language which he Had proposed at the September 21 meeting.

September 30, 1976:

By letter of September 30 Stoll notified the Union he was contacting the State Conciliation Service for assistance because the UFW had made no economic proposals. He also said that absent a Union response on wages the Employers would give effect to the wage scales they had proposed.

The Union made a wage proposal by letter of October 7 which did not propose any retroactitely. The initial increase was to become effective as of the signing of the agreement. For the classification General Field and Harvest, the proposed rates were the following: $3.50 per hour in 1976, $3.65 per hour in 1977 and $3.80 per hour in 1978.20/ The rate proposed for tractor drivers was 34 1/2¢ to 35 1/2¢ more than the rates for comparable classifications in the Master. No evidence was offered regarding whether the proposed schedule was then in effect in any UFW agreement. No response was made to Respondents' proposal to invite the State Conciliation Service into the negotiations.

October 19, 1976:

The October 19 meeting was arranged after a telephone call from Stoll to Cohen.

Stoll acknowledged receipt of the UFW wage proposal and noted that Respondents had not previously made a wage proposal for tractor drivers. He said the Employers' wage proposal equaled the prevailing rates in the Valley. There was no change in the UFW wage proposal. However, Cohen said that the UFW's wage proposal of $3.50 per hour was not necessarily their final wage position.

The cost to the employee of the Western Growers' health and welfare coverage when the employee was not working was reviewed. At Frazier's the season is two to three months in the spring and one to two months in the fall. At Eto's the work lasts about nine months a year.

Stoll stated that the Employers were going to implement the wage increases they had proposed because an impasse had been reached on all important issues. He said the Employers were ready to meet at any time to discuss the issues dividing them. Cohen responded that Stoll wanted the Union to abandon its positions. Stoll said the parties had fundamental differences on the hiring hall, supervisors working and Union security.

Stoll said that he looked on bargaining as a two-way street, that he was not insisting that the UFW abandon its position, but he did want to see some movement on their part. He said he did not want to close the door. Cohen expressed his understanding of that position.

Cohen could not understand why other firms represented by Stoll had

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20/Under its Master Agreement the comparable rates are: 1976--$3.10, 1977--$3.225 and 1978--$3.35 per hour.

entered into union security contracts while Respondents would not. Stoll responded that it was up to the growers. Eto and Frazier had had no previous union contracts and were opposed to the union shop.

The UFW stated its opposition to the Employers giving effect to the wage increases. No future meetings were scheduled.

On October 20 Respondents instituted the wage rates proposed to the Union on September 9. Although no increase had previously been proposed for tractor drivers, their wages were also increased.21/

December 2, 1976:

Negotiations resumed on December 2 at the request of the UFW.

Cohen reviewed the respective positions of the parties regarding the UFW proposal. The areas of agreement were listed; in some instances areas of disagreement were spelled out, in others the existence of disagreement was merely stated. Hiring hall, arbitration procedure, seniority, access to Company, property, warning notices before discharge, picket line language and health and safety were topics discussed by the parties. The meeting closed without setting a date for a future meeting.22/

In response to a letter from Stoll regarding the UFW's failure to arrange for another meeting, Cohen telephoned Stoll's office. Stoll was not in. Cohen spoke to Dressler, who asked about the status of negotiations between the UFW and the Teamsters on a jurisdictional pact. Cohen did not know what was happening in those negotiations. Dressler said he was at a disadvantage because he did not know how the pie was to be divided. He asked Cohen to find out. Cohen responded that the UFW-IBT meetings had nothing to do with the Eto-Frazier UFW negotiations, and he pressed for a meeting in December, adding that. Chavez wanted to sit in the next meeting.

Dressler objected to Chavez or Padilla sitting in negotiations because their knowledge of the UFW-IBT dealings would put him at a disadvantage. Dressler wanted to wait until the second or third week in January to meet because he understood progress was being made in the jurisdictional talks. He declined to meet in December unless Cohen would update him on the status of the UFW-IBT meetings.

In the summer of 1976 Dressler had been briefed by Sanford Nathan, a UFW attorney, regarding the scope of the proposed IBT-UFW pact and was made aware that Bart Curto of the Santa Maria Teamsters local was a problem. It was not

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21/These findings are a composite of a transcription of Peter Cohen's testimony and the UFW meeting notes which were introduced into evidence.

22/These findings are a composite of a transcription of the tape recording of the meeting by Respondents and the testimony of Peter Cohen.

clear whether that local would be covered by the pact or whether they would retain their contracts.23/

A meeting was set for February 1, 1977, which was cancelled by the UFW because of Chavez's inability to attend.. Stoll was involved in an unfair labor practice case before the Agricultural Labor Relations Board from February 7 until March 15. The parties met on March 15 with Dressler acting as spokesman. Stoll was not present.

January 17, 1977:

The UFW directed a letter to Watkins stating that the list of bargaining unit employees for each Employer was outdated in that it did not cover people working in the fall of 1976. The letter requested an updated list and other relevant information about the new employees before February 1.24/

March 15, 1977:

The meeting started with the UFW objecting to having the proceedings recorded. Dressler proposed giving them a copy of the tape or otherwise making the record available. The UFW agreed to proceed with the meeting under protest.

Cohen, submitted .a written proposal which he proceeded? to review.

Union Security: Cohen said the question of whether employees wanted to join the Union was a matter of concern only to the Union. Dressler disagreed. He argued that the Employers had an interest in not forcing something on the workers which would lead them to quit. Dressler then proposed that the issue of Union security be submitted to the workers for separate ratification. Cohen said he would consider this.

Hiring Hall: Cohen said the UFW had not amended its hiring hall position because there had been no response on the point from the Employers. Dressler said their obligation was to take account of each other's concerns, but the UFW had no right to expect any proposal.

Responding to Dressler's questions, Cohen said the UFW person to be assigned to run the hall had not previously operated a hall. Dressler said the hiring hall was not working well in many parts of the state. Cohen disagreed.

Dressler stated the use of a hall jeopardized employers with perishable crops because they would not learn until too late whether the UFW was

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23/These findings are based upon the testimony of Dressler and Cohen.

24/Cohen testified he typed the letter and placed the original, as well as copies for Eto and Frazier in the mail, properly addressed and having the requisite amount of first-class postage. I credit this testimony and I find the letters to have been received.

going to be able to supply workers, and if the people operating the hall were inexperienced, it was a big gamble for the Employers. Cohen pointed out that the hiring hall would apply only to new employees. Persons having seniority would be subject to the three-day call-back provision under the seniority language.

Seniority: The UFW's proposal was similar to its previous proposals. They still felt a probationary period was inappropriate. The notice of recall letter previously proposed was still part of the UFW position as was the proposal for an update of the seniority list every three months and the provisions giving workers an opportunity to get the higher-paying jobs.

Grievance Procedure: The proposal was similar to earlier proposals. The position was modified to provide that grievances must be submitted in writing at the first step. They proposed a five-day limit on the filing of discharge grievances and a 10-day limit on all others. Dressler thought it was in the best interest of the parties to get experienced labor arbitrators such as one qualified to serve on a Federal Mediation and Conciliation Service panel. Cohen said .he thought an expedited grievance procedure would help solve uncontrollable work stoppages; that such a procedure was in the best interests of the parties. Dressler responded that it had not worked in Oxnard or with Interharvest. Cohen said they intended to abide by the no-strike clause.

Discipline and Discharge: Dressler asked why the UFW avoided the idea of warning notices Cohen's response was that it was unnecessary and could be used to the detriment of employees.

Cohen stated the UFW's position on maintenance of standards, supervisors working in the bargaining unit, health and safety, mechanization, management rights, Union label, new or changed operations, hours of work, reporting and stand-by time, vacations, jury duty and witness pay, travel allowance and income tax and credit union deductions. For the most part these proposals tracked the Master Agreement and represented no change of position.

Dressler asked about the agreement reached between the UFW and the IBT with respect to mutual observance of each other's picket lines. He said knowledge of this was necessary to know the impact of the UFW's proposal on worker security.25/

Dressler requested a copy of the pension plan, and a copy of the semi-annual report of the fund. He expressed doubt that a plan had been developed, and said the Employers would certainly be reluctant to enter into a non-existing plan.

The UFW was proposing a three-year contract and its wage position was unchanged from that submitted to Stoll in October.

Dressler suggested that the parties try to resolve the outstanding

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25/The proposal is one embodying a worker's right to observe a picket line and to refuse to perform struck work.

unfair labor practice charges since a trial of the issues would not resolve anything. Cohen said he wanted to see how the negotiations progressed before he talked settlement. Cohen understood the UFW's policy required reaching agreement on a contract before the unfair labor practices could be settled. Dressler thought this position was unrealistic.

A tentative date of March 23 was set for the next meeting.26/

March 23, 1977:

Respondents presented a written counterproposal which was explained by Stoll.

Seniority: The probationary period proposed was cut to 14 days from 30 days. Respondents proposed that a worker leaving the bargaining unit to take a supervisory or other position with the Company would not have a break in seniority for a period of a year. Their proposal now provided for posting of a vacancy in a higher-rated classification with the Company being the judge of who fills the vacancy. The proposal also called for an updated seniority list every six months as opposed to the UFW's three-month proposal.

A first-step meeting between the steward and the supervisor was proposed. Stoll proposed using the State Conciliation Service as the source for arbitrators because of the speed with which they can be obtained and because they are free.

The Employers stood on their prior proposal to include a warning letter system in the contract.

Stoll reiterated the importance of a management rights clause because the Employers had no prior collective bargaining agreements. He pointed out that the scope of the clause narrowed every time Respondents modified their position on any provision of the contract.

Respondents proposed right of access, modification and savings sections which were substantially the same as the UFW proposals.

A picket line clause protecting an employee's right to observe a sanctioned picket line and his right to refuse to perform struck work was part of the proposal.

New or Changed Operations: Stoll proposed that the Employers would initially set the rate on any new job, then the parties would negotiate, and if they were unable to agree, the matter would go to arbitration. Any rate set by the arbitrator would be retroactive to the date work started in the classification.

26/These findings are a composite of a transcription of Respondents' tape of the meeting as put in evidence and Cohen's testimony.

The Employers proposed that a worker appointed as an officer of the Union would be given a leave of absence. The proposal also provided for temporary leave for jury duty, service in the armed forces, work-connected illnesses or injuries and for personal reasons. The personal leaves were limited to 30 days but could be extended 30 days with the Companies' approval.

With respect to supervisors and family members, Stoll proposed that they could perform any of the work covered by the agreement. . __

Modifications of Respondents' position on subcontracting, mechanization, Union label, overtime, time and one-quarter for Sunday work, lunch periods and records and pay periods were also presented.

Respondents agreed to the UFW proposals on income tax withholding, credit union withholding and bulletin boards.

They maintained without change their previous position on holidays, reporting and stand-by pay, medical plan and wages. A three-year contract was proposed.

After the parties caucused, Cohen discussed the supervisor and family member issue and asked why it could not be resolved by a side letter setting forth the historical practice. Stoll illustrated Respondents' opposition to this approach by reference to an Oxnard grower who had grievances filed every time "he picks up a trash can." He also said the Union was trying to tie the hands of the small farmer when the price of crop goes down by prohibiting him from working when he cannot afford to hire someone. He also pointed out that Frazier did his own irrigating and Eto's son did a lot of work around the place.

Cohen said he saw no big problem with Respondents' proposal on access to Company property.

Cohen notified the Employers that there was no annual report of the pension fund which could be provided. He also stated that he was not prepared to agree to the presentation of the Union security issue to an employee vote. Stoll said that Frazier had had a 100% turnover since the election and many of his current employees have expressed a desire not to have to join the Union.

Dressler said that one reason for not having been able to work out an agreement was that the Respondents did not know what was going on with the jurisdictional pact. Once they had that knowledge they agreed to meet regularly. He suggested the parties try to reach an agreement during the next month. Cohen said he would have to check with his counsel before agreeing to continue the Agricultural Labor Relations Board proceedings.27/

March 30, 1977:

At the start of the meeting Cohen noted that he had to leave at 5:00

27/TRe Findings regarding the March'23 meeting are a composite of Cohen's testimony and the transcript o£" the meeting put into evidence.

p.m. and suggested he would like to review and respond to some things to see where the parties stood. He did not think agreement could be reached that day on such major issues as Union security, hiring and seniority. He asked the meaning of Respondents' failure to make a counterproposal on hiring.

Dressler said that the employment history of Respondents, the size of their work forces and the fact there had never been a hiring hall in the area, made the Employers reluctant to enter into such an arrangement. Dressler also stated he understood the UFW had waived the hiring hall in one of its Coachella Valley contracts.

Cohen suggested postponing discussion on the no-strike clause, seniority, grievance procedure, management rights, Union label, subcontracting, overtime, wages and a successor clause.

Cohen proposed that a meeting be set for April 13 so Chavez could attend, Cohen said that Chavez's presence would eliminate "some of the steps in the negotiating in that we would not have to go to get authorization on agreements. We could make agreements on the major issues."

Cohen stated the Employers' proposals on worker security, and new and changed operations were acceptable to the Union.

There was extended discussion on the issue of the Union representatives' right to access and whether the word "unnecessary" should be inserted into the language calling for no interference with the Employers' operations. The Respondents were reluctant to add "unnecessary" because of adverse experience in the Oxnard area.

Discharge: Cohen said the UFW was still opposed to the idea of warning notices prior to discharge and with the exceptions to the notice requirement such as a discharge for dishonesty. Dressler explained that the employer has the burden of proving that any discharge is for just cause. He also pointed out that warning notices put constraints on the employer's ability to discharge and that it is really advantageous to an employee to have no such system, since many dischargees never contest their termination even though it might be without just cause.

Dressler said the reason for setting forth examples of just cause in the contract was to provide Respondents who have never had a union contract with some guidelines.

Leave of Absence: In addition to what Respondents proposed, the Union wanted a provision that 10% of the work force could get a three-day temporary leave on two days' notice. Dressler said he would look at any ideas submitted.

Maintenance of Standards: The UFW expressed concern about Respondents' exclusion of conditions of work from the clause, but could not illustrate this concern by example.

Supervisors and Family Members: Dressler suggested that perhaps family members and supervisors should be treated differently with restrictions " placed on the work the supervisors could do. Respondents' position was that family members should be able to do any work they wanted even if this means laying off a Union worker. Respondents wanted to be free to bring their children and grandchildren into the business.

The UFW stated there was no need to deal with the children problem because they were only talking about a three-year contract. Dressler observed they were talking about principle and, that if the Employers did not get something as important as this in the first contract, they would never get it in.

There was a brief discussion of pensions. Dressler said Respondents would not want to make pension contributions when there was no plan. He said Western Growers had an operative plan which could be available. There was also brief discussion of the Martin Luther King fund, its operations and its purpose.

It was disclosed that Eto has some family units for which he charges rent. He is going to continue to charge "rent for the units and will increase its amount if costs increase. The UFW voiced no objection to increases so long as they were related to costs. Dressler said language would be proposed.

Mechanization, reporting and stand-by pay, jury duty pay, travel allowance, and records and pay periods were subject matters briefly discussed at the meeting.

Dressler stated the Employers were contemplating giving effect to their health and welfare program and asked what the Union position was on this question. Cohen said he would reply the next day.

Respondents agreed with the Union's concept on stand-by and reporting pay. Dressler said Respondents would propose language on health and safety and on camp housing. Agreement was reached on income tax and credit union withholding and bulletin boards.

The issue of Union security and the single issue ratification was again discussed. The arguments previously made were raised again with Dressler stating that the Union's and the workers' interests were obviously not the same on this issue. Cohen did not deny a Dressler statement that Respondents had more in common with the employees than did the Union on this issue.

Dressler said the negotiations may have proceeded faster if the UFW had told them what was going on with the Teamsters. He noted that once they learned what the story was, the Employers had been prepared to meet twice a week.28/

28/Cohen's testimony and the transcript of the March 30 meeting put into evidence provide the basis for the findings for the March 30 meeting.

March 31. 1977:

Respondents presented a proposal on health and safety to which Cohen said he would respond at the next meeting. The Employers' need to have a one-hour cancellation right in the call-out provision was stated, and the UFW reserved response until the next meeting. Later in the meeting Dressler "stretched" the hour to an hour and a half.

Dressler said the Employers were prepared to meet two days a week. Cohen said he would let Dressler know whether the Union wished to meet the next week.29/

April 14, 1977:

Cesar Chavez acted as the UFW spokesman at this meeting. He opened the meeting by questioning Respondents' failure to supply requested information. Stoll responded that some information had been supplied and that there had been no requests for information since negotiations commenced. Chavez repeatedly stated the Employers had failed to provide the information requested in his letter of January, 1976. Pressing Stoll for a date on which the requested information would be in his hands, Chavez said it was the first time in his experience ". . . in 20 years that I've had this kind of crap thrown at me." Chavez said the Union had a strong case against the Employers with the Agricultural Labor Relations Board. He told Respondents: "you guys make up your minds you want to deal with us and we'll deal with you. We don't want this kind of crap going on." He said Stoll was getting Eto and Frazier in trouble with the UFW and costing them a lot of money by failing to furnish requested information. Stoll responded that the Union had been given a lot of economic information and no one had complained about not receiving information for over a year.

Chavez then reviewed the areas on which he understood agreement had been reached to ascertain whether both sides had the same understanding. The parties agreed they were in accord on the following subject matters: no discrimination, recognition, modification of the agreement, a savings clause, workers security, use of the Union label, new and changed operations, income tax with holding, credit union withholding, bulletin boards, rest periods and bereavement pay. The non-economic issues still on the table were itemized by Stoll.

The parties discussed adding no-lockout language to the no-strike proposal as a basis for reaching agreement on that issue. The UFW was concerned that Respondents' paragraph permitting discharge for violation of the no-strike clause was too broad. Each side said the matters raised would be discussed among themselves.

Grievance Procedure: The outstanding differences between the parties on the grievance procedure were discussed. The UFW proposed that disruption of harmonious working relations by non-bargaining unit employees could be

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29/Cohen's testimony is at some points at variance with the transcript of the meeting prepared by the Respondents. When there is a conflict, the transcript is credited.

treated as a grievance. Stoll said the matter was covered by the "no denigration" language in the recognition section. He also argued that inclusion of the language would proliferate grievances.

Respondents objected to permitting grievance handling on Company time with no loss in pay as proposed by the UFW. Chavez said the access would permit speedier handling of grievances and in many cases prevent their escalation. He stated that he would never agree to limiting a steward's right to perform his duties to free time, and the Employers were out of their mind if they thought so. He said the Employers were legally wrong in their position and would have no peace in the fields if the worker could not see his steward on work time. Chavez told Stoll that the UFW would really have the Respondents in a bind if they boycotted their products because the stewards could not talk to the supervisors.

There was extended discussion of the need for the UFW's proposal that settled or withdrawn grievances do not establish precedents and on the need for time limits within which to file grievances. Respondents proposed a five-day "statute of limitation" on filing of all grievances. Chavez said this did not provide adequate time for investigation and would cause the Union to file grievances to protect themselves. He suggested five days on discharges and 30 days on other grievances. The matters were reserved for further consideration.

The size of the Step 2 grievance committee was discussed. The Employers wanted a small committee. Chavez said that having only one representative from the Union would inhibit the process because it puts too much pressure on the individual.

The UFW's proposal for an expedited arbitration procedure using local arbitrators and the Employer proposal for using the State Conciliation Service as arbitrators were discussed together with the time and costs involved in the process. Chavez objected strongly to the Employers' proposal for a warning letter system. He stated the proposal was totally rejected and did not respond when asked whether it was the Union's position that it would never agree to incorporate a warning system in a discharge or suspension article. The parties talked about having the loser pay the total cost of an arbitration. Chavez expressed great interest in the idea.

Chavez modified the UFW's position by agreeing to a three-day probationary period and seniority after 14 days if the Employers would accept the UFW hiring hall.

The meeting ended with an outline of the subjects to be discussed at the meeting the following morning. The parties agreed to an 8:00 a.m. start for the meeting.30/

30/These findings are a composite of the transcript of the meeting put into evidence and the testimony of Peter Cohen.

April 15, 1977:

Stoll expressed concern about the limitation which the UFW sought to impose on the performance of work by family members. He said each ranch was a family ranch, and both Eto and Frazier worked as did their families. Stoll wanted family members to be free to do whatever needed to be done on the ranch, even if, in a pinch, this might entail layoff of a worker. Chavez said the UFW did not want to exclude them from what they were doing, but he wanted security for the workers. Otherwise they would have no incentive to have a union. He said the Employers were not going to get total and complete freedom to do what they wanted; they would get only what the UFW had given all the companies in California. He said he understood the family had to work and that they had to supervise, but he also wanted the workers to feel secure. Stoll said the Employers would review their position.

After a caucus Respondents expressed basic agreement with the UFW on their health and safety proposal, but needed some time to prepare language.

Respondents proposed that temporary leaves be limited to 10% of the hoeing and thinning crew. If this limitation were adopted, the balance of the UFW proposal was acceptable. Chavez agreed to think about it.

Stoll wanted an explanation of the UFW proposal on mechanization, saying the parties were not far apart on the subject. Chavez suggested that the simpler approach would be to agree to negotiate if they ever mechanized. He explained the substance of the standard Union proposal when the subject matter is included in a contract.

Chavez asked when the information he had requested was to be forthcoming. He stated the UFW would not agree to continue the impending unfair labor practice proceeding.

April 20 was agreed on as the next meeting date.31/

April 20, 1977:

The meeting opened with a discussion of the time within which a direction to report for work might be rescinded without penalty.

The Employers' proposal for a separate vote on the Union shop was withdrawn.

The UFW's Family Housing proposal was accepted. Stoll proposed adding language to the changed operations section to require notification and bargaining if either Respondent ever began furnishing transportation. This was acceptable to the UFW.

31/These findings are based upon the transcript of the meeting. Peter Cohen testified there was discussion of the single election issue. The transcript shows no such discussion.

Respondents accepted the UFW language on management rights subject to a slight modification to which the UFW agreed.

Respondents accepted the UFW's language on mechanization subject to adding the phrase "if at all possible" in connection with their obligation to train people to operate the new equipment.

On Health and Safety Stoll wanted language to require employee payment if there were deliberate destruction of tools. He proposed language taken primarily from the Master Agreement.

After a caucus the parties agreed on the following provisions: Right To Access, Health And Safety, Mechanization, Management Rights, and Travel Allowance.

There was further discussion of the leave of absence and call-out proposals. The parties caucused and upon return the Employers adopted the modified UFW leave of absence proposal. They also accepted the UFW proposals On Location of Company Operations and Records and Pay Periods.

Stoll proposed a trade-off on several outstanding items in order to reach agreement: Respondents were willing to accept the UFW proposals on subcontracting bargaining unit work, jury duty and witness pay, the paid holiday-language of the Master Agreement, maintenance of standards, discipline and discharge, the modified grievance procedure, and seniority. In exchange for these concessions, the union must withdraw their proposals on union security, hiring, supervisors working, vacations, pensions and the Martin Luther King fund as well as accept the Employers' health and welfare proposal.

Stoll then requested that the Union make a counterproposal, and said if the Union wanted a different kind of trade-off, he was prepared to look at __ such a proposal.

Cohen responded that Stoll's trade-off cut the guts out of the Union. He suggested that progress could be made looking at the items individually, leaving economics, union security and hiring until last since those were the items on which the parties were farthest apart.

Hiring hall problems were again discussed. Stoll recited the Employers' position on the pension fund, the Martin Luther King fund, vacations, the 40¢ per hour wage increase already granted by the Employers, and the health and welfare program.

Stoll stated the Employers had strong feelings about the items they had withdrawn, but they wanted to reach agreement. They had wanted a warning letter system and they had withdrawn their maintenance of standards proposal. He said the Employers' proposal was not a "last proposal type of thing," but was an attempt to reach agreement on outstanding issues. When negotiations started, the Employers did not want a lot of the crap proposed by the Union to be in any contract; but after listening to Chavez, they have agreed to include a lot of extraneous provisions in the contract. To help the parties reach agreement

Stoll suggested that a state conciliator be invited to sit in the next meeting. Cohen said it might be appropriate.

Cohen responded to Stoll's review by saying the UFW could not withdraw its position on union security or hiring, that without these two items they did not really have a union. The outstanding problems on seniority and the grievance procedure were discussed, and after some interaction and modifications agreement was reached on both sections. Cohen said he needed a lot of facts and figures before he could discuss the economic issues.

The operation of Respondents' proposed health and welfare program was discussed. Stoll expressed doubt that claims would be properly processed under the Union's plan.

There was discussion of the Union's proposal for overtime after eight as opposed to overtime after 10 hours per day and the effect of modification of the proposal to limit it to hourly rated employees.

Stoll wanted it understood that the Union had rejected his trade-off proposal and that the proposal was withdrawn.

The parties recapped the subjects on which agreement had been reached.

Reporting and Stand-By Time
Leave of Absence
Location of Company Operation
Camp Housing
Mechanization
Management Rights
Seniority (contingent)
Grievance and Arbitration Procedure (contingent)
Right of Access
Health and Safety
Records and Pay Periods

Cohen said he needed some updated information in order to evaluate their position on fringe benefits and wages.

The parties again discussed the issue of family members and supervisors performing bargaining unit work. Cohen suggested language reading "family members presently working can continue to do whatever they want." Stoll responded that whatever went into the contract would be a precedent. He said they were talking about a long-time relationship and the contract would not stop after three years, and the Union would be unlikely to backtrack on the issue in the future. He said this article was probably one of the most important things in the whole contract.

Stoll said they were now getting down to where push comes to shove, and though they were not fixed in concrete on any of the major items, they were probably more fixed on this item than others.

The need to postpone the unfair labor practice proceeding was discussed. Cohen said he would let Stoll know their position and acknowledged that the parties were moving along.32/

April 26, 1977:

The meeting opened with a renewal of the discussion about a union shop provision in the contract. Stoll sought clarification of a previous statement by Cohen regarding UFW action against delinquent-members. Cohen said the Union would not seek the discipline or discharge of employees who were in bad standing at the signing of the agreement.

Discussion then moved to spelling out language in the seniority article relating to promotions or filling of vacancies. The proposed language gave the senior employee a reasonable time within which to demonstrate he could perform the work satisfactorily, and if he failed to do so, he would return to his former job.

In response to some remarks by Cohen, Stoll stated the current wages being paid were those established in October, 1976. Neither Employer was giving paid vacations or paid holidays.

Stoll listed the articles in the UFW proposal regarding which the parties had differences: union security, maintenance of standards, discharge and suspension, subcontracting, supervisors and family members, hours of work, overtime, wages, holidays, vacations, pensions, Martin Luther King fund, and a successor clause.33/ The review was followed by more specific discussion about when overtime was to be paid, whether it was applicable to irrigators and the rate to be paid for Sunday or a day of rest.

Stoll noted there had been very little discussion of a successorship clause. He said the Employers were strongly opposed to the inclusion of such a clause. Cohen said the Employers could not seriously expect the UFW to agree to a contract not containing such a standard clause. Stoll said there were many contracts even in agriculture which did not contain such clauses. Stoll argued that the Employers needed to be free to sell their business without the inhibition of such a clause. Stoll also argued that the presence of a successorship clause in the labor agreement would reduce the sales value of the business. Cohen said the rapidly changing ownership in the agricultural industry made such clauses imperative. Stoll objected to the inclusion of "administrators" and "executors" in the UFW proposal. He suggested that the UFW clause exceeded the scope of existing law. Cohen and Stoll agreed that Stoll would draft some language on the subject matter.

32/These findings are based upon the transcript of the meeting as introduced into evidence and Peter Cohen's testimony.

33/Stoll did not list health and welfare as an area where the parties were in dispute; however, there is nothing in the record indicating agreement had been reached on either the Robert F. Kennedy plan or the Western Growers plan.

Respondents said they still wanted a warning notice system and then returned to union security.

Stoll expressed concern about having to terminate someone whom the Union said was in bad standing, Stoll referred to National Labor Relations Board precedent which did not require membership although dues payment was required (an agency shop). Stoll, said an agency shop would meet the UFW's argument that all workers should have to pay their share for the representation received. Cohen's response was that the UFW was interested in worker participation in the Union, not simply their-money. He was not sure that the Union was prepared to move from a union shop to an agency shop.

Stoll presented written objections to the hiring hall which had been requested earlier by Cohen. Juan Uvalle's relationship with Frazier and Frazier's desire to continue to have Uvalle do his hiring was discussed. Frazier has used Uvalle since 1967 or 1969.

The parties discussed Eto's notice to worker requirements, use of Cal-Poly students and the work which they performed and his use of foreign students. The discussion as it appears in the transcript of the meeting is incomprehensible.

Stoll expressed his concern about the Union's position on seniority, stating that the Union was retreating from tentative agreement which had been reached. He then made another overall "contingent" proposal. The Employers would accept: agency shop, Christmas as a paid holiday, jury duty and witness pay to workers having worked five days in the preceding two weeks, the discipline and discharge language in the "Master" agreement, the day of rest language of the Union, their previous proposal on subcontracting, the Western Growers Plan 22 and the maintenance of standards language, proposed by the UFW, contingent upon the withdrawal of the UFW proposals on hiring hall, successorship, supervisors, pensions and the Martin Luther King fund.

Cohen said he needed a couple of days to prepare a comprehensive response to Stoll's proposal. Stoll again suggested that the State Conciliation Service be brought into the proceedings. Cohen was opposed in principle to this idea, but said he would think about it.34/

April 26--May 18:

During the period between the meeting of April 26 and May 18 no meetings were held. A scheduled meeting for May 5 was cancelled because Frazier was ill. The UFW was unable to meet during the week of May 12 because Cohen had to attend a week-long UFW conference. The parties next met on May 18, 1977.

May 18, 1977:

At the start of the meeting Stoll asked whether Cohen had full

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34/The findings made with respect to the April 26 meeting are based upon the Respondents' transcript which was put into evidence.

authority to act. Cohen replied that he had full authority to negotiate.

Before proceeding with any new discussions Cohen wanted to clear up some language on seniority. He told Stoll he had made some concessions on promotions and recall which the UFW had not made in any other agreement. Cohen sought to protect workers against loss of seniority for failure to report after recall by requiring that the recall notice be sent to the Union, and he also proposed a 10-day notice of anticipated recall to both the Union and the workers. The notice was also to state the approximate duration of the work.

Stoll said he thought the parties, were through talking about seniority. Cohen said he had made some concessions; then said there was no point in going on with the discussion. He said the UFW was willing to proceed with the unfair labor practice hearing. Cohen agreed that he was threatening Respondents because he thought they were not being serious.

Cohen stated: "Really, I don't care what you think we agreed to or what I think was agreed to there are certain areas that I think need to be cleared up such as mechanization . . . I'm not going to backtrack. I am backtracking when I think it is appropriate, where I think what he agreed to is meaningless. It was only creating problems. I am standing by the concessions I made."

Stoll's response: "Let's go on. Give me your deal and we'll talk about it instead of sitting and yelling about it."

Stoll said Respondents had been waiting for something in the mail from the UFW which stated their response on open issues. He said Respondents thought they had deals on all the things Cohen was bringing up. He characterized Cohen's actions as screwing around.

Cohen expressed dissatisfaction with the Employers' contingency proposal approach, characterizing it as "bullshit."

Cohen then outlined the UFW "rock bottom" position:

(1) The Master Agreement language on Union security.

(2) Hiring to be reserved for further discussion.

(3) Seniority, the modified UFW position.

(4) Discipline and discharge, the UFW language.

(5) Supervisors: let family members and supervisors collectively do the jobs that are now done.

(6) Mechanization--UFW language (Cohen thought agreement had been reached on this).

(7) Subcontracting language had been prepared and was Xeroxed for distribution.

(8) Vacation--Union's original position.

(9) Three paid holidays (one holiday traded for CPD).35/

(10) Robert F. Kennedy health insurance.

(11) Pension.

(12) Martin Luther King fund (effective the second year of the agreement) .

(13) Reserved position on wages.36/

When wages were discussed, the Employer modified its wage position and proposed $3.45 for 1977, $3.65 for 1978 and $3.80 for 1979. Cohen modified the UFW's demand on overtime to call for time and one-half after 10 hours a day, Sunday or another designated day of rest to be paid at the overtime rate. Cohen said he would agree to Respondents' wage proposal reserving the right to further negotiate piece rates on broccoli and lettuce. However, this position depended upon Respondents' acceptance of the UFW's health and welfare/pension, Martin Luther King fund and paid holiday proposals.

Cohen said the UFW would modify its hiring hall position provided that when there was an opening the UFW would have the "first shot" at filling it. The Union position was that if they were able to refer someone who met the Employers' qualifications, that person should be hired. The proposed language made the hiring hall operative in San Luis Obispo if an office were opened there and in the Santa Maria area when the Union got other growers under contract. Cohen emphasized this was a major concession, and he stated he expected something in return for it, that is he expected the Employers to adopt the package he outlined; He added the successor clause of the Master Agreement as part of the package.

The UFW's union, shop proposal was discussed. Cohen said that a situation where everyone was not a member would be a big hassle; he said the UFW would be filing grievances all the time to get the workers to become Union members. Cohen said that if there were members and non-members working, Union organizers are going to be present all the time organizing those people. The Union would be filing grievances right and left "because we've got to protect ourselves."

After the noon break Stoll said that it would take the Employers some time to put together a total response to the Union's position. He asked Cohen whether the Uni9n still had any room to move and Cohen said yes. Stoll said he could see how “it” could come together now.

35/The record does not reveal what CPD is.

36/During the course of this outline there were verbal exchanges between Cohen and Stoll regarding whether either side had made any concessions.

There was discussion about continuing the ALRB hearing so that Respondents could prepare a response. Cohen said he had no authority to do that. Stoll suggested the parties could meet while the ALRB hearing was going on.

Cohen asked whether Frazier was bound by what Eto decided to do. Stoll responded that if it came down to individual differences, they would split off. He said they were in agreement on everything up to this point.

Cohen asked whether there were problems with the package he outlined. Stoll said union security was still a problem; hiring was still a problem, but he wanted to review the entire package rather than discuss particular sections. Cohen mentioned jury duty pay and successor[1] as two items he overlooked in presenting his package. Stoll acknowledged that things were in better shape due to the UFW's movement.37/

May 19, 1977:

Stoll presented an entire package to Cohen. It contained some new economic items and some answers on open issues.

In discussing seniority Stoll said that he had reviewed the tapes of the meetings and discovered Respondents had agreed to a 10-day recall period; he apologized for inserting a five-day recall into the discussion. Respondents still objected to notifying the UFW if a recalled worker failed to report, and having to allow three days to report after notice to the Union. They continued to object to supplying seniority lists every three months.

The UFW's contingent hiring hall proposal was rejected. The employers agreed to notify the Union of openings and to permit referral of applicants to be treated in a nondiscriminatory manner. Frazier would continue his past practice of hiring through Uvalle.

Stoll said the Employers were adamant on their previously stated position regarding permissible work for the family and for supervisors.

Stoll said he felt mechanization was agreed except for some language about the hiring arrangements.

Respondents proposed the "Master Agreement" language to cover the discipline and discharge.

The Employers stood on their proposal for an agency shop.

Christmas was proposed as a paid holiday, and three observed holidays were also proposed. Any work performed on an observed holiday would be at time and one-half. The paid holiday eligibility requirements proposed paralleled the "Master Agreement" provisions.

37/These findings are based upon the transcript of "the meeting prepared by Respondents and put into evidence.

Respondents modified their proposal to include vacations for workers who complete a qualifying period of 1,000 hours per year to be paid at the rate of 2% of gross earnings.

The subcontracting proposal was discussed with the Employers indicating basic agreement with the UFW language and manifesting a lack of understanding regarding one part of the section.

The Robert F. Kennedy, pension and Martin Luther King proposals were rejected.

The Union was unwilling to waive its hiring hall proposal except for any period it had no San Luis Obispo office. Cohen said the growers were ultimately going to have to accept the hiring hall as a fact of life. Cohen said hiring halls and union security were the serious problems together with the economic funds. Respondents were unwilling to agree to a hiring hall even on a contingency basis because there was nothing to prevent the UFW from opening a hall in San Luis Obispo and then Eto would be bound. Cohen said the UFW would only be willing to waive the hiring hall on an "until" basis. Stoll recognized that in three years the UFW would be able to shove the hiring hall down their throats.

Cohen said if they yielded on the economic funds and union security, it would be the most significant thing to be done. He suggested the Employers did not "recognize certain political realities which exist." He said the damage from agreeing to a hiring hall was far less than a month of hearings. Cohen said he was just putting the choice before the Employers.

Stoll suggested each side try to make some movement. He said that the Employer position on family members working and on hiring hall was very strong.

A major area of difference between the parties on family members working related to the UFW position of limiting the scope of permission to present family members who were working. Respondents made reference to children who were growing up and who would become part of the farm operations in the future. The UFW suggested those problems could be dealt with down the road. To which the Respondents replied in substance that once something was put into a contract it was impossible to negotiate it out. In responding Stoll directed Cohen’s attention to a UFW contract in San Diego where the UFW had permitted unlimited work by family members.

Stoll said the Employers had given what they thought they could give on hiring, Union security, pension fund, medical fund and economic development fund.

Cohen responded that he saw no basis for agreement.

Stoll reviewed the agreed upon safeguards for the workers: in hiring the Employers had agreed to notify the Union if possible and to consider on a nondiscriminatory basis the people sent out; in subcontracting the Employers agreed not to subcontract to the detriment of the bargaining unit; and on seniority had agreed to apply seniority to promotions.

The agreements reached in the areas of hiring, subcontracting, seniority and successorship were reiterated.

Following the lunch break Stoll said ". . .we want to have our family members work. And we want to be able to have our supervisors do whatever work we ask them to do. And we're not going to be limited in that regard." Stoll said that with this subject matter, as well as with *a.* lot of others, Respondents preferred nothing in the contract; but since the Union insisted on a counterproposal he made one. Each party recited its position regarding the current need for supervisor language and the future impact of such a provision.

With regard to hiring Respondents wanted to continue their past practice. Cohen said the UFW wanted a hiring hall but that he had made some concessions. Stoll regarded Respondents' agreement to notify of openings as a concession.

Stoll suggested that the UFW try to make some movement and the Respondents would try to make some movement in response; however, they were very strong on supervisor and on the hiring hall issues.

Stoll said he recognized the difficulty of this issue for the Union because he was involved in other negotiations. Cohen responded it was not insurmountable, but in the context of Respondents' other positions there was only so much room to move. The Union could not concede all the points at the same time.

Stoll said he thought the Employers had come a long way on vacations and holidays and some other items never before in the contract.

Stoll again outlined the work currently performed by family members. Frazier does almost all the work on his ranch. Again the need to get proper language in the contract to cover the future was stressed. The UFW said they were merely seeking to protect the workers. Stoll referred to the UFW's contract with Sam Vener in San Diego which permits family members to do everything.

Cohen needed more time to review the situation to see whether there was room for further movement. He said he would take a serious look at the "family member" question. Cohen said he would try to come up with another package before the next meeting.

Stoll suggested that the parties try to keep meeting notwithstanding the unfair labor practice proceedings. The matter was left open. 38/

ANALYSIS AND CONCLUSIONS

Labor Code Section 1153(e) makes it an unfair labor practice for an agricultural employer to refuse to bargain collectively in good faith with a labor organization certified pursuant to the provisions of the Agricultural

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38/These findings are based upon the transcript of the meeting prepared by Respondents and introduced into evidence without objection.

Labor Relations Act. Substantively the section is identical to Section 8(a)(5) of the National Labor Relations Act.

Labor Code Section 1155.2(a) which is identical to National Labor Relations Act Section 8(d) defines bargaining in good faith as follows:

> (T)o bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract . . ., but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The substantive identity of statutory language makes reference to National Labor Relations Board and federal court decisions particularly appropriate in the present case. See Labor Code Section 1148.

A violation of Sections 1153(e) and 1155.2(a) may occur in two ways: an employer may simply refuse to bargain, or alternatively an employer may bargain, that is meet and confer, in a manner which does not evidence a sincere desire to reach agreement.

Respondents are charged with refusing to bargain by delaying the start of negotiations, by refusing to meet, by refusing to meet for sufficient periods of time, by unilaterally changing the workers' wages during the course of negotiations, by refusing or failing to provide the UFW with requested information necessary and relevant to the preparation and negotiation of a collective bargaining agreement and by bypassing the UFW and dealing directly with employees regarding wages, hours and working conditions.

Respondents are also charged with failing to bargain in good faith by engaging in surface bargaining or bad faith table bargaining. Resolution of this charge requires an examination of the totality of the Employers' conduct both away from and at the bargaining table to ascertain whether Respondents entered into the discussions with an open and fair mind and a sincere desire to find a basis for agreement. 39/ Isolated instances of a refusal to bargain during the span of the negotiations are factors to be considered in deciding whether an employer has also violated the statute by failing to bargain in good faith, but such refusals to bargain do not automatically transform table conduct into a failure to bargain in good faith. 40/

39/ Labor Board v. Truitt Mfg. Co. (1955), 351 U.S. 149; Southern Soddlery Co. (1950) , 90 NLRB 1205.

40/ Pay 'N Save Corp. (1974), 210 NLRB 311, 325; Valley Oil Co. (1974), 210 NLRB 370, 385.

I. The Refusal To Bargain

A. Delay In Commencing Negotiations:

The UFW was certified at Frazier Ranch on December 6, 1975, and at Eto Farms on January 22, 1976. Shortly after certification each Employer received a communication from the UFW requesting a preliminary negotiations meeting. Neither Employer responded to the communication.

During late 1975 and until January 21, 1976, the UFW was engaged in multiemployer negotiations in Bakersfield. These negotiations produced the UFW "Master Agreement." Both Ann Smith and Donald Dressler were continuously involved in these negotiations. During the month following agreement on the "Master" it was adopted by employers in the Salinas and Oxnard areas who were members of Western Growers Association, an organization for whom Dressler is house counsel.

Following the initial letters to Respondents the UFW made no effort to get negotiations started until after Smith arrived in Oxnard on February 26, 1976. Commencing in early March Smith attempted to contact Dressler regarding negotiations with Respondents. She reached him on March 10; no dates were proposed for a meeting. On March 15 Smith again spoke with Dressler on the phone and was advised that April 13, 1976, was the earliest date on which Respondents were able to meet. She was told that Charley Stoll would handle negotiations.

There is no evidence regarding the diligence with which Smith sought to arrange for a first meeting with Respondents during the period between February 26 and March 10. For reasons not made clear in the record, she apparently concluded it was appropriate to contact Dressler and not Eto. and Frazier. There is no evidence of any attempt to contact Frazier or Eto after the initial communications were sent at the end of the year.

Unquestionably there was an inordinate delay between certification and the commencement of negotiations; however, much of the time loss is not attributable to Respondents. (Cf_. Chevron Oil Company (1970), 182 NLRB 445, 446.) Until Smith contacted Dressler in early March, the UFW had not specifically requested that bargaining begin and absent such a request, an employer does not sin by sitting tight and awaiting such a request. N.L.R.B. v. Columbian Enameling § Stamping Co. (1939), 306 U.S. 292, 4 LRRM 524; Atlas Life Ins. Co. v. N.L.R.B. (10th Cir. 1952), 195 F.2d 136, 29 LRRM 2499. The Union was occupied in consummating the "Master Agreement" until late January." It is apparent that its strategy was to complete those negotiations and use the product thereof as the pattern for dealing with growers not at that bargaining table. Once the "Master" was completed the Union moved into the Salinas and Oxnard areas to complete contracts. Smith's arrival in Santa Maria signified the commencement of active UFW efforts to reach contracts with Respondents and other growers in the Santa Maria Valley.

The delay in commencement of negotiations during the period between March 10, 1976, and April 13 is chargeable to Respondents. No case is cited by General Counsel which stands for the proposition that standing alone a five-week delay between the specific demand that negotiations commence and their

commencement is unreasonable delay and constitutes a refusal to meet at reasonable times as required by Section 8(d) and Section 1155.2(a).

I am mindful that an employer is required to ". . . attend to his bargain obligation with the same degree of diligence as he would to important business matters." 41/ An employer has "... the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring." 42/ This duty was met with respect to arrangements for the initial bargaining session.

There is not here as there was in Quality Motels an hiatus of three months between demand for negotiations and the initial meeting. 43/ There is not here as there was in Chevron Oil Company evidence of pre-election or pre-bargaining conduct by Respondents manifesting an "unmistakable aversion" to having their employees represented by a union. 44/ While it is clear that the delay in the start of negotiations does not have to be deliberate in order to constitute a refusal to bargain, where the time lapse balances between reasonable and unreasonable, it is appropriate to consider contemporaneous and precedent employer conduct in reaching a conclusion regarding whether the time lapse amounted to a refusal to bargain. 45/ Recognizing that the five-week delay is borderline, the absence of evidence of Union animus supports the conclusion the delay was not deliberate. This tips the balance in favor of Respondents on this question. The General Counsel has the burden of establishing by a preponderance of the evidence the delay was so unreasonable as to amount to a refusal to bargain. He has failed to do so.

B. The Refusals To Meet:

During the period between April 13, 1976, and May 19, 1977, the parties had 20 .collective bargaining meetings. Ten of these were held between March 15 and May 19, 1977.

Section 1155.2(a) includes as a requisite of bargaining in good faith the duty to meet at reasonable times. The failure to do so violates 1153 (e). It is apparent from a juxtaposition of the facts herein to applicable National Labor Relations Board precedent that Respondents breached this duty.

June 24--August 12: At the close of their meeting of June 24, 1976, the parties agreed to meet on July 6 and 7. On July 2 Stoll called Cohen

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41/ Quality Motels of Colorado. Inc. (1971), 189 NLRB 332, 337 and cases cited therein.

42/Ibid., at p. 337.

43/Ibid., at p. 336.

44/Chevron Oil Company (1970), 182 NLRB 445.

45/ Quality Motels, supra, p. 337.

cancelling the forthcoming meetings. Cohen protested. Stoll's reason for declining to meet was the progress the UFW and the IBT were making toward reaching a jurisdictional pact. Cohen contended the pact negotiations had nothing to do with the negotiations between Respondents and the UFW. The gravamen of the Union opposition was set forth in Cohen's letter to Stoll of July 6, copies of which were sent to Frazier and Eto. The record shows no response to this letter. Respondents proposed a resumption of negotiations shortly after unfair labor practice charges were filed against each Respondent.

As of July, 1976, the UFW was- the certified bargaining representative of Respondents' agricultural employees and Respondents had an absolute obligation to bargain with the Union. This obligation was in no manner stayed by attempts of the UFW and the IBT to solve existing problems between the two organizations. As noted above, Respondents had an obligation to attend to its bargaining obligation with the same diligence they would afford to any important business obligation. This they did not do.

During the hiatus Respondents' bargaining representative negotiated several agreements in the Santa Maria area with Teamster Local 865, a manifestation of the lack of bona fides in the representative's rationale for declining to meet with the UFW. Respondents are chargeable with this conduct of their representatives.

A legitimate inference to be drawn from the proximity of Respondents ' request for another bargaining meeting to their receipt of unfair labor practice charges is that the delay was violative of Sections 1155.2(a) and 1153 (e). I draw this inference. It reinforces the conclusion that Respondents' refusal to meet during the period between June 24 and August 12 violated, the Act.

September 21--October 19: The four-week hiatus in meetings which occurred between September 21 and October 19, 1976, did not violate-Respondents' duty to meet and confer. The distillate of the evidence adduced regarding the September 21 meeting produces the following conclusions: Respondents conditioned further meetings upon a UFW response to Respondents' economic package and upon some movement with respect to non-economic items previously discussed. Since Respondents had been seeking a UFW response to its initial wage proposal and since no wage proposal had ever been forthcoming from the Union, it was not unreasonable to condition a further meeting upon the UFW's economic response. A meeting was held upon Respondents' initiative shortly after the UFW's wage and trust fund proposal was forwarded to Respondents.

October 19, 1976--March 15, 1977: At the meeting of October_19_ Stoll stated the parties had reached an impasse on all issues; therefore the wage rates previously proposed were being effected on October 20. The Union voiced its objections. The parties next met on December 2 in response to the Union's request. The meeting was brief and devoted to recapping the parties' respective positions. Stoll held himself available for future meetings. Cohen was to contact him regarding available dates.

Sometime after December 10 Cohen contacted Stoll's office to discuss meeting dates. In Stoll's absence, Cohen spoke to Dressler who expressed

an unwillingness to meet until late January because there was movement occurring, in the UFW-IBT negotiations. He also expressed an unwillingness to meet with Chavez present at the negotiations because of the latter's knowledge of those negotiations. A meeting was arranged for February 1, which meeting did not occur because of the inability of Chavez to attend.

The parties met on March 15, 1977. Stoll was unavailable during most of the period between February 1 and March 16 representing another client in an Agricultural Labor Relations Board unfair labor practice proceeding. He was not present at the March 15 meeting. Dressler represented the Respondents.

If, as Mr. Stoll contended, the parties reached impasse on October 19, 1976, Respondents were relieved of any further obligation to meet until there was some break in the impasse created by a modification in the UFW position. However, as noted below, the evidence does not support a conclusion that impasse was reached. Therefore, Respondents' declination to meet between October 19 and December 2 violated Sections 1153(e) and 1155.2(a).

Respondents also violated the Act by refusing to meet from sometime in mid-December until February 1, 1977. This hiatus occurred, as did the eight-and-one-half-week hiatus during the summer of 1976, because Respondents wanted to await developments regarding the UFW-IBT jurisdictional pact. This explanation is as legally unconvincing now 'as it was when offered to excuse the July refusal to meet.

The UFW cancelled a February 1 meeting because Chavez was unable to be present and was unable to schedule another meeting with Respondents until March 15. From the record it appears the delay was occasioned by Mr. Stoll's representation of another client in a lengthy unfair labor practice proceeding before this agency. The explanation does not suffice to excuse Respondents from their duty to meet with the Union at reasonable times. Deliberate procrastination is not prerequisite to a breach of Respondents' duty. The bargaining process must be treated with the same dignity as any significant business relationship. Respondents' failure to so deal with Mr. Stoll's unavailability by obtaining another representative amounted to a refusal to meet. It cannot go unnoticed that there were other negotiators from the law firm present at most meetings which Mr. Stoll attended. It behooved Respondents to proceed with negotiations even in Stoll's absence; a course of conduct ultimately followed, since Dressier, not Stoll, was Respondents' main representative at the March 15 meeting.

In summary: the refusal of Respondents to meet with Union representatives during the period between June 24 and August 12, 1976, violated Sections 1153(a), 1153(e) and 1155.2(a) of the Act. These sections were also violated by Respondents' refusal to meet during the period between October 19, 1976, and March 15, 1977.

C. Failure To Furnish Information:

It is well settled that an employer is obligated to furnish the representative of his employees information which is reasonably necessary and

relevant to enable the representative' to perform its bargaining function intelligently. 46/ Satisfaction of this duty requires not only that the information be furnished, but that an employer supply it with reasonable promptness. 47/

Knowledge of existing wages and fringe benefits is customarily essential to a union's formulation of any intelligent proposal tailored to an employer's operation. 48/ In the present case, however, it is not obvious that the Union in the area of fringe benefits ever considered modifying the provisions of the Master Agreement to fit any uniqueness of either Eto's or Frazier's operations. The absence of evidence establishing this point is significant in reaching a conclusion regarding whether Respondents' failure to supply requested information about health and welfare plans, pension plans, profit-sharing plans or life insurance plans violated the Act.

The "Master Agreement" requires contributions from the employer into the Robert F. Kennedy Farm Workers Medical Plan and into the Juan De La Cruz Farm Workers Pension Fund. The proposals initially made to Respondents incorporated these provisions, and the record shows no Union interest in substituting any other plan for either of the above. On the contrary at the initial bargaining session UFW representative Smith gave Respondents copies of the Trust Agreement "that explain the benefit plans you'll be contributing into."49/ At the time these materials were given to Respondents, Smith made no inquiry of either as to whether either already provided such benefits. On the basis of the universality of the UFW position on health and welfare and pension, and the obvious advantage of the broadest employer participation in their plans, it is reasonable to conclude that the requested details about any health and welfare or pension plan in effect were not sought in order, to enable the Union to intelligently formulate a plan peculiarly applicable to Respondents. Therefore, Respondents' failure to respond to this request except in the form of proposing its own health and welfare programs did not violate the Act. 50/

The Union learned at the first negotiating meeting that neither Respondent had a collective bargaining agreement with the Teamsters. This was a timely response to the Union's requests for information about bargaining history.

46/ Autoprod, Inc. (1976), 223 NLRB No. 101, 92 LRRM 1076.

47/ B. F. Diamond Construction Company (1967), 163 NLRB 161, 175 and cases cited at Footnote 94 and Footnote 95.

48/ Boston Herald Traveler Corporation (1st Cir. 1954), 110 NLRB 2097, enf'd, 223 F.2d 58.

49/General Counsel's Exhibit No. 35--minutes of the April 14, 1976, meeting.

50/As to the request for information regarding the spouse of each; unit employee, for the reasons set forth such information was not necessary so far as it was sought for health and welfare purposes.

With respect to other fringe benefits, such as vacations and paid holidays, some information was provided at the initial bargaining session, and each Respondent's practice regarding vacations and holidays became known during the course of negotiations. Thus, the issue is whether the information was supplied with reasonable promptness. The UFW's announced bargaining strategy was to delay discussion on cost items until the major non-economic items in their proposal were worked out. Moreover, their proposals on holidays and vacations were "Master Agreement" provisions and their wage proposal apparently tracked the wage agreement reached in Salinas. Combining these factors one is impelled to conclude that in the context of this case, Respondents supplied the fringe benefit information requested with reasonable promptness.

In the initial communication each Respondent received from the i Union after it had been certified, there was a request for the names, addresses, age, social security number, job classification and current wage and date of hire of each worker. This information is patently pertinent to the negotiations of an initial collective bargaining agreement. Pennco, Inc. (1974), 212 NLRB 677; Dynamic Machine Co. (1975), 221 NLRB 1140. The possibility that the UFW may have been able by other means to procure this information does not diminish Respondents' obligation to furnish it. Autoprod, Inc., supra. Respondent Eto's failure to furnish the requested information violated Section 1153(e) and Section 1155.2(a) as did Frazier's failure to maintain an updated list for the Union. The Respondents' violation of the statute in this regard is the more serious in light of the stated high rate of turnover at each operation. The requested personnel data is obviously necessary regardless of whether the UFW's bargaining approach was the "Master Agreement" or from scratch.

The UFW's initial communication to each Respondent also requested a summary of the wages, fringe benefits and other compensation offered to non-bargaining unit employees. Such information is relevant when there are non-unit employees having the potential of transferring into the unit, such as employees not yet having sufficient service to be included, or when the information will assist the bargaining agent in policing a contract. See Western Electric (1976), 225 NLRB No. 99; Viewlex, Inc. (1973), 204 NLRB 1080. Neither such reason is present in the instant case, nor considering the scope of the certification and nature of each Employer's operations does an analogous reason for considering such information necessary and relevant come to mind. No testimony was offered to show that such information was reasonably necessary to enable the UFW to bargain intelligently. See Autoprod, Inc., supra. Therefore, Respondents did not violate Section 1153(e) in failing to supply this information.

The General Counsel argues that Respondents' failure to supply requested information regarding each employee's spouse violated Section 1153(e) because such information was necessary to enable the UFW to bargain intelligently on the subject of camp housing. This argument can be directed only to Eto; Frazier has no camp housing. However, the argument presumes that camp housing is a mandatory subject of bargaining in the context of this case. See American Smelting and Refining Company v. N.L.R.B. (9th Cir. 1969), 406 F.2d 552. But, there is not sufficient evidence in the record to determine whether Eto's ownership of some houses materially affects the conditions of employment of bargaining unit workers. See N.L.R.B. v. Lehigh Portland Cement Co. (4th Cir. 1953), 205 F.2d 821. Thus, no determination can be made regarding the

mandatory-permissive status of company housing and, as a result, no determination can be made that Eto's failure to supply the requested spouse data violated Section 1153(e).

D. Unilateral Changes In Wages:

October 19-20: At the outset of the ninth bargaining session on October 19 Stoll announced the Respondents were giving effect to their proposed wage schedule the next day. He stated the parties had reached an impasse on all issues. The UFW objected, accusing Respondents of failing to bargain in good faith.

Unless an impasse existed on October 20 Respondents were not privileged to effect their last wage proposal over the objections of the UFW. See Pay 'N Save Corp. (1974), 210 NLRB 311, 327; N.L.R.B. v. Katz [1962], 369 U.S. 736.

The National Labor Relations Board set forth its general criteria for determining impasse in American Federation of Television and Radio Artists, AFL-CIO, 163 NLRB 475, 478 in the following terms: ____

> An employer violates his duty to bargain if, when negotiations are sought or are in progress he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.
>
> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of 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. (Footnotes omitted.)

Impasse describes the situation which exists when the bargaining process has failed to produce agreement and it is apparent that extension of the process will not produce agreement. Such was not the case here. The divergence of the parties' positions on wages as of October 19 can hardly be regarded as a situation in which the parties had exhausted the bargaining process. The Union had only recently put forth its initial wage proposal at the insistence of the Employers. Their proposal had not been discussed. Respondents made no effort to ascertain its rationale or the firmness with which it was put forth. Nor had there been any discussion of the rationale of the two wage proposals put forth by Respondents. Wage negotiations were certainly at a primary stage of the bargaining procedure, and disagreement at this stage does not amount to impasse.

See Sioux Falls Stock Yards Co. (1974), 208 NLRB 64, 71.

It is equally apparent that impasse had not been reached on other issues on which the parties were in disagreement. This was the ninth meeting between the parties. The first four meetings were largely devoted to presentation and explanation of the initial positions of the parties. The fifth was devoted to the Union's discussion of three or four major areas of its interest. Between the fifth and sixth meetings was a period of approximately one month during which Respondents refused to meet.

The sixth meeting was devoted to the presentation by Respondents of a modified counterproposal. At the seventh meeting the UFW presented Respondents with modified positions on seniority, grievance procedures, discharges and discipline, family members working and stand-by time. Respondents increased their wage proposal at this meeting and modified their proposals on seniority and stand-by time.

At the eighth meeting on September 21 Respondents agreed to a Union proposal calling for. a first-step grievance discussion between the shop steward and the foreman. Respondents also agreed to UFW proposals regarding the authority and manner of payment of the arbitrator. The parties' disagreements regarding the hiring hall were aired. The Employers' negotiator then stated he saw no use in further meetings unless the UFW was prepared to make some movement. He noted the UFW had made no wage proposal despite repeated requests for one from the Employers. The meeting closed on this note.

By letter of September 30 Respondents said they would effect their proposed wage increase absent any wage proposal from the UFW. The Union immediately responded with a wage proposal.

It does not appear from this record that the positions of the parties were so fixed as to render further negotiations futile. This conclusion is butressed by statements of both Cohen and Stoll at the meeting of the 19th. Stoll said he wanted to see some UFW movement, he did not want to close the door. Cohen said he understood that position. Moreover, the concessions of the parties after resumption of negotiations in late August were such as to indicate that further bargaining might reasonably have been expected to be fruitful. It is true that progress was slow and that both parties were hard bargainers, but it was sufficient to indicate the appropriateness of further bargaining. See Sioux Falls Stock Yards Co., supra, p. 72.

Respondents violated Sections 1153(e) and 1155.2(a) by unilaterally increasing wages on October 20, 1976.

E. Eto's January, 1976, Wage Increase:

Eto has historically paid his farm workers the prevailing rate in the Oceano-Arroyo Grande area. In January, 1976, subsequent to the UFW's certification, Eto increased his workers to $2.95 per hour upon learning this was the prevailing rate. There was no discussion with the UFW prior to the increase. At the time the January increase was effected negotiations had not commenced nor

had the UFW made a demand that bargaining begin. _51/ The National Labor Relations Board has found unilateral changes in wages or conditions of employment at a time when negotiations are pending to be proscribed. See Central Metallic Casket Co. (1950), 91 NLRB 572. The Supreme Court has similarly found a unilateral change in conditions of employment under negotiation to be a violation of National Labor Relations Act Section 8(a)(5). See N.L.R.B. v. Katz (1962), 369 U.S. 736. The theory of these cases is that such an action is a circumvention of the duty to negotiate. The cases all involve fact situations in which the employer's action occurred during the period when negotiations were in progress or had been demanded. See Birite Foods, Inc. (1964), 147 NLRB 59, and cases cited therein.

The January, 1976, wage increase by Eto occurred prior to the commencement of negotiations or the demand for meetings. Since the parties had yet to come to grips, Eto's action was not a refusal to bargain upon demand and therefore not violative of Section 1153(e).

F. Eto's Wage Practices:

During the course of negotiations Eto on three occasions unilaterally increased the wage rates for certain of his employees; on one occasion he hired a worker at less than his standard scale for field work; on other occasions he appears to have established new classifications and accompanying rates of pay.

Isolated wage increases for a few employees during the course of negotiations may not be a refusal to bargain or probative of bad faith. 52/ But that principle is not applicable here, since the number of employees involved is significant vis a vis the small size of Eto's work force and since his action appears to have been directed toward every employee working in other than the field worker classification.

Purportedly the increases were merit increases and part of Eto's established wage policy. It matters not. The granting of these increases was violative of Section 1153(e) for two reasons: (1) the UFW was not made aware of these increases and given the opportunity to bargain about them prior to their promulgation;53/ and (2) the increases occurred during the course of negotiations and in the absence of an impasse. See N.L.R.B. v. Katz, supra; Pay 'N Save Corp. ,supra. Similarly, the unilateral establishment of new classifications and a less than scale starting rate violated Section 1153(e). These conclusions follow irrespective of Eto's motive, for his actions amounted to a refusal to bargain. Motive is not important when Respondent's conduct does not rise to the level of bargaining. When an employer does not meet and confer regarding wages

51/I do not regard the form letter sent Eto as a demand for negotiations. There was no follow-up by the UFW until early March and then with Dressler and not with Eto personally.

52/ N.L.R.B. v. Fitzgerald Mills Corporation (2nd Cir. 1963) , 313_F.2d_ 260, 268.

53/Idaho Fresh Pak-Inc. (1974), 215 NLRB 676; Oneita Knitting Mills, Inc. (1973), 205 NLRB 500.

and conditions, and Eto did not, the statute is violated even absent animus.54/

Eto's conduct vis a vis the Korean persons supplied pursuant to an exchange program is another matter. The amendment to the complaint alleges the wages of the Koreans were modified without notice to the UFW in September, 1976. This allegation was proved, whether what happened is regarded as a wage increase or the payment of a bonus. However, no proof was presented that this class of persons was included in the unit for which the UFW was certified. If not, Eto's unilateral action regarding them was not interdicted. The General Counsel had the burden of proving the persons working at Eto's as part of International Farmers Association program were part of the certified bargaining unit. This he did not do. Therefore, he has not established that Eto's grant of a wage increase or bonus to these persons was a refusal to bargain.

G. Frazier's Wage Practices:

Frazier has historically paid the workers who thin for him either on a "contract" basis or by the hour. Uvalle checks with the workers to see how they want to work a particular area. He then tells Frazier the contract rate at which the workers will do the field; if Frazier accepts, the field is thinned on that basis unless the income produced is less than that which working at the prevailing hourly rate would produce. If the proposed "contract" rate is rejected, the field is thinned on an hourly basis or not at all. Admittedly this practice was continued during 1976 and 1977.

It does not appear that Uvalle performs any supervisorial function in connection with the contract rate setting. He merely relates the proposal to Frazier. Nor does it appear from the record that Frazier does more than say yes or no to the proposal. This method of compensation was disclosed to the UFW at the initial bargaining meeting. No objection was raised to its continuation, nor was there any request to participate in setting the rates per field.

The General Counsel characterizes Frazier's practice as circumvention of bargaining agent by bargaining directly with the workers as to whether the rate is to be hourly or piece rate. So characterized, Frazier's conduct would violate the Act; however, this characterization is more form than substance and does not really come to grips with reality. Frazier merely continued the method of payment which existed prior to the UFW's certification. The only discretion he exercised was determining whether or not a particular field was to be thinned. A tenuous argument can be made that this suffices. However, consideration of the alternatives available to Frazier points up the propriety of his continued use of his pre-certification method of compensation. If Frazier had taken away the "contract" option from his employees, the action would likely have effected a unilateral wage reduction which would have violated Section 1153 (e). Nor is it realistic to say that bargaining with the UFW was required on each occasion when a field was to be thinned. It is apparent from the UFW's announced strategy that such fragmented bargaining would have been unacceptable.

Frazier's continuation of his past pay practices after the UFW's

54/ N.L.R.B. v. Katz, supra.

certification did not constitute an independent violation of Section 1153(e). His yes or no to the price proposed by his workers did not rise to the level of collective bargaining. It was a continuation of a previous worker benefit.

II. Failure To Bargain In Good Faith

The General Counsel contends that Respondents did not meet their obligation to bargain in good faith during those periods when they did engage in bargaining. This surface bargaining is charged as a separate violation of the Act. The negotiations herein break down into three periods: April 13--June 24, 1976, July 2--October 19, 1976, and March 15--May 19, 1977. It is convenient analytically and appropriate statutorily to examine each segment.

April 13--June 24: During telephone conversations with UFW representative Ann Smith regarding arrangements for the start of negotiations, Donald Dressler acknowledged that Respondents were interested in the Master Agreement. 55/ This led Smith to conclude she would have to negotiate only "local" issues. At the first meeting Respondents, speaking through Stoll, requested a complete proposal from the UFW, manifesting a desire to do other than negotiate "local" _ issues. He was given the UFW Master Agreement as the Union's proposal. It is not clear whether any specific "local" issues were added to make up the package. The meeting adjourned to permit Employer study of the proposal.

When the parties returned to the bargaining table on May 4, Respondents declined to sign the Master, characterizing it as cumbersome and containing provisions not applicable to their operations. Rather than sign the Master Respondents stated a desire to fashion a contract from "scratch."

The General Counsel contends this action was the repudiation of Respondents ' previous position and a failure to bargain in good faith. The record does not support this conclusion. Dressler's pre-negotiation remarks to Smith do not have the stature of a proposal. They are no more than an expression of interest as Dressler said they were.

When Respondents asked to bargain from scratch, the UFW, rather than reaffirm the "Master" as its proposal, presented Respondents with the UFW's original proposal in the negotiations which resulted in the Master Agreement, a proposal more onerous than the Master. When Stoll received this 55-page proposal, he said it would have to be studied before Respondents could respond. 56/

55/Dressler is an attorney in the office of Dressler, Stoll and Jacobs, the attorneys representing Respondents. Mr. Stoll was the primary Respondent negotiator. Master Agreement refers to the agreement negotiated between the UFW and a group of employers, including Interharvest, during late 1975 and early 1976. It was thereafter executed by employers not party to the original negotiations.

56/Since there is no 1154(c) charge involved here, the UFW's withdrawal of its initial proposal and the presentation of one admittedly more stringent need only be considered in terms of the duty of Respondents to go forward with counterproposals. See Reisman Brothers, Inc. (1967), 165 NLRB 390.

The Employers responded with a counterproposal at the third meeting on May 12 which dealt with 16 subject matters in the UFW proposal. There were 25 subject matters which were rejected on the basis of inapplicability to Respondents' operations, or on the basis the subject matter was adequately covered by state or federal law. Counterproposals were made on Recognition, Union Security, Grievance and Arbitration Procedure, Right of Access to Company Property, Location of Company Operations, "Health and Welfare," Rest Periods, No Discrimination. Seniority and Bereavement Pay. Agreement was reached on Rest Periods, No Discrimination and Bereavement Pay.

The meeting of June 24 was devoted to a UFW exposition of its proposals on recognition. Union security, the Hiring hall, seniority, the grievance and arbitration procedure and worker health and safety. There were questions from Respondents, and there were some commitments to examine changes in the Union position. 57/

Respondents' conduct at the bargaining table during the four meetings of this phase of negotiations does not manifest an absence of the sincere desire to reach agreement with the Union which is essential to good faith bargaining.58/ This is so whether this segment of negotiations is viewed in isolation or as part of Respondents' total course of conduct at the bargaining table. Capsulized the situation was this: the UFW presented its original proposal; Respondents studied the proposal and made a counterproposal which contained those items it wanted in a contract; the UFW responded with a more detailed explanation of its more important proposals. The scenario to this point was not abnormal. Negotiations were in their initial stages and the parties here conducted themselves in a manner consistent with good faith table bargaining.

July 2--October 19: After an hiatus during which Respondents refused to bargain, the parties resumed negotiations on August 12 at the Employers' request. 59/ Respondents made the first wage proposal put forth by either party; it provided" for a 15¢ per hour wage increase upon execution of an agreement. Respondents modified their position on Recognition and adopted the language of the Master Agreement. They presented modified, positions on the subjects of discharges and discipline and in the area of health and welfare. There was no movement in the area of 'Timing security, hiring halls or seniority, topics which the UFW listed as essential to a good contract.

57/Between June 24 and August 12 the parties did not meet. Scheduled meetings in July were cancelled by Respondents, who declined to meet because of the jurisdictional pact negotiations in progress between the UFW and the Teamsters.

58/National Labor Relations Bd. v. Highland Park Mfg. Co. (4th Cir. 1940), 110 F.2d 632, 637; National Labor Relations Bd. v. Reed & Prince Mfg. Co. (1st Cir. 1953), 205 F.2d 131. 134, 885; Valley Oil Co. (1974), 210 NLRB 370, 384.

59/Unfair labor practice charges were filed against each Respondent on July 29.

The parties next met on September 9. Respondents' major move was to increase their wage proposal by 25¢ per hour for each of the first two years of a contract and by 30¢ per hour for the third year. This brought their proposed field worker rates to $3.35, $3.45 and $3.60 for each of the contract years as compared to rates for comparable classifications in the Master of $3.10, $3.225 and $3.35. This wage proposal was confirmed in writing following the meeting. The UFW had presented no wage position to this point and did not reply to a written request to do so which accompanied Respondents' confirmation of its wage position.

The UFW modified its positions on seniority, grievance procedure, discharges, work by family members and supervisors, reporting and stand-by time and mechanization. Stoll characterized the modifications as meaningless, merely restatements of the same positions in Master Agreement language.

The appropriateness of a probationary period for new employees was discussed with each side reiterating previously made arguments. The Union proposed to resolve the differences between the parties regarding permissible work by family members by a side letter spelling out what work each family member and each supervisor performed. This was unacceptable to Respondents. The respective .-merits of the Robert F. Kennedy and Western Growers health and welfare plans were discussed.

The meeting marked little movement by either side with Respondents' modification of its wage proposal being the most significant change of position.

At the next meeting on September 21, there was a hardening of position by both parties. Respondents moved by agreeing to an initial step in the grievance procedure which involved a meeting between the supervisor and the shop steward. Respondents complained that no wage proposal had been forthcoming .from the. Union, to which the Union responded that the Employers were seeding to undermine the Union by making wage proposals prior to reaching agreement on other issues.

Stoll suggested there was no point in reiterating again and again previously made arguments. He noted the failure of the UFW to make a wage proposal or to respond to that of the Employers and proposed discontinuing meetings until the UFW was prepared to make some movement.

After the meeting Respondents notified, the Union they would effect their proposed increases if no UFW wage proposal was forthcoming. The UFW came forth with a wage position which was submitted by mail on October 7. Thereafter a meeting was arranged at the Employers' request for October 19. The meeting was used as a forum for Respondents' declaration that they were going to effect their proposed wage rates the next day because an impasse had been reached.60/

The determination of whether Respondents engaged in surface bargaining between July 2 and October 19 is necessarily based upon subjective consideration of their motives and state of mind during this period as manifested by their

60/This action has been found to be a refusal to bargain.

conduct both at the bargaining table and away from it. A. H. Belo Corp. *v.* N.L.R.B., supra; National Labor Relations Bd. v. Reed & Prince Mfg. Co., supra; Pay 'N gave Corp., supra.

Respondents' strategy during this phase of negotiations was to buy out of distasteful contract provisions by making a substantial wage proposal. If, as was the case, the Union negotiators failed to rise to the bait, the strategy could be successful only if the workers received the increase and were made aware that the Union had rejected it as their representative. The increase could lawfully be granted only if an impasse existed; therefore table bargaining had to be orchestrated toward this end. This was done by maintaining rigid bargaining positions with respect to the more significant subject matters set forth in the UFW proposals. Such conduct standing alone might not amount to a failure to bargain, but in the context of the spurious impasse and in the context of the two extended periods during which Respondents refused to meet, I conclude that Respondents did not come to the bargaining table during this period with any real desire to reach agreement and were, therefore, failing to bargain in good faith in violation of Sections 1153(e) and 1155.2(a).

March 15--May 19, 1977: After an extended period during which Respondents refused to bargain the parties resumed negotiations on March 15 and met 10 times between that date and May 19. The meetings during this period are characterized by substantially greater movement on issues by Respondents than occurred during the two earlier series of meetings. Agreement was reached on the following subject matters: Income Tax Withholding. Seniority, Credit Union Withholding, Bulletin Boards, Camp Housing, Health and Safety, Mechanization, Management Rights, Travel Allowance, Leave of Absence, Location of Employer Operations, Records and Pay Periods. New and Changed Operations. Worker Security, Reporting and Stand-By Time, Leave of Absence, Right of Access, Subcontracting and Family Housing. In some instances the Union's initial proposal on a subject matter was accepted, in other cases agreement was reached on the language of the Master Agreement and in still others the agreed upon language was new to the UFW.

There are other subject matters on which no agreement was reached, such as unions security, the hiring nail, family members working, the grievance procedure, pensions, health and welfare, wages, the Martin Luther King fund, vacations and paid holidays. It is axiomatic that the Employers do not have to accept the UFW proposals in these areas, and it is equally clear they may decline to impasse to include such provisions in any agreement reached. "(W)hile a party may not come to the bargaining table with a closed mind, neither is he bound to yield any position fairly maintained."61/ It remains to examine Respondents' position regarding these subject matters.

While rejecting the UFW's proposal for a unions security clause, Respondents early agreed to some provisions of the proposal such as check-off and notification of new hires. The stated reason for rejecting a union security clause was the fear that present workers would leave if required to join the Union. Stoll represented that many workers had told Respondents they did not want to join a union. Attempting to meet the UFW's argument that everyone they

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61/ Pay 'N Save Corp. (1974), 210 NLRB 311, 324.

were obligated to represent should have to pay his way for such representation, Respondents proposed an agency shop. This was rejected by the UFW who said the Union was interested in worker participation in the Union and not merely his money. Short of capitulating on the issue. Respondents compromised to the limit, As the Union spokesman said either its there or it isn't. Respondents' posture on this subject matter does not support a conclusion of bad faith table bargaining.

Throughout the negotiations Respondents rejected the idea of incorporating an exclusive hiring hall into the contract. During the third stage of negotiation, they agreed to notify the Union of vacancies and not to discriminate against persons referred by the Union. This position was unacceptable to the UFW, which insisted throughout the negotiations that their hiring hall idea was an essential of reaching a contract. The only concession made by the UFW was to postpone its operative date until they opened a San Luis Obispo office and until they had contracts agreeing to a hall with employers in the Santa Maria area. Respondents stated reasons for rejecting the hiring hall were the desire to continue their existing hiring practices and doubts as to its workability.

Section 8(d) of the National Labor Relations Act, as does Section 1155.2(a), contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.

> Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless mara-thon discussions at the expense of frank statement and sup port of his position. And it is equally clear that the Board may not, either directly or indirectly, compel con cession or. otherwise sit in judgment upon the substantive terms of collective bargaining agreements.
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> Labor Board v. American Ins. Co., 343 U.S. 395, 405 (1951)

Respondents frankly stated their opposition to a hiring hall and set forth the reasons for their opposition to the proposal. In the total context of the bargaining between the parties, and with attention to the particular operations of each Respondent, I conclude that Respondents met their obligation to bargain in good, faith about Union security and the hiring hall.

The bargaining unit work which members of Respondents' families were to be permitted to perform was the subject of extensive discussion during the 1977 bargaining sessions. Essentially, Respondents said the Employers did everything but hoeing and harvesting and wanted to continue to do so. Moreover, they wanted any member of their families now and in the future to enjoy the same rights. On the other hand, the Union wanted to retain its contract language and by side letter particularize the work which present family members could perform, Despite discussion of this subject at four of their meetings, the area of difference between the parties did not decrease.

Unquestionably, the amount of work which non-bargaining unit persons

are permitted to perform is an important subject matter, particularly when small work forces are involved. The greater the degree of incursion upon unit work, the less protection the agreement offers the workers with a concomitant effect upon the strength of the Union as his representative. On the other hand, both Eto and Frazier have historically worked and contend, without contradiction, that their freedom to work is essential to a profitable operation.

The decision regarding whether Respondents' rigidity on family members working amounted to a failure to bargain in good faith cannot be based upon the _fact that they failed to make concessions on this issue. United Steelworkers of America, AFL-CIO v. N.L.R.B. (D.C. Cir. 1971), 441 F.2d 1005, 1010. Rather, their position on this issue must be dealt with as part of the total happening between the parties. Good faith or the lack thereof is a question of fact as to Respondents' state of mind, and their position on this issue is only one element to be considered in reaching any conclusion regarding the Respondents' willingness to reach agreement.

In a context in which the Respondents agreed to numerous changes in working conditions designed to improve the lot of the farm worker as well as proposing economic benefits for the workers in the form of substantial wage increases, paid holidays, vacations and a health and welfare program, the conclusion seems inescapable Respondents bargained in good faith during the March 15--May 19 period. To hold otherwise because of Respondents' rejection of the Union security, hiring hall and family members working positions would be to cross the line dividing "permissible inference" from "impermissible compulsion."62/

There is a Jekyl and Hyde atmosphere which pervades this case. Away from the bargaining table, Respondents engaged in some obvious refusals to bargain. But, once at the table Respondents displayed none of the behavior which has been held to manifest the prohibited state of mind. This is clearly true during the 1977 bargaining.

> . . . (T)he negotiation of labor contracts is not a gentle art. Both labor and management have a great deal at stake when sitting down at a bargaining table and this is reflected in the language used and in the proposals advanced for consideration. This court and the Board each must remain aware of how difficult it is to capture the tone of such proceedings from an outside vantage point. What may appear to be an unreasonable, obdurate demand may be no more than the skillful practice of the negotiator's art, designed to wring concessions from the opposite side. Congress has excluded the Board from interfering in this process no matter how strongly it feels about the merits of the proposals under discussion.63/

62/ United Steelworkers of America, AFL-CIO v. N.L.R.B., supra, at p. 1010.

63/Ibid.. at p. 1008.

These words are appropriately applied to this Board and this Hearing Officer. I conclude that Respondents did not engage in surface bargaining during the period between March 15 and May 19 and, therefore, did not fail to bargain in good faith during this period.

THE REMEDY

Having found that each Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(e) and 1155.2(a) of the Act, I shall recommend that each be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

(1) Having found that each Respondent failed to furnish the certified bargaining representative of its employees with a list setting forth the name, sex, date of birth, social security number, job classification and wage rate of each employee, I shall recommend that this information be forwarded in writing to the UFW at its office in Santa Maria, California, within 14 days after receipt of the Decision and Order of the Board. I shall also recommend that within three days of the hire of any new employee the Employers shall forward to the UFW at its Santa Maria office the information concerning said employee which is set forth above.

(2) Having found that Respondents refused to meet for extended periods with the certified bargaining representative of their employees thereby violating Sections 1153(e) and 1155.2(a), I shall recommend that each person employed by Respondents during the periods when Respondents refused to meet shall be made whole for the loss of pay resulting from the failure of Respondents to meet together with interest thereon at the rate of 7% per annum.

There are two discrete periods for which the employees then employed are to be made whole. The first period begins July 2, 1976, and ends August 12, 1976. The second period begins October 20, 1976, and ends March IS, 1977. The July—August period encompasses the period during which Respondents refused to meet because of the jurisdictional pact negotiations between the UFW and the IBT. The second period commences with that date upon which Respondents unilaterally effected a general wage increase found violative of the Act and includes the period during which the Respondents again refused to meet because of the IBT-UFW negotiations. March 15, 1977, is the date on which the parties resumed meetings. I shall not recommend, as urged by the General Counsel and by the UFW, that the make-whole period run from a date six months prior to the filing of the charges until a time when impasse occurrs or the parties reach agreement.

Since no Board decisions have issued at this writing to provide guidance in dealing with the make-whole remedy, it may be helpful to elucidate the reasons why I conclude the remedy should be limited in this case to the time periods set forth.

With the exception of a lingering failure to supply all the personnel data for unit employees requested by the UFW, I have found neither a refusal to bargain nor a failure to bargain in good faith occurring after March 15,

1977. Respondents, from torch 15 forward, met their obligations to bargain in good faith. Therefore, it seems elemental that the make-whole remedy is not properly associated with this time frame.

The General Counsel argues that the make-whole remedy is proper in every situation in which a violation of Sections 1153(e) and 1155.2(a) is found. I disagree. This argument overlooks the clause in Section 1160.3 which states that employees shall be made whole "when the Board deems such relief appropriate." To interpret the section as urged by the General Counsel would require treating the quoted clause as surplusage. But it is a "cardinal rule of construction" that a construction rendering statutory words surplusage is to be avoided. 64/ If the Legislature had intended automatic imposition of the make-whole remedy in 1153(e) cases, the "when deems appropriate" language would not have appeared. The remarks of now Chief Justice Bird on the new remedy at legislative hearings on the bill manifest the drafters' intent to spell out the Agricultural Labor Relations Board's authority to effect a remedy the federal courts had told the National Labor Relations Board it had power to grant, but which the National Labor Relations Board, disagreeing with the courts, had refused to adopt. The 1160.3 language was put into the Agricultural Labor Relations Act to make it clear to the Board that it need not equivocate regarding its -authority to provide a make-whole remedy.

The Agricultural Labor Relations Board has recently adopted the frivolous--debatable test set forth by the National Labor Relations Board in Heck's, Inc. (1974), 215 NLRB 142; and Tiidee Products, Inc. (1972), 194 NLRB 1234,65/ in deciding whether attorney fees and litigation costs are awardable to the General Counsel and charging party. The same test may appropriately be applied to determine whether the make-whole remedy should be imposed upon a violator of Section 1153(e). If Respondents' conduct was a clear and flagrant violation of Section 1153(e), the make-whole remedy is appropriate. International Union of E. R. & M. W., AFL-CIO (D.C. Cir. 1970), 426 F.2d 1243.

Respondents' refusal to meet during the period between July *2* and August 12, 1976, grounded as it was upon the concurrent UFW-IBT negotiations, was a flagrant (frivolous) refusal to bargain warranting the imposition of a make-whole remedy. "Similarly, their refusal to meet during the period between October 20, 1976, and March 15,. 1977, was also a flagrant violation of the Act. 66/

64/People v. Gilbert (1969), 1 C.3d 475, 480; Watkins v. Real Estate Comr. (1960), 182 Cal.App.2d 397.

65/Western Conference of Teamsters (1977), 3 ALRB No. 57, Slip Opinion, p. 6.

66/The refusal to meet during this period originally rested upon a spurious impasse and thereafter on the UFW-IBT negotiations. A meeting set for February 1 was cancelled because Chavez could not be present. Since the Employers were unable to meet thereafter until March 15, I do not regard the UFW's inability to meet on the first as warranting the interruption of the make-whole period.

Although I have concluded Respondents engaged in surface bargaining during meetings held between August 12 and October 20, the case is close enough to characterize their conduct as a debatable, rather than a frivolous, violation of the statute; therefore I shall recommend termination of the initial make-whole remedy period as of August 12 when the parties resumed meeting.

I shall recommend that the following elements be included in the calculation of the pay due each person employed by the Respondents during either of the above periods: wages (hourly or piece rate), bereavement pay, vacation pay, holiday pay, rest periods and overtime pay.

The parties have agreed upon the conditions under which rest period pay and bereavement pay are to be paid. The agreed upon formulae are appropriately applied in calculating the amounts due, if any, to each employee for these items. I shall so recommend.

The General Counsel urges, and I agree, that any overtime due should be paid in accordance with existing Labor Code provisions. I shall so _ recommend.

For the initial time period of the make-whole remedy I shall recommend that the wage schedule to be used shall reflect the Santa Maria area rates for comparable work or the rates for the period proposed by Respondents, whichever is the greater. For the second make-whole period, I shall recommend that the wage schedule used to compute make-whole pay be the rates proposed by the Employers and conditionally accepted by the UFW at the meeting between the parties on May 18, 1977.

With respect to paid holidays, I shall recommend that an individual 's eligibility to have holiday pay included in the amount of. pay he receives shall be determined on the basis of the eligibility requirements agreed upon by the UFW and Respondents, i.e. the requirements set forth in the Master Agreement, Article 24. Employees eligible shall receive holiday pay for Christmas 1976.67/ I shall recommend that any person working on Thanksgiving Day 1976, Christmas Day 1976 or New Year's Day 1977 be compensated at the rate of time and one-half for all work performed on said days. An amount reflecting such compensation shall be included in the calculation of the make-whole pay due. Whether Thanksgiving and New Year's 1977 are to be included as paid holidays for make-whole purposes shall be determined by the bargaining parties or at *a.* backpay hearing in the absence of their agreement.

Since Respondents conditionally agreed upon a vacation plan, I shall recommend that each employee who became eligible for a paid vacation, during either of the make-whole periods shall receive an increment of 2% of wages earned during the 12 months preceding his eligibility date. 68/

67/This holiday was agreed to by Respondents as was payment at time and one-half for work performed on Thanksgiving and New Year's.

68/The UFW Master Agreement gives piece workers a vacation after 700 hours.

In addition to the above elements the General Counsel argues that retroactive contributions should be made into the UFW pension plan, the Martin Luther King Fund, and the Robert F. Kennedy Health and Welfare Plan. I shall not recommend that these items be included in make-whole pay for two reasons: (1) Section 1160.3 mandates making the employee whole for loss of pay. It does not mandate making the Union whole. The record shows there presently is no pension plan; therefore it is not presently possible to determine what, if any, adverse effect would result to an employee from a failure to make contributions on his behalf during the limited time periods involved here. Not only is it not possible to determine the amount of damage suffered by an employee from the failure to make contributions, but it is impossible to predict whether there would be any damage. 69/ Moreover, even if there were an operative pension plan, it is unlikely that the present value of any pension benefit generated had contributions been made during the make-whole periods would be di minimis; and it is that I present value which the employee loses not the actual amount of the required contribution into the fund. (2) Section 1155..2(a) does not require the employer to agree to any union proposal.. The U.S. Supreme Court has held that National Labor Relations Act Section 8(d), from which 1155.2(a) is taken, prohibits the National Labor Relations Board from imposing a contract condition upon an employer in remedying a refusal to bargain violation. Porter v. N.L.R.B. (1969), 397 U.S. 99. To require Respondents to make contributions into the pension fund would impose upon them, if only for the periods in question, a contract condition. Such a result is beyond the authority of the Board.

The above conclusions are equally applicable to the General Counsel's contention that the remedy should require contributions to the Martin Luther King Fund. I shall not recommend that such contributions be part of the make-whole remedy.

With respect to health and welfare benefits the situation differs from pensions or the Martin Luther King Fund. Here it is possible to ascertain whether particular employees should be made whole for being deprived of the opportunity to bargain regarding such benefits. I shall recommend that any employee incurring medical or hospital expenses during either of the two make-whole periods shall be reimbursed for such expenses as are covered by either the Western Growers or the Robert F. Kennedy plan, depending upon which provides the greater coverage. Said reimbursement to be part of making the employee whole. 70/

(3) The General Counsel argued that Union dues should be "deleted from the amount paid each employee in the amount specified in the UFW Constitution" on the ground that such deductions are appropriately part of the make-whole remedy. I shall not so recommend. However, I shall recommend that Union dues, and initiation fees if appropriate, shall be deducted from any make-whole

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69/Compare: Bigelow v. R.K.O. Radio Pictures (1945), 327 U.S. 251; Story Parchment Co. v. Paterson Parchment Paper Co. (1930), 282 U.S. 555.

70/Neither plan was offered in evidence. Respondents contended the Western Growers plan provided greater benefits. If so, Respondents will be paying the benefits they proposed.

monies received by any employee who provides his Employer with an executed check-off authorization form meeting the requirements of 29 U.S.C. 186(c), as required by Labor Code Section 1155.6. I make this recommendation independent of the make-whole remedy, and on the authority of the Board to provide such other relief as will effectuate the policies of the Act, noting also that such check-off was agreed to by the Respondents.

UFW Attorney Fees And Litigation Costs

The UFW seeks an award of litigation costs and counsel fees incurred in the preparation and litigation of this case. Little discussion is necessary to reject this claim. The Board in Western Conference of Teamsters (V. B. Zaninovich and Sons, Inc.) (1977), 76-CL-6-F, has set forth its *test* for awarding fees and costs in terms of whether the respondent's litigation posture" is" "frivolous" or "debatable." If the former, the award may be made; if the posture is "debatable," the award is not warranted. In Zaninovich both the General Counsel and the charging party were awarded costs and fees by the Administrative Law Officer. The Board did not distinguish the parties in its discussion refusing the remedy.

The Zaninovich test is controlling here. Since the Board has mandated case-by-case elucidation of the meaning to be given to "frivolous" and "debatable," it remains to examine Respondents' litigation posture herein using Zaninovich for guidance.

Respondents were charged with refusing to bargain in delaying the start of negotiations, in refusing to meet, in effecting unilateral changes in wages and conditions, in circumventing the bargaining agent and in failing to supply relevant information. They were also charged with failing to bargain—in good faith by engaging in surface bargaining. Respondents have successfully defended against almost the entire surface bargaining charge, the delay allegation, and portions of the unilateral change and refusal to furnish information counts. Patently Respondents' litigation posture was not frivolous.

"The application of the remedy . . . must be carefully weighed. Its injudicious use threatens substantial harm to the legitimate right of the charged parties to force the general counsel to its proof." 3 ALRB No. 57, Slip Opinion, p. 9.

The Board's words seem particularly appropriate in considering Whether the Charging Party is entitled to costs and fees. While counsel for the UFW actively participated in and contributed to the presentation of the case, the UFW's posture regarding the theory of the case and the scope of proof was not different from the position of the General Counsel. There is no reason to conclude the Charging Party and the affected workers would not have been as well represented had the matter been tried solely by the General Counsel. Where, as here, the UFW and the General Counsel see eye to eye as to how the case should be tried and where, as here, the General Counsel's representative is competent, the UFW's participation in the case is not appropriately chargeable to Respondents. In the context of this case there is no reason to not subject the UFW's request for costs and fees to the frivolous--debatable dichotomy established by

by the Board. Having found the Respondents' litigation posture to be debatable, I shall not recommend the UFW be awarded litigation costs and attorney fees.

The UFW's request that it be compensated for Union expenses occasioned by the Employers' refusal to bargain has been considered. I shall not recommend this remedy for the following reasons: (1) no evidence was offered establishing that the Union incurred such costs and expenses in connection with maintaining contact and support with Respondents' employees or in connection with the bargaining process. (2) While the strengthening of the Union as part of an 1153(e) remedy is appropriate, the remedy must consider the balancing right of Respondents to put the General Counsel to his proof.

In the context of this case, it is reasonable to conclude that the Union will be strengthened vis a vis the employees by favorable termination of this proceeding. Moreover, it is likely that Respondents having experienced a make-whole order for refusing to bargain will continue to bargain in good faith to contract or impasse. 71/

In order to more fully remedy Respondents' unlawful conduct, I shall recommend that each Respondent make known to its current employees and to all persons employed by each during 1976 and 1977, that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make certain employees whole for loss of pay resulting from its unlawful acts, that it has been ordered to honor voluntary check-off authorizations executed by an employee receiving a back pay award, and that it has been ordered to cease violating the Act by refusing to bargain with the UFW and not to engage in future violations.

To this end I shall recommend:

(1) That each Respondent be ordered to mail a copy of the attached Notice To Employees to each person employed during 1976 or 1977 at his or her last known address on file with Respondent or to any more current address furnished Respondent by the Salinas Regional Director or the Charging Party.

(2) That each Respondent be ordered to distribute a copy of the Notice to each of its current employees.

(3) That each Respondent be ordered to immediately post the Notice on its premises for a period of not less than 60 days at appropriate locations on its premises determined by the Regional Director as reasonably calculated to come to the employees' attention.

(4) That each Respondent be directed to distribute a copy of the Notice to each person hired during the 60-day period subsequent to this Decision.

I shall further recommend that the Notice as posted and distributed be printed in English and any other language which the Regional Director finds to be the primary language of workers of either Respondent.

71/See: Atlas Tack Corp. (1976), 226 NLRB No. 38, 93 LRRM 1236.

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

ORDER

The officers, agents, supervisors and representatives of Respondent Eto and Respondent Frazier shall: -

(1) Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of rights guaranteed employees by Section 1152 of the Act.

(b) Refusing to bargain collectively with the UFW or its authorized representatives by refusing to meet at reasonable times, by unilaterally changing wages and conditions of employment, by failing to furnish upon request information necessary to enable the UFW to intelligently carry out its functions as a bargaining representative, or in any other manner refusing to bargain.

(c) Failing to bargain 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.

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make each and every person employed during either or both the period between July 2, 1976, and August 12, and the period between October 20, 1976, and March IS, 1977, whole in the manner described in the section titled "The Remedy" for any loss of pay suffered during said period or periods as the result of Respondents' refusal to bargain in good faith.

(b) Consistent with the limitations set forth in the section titled "The Remedy" deduct Union dues and initiation fees prescribed by the UFW Constitution from the amount of pay payable to an employee pursuant to this Order.

(c) Consistent with the provisions set forth in the section titled "The Remedy" forward the UFW at Santa Maria the information regarding bargaining unit employees described therein.

(d) Preserve and make available to the Regional Director or his representatives, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to ascertain the back pay due.

(e) Mail to each employee employed during 1976 or 1977 a copy of the Notice attached hereto and marked "Appendix." The Notice shall be mailed to the person's last known address on file with Respondents or the person's address as supplied by the Salinas Regional Director or the Charging Party.

(f) Give to each of its current employees a copy of the Notice attached hereto and marked "Appendix."

(g) Give to each employee hired during the 60-day period subsequent to the effective date of this Order a copy of the Notice attached hereto and marked "Appendix."

(h) Post the "Notice" attached hereto and marked "Appendix" in conspicuous places on the premises as determined by the Regional Director.

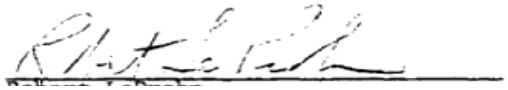
(i) Notify the Regional Director in the Salinas Regional Office within 20 days from receipt of a copy of this Decision of the steps Respondents have taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

Copies of the Notice attached hereto shall be furnished each Respondent for distribution by the Regional Director for the Salinas Regional Office.

It is further recommended that the allegations of the amended complaint not found to be violations of the Act be dismissed.

Dated: August 10, 1977.

AGRICULTURAL LABOR RELATIONS BOARD

By 

Robert LeProhn
Administrative Law Officer

APPENDIX "A"

NOTICE TO EMPLOYEES

After a trial at which all sides had the opportunity to present their evidence, the Agricultural Labor Relations Board has found .that we violated the Agricultural Labor Relations Act, and has ordered us to send, out and to post this notice. We will do what the Board has ordered.

The Act gives all agricultural employees the following rights:

To engage in self-organization;

To form, join or assist labor unions;

To bargain as a group and choose whom they want to speak for them;

To act together with other workers to try to get a contract, or to help protect one another;

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.

Particularly,

WE WILL NOT refuse to meet with your authorized representatives from the UFW for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL NOT make any changes in your wages, hours or conditions of employment without the approval of the UFW.

WE WILL pay those workers employed during the period between July 2, 1976, and August 12, 1976, for any loss they suffered during this period as a result of our refusal to bargain with the UFW.

WE WILL pay those workers employed during the period between October 20, 1976, and March 15, 1977, for any loss they suffered during this period as a result of our refusal to bargain with the UFW.

WE WILL, if properly authorized in writing by you, withhold Union dues and initiation fees from any "monies-due you because we violated the law.

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Dated: _____, 1977.

MASAJI ETO, dba ETO FARMS

By _____

Dated: _____. 1977.

B. MACKIE FRAZIER and BUFORD FRAZIER, dba FRAZIER RANCH

By_____

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

DO NOT REMOVE OR MUTILATE