Fresno, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAPLAN'S FRUIT AND PRODUCE COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CTO, Charging Party.	)	Case No. 77-CE-188-D 6 ALRB No. 36

DECISION AND ORDER

On August 21, 1979, Administrative Law Officer (ALO) Leonard M. Tillem issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel and Charging Party each filed a brief in response to Respondent's exceptions.

The Board[1/] 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 only to the extent consistent with this Decision.

I. Bargaining Is sue s

The ALO concluded that Respondent violated Labor Code section 1153 (e) and (a) by failing and refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW). He concluded also that Respondent had bargained in bad faith during the negotiations, and that it had committed certain per se

[1/]Chairman Brown and Board Member Faust did not participate in this Decision.

violations of section 1153 (e) and (a) by granting unilateral wage increases. Respondent takes exception to these conclusions. We find merit in Respondent's exceptions regarding bad-faith bargaining, but not in its exceptions regarding the per se violations. We therefore reverse the ALO's conclusions as to bad-faith bargaining and affirm his conclusions as to the per se violations.

This Board certified the UFW as the exclusive collective bargaining representative of Respondent's agricultural employees on January 12, 1976. Thereafter, the UFW requested Respondent to commence negotiations and the first meeting was held on February 6, 1976. At that time the UFW offered a complete contract proposal. Negotiations continued for almost three years, with thirty-seven meetings occurring from February 6, 1976, through November 1978. The parties had reached agreement on thirty-two of thirty-seven contract articles by the close of the hearing herein.

A. Bad-Faith Bargaining

The complaint alleges that Respondent demonstrated its bad faith in collective bargaining by using delaying tactics and unprepared negotiators. The General Counsel contends that this conduct, in the context of all Respondent's actions, establishes that Respondent never intended to reach agreement with the UFW, and that Respondent, through its skilled negotiator, engaged in surface bargaining designed to frustrate and exhaust the Union.

We have held that delaying negotiations by cancelling meetings and appearing unprepared at negotiation sessions are

indicia of bad faith. 0. P. Murphy Produce Co. (Oct. 26, 1979) 5 ALRB No. 63 and Montebello Rose Co. (Oct. 29, 1979) 5 ALRB No. 64. Respondent's conduct in this case presents some evidence of delay and unpreparedness and is by no means a model of efficient collective bargaining. However, the record here does not adequately explain why the negotiations proceeded so slowly, and does not fully explain the substantive positions of the parties during the negotiations. The totality of Respondent's conduct as disclosed by the record in this case, viewed in light of the Union's conduct, simply fails to convince us that Respondent was attempting to avoid reaching agreement. See NLRB v. Gopher Aviation, Inc. (8th Cir. 1968) 402 F.2d 176 [69 LRRM 2542].

1. Respondent's Delaying Tactics

The complaint alleges that Respondent cancelled meetings, left meetings early, and refused to schedule additional meetings. The record reflects that these factual allegations are largely uncontroverted. However, the record further reveals that the UFW also cancelled meetings, was often late for meetings, and changed negotiators repeatedly. Further, the record is unclear as to the cause of several long delays. As stated above, we do not condone Respondent's unnecessary delays, but we find that the Union contributed to the delay and that there is insufficient evidence to establish that Respondent's conduct in this regard constituted a violation. See Dunn Packing Co. (1963) 143 NLRB 1149 [53 LRRM 1471] and NLRB v. Stevenson Brick & Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086].

Specifically, Respondent appears to have cancelled twelve meetings, seven without explanation.[2/] The length of the delays caused by these cancellations vary greatly. On several occasions the delay was for a week or two. As a result of one cancellation, on March 12, 1977, more than two months passed before another meeting was held. However, it appears that during this period each side rejected proposed meeting dates due to other obligations.[3/] Further, a five-week hearing in an unfair labor practice case involving Respondent and the UFW began on April 18, 1977, causing scheduling problems for Respondent. We therefore find insufficient evidence that Respondent was solely responsible for this particular delay, and infer no bad-faith bargaining in that regard.

It is also undisputed that Respondent's negotiator, Al Caplan, left four meetings early. Moreover, it appears that a pattern developed whereby Caplan would refuse to set a future

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[2/] Three meetings were cancelled by Respondent's negotiator-, Al Caplan, due to illness. Two other meetings, scheduled for February 11 and 12, 1977, were postponed due to a telephone exchange between UFW negotiator Dolores Huerta and Al Caplan's secretary. Huerta called to change the meeting dates to the week of February 18, but stated that if the week of the 18th was unacceptable she would rather meet on the earlier dates. Caplan's secretary called Huerta back confirming February 25, 1977, as the next meeting date. Although Caplan offered no explanation for this change in the dates, we find no evidence of bad faith as the postponement was partially to accommodate the Union and caused only a minimal delay.

[3/] Dolores Huerta rejected March 31, 1977, because she wanted to be with Cesar Chavez on his birthday. Al Caplan rejected April 8 and 9, 1977, apparently because one of his clients could not be present on Good Friday. Finally, a letter from Caplan to Huerta, dated April 1, 1977, indicates that the Union was unavailable to meet during the week of April 11, 1977.

meeting date at the close of a session, preferring to let the Union know by mail when he was next available. If the date he proposed was acceptable, the Union then set the time and the place. The record seems to indicate acquiescence by the Union in this pattern and, in many instances, the record simply does not explain the basis for the delay.

We have considered the relatively rapid scheduling of the first session on February 6, 1976, approximately three weeks after certification. We also note that at the second meeting Respondent offered a full set of counterproposals and began to reach agreement on some of the peripheral issues, such as "Location of Company Operations." Still further, we note that the parties met thirty-seven times and reached agreement on thirty-two contract articles.

On the Union's part, the UFW negotiators cancelled five meetings,[4/] were sometimes unavailable to meet on dates suggested by Caplan, and did not always respond promptly to Caplan's communications. Further, the UFW's primary negotiator, 'Dolores Huerta, usually arrived late. We credit the testimony of Al Caplan on this point as his statements are corroborated by his bargaining notes in which he routinely recorded Huerta's arrival time.

[4/]'On March 30, 1978, Huerta was late for a meeting in Los Angeles due to bad driving conditions in the mountains. Not knowing when she would arrive, Al Caplan left the meeting place to visit another client with offices nearby. He left word with a UFW volunteer that he could be reached through his office to return to the meeting place whenever Huerta arrived. Huerta did not attempt to contact Caplan and the meeting did not occur. Contrary to our dissenting colleague, we find this cancellation attributable to the Union.

The UFW changed chief negotiators five times. The first negotiator was Sylvan Schnaittacher who explained the UFW proposals on February 6, 1976. He was replaced in late April 1976 by Richard Chavez, who was replaced after two sessions by Dolores Huerta. Huerta negotiated until August 20, 1976, when Barbara Macri took over. On January 21, 1977, Huerta returned as chief negotiator. On August 11, 1977, Ken Schroeder appeared briefly as a replacement for Huerta. Finally, on June 14, 1978, Ken Schroeder became the spokesperson for the UFW and continued through the beginning of the hearing on January 5, 1979. While we do not credit Al Caplan's testimony that every change of negotiator wasted an entire session, we find that the repeated necessity for updating replacements caused some actual delays and tended to disrupt the established rapport between previous negotiators.

The record also presents us with unexplained gaps in the bargaining history. The parties met on February 6, 1976, then waited until early April 1976 to meet again. There is no evidence as to the cause for that delay. After January 14, 1978, the next meeting was held on March 20, 1978.[5/] There were no meetings between April 15, 1978, and June 14, 1978, again with

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[5/] Although no regular negotiation sessions were held during this period, Dolores Huerta and several UFW organizers met with Kaplan's managers, without Al Caplan, at the wholesale fruit stand in February 1978. They discussed the hiring-hall problem, but exchanged no written proposals.

no explanation in the record.[6/] The showing of a hiatus, in and of itself, does not support the inference that the hiatus was caused by Respondent or that Respondent intended to delay the negotiations. We therefore draw no inference from these unexplained interruptions in negotiations.

The parties also did not meet between October 21, 1976, and January 21, 1977. At the October 21 meeting, Caplan told UPW representative Barbara Macri that he would be unavailable for three weeks. On November 10, after three weeks had passed, Macri wrote Caplan asking him to suggest the next meeting dates by telephone. Caplan replied by letter on November 12, 1976, questioning the Union's position on bargaining after the certification year elapsed,[7/] and asking for a reply from Macri. She replied on November 22, 1976, answering Caplan's question and renewing her request for a telephone call suggesting meeting dates. Caplan's subsequent letter of December 3, 1976, suggested that Macri call him on the telephone

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[6/] It appears from the uncontradicted testimony of Dolores Huerta that she and Al Caplan met "off-the-record" on April 26, 1978, at the Bonaventure Hotel in Los Angeles. Caplan stated that Respondent would not sign a contract unless the UFW dropped the unfair-labor-practice charge that was still pending against Respondent (see discussion of Kaplan Fruit and Produce Co. (May 24, 1979) 5 ALRB No. 40 below at p.r4). While conditioning bargaining on dropping such charges is evidence of bad faith, American Gypsum Co. (1977) 231 NLRB No. 152 197 LRRM 1069], we find that Respondent met with the Union on June 14, 1978, and continued to negotiate thereafter. The threat to illegally condition bargaining made on April 26 was mitigated by Respondent's subsequent conduct.

[7/] This issue was raised by Respondent in the separate case of Kaplan Fruit and Produce Co. (April 1, 1977) 3 ALRB No. 38. There, we ruled that when the initial certification year expires, there remains a presumption of continuing majority status sufficient to require continued bargaining.

regarding dates. Macri wrote again on December 9, 1976, indicating she was tied up until December 23, but asking Caplan to suggest dates any time after that. Caplan suggested some dates in his letter of December 21, 1976, and a meeting was held on January 20, 1977.

Unlike the ALO, we are not convinced that this sequence shows Respondent's bad faith. Although Caplan avoided suggesting new dates in two letters, Macri also refused Caplan 's invitation to take the initiative in her last two letters. Moreover, she was unavailable for a ten-day period in mid-December. In any event, we do not attribute the responsibility solely to Respondent. The Union did not request meetings on specific dates; rather, neither party actually named a date until Respondent did so on December 21. The ambiguity of this sequence does not support the inference that Respondent engineered the entire delay to frustrate ultimate agreement.

The parties did not meet between October 5, 1977, and January 14, 1978. The record indicates that on October 5, 1977, Caplan left the meeting saying Respondent was close to its final offer if the Union was not moving on the hiring-hall issue. After this meeting, Caplan wrote to Huerta, stating Respondent's willingness to continue meeting if the Union had anything new to offer. The UFW decided, at this point, to begin picketing of Respondent's wholesale fruit stand in Los Angeles. Respondent sought to enjoin the picketing, but

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its request for injunction was denied in the Superior Court.[8/] Given Respondent's willingness to continue meeting, we find no evidence of bad faith during this three-month period.

2 Respondent's Preparation for Negotiation

The General Counsel has attempted to prove that Respondent failed to provide a well-prepared negotiator and that such failure -caused further delay, as it required Respondent's negotiator to go back to his principals for information or authority and prevented him from bargaining effectively at the table.

As evidence of this, the record reflects Al Caplan's ignorance as to the effect of certain proposals. In September 1976, Barbara Macri made a proposal regarding the seniority rights of unit employees who became supervisors. Al Caplan was unable to discuss the subject without first checking with the officers of Respondent. At the next meeting, he was still unprepared to discuss the seniority issue.

Caplan also was unaware of the effect of his own proposal on the subject of vacations. His proposal stated that an employee would be eligible for vacation after working a total of 1750 hours. When pressed, Caplan admitted he did not know how many employees were currently eligible for vacation under this proposal. He later informed the UFW by letter that only

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[8/] The Superior Court's denial of the injunction was reversed and remanded by the Supreme Court in Kaplan's Fruit and Produce v. Superior Court (1979) 26 Cal. 3d 60!The Court held that the Agricultural Labor Relations Act (Act) did not preempt courts from enjoining obstruction of business traffic and therefore such suits could be brought by private parties.

two employees were eligible.

There is also testimony by Dolores Huerta that Caplan would not make economic concessions without checking with Respondent's officials, who did not always attend the negotiations. General Counsel contends that this lack of authority in Caplan further frustrated agreement as it delayed achieving final agreements at the bargaining table. Caplan, however, established, through the introduction of an authorization form signed by Respondent's officials, that he simply had to check with his principals from time to time to keep them informed of new developments.

In this area of unpreparedness, the record shows that the UFW was also unprepared on occasion. On the issue of hiring practices, Al Caplan proposed language in July, 1976 that would guarantee non-discriminatory treatment of Union members, but would eliminate the UFW-operated hiring hall. Dolores Huerta declined to make a commitment without checking with the UFW Executive Board. Also, Barbara Maori testified that she took various matters back to the UFW office for advice and suggestions on how to proceed with the negotiations.

We have considered the evidence on lack of preparation as to both Respondent and the UFW. We note that each side felt the need to confer with higher authority on issues of basic policy. We further note that, although such conferences had a delaying effect on the negotiations, the parties agreed on a majority of the bargaining subjects, including some economic issues, indicating the authority of the negotiators to finalize

specific contract language. In total, we find the delays resulting from unpreparedness were minor and insufficient to prove Respondent's bad faith.

3. Surface Bargaining as to the Hiring and Wage Proposals

Although the issue was not alleged in the complaint, the General Counsel offered much evidence on the negotiations regarding hiring and contended that Respondent exhibited bad faith in dealing with the issue. Respondent denied any bad faith in its bargaining as to the hiring proposals and, in turn, accused the UFW of bad faith in refusing to make a wage proposal during the first nineteen months of the protracted negotiations.

The UFW originally proposed that all Respondent's hiring be done through a union-controlled hall. This proposal was the most frequent topic of discussion during the negotiations. Under a 1970-73 contract between the UFW and Respondent, a hiring hall system had been in effect. It was replaced in 1973 by a system whereby Respondent's crew leaders in the Tulare County grape fields had direct power to hire their own crews. Respondent's officials, 'particularly John Bono, Sr., the manager of Respondent's grape division, had repeatedly expressed dissatisfaction with the hiring hall, claiming that the Union had referred unqualified workers who damaged the grape crop. While Respondent adamantly opposed any hiring-hall provision, the UFW at first insisted that a hiring hall was crucial to their ability to protect the job security of their members.

Although the disagreement over hiring procedures was intense, it is not clear why the parties could not reach a

compromise. The record shows that as early as July 1976, Al Caplan offered a proposal which would guarantee no discrimination against Union members and would give preference to local residents over migrant workers. The UFW did not immediately accept this proposal and yet, at an "unofficial" meeting with Respondent's officials in February 1978, the Union indicated that a "no discrimination" hiring provision was really the Union's main concern.

Another point of confusion arose concerning the use of hiring-hall language from the Sam Vener-UFW contract. Dolores Huerta testified that Caplan proposed the Vener language in July 1977. Then in January 1978, when Huerta offered to accept the Vener language, Caplan reneged, despite Huerta's belief that the language was only permissive as to hiring practices and not mandatory. Caplan did not deny he proposed the Vener contract provision, but stated that after consulting with the negotiator for Sam Vener he came to regard the provision as establishing a mandatory hiring hall and therefore withdrew the proposal.

Finally, on June 14, 1978, the UFW presented a hiring proposal which was taken from a recently-signed contract between the UFW and a group of grape growers operating in the vicinity of Delano, California. This proposal would provide for a company-controlled hiring location, advance notice of hiring needs to the UFW, a guarantee that all hiring would be free of arbitrary discrimination, and a built-in union shop provision.

There are several statements by Respondent's officers on the record which indicate that the primary obstacle to

agreement was the hiring hall issue. There are even statements to the effect that wages would not be a problem once the Union's hiring-hall proposal was dropped. It is therefore difficult to understand why agreement was not quickly reached following the UFW proposal of June 14, 1978. The record, however, is silent as to Respondent's reply to the proposal or the context in which the proposal was made by the Union. We are certain only that the parties had not reached a contract or impasse, and that hiring and various economic issues were still unresolved. Therefore, as we previously found with regard to unexplained gaps in the negotiations, we cannot infer, from the record herein, that because the parties did not reach agreement on or after June 14, 1978, Respondent never intended to reach agreement.[9/]

Respondent contends that the UFW bargained in bad faith by refusing to make a wage proposal until August 31, 1977, some nineteen months into the negotiations. This assertedly prevented Respondent from estimating the total cost of the Union's proposals and forced it to make concessions in other areas as a precondition to wage negotiation. While we find the contention of Union bad faith to be without merit, we find that the Union's tactics contributed to the undue length of the negotiations.

The record reflects some discussion of wages between the parties on July 20, 1976. At that time Dolores Huerta

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[9/]While we respect our dissenting colleague's right to draw different inferences from the facts of this case, we reject the suggestion that Respondent refused to sign a contract unless the UFW withdrew its June 14 hiring proposal. The record does not indicate any response to that proposal.

indicated that the UFW was generally asking for $3.10 or $3.15 per hour. It appears, however, that the Union made no written wage proposal until August 1977. The record shows that Huerta refused Caplan's request for a "concrete" wage proposal on July 24, 1977, assertedly because she needed more information on Respondent's pay system. Regardless of whether the July 20, 1976, comment of Huerta may be considered a wage proposal, it is clear that after that date the Union refused to discuss wages until other issues, such as fringe benefits, were settled.

4. Other Indicia of Bad Faith

An employer's anti-union conduct away from the bargaining table may reflect upon its good faith at the table. Imperial Machine Corp. (1958) 121 NLRB 621 [42 LRRM 1406]. We have previously found that Respondent discriminatorily discharged pro-UFW crew leader Sylvestre Ramos, and his crew, just before the negotiations began. Kaplan Fruit and Produce Co., supra, 5 ALRB No. 40. This prior unfair labor practice was noted by the ALO here and found to support his finding of bad faith.

Other indicia of bad faith are Respondent's unilateral wage increases granted to the grape workers during the pruning seasons in 1977 and 1978, discussed below. These increases tended to undermine the Union's authority as exclusive collective bargaining representative, making the Union appear ineffectual.

These peripheral incidents shed light on Respondent's overall attitude toward bargaining. However, given the inadequate evidence of bad faith in the bargaining process, these incidents are not enough to change our view of the totality of Respondent's

conduct.[10/]

B. Asserted Bad Faith Bargaining by the Union

Respondent contends that the UFW demonstrated bad faith in negotiations by failing to make a wage proposal, changing proposals, reneging on agreements, circumventing Respondent's negotiator, and engaging in illegal picketing. We have considered, supra, Respondent's contention regarding the UFW's wage proposal and found that this conduct by the Union contributed to the delay in the negotiations. Although the Union's conduct may be considered an indication of bad faith, the record does not demonstrate that the UFW was trying to avoid reaching an agreement or that its tactics were illegal. Therefore we find Respondent's contention as to the wage proposal to be without merit.

As to Respondent's contentions that the UFW changed its proposals and reneged on agreements, we find no merit. Although Dolores Huerta gave Respondent a new union proposal on April 24, 1976, and again on July 1, 1976, the record does not contain copies of the proposals. We therefore have no documentary evidence that the new proposals included substantial changes in the terms of the UFW proposal. The testimony of Al Caplan

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[10/]Our dissenting colleague finds direct evidence of Respondent's bad faith intent in the conpletely uncontroverted testimony of John Lambiase, a UFW organizer. Lambiase testified that Milt Kaplan, a co-owner of Respondent, stated during the picketing that he did not intend to sign a contract or obey the law. On the witness stand, Kaplan denied having a conversation of "any consequence" with Lambiase, and further stated that he was not involved in Respondent's labor relations either as a negotiator or policy-maker. We therefore find Lambiase's testimony unpersuasive in light of Kaplan's testimony and the record as a whole.

indicates that the only change from previously agreed-upon language was minimal, involving one word in the "Location of Company Operations" article. As we stated above, we will not infer bad faith from evidence that is scanty and insubstantial.

We also find no merit in Respondent's contention that the Union circumvented Respondent's negotiator. The Respondent here attempts to equate a meeting between UFW representatives and Respondent's managers, absent Caplan, with circumvention of a union by an employer. There is neither factual, nor legal basis for such an equation. The meeting in question was voluntarily attended by Respondent's managers and there is no suggestion that the Union refused to meet with Caplan thereafter.

As to the picketing of Respondent's wholesale produce stand in Los Angeles, such economic pressure by a union during collective bargaining is not proof of bad faith. NLRB v. Insurance Agents International Union (1960) 361 U.S. 447 [45 LRRM 2704]. We therefore find no merit in Respondent's contention as to picketing by the UFW.

C. Per Se Violations

In May 1977 and June 1978, Respondent granted hourly wage increases to its grape workers without giving the UFW advance notice or an opportunity to negotiate prior to implementation. As such unilateral wage increases are per se refusals to bargain, we affirm the ALO's conclusion that Respondent violated Section 1153 (e) and (a) of the Act thereby.

Respondent had a pattern of granting such wage increases, after a request by the workers, every year during the pruning

season. After a conference among Respondent's managers and a quick survey of the prevailing area wage rate, Respondent had raised wages in this manner every year since 1973. In 1977 and 1978, the pattern was repeated, despite the ongoing negotiations between Respondent and the UFW. In both years Respondent notified the UFW of the wage increase by letter, but only after the increase was in effect. Unilateral action of this sort, in and of itself, violated the duty to bargain since the possibility of meaningful union input is foreclosed. NLRB v. Katz (1962) 369 U.S. 736 159 LRRM 2177]; O. P. Murphy Produce Co., Inc., supra, 5 ALRB No. 63; Masaji Eto (April 25, 1980) 6 ALRB No. 20.

Respondent's exceptions contend that the increases are legal because they follow a "well established company policy of granting certain increases at specific times." The increases, it is argued, represent the maintenance of the "dynamic status quo," not a change in conditions. NLRB v. Ralph Printing & Lithography Co. (8th Cir. 1970) 433 F.2d 1058 [75 LRRM 2267]. While this is an exception to the general rule, the Katz case specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary. The increases here occurred only after an employee request, subject to refusal by Respondent, and in an amount fixed by Respondent's sense of the prevailing rate. We therefore conclude that the increases were discretionary and subject to collective bargaining.

Respondent also argues that the UFW waived any right to negotiate over wages by refusing to make a wage proposal at

the bargaining table and failing to contest the increases after receiving notice. We find no merit in this argument. We will not construe a party's silence on a bargaining issue to constitute a voluntary waiver of its right to bargain unless the evidence of intentional waiver is clear and unequivocal. Caravelle Boat Company (1977) 227 NLRB 1353 195 LRRM 1003].

We affirm the ALO's conclusion that Respondent refused to bargain, per se, when it discussed the 1977 and 1978 wage increases directly with the employees. Respondent's duty is to bargain with the Union, as exclusive collective bargaining representative of the employees, and no one else. Chase Manufacturing, Inc. (1972) 200 NLRB 886 [82 LRRM 1026]; Masaji Eto, supra, 6 ALRB No. 20.

II. Conclusion and Remedy

We find that Respondent's conduct presents some evidence of a bad-faith approach to collective bargaining. However, the record is, in many respects, inconclusive and inadequate to establish that these indicia of bad faith' amount to refusal to bargain in violation of Labor Code section 1153(e). Accordingly, we hereby dismiss that portion of the complaint which alleges bad-faith bargaining.

As to the unilateral wage increases and individual bargaining with the employees, however, we conclude that those acts constituted per se refusals to bargain by Respondent and violations of section 1153(e) and (a). It is essential to an effective bargaining relationship that an employer communicate and negotiate with the Union before implementing proposed

changes in wages or other working conditions. Respondent's failure to do so here weakens the Union's bargaining position and undermines its statutory right to represent the employees.

In fashioning an appropriate remedy for Respondent's per se violations, we must determine whether to apply the make-whole provision in Labor Code section 1160.3. As we stated in Adam Dairy (April 26, 1978) 4 ALRB No. 24, collective bargaining is a voluntary process which succeeds most frequently in an atmosphere of cooperation. To that end, we will attempt "to fashion a make-whole remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process." Ibid, at p. 11.

Our review of the facts indicates that the wage increases, though illegal, brought Respondent's grape workers up to the approximate prevailing wage rate, and that the UFW consciously refused to discuss the wage issue both before and after the increases. In these circumstances, we conclude that imposition of the make-whole remedy would be largely ineffectual and also inappropriate in this instance.

We shall order Respondent to post, mail, and read the attached Notice to its employees, explaining the illegality of the unilateral wage increases. This Notice is necessary to counteract the negative effects of Respondent's misconduct and an appropriate remedy under the reasoning in M. Caratan, Inc. (March 12, 1980) 6 ALRB No. 14.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders Respondent Kaplan Fruit and Produce Company, its officers, agents, successors, and assigns to:

1. Cease and desist from:

(a) Changing any of its employees' wages, or any other term or condition of their employment without first notifying and affording the UFW a reasonable opportunity to bargain with respect thereto.

(b) Dealing directly or indirectly with its employees concerning their wages, or other terms or conditions of their employment.

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

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

(a) Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes heretofore made in the employees' wage rates and other terms and conditions of their employment.

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

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

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order to all Respondent's agricultural employees employed at any time during the payroll periods immediately preceding May 7, 1977, and June 1, 1978.

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

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

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

Dated: July 1, 1980

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

MEMBER RUIZ, Dissenting:

I respectfully dissent.

Although the majority finds indicia of Respondent's bad faith intent in its bargaining conduct both at and away from the table, the majority refuses to find that Respondent bargained in bad faith. In coming to their conclusion, the majority makes, I believe, erroneous factual findings and engages in faulty legal reasoning. First, they incorrectly analyze the facts concerning the issue of delay by the parties as well as other evidence of bad faith. Second, after determining incorrectly that Respondent was not solely responsible for the delays, the majority cuts short their analysis of the facts. By virtually ignoring all other indications of Respondent's bad faith, they disregard the "totality of the conduct" standard normally applied in surface bargaining cases.

In surfacing bargaining cases, we must determine, by examining the totality of its conduct, whether a respondent acted

with a bona fide intent to reach an agreement. As-H-Ne Farms, Inc., 6 ALRB No. 9 (1980). After an examination of the totality of Respondent's conduct, I find that the record supports the ALO's conclusion that Respondent bargained in bad faith. Shortly before negotiations began, Respondent fired a crew of more than 30 workers because of their support for the UFW. During the following three years prior to the hearing herein, Respondent engaged in dilatory tactics by cancelling and refusing to schedule meetings, in spite of repeated requests by the UFW and a UFW boycott of its products. Respondent unilaterally raised the wages of its workers at the start of the 1977 and 1978 pruning seasons, thereby showing its disregard for the UFW as the bargaining representative of its workers and undermining support for the Union in the negotiations. Respondent made statements of intent not to sign a contract with the UFW. Throughout negotiations, Respondent asserted that it would not sign a contract with a union hiring hall provision; when the Union capitulated on this key issue, Respondent still refused to reach agreement. As explained fully below, I find that these facts lead to the conclusion that Respondent had no intent to reach agreement with the Union.

I. Respondent's Delaying Tactics

A. Cancellation of Meetings

The record clearly shows that Respondent cancelled 12

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meetings and the Union cancelled 5.[1/] The majority states that Respondent "cancelled seven meetings without explanation." Respondent's explanation for cancelling at least two of the remaining five meetings is, in my opinion, no explanation at all.[2/] Therefore, at least nine unexplained or unexcusable cancellations are attributable to Respondent. However, the number of cancellations is in itself not nearly so important as the amount of delay that these cancellations caused. My calculations indicate that the Respondent's cancellations resulted in delays totaling

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[1/]The majority also attributes five cancellations to the Union. One of these cancellations occurred in March of 1978. The testimony indicates that Dolores Huerta, the Union's negotiator, was caught in a wind and rain storm in the mountains outside Los Angeles and that she had someone contact A1 Caplan, Respondent's negotiator, at the meeting site to inform him of her delay. Caplan left. The testimony as to whether he was available for the remainder of the day is in conflict. This, in my opinion, is not an unexcusable cancellation of a meeting and in no way resembles any of the other unexplained cancellations in this record.

[2/]Meetings had been scheduled for February 11 and 12, 1977. Sometime before those dates, Huerta called Caplan who was out of the office and asked his secretary if it was possible to continue those meetings to the week of February 18. Huerta made it clear to the secretary that if Caplan could not meet during the week of the 18th, she wanted to keep the dates of February 11 and 12. Caplan's secretary said he was at another meeting but that she would contact him and call back. She did and said the only dates he had available were the 25th and 26th. Huerta said that was too far away, to keep the dates of the 11th and 12th. Caplan's secretary called back again, saying Caplan had already scheduled something for those two days. No more than two hours had passed from the first to the last phone call.

141 days; the Union's cancellations resulted in a 40-day delay.[1/] The majority suggests that cancellations resulting in a delay of a week or two are to be tolerated. I disagree with that suggestion. Furthermore, the majority fails to address the 36-day delay caused by Respondent's cancellation of the July 14, 1976, meeting. Caplan cancelled this meeting by phone with no reason given for the cancellation. Respondent presented no evidence explaining the resulting 36-day delay. I submit that if a party cancels a meeting and then fails to introduce any evidence on the issue, that party is responsible for the resulting delay. This is a logical and appropriate inference commonly drawn from such evidence. The majority seeks to relieve Respondent from responsibility of the 77-day delay that resulted from its cancellation of the March 12, 1977, meeting by finding that there

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[3/]

Unexcused Meetings Cancelled by Kaplan's	Date of Next Meeting	Delay
7/14/76	8/20/76	36 days
10/14 and 10/15/76	10/21/76	7 days
2/11 and 2/12/77	2/25/77	14 days
3/11 and 3/12/77	5/27/77	77 days
6/26/77	7/23/77*	-0- days
9/12/78	9/19/78	7 days
		141 days

*Meeting had been previously scheduled.

Unexcused Meetings Cancelled by Union	Date of Next Meeting	Delay
9/26/77	10/4/77	8 days
10/4/77	10/5/77	1 day
12/4/78	12/18/78	14 days
12/18/78	1/5/79	17 days
		40 days

was insufficient evidence that Respondent was solely responsible for this delay. The evidence shows that Respondent cancelled the March 11 and 12 meetings, because John Bono, Jr. was ill. The Union representative did not understand the cancellation since John Bono, Jr.'s, as opposed to John Bono, Sr.'s, role in the negotiations had been minor.[4/] Huerta testified that she "pressed" Caplan for more meetings but that Caplan refused to meet because of the illness. Caplan in turn testified that Huerta rejected a meeting proposed for March 31, 1977. The record shows that, by the end of March, Bono's illness was no longer a deterrent to the resumption of negotiations. However, in a letter to the Union dated April 1, 1977, Caplan requested a meeting date more than a month away, during the week of May 2, 1977. Caplan rejected the Union's proposed meeting dates of April 8 and April 9 because one of the two dates was Good Friday. In the same letter, Caplan mentioned the Union's unavailability during the week of April 11 and informed the Union that he would be unavailable beginning April 18 because of a pending ALRB hearing which "may last seven to ten days."[5/] The record next shows that a phone call from the Union on May 8 was answered by Caplan's written request to set meetings on May 27 and May 28. Despite the paucity of evidence, Respondent, in my opinion, is clearly responsible for the bulk of the delay in

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[4/] While it is clear that John Bono, Sr. was in charge of Kaplan's grape growing operation in Tulare County, it is not clear from the record what role John Bono, Jr. played in the negotiations.

[5/] The hearing, in fact, lasted five weeks. The majority states that the hearing caused "scheduling problems" for Respondent. I submit that the unavailability of the company negotiator during this period evidences Respondent's bad faith.

this instance. Having initiated the cancellation, Respondent has the burden of coming forward with evidence to explain the delay. Failing to do so, it can and should be held responsible for the resulting delay.

In the absence of any explanation to the contrary, I conclude that Respondent engaged in dilatory tactics by cancelling meetings.[6/] The fact that the Union cancelled a few meetings does not invalidate this conclusion. Furthermore, cancellations of meetings by both parties which result in better than a three to one ratio of delay on the part of Respondent clearly show that it was Respondent rather than the Union that was responsible for the delay.

B. Scheduling of Meetings

The ALO concluded that Respondent used dilatory tactics which included refusing to schedule meetings. The majority ignores this conclusion. The majority finds that a pattern was established whereby Caplan would refuse to set a future meeting date at the close of a session, preferring to let the Union know later by mail when he was next available. Despite this finding, the majority refuses to conclude that Respondent engaged in delaying tactics, finding that the "record seems to indicate acquiescence by the Union in this pattern." Furthermore, the majority ignores additional evidence of Respondent's refusal to schedule meetings.

I disagree with the majority's analysis of the facts and

[6/] The majority notes the parties' late arrivals to and early departures from meetings. The record shows that Al Caplan often left meetings early and Dolores Huerta usually arrived late. Whatever delay was caused by late arrivals or early departures was miniscule when compared to the delays caused by cancellations and refusals to schedule meetings.

the law. The record and the discussion below clearly show that the Union did not acquiesce to Caplan's (and his replacement Michael Melman's) refusals to set future meetings at the close of a bargaining session. The record also shows that Respondent, on several occasions, refused to schedule meetings even though the UFW urged the company negotiator to meet.

The parties did not meet between October 21, 1976, and January 21, 1977. The majority finds that Respondent was not solely responsible for this delay, but rather that the Union shared that responsibility. I disagree. The sequence of events supports the ALO's conclusion that Respondent engaged in dilatory tactics during this period. At the October 21 meeting, Union negotiator Barbara Macri requested that more meetings be scheduled. Al Caplan refused the request on the ground that he was unavailable for three weeks. Caplan apparently told Macri that he would call her as soon as he was available. This three-week delay is therefore clearly attributable to Respondent.

Although Caplan told Macri he would call her, it was Macri instead who wrote to Caplan on November 10, 1976, pointing out that the three weeks had passed and asking that he call to set up further meetings. Caplan did not call. Instead, he wrote a letter on November 12, 1976, questioning the Respondent's continuing obligation to bargain. Again, Macri wrote asking that Caplan call regarding future meetings. On December 3, 1976, 43 days after the Union had asked Caplan to meet and 43 days after Caplan had indicated that he would call to set up meetings, Caplan finally invited the Union to call him to set up future meetings.

By that time, after 43 days of waiting, Maori was unavailable from December 13 to December 23 due to other negotiations and several arbitrations, but she advised Caplan that any date after December 23 was acceptable. Because Maori was unavailable for ten days and because she "refused Caplan's invitation to take the initiative" and did not request meetings on specific dates, the majority finds an "ambiguity" that "does not support the inference that Respondent engineered the entire delay to frustrate ultimate agreement." I disagree. Given Caplan's years of experience in this field,[7/] the ALO's characterization of Caplan's conduct as a "cat and mouse" game in which he succeeded in postponing the setting of a meeting date in excess of six weeks, is certainly warranted. The fact that the Union negotiator did not request specific meeting dates does not do away with Respondent's bad faith intent, in light of Respondent's three-week refusal to meet and its subsequent refusals to schedule meetings. Furthermore, the majority's reliance on the fact that the Union negotiator was, after 43 days of waiting, unavailable to meet on a specific day, is misplaced; this fact does not in any way diminish the finding that Respondent engaged in dilatory tactics during this period.

The record reveals several other instances of Respondent's refusals to schedule meetings, which the majority ignores or discounts. The record shows that the parties did not

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[7/] The record shows that Al Caplan has been a labor consultant for 22 years. Before that he was a union organizer and a regional director for the Longshoremen's Union and also served as a union negotiator. Ironically, Caplan at one point in his testimony described Macri as inexperienced and very unsure of herself.

meet from February 26, 1977, until May 28, 1977. For a discussion of Respondent's refusal to meet during this period, see page 27.

At the May 28, 1977, meeting, the UFW suggested that the next meetings be scheduled for the first and second week of June. Caplan would not meet then because of grievance meetings. Instead, the parties scheduled meetings for June 25 and 26. The UFW also made an effort to schedule a meeting beyond June 25 and 26, but Caplan would not agree to a date.

At the June 25, 1977, meeting, the Union tried to set up a meeting on July 9. Caplan would not agree because July 9 was his birthday. Meetings were finally set for July 23 and 24.

At the August 11, 1978, meeting, UFW negotiator Ken Schroeder suggested that, since the grape harvest was on, the parties meet again as soon as they could. Caplan said he was unable to meet because of his schedule until September 1, 1978. Between the August 11 and September 1 dates, Schroeder wrote to Caplan suggesting they meet one or two times a week through September. Caplan did not answer the letter.

At the September 1, 1978, meeting, Schroeder proposed that the parties meet once a week through September. Respondent was not agreeable to that, so meetings were scheduled instead for September 12 and 19. Respondent subsequently cancelled the September 12 meeting.

At the September 19, 1978, meeting, Schroeder suggested the parties meet again soon, expressing a concern at their failure to meet more frequently. Respondent's answer was to suggest October 12 and 13 as meeting dates. Schroeder said that was pretty

far away, especially considering the harvest would be ending soon. Meetings were scheduled for October 9 and 23.

At the October 9, 1978, meeting, Schroeder suggested that the parties schedule more meetings beyond October 23. His reasoning was that he was concerned about waiting until the October 23 meeting and then running into busy schedules. Respondent was not agreeable to this. At the October 23, 1978, meeting, Schroeder again suggested meetings beyond October 23 but Respondent refused to meet because John Bono, Jr. had been hospitalized by a heart attack.

The sequence of events described above fully supports the ALO's conclusion that Respondent delayed by refusing to schedule meetings.[8/] However, the majority does not draw this conclusion. The majority apparently relies on the fact that Respondent began bargaining fairly quickly after certification, offering full counterproposals at the second meeting, and that the parties met 37 times and agreed on 32 contract articles.

In light of Respondent's repeated cancellations and refusals to meet, I find that Respondent's willingness to meet shortly after the Union's first request does not overcome the evidence of its bad faith in the ensuing years. I also find that meeting 37 times over the course of approximately three years is not an indication of good faith. Furthermore, the majority apparently

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[8/]Respondent's only hint of a similar delay caused by the Union was Huerta's admission that after the March 11 and 12, 1977, cancellations, she would not agree to a March 31, 1977, meeting because it was Cesar Chavez' birthday, although Huerta did press for other dates.

attaches some significance to the fact that the parties agreed to 32 out of 37 contract items. In light of the fact that Respondent successfully avoided signing a contract by refusing to agree on one crucial issue, the hiring hall provision, I find that their reliance on the other agreements as an indication of Respondent's good faith to be misplaced.

The NLRB and, until this day, this Board have held the view that, to comport with the law, the negotiation of a collective bargaining agreement should be given the same importance as a business transaction: "Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective bargaining negotiations as they display in other business affairs of importance." O. P. Murphy Produce Co., Inc. (October 26, 1979) 5 ALRB No. 63 at 4, citing A. H. Belo Corporation (WFAA-TV) (1968) 170 NLRB 1558, 1565 [69 LRRM 1239], modified, (5th Cir. 1969) 411 P.2d 959. I find that the facts of this case show that Respondent did not fulfill its obligation to make itself available for meetings at reasonable times, a finding which warrants the inference that Respondent was attempting to delay agreement. O. P. Murphy Produce Co., Inc., supra.

C. The Majority's Unwarranted Finding of Delay on the Part of the Union

The record reveals ample evidence of Respondent's delay in refusing to schedule meetings and cancelling meetings throughout the entire course of negotiations. Instead of concluding that Respondent bargained in bad faith, the majority finds that the Union contributed to the length of the negotiations by changing

negotiators and by failing to present a written wage proposal for a certain period of time. After a careful examination of the facts, I find that the record does not support the majority's findings and conclusions.

1. Change in Negotiators

The majority cites the fact that the UFW changed chief negotiators five times and finds that "the repeated necessity for updating replacements caused some actual delays and tended to disrupt the established rapport between previous negotiators." The record clearly shows that there was little, if any, delay caused by the change in the Union's negotiators. Based on my reading of the record, the majority's finding is unwarranted.

The issue is not the number of changes in negotiators. The issue is simply whether these changes caused delay. The following is a recitation of the facts as revealed by the record on the subject of change of negotiators. It is derived primarily from the testimony of the Respondent's chief negotiator, Al Caplan. Sylvan Schnaittacher represented the Union at the initial meeting of the parties on February 6, 1976. Schnaittacher gave Caplan a copy of a proposed contract and explained it. At the second meeting in April 1976, the Union was represented by Richard Chavez. The company made counterproposals and agreements were reached on certain items. Dolores Huerta became the Union's spokesperson on April 24, 1976. On that date, agreement was reached on Right of Access to Company Property, New or Changed Family Housing, Modification, and the Savings Clause. Barbara Maori became the Union negotiator on August 20, 1976. After reviewing what had gone

on at the previous meeting, Caplan and Maori discussed the grievance and arbitration procedure, mechanization, the hiring hall and seniority. On January 21, 1977, approximately one year after certification, Dolores Huerta returned as chief negotiator for the Union. The record reveals only that the parties met for two hours, that Caplan said he was meeting without the company's knowledge, and that two future meetings were then scheduled. On June 14, 1978, a year and a half later, Ken Schroeder replaced Dolores Huerta as the Union's chief negotiator. He had been Huerta[1]s assistant at prior meetings. At the June 14 meeting, Schroeder presented a hiring hall proposal which amounted to a capitulation on the Union's position regarding this crucial issue. I am baffled by the majority's finding and invite them to demonstrate where the record shows "actual delays and ... [a disruption of] established rapport between previous negotiators." (emphasis added)

2. The Union's Failure to Make a Wage Proposal

The majority finds that the Union failed to make a written wage proposal until August 1977 and thus contributed to the length of negotiations. The record shows, however, that the UFW made an informal proposal in July 1976. The majority finds nonetheless that the Union refused to discuss wages until other issues, such as fringe benefits, were settled.

The facts of this case show that the parties did not consider wages to be a key issue and that any dispute over wages or any failure on the part of the Union to present a written wage proposal did not delay the negotiations. The primary issue on which the parties disagreed was the hiring hall provision. John Bono, Sr.

consistently stated that money was not a problem for the company, but that the hiring hall was. In July 1976, he indicated accord with the Union's wage proposal of $3.10 per hour. During the UFW's picketing of Kaplan's Los Angeles headquarters in late 1977 and early 1978, he repeated several times that the hiring hall, not the money, was the issue for the company. Under these circumstances, it is difficult to see how the Union's failure to provide a written proposal for a period of time on a subject that the parties did not consider "a problem" shows that the Union contributed to the length of negotiations.

D. Conclusion

Unfortunately, I have found no way other than the preceding tedious recitation, of the record to illustrate my position. That position is that, when one carefully examines Respondent's cancellations of meetings and its refusal to schedule meetings, a clear and overwhelming pattern of dilatory tactics appears. On the other hand, a careful examination of the Union's conduct reveals no such tactics. The Union's repeated requests for meetings, as well as its boycott of Kaplan's products in late 1977 and early 1978, show the Union's serious attitude towards negotiations. Given the skillful delaying strategy of Respondent's negotiator, it is hard to understand what more the Union could have done in this case to pursue negotiations.

II. Other Indicia of Respondent's Bad Faith

After examining instances of delay by the parties and concluding that Respondent was not solely responsible for the delay, the majority essentially ends its analysis. The record,

however, reveals several instances of Respondent's illegal intent which lead me to conclude that Respondent was indeed bargaining in bad faith. The majority summarily discounts the significance of these indicia of bad faith in disregard of the "totality of the conduct" standard by which the NLRB and this Board have previously measured bad faith.

The majority, noting that Respondent discriminatorily discharged a crew of UFW supporters prior to the commencement of negotiations and instituted unlawful unilateral wage changes during negotiations, states that these incidents "shed light" on Respondent's bargaining attitude. Nonetheless, they find that, "given the inadequate evidence of bad faith in the bargaining process," the incidents do not change their view of Respondent's intent. I submit that this analysis is contrary to that normally applied in surface bargaining cases. The underlying bad faith of a respondent's conduct, which otherwise resembles hard good-faith bargaining, is often revealed only by examining a respondent's conduct away from the table. Montebello Rose Co., Inc., et al. (October 29, 1979) 5 ALRB No. 64. The majority finds that the factual allegations that Respondent cancelled and refused to schedule meetings are largely uncontroverted. However, they discount such easily recognizable evidence of bad faith as unilateral wage changes in determining Respondent's motives for delaying negotiations.

After an examination of the record, which reveals several indications of Respondent's bad faith, I find that the totality of Respondent's conduct can only support a conclusion that Respondent

did not have the intent to reach an agreement with the Union.

A. The Prior Unfair Labor Practice

In Kaplan Fruit & Produce Co., Inc. (May 24, 1979) 5 ALRB No. 40, we concluded that Respondent had discriminatorily discharged the Sylvestre Ramos crew of more than 30 employees for their UFW support prior to the commencement of negotiations. The ALO in that case, in examining Respondent's motive for the firings, found that "sooner or later the respondent would have to bargain in good faith with the UFW and a mass discharge would be demoralizing and would sap the strength of the Union."

The ALO in the instant case found that the firing was "evidence of the anti-union animus of Employer which serves to shed light on the intentions of the Employer in engaging in dilatory tactics in the scheduling of and attendance at negotiations sessions with the UFW." I agree. It is contrary to reality to believe that Respondent's discharge of a large group of UFW supporters shortly before negotiations commenced does not reveal Respondent's intent in dealing with the UFW as its employees' collective bargaining representative. The majority's failure to attach much significance to Respondent's conduct shows a failure to examine the context in which Respondent refused to bargain.

B. The Unilateral Wage Increases

Respondent implemented unilateral wage increases in the 1977 and 1978 pruning seasons. The majority finds that these increases constitute per se violations of Section 1153(e). They further find that the wage increases establish the Respondent's intent to undermine the Union by dealing directly with the workers

and unilaterally changing their working conditions. I agree. However, contrary to the majority, I find that these per se violations, along with other indicia of bad faith, lead to the conclusion that Respondent bargained in bad faith.

Respondent's actions are direct evidence of its refusal to recognize the UFW as the bargaining representative of its employees. The majority states correctly that such actions tend to undermine the Union by making it appear ineffectual. I find that Respondent's unilateral decision on an issue so important to its employees as wages is a strong indication of the bad faith intent underlying its conduct at the bargaining table.

C. Placing Unlawful Conditions on Signing of Contract

The majority, in its examination of Respondent's conduct attaches no significance to the behavior of the company representative, who pressed the Union negotiator to stop pursuing an unfair labor practice case against Respondent in order to sign a collective bargaining agreement. During negotiations, Respondent was in the process of appealing a November 1977 Administrative Law Officer's Decision which found that Respondent had discriminatorily discharged the Ramos crew for union support. According to the uncontradicted testimony of Dolores Huerta, Huerta and Al Caplan had a private meeting on April 26, 1978, requested by Caplan, in which he told Huerta that the company would not sign a contract unless the Union dropped the Ramos case. Conditioning negotiations or the execution of a collective bargaining agreement on the withdrawal of unfair labor practice charges or lawsuits is evidence of bad faith. American Gypsum Co. (1977) 231 NLRB No. 152

[97 LRRM 1069]; Peerless Food Products, Inc. (1977) 231 NLRB 530 [96 LRRM 1048].

The majority finds that Respondent's conditioning the contract was mitigated by Respondent's subsequent conduct, in that Respondent met with the UFW on June 14, 1978, and thereafter, I find no such mitigating effect. Respondent placed a condition on the execution of the contract, not on further negotiations sessions. I find no retraction of this condition on the record. Furthermore, even if Respondent had later withdrawn this condition, I find that its attempt to place such a condition on the execution of a contract to be evidence of bad faith. Lion Oil Co. v. NLRB (8th Cir. 1957) 245 F.2d 376 [40 LRRM 2193].

D. Respondent's Statements of Intent Not to Sign a Contract

On January 11, 1979, while co-owner Milt Kaplan was testifying, John Lambiase, a UFW worker, was pointed out to him. Asked if he had spoken to Lambiase while Lambiase was picketing his premises during the UFW boycott, Milt Kaplan testified that he had. Kaplan characterized these conversations as short and as being "nothing of any consequence, that I can remember." The next day, January 12, 1979, Lambiase testified that during the boycott at Kaplan's Los Angeles headquarters, Milt Kaplan told him on three occasions that he did not intend to sign a contract with the UFW. Kaplan also said that he did not intend to obey "Governor Brown's law". A week later on January 19, 1979, Milt Kaplan was recalled as a witness by the Respondent's attorney. Not once was Kaplan asked about his conversations with Lambiase, although he was asked and did testify about conversations with Lambiase's co-worker,

Gretchen Laue, which took place at approximately the same time as the Lambiase conversations. Not once did he in any way refute Lambiase's assertions.

This, in my opinion, is purely and simply direct unrefuted evidence of Respondent's bad faith intent. Nevertheless, the majority finds "Lambiase's testimony unpersuasive in light of Kaplan's testimony and the record as a whole." I simply do not understand what there is in Kaplan's testimony, given the sequence of his testimony and his failure to refute Lambiase's testimony when recalled as a witness, that makes Lambiase's testimony "unpersuasive". I also invite the majority to demonstrate how "the record as a whole" makes Lambiase[1]s testimony unpersuasive.

Somehow the majority attempts to use Milt Kaplan's disclaimer, regarding his role in Respondent's labor relations in support of this argument. Kaplan's description of his willingness and readiness to meet secretly and directly with the UFW, as well as his description of the secret meeting he had with Huerta, undermines any such reliance.

E. The Hiring Hall

In my opinion, Respondent's conduct in dealing with the hiring hall issue in this case is clear, unequivocal evidence of its bad faith intent. The facts reveal that Respondent was merely "going through the motions" of bargaining.

The primary bargaining issue in this case was the Union hiring hall article, which provided a Union-run hiring hall as the parties knew it in 1970. On this point, at least, all parties agreed. The parties stipulated that the company was unhappy with

the hiring hall as it existed from 1970 to 1973. Because of John Bono, Sr.'s negative experience with the hiring hall from 1970 to 1973, he said in February 1978 that the company would not sign a contract until the Union took the hiring hall proposal out of the contract. He stated that money was not an issue in negotiations, but that the hiring hall was. Co-owner Milt Kaplan also said that the big issue was the hiring hall and that, unless the Union moved away from it, the company could not possibly sign a contract.

For a time, the Union would not budge from its position on the hiring hall. In July of 1977, Al Caplan proposed the Sam Vener Co. hiring hall language which, according to Huerta, did not contain a mandatory (using the word "may" instead of "shall") union hiring hall provision. The Union would not accept his offer. In January 1978, the Union began to move. Huerta said the Union would accept the Vener hiring hall language. Caplan then said he no longer wanted this provision because he had, in effect, misinterpreted it. Six weeks later at the Los Angeles meeting with Milt Kaplan, the Union indicated they were willing to move away from the union hiring hall if a contract could be signed. On June 14, 1978, the Union submitted a proposal that did away with the union hiring hall concept and provided for company control over hiring. The proposal set up a centralized hiring hall, run by the company, that prohibited favoritism or discrimination in hiring. This language was contained in contracts signed with several other Delano grape growers. Earlier, Respondent had been a joint-negotiator with some of these same growers and the UFW. Respondent's response now was that the concept of any hiring hall had to be withdrawn and that

there simply be language barring discrimination against new employees or replacements.

Respondent's answer to the Union's June 14, 1978, proposal is critical. The majority says simply that the "record does not indicate any response to that proposal." At another point, they say the record "is silent as to Respondent's reply to the proposal." If they mean that there are no letters ot telegrams or flat statements giving Respondent's answer, I agree. There is, I submit, testimony from John Bono, Sr. that makes Respondent's position toward the Union's proposal clear enough. John Bono, Sr. accused Huerta of reneging on her agreement with Respondent to take out the hiring hall provision completely. His testimony obviously indicates that Respondent was not willing to accept even a company hiring hall. He clearly felt that the June 14 proposal did not go far enough when it substituted a company hiring hall for the union hiring hall. In his words: "I suppose she wanted us to take over their work." In 1977, Respondent told the Union that it would agree to the so-called "Vener contract" which had a union hiring hall provision in it. In January 1978 when the Union indicated its willingness to accept the Vener language, the Respondent withdrew its offer. Later in 1978 when the Union withdrew the union hiring hall provision and substituted a company hiring hall provision instead, the Respondent now said it wanted no hiring hall whatever. Put simply, the Respondent was playing games.

The majority, finding that Respondent viewed the hiring hall issue as the primary obstacle to agreement, states "It is therefore difficult to understand why agreement was not quickly

reached following the UFW proposal of June 14, 1978." I, for one, have no difficulty in understanding the reason. The Respondent had no intention of reaching a contract.

Assume that a man comes to you and says he will sign your proposed contract if you remove provision A. You say you need provision A. He returns saying he will sign the contract if provision A is worded as it was in his brother's contract with you. You say that you need provision A as it is. Some time passes and, wanting to sign a contract, you go to the man and tell him you will give him provision A as it appears in his brother's contract. The man tells you he was mistaken as to what his brother's contract really said but assures you he will sign a contract if you take out provision A. More time passing and wanting to sign a contract, you finally take out provision A and substitute provision B. Now the man says he cannot sign a contract unless you take out provision B. Provision B gives him control over a situation which he did not want you to control. Is it difficult or illogical to deduce that the man does not want to sign a contract? No. These are precisely the facts of this case. Throughout negotiations Respondent delayed the execution of an agreement for literally years and insisted on deletion of the union hiring hall provision as the essential prerequisite to signing a contract. When the Union finally capitulated, Respondent still refused to sign the contract. It is clear to me that Respondent was simply "going through the motions" of bargaining. I would find that Respondent bargained in bad faith.

Dated: July 1, 1980

RONALD L. RUIZ, Member

NOTICE TO EMPLOYEES

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

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

1. To organize themselves;

2. To form, join, or help any union;

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

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

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

Because this is true, we promise you that:

WE WILL NOT change your wage rates or other working conditions without first meeting and bargaining with the UFW about such matters because it is the representative chosen by our employees.

WE WILL NOT deal directly or indirectly with our employees concerning their wages or other working conditions, but will conduct such negotiations with the UFW because it was chosen by our employees as their representative.

Dated: KAPLAN FRUIT AND PRODUCE COMPANY

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

Kaplan's Fruit and Produce Company (UFW) 6 ALRB No. 36
Case No. 77-CE-188-D

ALO DECISION

The ALO concluded that Respondent's dilatory tactics were evidence of "surface bargaining" and found a violation of section 1153 (e) and (a). The ALO further found several wage increases to be violations of section 1153(e) and (a) since Respondent failed to give the UFW notice and an opportunity to request negotiation of the increases prior to implementation. He recommended that Respondent make its employees whole for economic losses suffered as a result of the violations, beginning March 16, 1977.

BOARD DECISION

The Board found that the totality of Respondent's conduct, viewed in the light of the Union's conduct, did not prove that Respondent was bargaining in bad faith. Although negotiations proceeded slowly, the parties appeared to be mutually responsible for the slow pace. The record generally contained insufficient evidence on which to base a finding of a violation. The ALO's conclusion with regard to "surface" or bad-faith bargaining was reversed and that portion of the complaint dismissed.

The Board affirmed the ALO's conclusion as to the unilateral wage increases and further concluded that these increases were direct negotiation with Respondent's employees. Such direct dealing by Respondent circumvented the exclusive collective bargaining representative in violation of section 1153 (e) and (a).

REMEDY

The Board ordered Respondent to bargain, on request, with the UFW over the wage increases and to post, read, and mail notices to its employees, admitting the violation. The make-whole remedy was found inappropriate since the wage increases brought the employees up to existing area wage rates.

DISSENT

Member Ruiz disagrees with the Board's finding regarding Respondent's bad faith bargaining. In his view, the totality of Respondent's conduct, in delaying the negotiations, refusing to agree even after a major union concession, and committing other unfair labor practices away from the negotiations, prove a violation of Respondent's duty to bargain in good faith.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the matter of:

Case No. 77-CE-188-D

KAPLAN FRUIT AND PRODUCE COMPANY,

Respondent,

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

DECISION

Charging Party,

_____/

STATEMENT OF THE CASE

This case was heard before me in Los Angeles and Fresno, California, on January 5, 10, 11, 12, 17, 18, 19 and 26, 1979. The hearing was held pursuant to the complaint issued by the Regional Director of the Fresno Regional Office on November 7, 1978, upon an unfair labor practice charge filed by the charging party, the United Farm Workers of America, AFL-CIO,(hereinafter the "UFW") on September 16, 1977.

The complaint, as amended at the hearing, alleges the refusal of respondent KAPLAN FRUIT AND PRODUCE CO., (hereinafter the "Employer"), to bargain collectively in good faith with the certified bargaining representative of its employees (the UFW) in violation of Section 1153(e) of the Agricultural Labor Relations Act (hereinafter the "Act"). During the hearing the complaint was amended by stipulation of the parties to strike Paragraph 7 c. and to add sub-paragraphs e and f to Paragraph 7. Paragraph 5 was amended to name the following persons as agents of the

Employer acting on its behalf: Al Caplan, negotiator; A. H. Caplan & Associates, negotiation representative; Michael F. Melman, negotiator; Mary Berra, bookkeeper; Milton Kaplan, corporation secretary-treasurer and director; Ray Bubar, corporation vice-president and director; John Bono, Sr. , manager, fruit division; Constantino Regaspi, supervisor/and Bert Berra, ranch manager.

All parties were given full opportunity to participate in the hearing and after the close thereof the General Counsel and the Employer each filed a brief in support of their respective positions. The Charging Party by letter to the hearing officer, dated March 9, 1979, stated its wish to concur in the findings and legal arguments as presented by the General Counsel in its brief. Upon the entire record, including my observations of the demeanor of the witnesses, and in consideration of the briefs filed by the parties, I make the following findings of fact, analysis and conclusions of law, and determination of relief.

I

FINDINGS OF FACT

A. Jurisdiction

Employer is a California corporation which operates a grape-growing enterprise in Tulare County and a wholesale produce marketing enterprise in Los Angeles. Employer admits at Paragraph 3 of its answer that it is a California corporation and an agricultural employer doing business in Tulare County in the State of California. I find that Employer is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I further find that the employees of Employer are agricul-

tural employees within the meaning of Section 1140.4(f) of the Act.

B. Alleged Unfair Labor Practices

The complaint as amended at the hearing alleges that Employer refused to bargain collectively in good faith with the UFW for the purpose of reaching agreement on wages, hours, and working conditions of its employees by: (1) refusing to meet with UFW representatives; (2) increasing the wages of its agricultural employees without negotiating with representatives of the UFW on June 1, 1978 and May 7, 1977; (3) cancelling scheduled meetings, refusing to schedule meetings in a timely manner, abruptly terminating meetings previously scheduled, and acting in other ways to prevent or delay reaching of agreement on particular subjects; (4) discharging Sylvestre Ramos and his crew because of their support of UFW; (5) failing to have negotiators who were sufficiently informed about the Employer's agricultural operations; and (6) bargaining directly in May 1977 and June 1978 with agricultural employees.

C. The Bargaining Sessions

Employer operates a fruit and vegetable buying and selling operation with a sales outlet in Los Angeles. Employer owns a grape growing operation in Tulare County which is the location of the employment of the agricultural employees represented by the UFW. The UFW was certified as the exclusive representative of all of Employer's agricultural employees on January 12, 1976. The complaint in this action was issued on November 9, 1978 as a result of charges filed by the UFW on September 16, 1977.

Negotations began in February 1976 when the UFW and Employer met for the first time. Sylvan Schnaittacher represented the UFW at the

initial meeting, Richard Chavez at the second meeting and Dolores Huerta became UFW spokesperson and continued in the role until August 1976. Other spokespersons for the UFW were Barbara Maori and Ken Schroeder.

Initially, the UFW bargained with Employer together with two olive growers, Burr and Derfelt. Later in the spring of 1976 at Employer's suggestion, its negotiations with the UFW were merged with those of three Delano grape growers with the approval of the UFW.

Joint negotiation sessions involving all six employers were held on July 1, 1976 and July 2, 1976. A session scheduled for July 14, 1976 was never held because it was cancelled on July 13, as a result of a call from A. H. Caplan & Associates, the Employer's negotiator. The next meeting was held on July 19 and thereafter another meeting was held on August 31. Al Caplan left the August 31 meeting early stating that he was reconsidering the question of whether he wanted to continue the joint negotiations. These joint negotiations were initiated at the suggestion of Mr. Caplan.

Caplan and Barbara Maori (the UFW negotiator, who began representing the union at the August 31 meeting) met at an unspecified date in September at which Maori made a proposal to the effect that if a worker became a supervisor for the company, thus leaving the bargaining unit, the supervisor would not retain seniority rights under the collective bargaining agreement. Caplan professed ignorance on this subject and said he would discuss it with representatives of the Employer.

The UFW and Employer did not meet again in September though Maori had called Caplan to schedule negotiating sessions for October 4

and 15. Caplan cancelled those two meetings a few days before they were scheduled to occur. Caplan's testimony about this cancellation is somewhat tortured in its attempt to lay responsibility for the cancellation on the UFW because of what Caplan claimed to be the UFW's unilateral selection of meeting dates. Caplan testified that after receiving the UFW's letter of September 29 confirming the meeting dates of October 14 and 15, he noted them in his appointment book. Caplan further testified that the meeting dates were unilaterally selected by UFW. However, his failure to notify the UFW of his inability to meet on those dates earlier than he did and the fact that he noted them in his appointment book is strong evidence that he concurred in the meeting times. Caplan's testimony that he did not cancel the meeting dates because they had not been firmly scheduled does not stand up against his apparent acquiescence in those meeting times.

When the UFW and Caplan finally next met on October 21, 1976, Macri again asked Caplan about the question of seniority for the supervisors Caplan told Macri that he had not discussed the subject with his client.

At that October 21 meeting Caplan told Macri that he would not be available to meet for three weeks for further negotiating sessions. On November 10, 1976, Macri wrote Caplan asking him to call her when he was ready to engage in further negotiations. Caplan responded to Macri's letter on November 12, 1976 by asking her to in turn call him and respond at her earliest convenience to his question regarding whether the UFW's request for an extension of its certification as Employers' employees' bargaining representative meant that "until the Board acts on the request for certification that you agree that the employer may not have an obligation to continue bargaining until the Board acts?" (See GC 4).

Caplan's November 12 letter contains no reference at all to his duty to continue to bargain with regard to Kaplan, though he acknowledged his obligation to continue to negotiate on behalf of Employer in his letter to Macri on December 3, when he again asked her to call him to set up an appointment for negotiations. In this fashion, Caplan postponed setting a specific date for negotiations for a period in excess of six weeks.

On December 9, 1976, Barbara Macri wrote to Caplan suggesting a meeting date after the 23rd of December because she would be busy in negotiations from December 13 to December 23. Finally on December 21, Caplan wrote Macri suggesting three alternative dates for continuation of negotiations, January 8, January 20, or January 21, 1977. A meeting was set for January 8, 1977, which was subsequently cancelled on January 7 by Caplan's secretary who called Macri to say Caplan was ill.

On January 21, 1977, Dolores Huerta replaced Barbara Macri as the chief negotiator for the UFW. The next meeting after January 21, was scheduled for February 26, 1977, and further meetings were scheduled for March 11 and 12, 1977. On March 6, Caplan cancelled the negotiations scheduled for March 11 and 12 because of the illness of John Bono, Jr., who Caplan in a letter to Dolores Huerta, dated March 8, 1977, stated was a "principal of Kaplan's Fruit and Produce Co." (See GC 11). However, Bono, Jr., was not at any time an officer of Employer or a stockholder and appears to have attended only two negotiating sessions prior to March 1977. Barbara Macri testified that she had never met Bono, Jr., during the five months in which she negotiated with Employer.

Caplan vetoed a suggestion for a meeting on April 8 and 9, 1977, because at least one of his clients could not make the meeting on make the meeting on April 8 because it was Good Friday. (See GC 12) Caplan

did not indicate why this unnamed person was necessary for the carrying on of negotiations.

On May 9, 1977, Caplan sent Dolores Huerta a letter informing her that Employer had raised its crews' wages to $3.15 an hour. Caplan 's letter stated that Employer's crews stopped working and that Employer was given no choice other than to give the raise in order for the work in its vineyards to proceed. There was testimony from Huerta that the UFW sent a letter of protest regarding the wage increase but no letter was produced by the UFW and Huerta's testimony regarding a conversation with Caplan about the granting of the increase was so sketchy that I am unable to make a finding that the UFW protested the wage increase.

Negotiating sessions were scheduled for May 27 and May 28 pursuant to a letter from Caplan to Ken Schroeder who was then representing the UFW. The UFW and Employer met on May 27 and for one-half hour on May 28 after which Caplan, announcing he had an emergency elsewhere, left.

At the May 28 meeting the UFW had attempted to schedule bargaining sessions for early June but was unsuccessful in obtaining an agreement from Caplan to meet until June 25 and 26. Caplan left the June 25 bargaining session at 2:00 p.m. saying that he had to leave for personal reasons and cancelled the session set for the 26th.

Further negotiation sessions were scheduled for June 23 and 24, 1977. On July 24, Caplan left the meeting after one hour again not explaining his early departure.

At the July 23 meeting Caplan asked Dolores Huerta for a union wage proposal which Huerta agreed to make if Employer would first respond to the UFW's fringe benefit proposals made during the early stages of negotiations. Caplan informed Huerta that he could not respond

to the fringe benefit proposals because he did not know the position of Employer's principals.

On August 31, 1977, Caplan rejected each of the UFW's fringe benefit proposals. At that meeting, the UFW made its first wage proposal. The Employer then responded with its first wage proposal the level of which was that to which it had raised wages on May 7, 1977.

At the August 31 meeting, the Employer and UFW agreed to meet on September 9, 1977. That meeting began at 10 a.m. and lasted until approximately 1:30 p.m. at which time Caplan again left early.

At the next meeting held on October 5, the Employer's vacation proposal was discussed and the UFW asked Caplan exactly how many individuals would benefit by Employer's proposal which qualified employees with over 1,750 hours of work for-vacation benefits. Caplan was unable to answer this question but responded to it in a letter dated October 20, 1977, in which he indicated only that two of the Employer's employees qualified for vacation benefits under the proposal.

I find the testimony of Dolores Huerta that Caplan walked out of the October 5, 1977, meeting credible. Huerta testified that Caplan stated that the parties were at an impasse on the hiring hall and that he was going to give the UFW his final position on the items being negotiated. When Caplan left the meeting Ken Schroeder, Huerta's assistant, ran down the corridor after him to attempt to get him to return. Caplan did not return but stated that if the UFW desired to communicate with the Employer it should send its proposals.

No meetings were held between the UFW and the Employer between October 5, 1977 and January 14, 1978. In mid November 1977 the

UFW began a boycott centered upon Employer's sales outlet in Los Angeles. During that time Huerta met with officers of Employer without Caplan, at Employer's invitation.

At the January meeting the UFW proposed a change in its position on the hiring hall suggesting the language of the Vener (another agricultural employer with whom the UFW had negotiated a contract) contract proposed by Caplan in July of 1977. Caplan did not agree to the use of the Vener language, however. I find the testimony of Dolores Huerta credible when she states that the UFW did not regard the Vener hiring hall proposal as reflecting a mandatory hiring hall.

The next bargaining session scheduled between Huerta and Caplan was for March 20, 1978 in Los Angeles. The March 20 meeting was scheduled for 2:00 p.m. Huerta called the UFW office in Los Angeles to inform them she would be late in arriving at the meeting and to send a messenger to inform Caplan of her delay. The person sent, Laurence Frank, arrived at the meeting location' approximately ten minutes before Caplan who arrived at 2:00 p.m. Frank informed Caplan of the delay. Caplan left immediately, telling Frank to have Huerta call his office, which would know where he was, so that they could meet later than day or reschedule the meeting.

Huerta's last negotiation session with Caplan took place on April 19, 1978. At that meeting Caplan made a wage proposal of $3.30 per hour. On June 1, 1978, Huerta received a letter from Caplan stating that all Employer's employees had walked off the job and refused to work without a wage increase. The letter stated that an increase had been given but did not state the amount. The UFW does not appear to have

protested this wage increase, verbally or in writing.

At a negotiation session held on June 14, 1978, Ken Schroeder took over as the UFW negotiator. Schroeder had accompanied Huerta at previous negotiation meetings.

Caplan and Schroeder scheduled a meeting for July 27, 1978 which was cancelled and rescheduled at Caplan's request for August 4. That meeting again was rescheduled at Caplan's request for August 11, 1978. At that August 11 meeting, Caplan told Schroeder that he could not meet again until early September. Caplan and Schroeder met on September 1, at which time Caplan informed Schroeder that Michael Melman would be taking over Caplan's role in negotiations. Schroeder spoke with Melman at the September meeting about the scheduling of subsequent bargaining sessions. Melman and Schroeder scheduled meetings for September 12 and 19, but the September 12 meeting was not held because it was cancelled by Melman.

At the September 19 meeting, Melman proposed that Employer provide vacation pay for workers who had accumulated more than 1700 hours working for Kaplan's during the previous year. Schroeder told Melman that the Employer had already proposed at the June 14, 1978 meeting that workers who had accumulated 1500 hours or more receive vacation pay. At the conclusion of the September 19 meeting, Schroeder suggested that as it was still harvest time the parties meet again soon, Melman suggested that sessions be scheduled for the October 12 and 13, more than six weeks away. A meeting was held on October 9 at which Schroeder attempted to schedule meetings beyond the 23rd of October but he received no cooperation from Melman. At the October 23 meeting

Melman stated that since John Bono, Jr., had been hospitalized with a heart attack he was unable to schedule further meetings as he needed to talk to Bono first.

D. The Wage Increases

On May 9, 1977, Caplan wrote Dolores Huerta informing her that wages had been raised for Employer's crews to $3.15 per hour. In his letter to Huerta, Caplan stated that the Employer had no choice in the matter since "time was of the essence" and the wage increase was necessary in order that work in the vineyards proceed. (See GC 13).

The UFW was informed of the 1978 wage increase in much the same manner as it had been informed of the 1977 increase. On June 1, 1978, Huerta received a letter from Caplan stating that all of Employer's employees "walked off the job and refused to work unless they received a wage increase." (See GC 17). Caplan stated that since the season was a critical one in the agricultural practice the Employer had no choice but to grant its employees' demand.

In both 1977 and 1978, the wage increases came about as a result of field supervisor Constantino Regaspi receiving questions from workers in his crew about wage increases. I find the testimony of Regaspi credible with regard to the circumstances under which the 1977 and 1978 wage increases were granted.

Regaspi contacted Burt Berra, Employer's ranch manager, after members of his crew asked for an increase in wages in May 1977. Regaspi testified that members of his crew "walked out" in 1977 because they were not receiving the area wage. Regaspi told Berra of the walkout. Berra told him that he would have to check first as to whether an

increase could be granted. Berra then told Regaspi to go ahead and grant the 1977 wage increase.

There was extensive testimony by Bert Berra that May and June of the Employer's agricultural year are times when the type of pruning which is done to the grapevines must occur within a fairly rigid time frame or the quality of the crop suffers.

Regaspi testified that in 1978 his crew again walked out and he again contacted Bert Berra. In 1978, Regaspi left the field (in 1977 he had discussed the questions with Berra in the field) and sought Berra out at Mountain View Vineyards.

Regaspi testified that he was unable to make a determination on his own to increase his crew's wages. It is not clear from Regaspi's testimony exactly what was the nature of the "walkout" which occurred in 1978. Regaspi testified that his crew walked out but that they did not leave the field but instead waited from about 8 o'clock in the morning until 9 o'clock when Regaspi returned from talking to Bono and told them that they had received a wage increase.

Berra's testimony is consistent with that of Regaspi regarding the 1977 and 1978 wage increases. Berra was told by Regaspi in May 1977, that Regaspi's crew was going to walk out. When Berra arrived in the fields the crew was gone. Berra testified that after he was told by Regaspi that the employees would not return to work unless they received the area rate, he called John Bono, Jr., who contacted his father Bono, Sr., who contacted Caplan. Berra testified that he was told by someone to grant a raise to the area's going rate, which was $3.15 an hour. Berra testified that he checked into the area's rate on the day

that Regaspi's crew walked out by calling neighbors to determine what they were paying.

Berra testified that in 1978 he was talking to John Bono, Jr., and Sr., when Regaspi came and told them that the workers had gone home after requesting a wage increase. Regaspi testified that one of the Bonos called Caplan and asked him what to do about the workers' requested wage increase. Berra further testified that Bono indicated the wage increase should be granted after he talked to Caplan, at the level of $3.50 an hour, the going rate in the neighborhood.

There was testimony from Berra that in May 1975 Regaspi told him that his crew wanted a raise and if they didn't receive one they would walk out. Berra testified that he went to make a telephone call to find out if a raise could be granted and then called Regaspi back later that day to tell him that a wage increase would be granted. Berra testified that similar circumstances prevailed in 1976; that Regaspi went to Berra and asked for a wage increase for his crew; that Berra called Bono, who approved the increase; and, that Berra then informed Regaspi of the increase. Berra, however, overheard none of the conversations between Regaspi and members of his crew with regard to wage increases in either 1976, 1977, or 1978.

Berra also testified that a wage increase was given in May of 1973 to $2.15 an hour, the going rate in the area in which the Employer farmed. This was a result of Ramos, the crew boss in 1973, asking for a raise in his crew's wages.

Berra also testified that in 1974 he was approached by the crew boss for a wage increase in May and that a wage increase was granted

to the going rate in the neighborhood upon obtaining the approval of John Bono, Sr.

E. The Firing of Silvestre Ramos and His Crew

On May 24, 1979, the Agricultural Labor Relations Board adopted the recommended order of the hearing officer as modified in Kaplan Fruit and Produce Co., Inc., aka Kaplan Ranch, Case No. 76-CE-7-F (5 ALRB No. 40), in which it was found that the Employer had interfered with its employees in their exercise of their Section 1152 rights by discharging Silvestre Ramos, a crew boss. The hearing officer found that Ramos had been discharged on January 3, 1976, four months after a representation election among the agricultural employees of Employer in which sixty-one of one hundred ninety person voted for the UFW (37 voted for the Teamsters, five for "no Union" and 14 were unresolved challenged ballots).

With regard to the Ramos discharge, the hearing officer stated:

> The implication is clear. Sooner or later the respondent would have to bargain in good faith with the UFW and a mass discharge would be demoralizing and would sap the strength of the union. However, it would be necessary to prove that Kaplan's motivation in discharging Ramos was to interfere with the crew members', Section 1152, rights. In a real sense, the target would not be confined to the Ramos[1] crew members, but would extend to all agricultural employees of Kaplans, because its discriminatory motives would have a chilling effect on all of them. 5 ALRB No. 40 at 38.

The hearing officer found that a substantial reason for the discharge of Ramos was Employer's anti-union animus which manifested itself in the firing of Ramos' pro-UFW crew thereby chilling union activities and handicapping the UFW in the exercise of its functions as a labor organization. (See 5 ALRB No. 40 at 40).

F. The UFW's Inflexibility on the Hiring Hall

From early 1976 until 1978 the UFW proposed that the Employer do its hiring through a union hiring hall. The Employer opposed the institution of a union hiring hall because of its dissatisfaction with the operation of the hiring hall under its previous contract with the UFW.

In July 1977, Caplan proposed that the Employer's contract incorporate the language from the Samuel Vener contract. This contract, entered into in April 1977 as evidenced by R 13, contains a mandatory hiring hall. There was testimony by Dolores Huerta that the Vener contract contained permissive language and testimony from Caplan that the language called for a mandatory hiring hall. It appears that Caplan proposed the language of the Vener agreement in July of 1977, in apparent irgnorance that the hiring clause provided for a mandatory hiring hall. In any event, in January 1978 the UFW offered to accept the language of the Vener agreement proposed earlier by Caplan. Caplan then backed away from his July 1977 proposal. In June 1978, the UFW changed its position again and proposed a central company hiring facility over which the UFW would have no control. However, the Employer did not accept this proposal.

II

ANALYSIS AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent, Kaplan Fruit and Produce Co., is an agricultural employer within the terms of the Act, the UFW is a labor organization representing respondent agricultural employees within the meaning of the Act, and

the employees are agricultural employees within the meaning of the Act. B.

Scheduling and Attendance at Bargaining Sessions

The Employer argues in its brief that bargaining sessions were not cancelled because of a desire to avoid bargaining or out of hostility towards the UFW. Yet, the long series of cancelled meetings and meetings cut short because Employer's negotiator did not, for a variety of reasons, have time to bargain, indicates that Employer was engaging in dilatory tactics which effectively prevented any concentrated series of negotiation sessions from occurring.

The series of letters between Caplan and the union's negotiator, Barbara Maori (GC 3 through 7) in which Macri attempted to schedule sessions between October and December, 1976 are evidence of this dilatory course of conduct. After the last meeting in October of 1976, it was decided between Macri and Caplan that he would call her to schedule further meetings as he was in doubt about his obligations to continue to bargain with regard to the two other employers he was currently representing, Burr and Durfelt. Caplan never called Macri however, and to each of her letters requesting that he call, he made non-responsive statements, first ignoring his obligations to respond with regard to Employer altogether (GC 4) and second, asking her to call him to determine meeting times (GC 6) when he had already committed himself to call her. Employer's negotiator was indeed playing a cat and mouse game with the UFW.

The comments made by the National Labor Relations Board in Reed & Prince Manufacturing Co. with regard to an employer's approach to labor negotiations remain an accurate measure of an employer's good faith in the bargaining process. There the Board stated:

> [T]he negotiation of a collective bargaining agreement is as important as any business transaction. Accordingly the respondent's good faith in the present instance may be tested by considering whether it would have acted in a similar matter in the usual conduct of its business negotiations. Reed & Prince Manufacturing Co., 96 N.L.R.B. No. 129, 850, 853 (1951), enforced N.L.R.B. v. Reed S Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953).

Clearly Employer would not have treated its business contacts in the fashion it treated the UFW by repeatedly cancelling one day of two day negotiating sessions and cutting sessions remaining short so that little could be accomplished. Here Employer's negotiator was able to drag negotiations out over a period of three years by engaging in the tactic of scheduling a meeting, cancelling the meeting, then indicating to the UFW that it would be in touch regarding a new meeting date or writing the UFW to suggest that it contact the Employer's negotiator to schedule a new meeting date, and then, showing up at the meeting only to stay a few hours. Refusal to bargain in good faith may be predicated on such dilatory tactics. See Exchange Parts Co., 139 N.L.R.B. 710, (1962) enforced N.L.R.B. v. Exchange Parts Co., 339 F.2d 829, rehearing denied 341 F.2d 584, (5th Cir. 1965), and I so find.

In addition, I find that Employer has refused to bargain in good faith with the UFW by failing to provide negotiators sufficiently informed about Employer's operations to enable effective bargaining to go forward. At a meeting on August 31, 1976, the UFW negotiator, Macri, proposed that if a worker became a supervisor for the Employer, thus leaving the bargaining unit, he should not retain seniority rights under the collective bargaining agreement. Employer's negotiator professed ignorance as to whether this was a standard provision in agricultural labor contracts and said that he would need to discuss it with the Employer. However, a full

month later, on October 21, 1976, when the subject was again discussed he had still not informed himself as to the practices with regard to agricultural labor contracts or the desires of his client.

Another instance in which Employer's negotiator's lacadasical approach to this bargaining process is evidenced by his position on vacation benefits for employees. On September 9, 1977, Caplan proposed a plan whereby all agricultural employees with 1,750 hours or more of work would be entitled to vacation benefits but he didn't know how many employees would qualify under such a plan. Over five weeks later in a letter to Huerta, Caplan indicated that only two employees had worked more than 1,750 hours in the last year. Clearly, if Caplan had been aware of his facts, his proposal would have appeared ludicrous even to him, but his failure to know his facts meant that the UFW wasted time discussing an essentially meaningless proposal.

Caplan's lack of preparedness is also pointed out by his proposal that the UFW accept the language of the Vener contract instead of a mandatory hiring hall. Apparently Caplan did not understand that the. Vener contract provided for a mandatory hiring hall or, alternatively, he simply had not taken the time to read it to prepare himself for negotiations. These instances of the failure of Employer's negotiator to be adequately prepared to discuss bargaining issues is further evidence of the lack of intent on the part of the Employer to bargain in good faith with the UFW.

C. The Discharge of Silvestre Ramos and His Crew

Section 1160.2 of the Act precludes the finding that conduct occurring more than six months prior to the following of an unfair labor practice charge is, as a substantive matter, an unfair labor practice. The firing of Silvestre Ramos and his crew occurred on January 3, 1976, more

than a year and a half before the filing by the UFW of the unfair labor practice charges which were the subject of this hearing. Clearly, the firing of Ramos and his crew is outside that six month period. Also, the conduct of the Employer surrounding that firing has already been the subject of proceedings before the Agricultural Labor Relations Board and is the subject of findings adopted by the Board. The question here is not whether the firing of Ramos and his crew is conduct which, in the context of this hearing, may be found to be an unfair labor practice, but whether the decision of the Board in 5 ALRB No. 40, in which it was found that the firing was an unfair labor practice, may be used here as evidence of anti-union animus.

The United States Supreme Court in Local Lodge No. 1424 v. The National Labor Relations Board, 362 U.S. 411 (1960) ruled that conduct occurring outside the six month period may be used to "shed light on the true character of matters occurring within the limitations period." 362 U. S. at 416.

The National Labor Relations Board has taken official notice of its own proceedings and decisions and the California Agricultural Labor Relations Board has recently followed in that approach. See Seine and Line Fisherman's Union of San Pedro, 136 NLRB No. 2, 1 (1960), affirmed 374 F.2d 974 (9th Cir. 1967); Westpoint Manufacturing Co., 142 NLRB No. 126, (1963). In Sunnyside Nurseries, Inc., 4 ALRB No. 88 (1978) the hearing officer took administrative notice of the record and Board opinion in an earlier decision involving unfair labor practices committed by the same employer immediately before and after the election which was the subject of the later decision.

Judicial notice is here taken of the findings of the Board in 5 ALRB No. 40 that Employer, in firing Sylvestre Ramos and his crew, engaged in an unfair labor practice violative of the rights of its employees under the Act. The firing of Sylvestre Ramos and his crew is evidence of the anti-union animus of Employer which serves to shed light on the intentions of the Employer in engaging in dilatory tractics in the scheduling of and attendance at negotiating sessions with the UFW. See National Labor Relations Board v. Mueller Brass Co., 509 F.2d 704 (5th Cir. 1975) in which the taking of notice of an earlier decision to supply a background of anti-union animus to shed light on conduct charged to be an unfair labor practice was upheld.

D. The Wage Increases

Whether the granting of a wage increase during the collective bargaining process will be found to be a failure to bargain in good faith under the Act may not be determined merely upon the basis of whether an employer consulted with the union and obtained the union's agreement to the increase. Determination of whether a unilateral wage increase will be found to be inconsistent with a sincere desire to conclude agreement with a union must take into consideration whether the purpose of granting the wage increase is to discourage and frustrate the statutory right of employees to bargain collectively. In N.L.R.B. v. Dothan Eagle, Inc., 434 F2d 93, 98, (5th Cir. 1970) the court, in reviewing an employer's refusal to grant wage increases during an election campaign and refusal to grant wage increases to some employees thereafter while granting increases to others, stated:

> The issue under the Act is therefore whether in form and in purpose the withholding or conferring

> of economic benefits was to discourage and frustrate the statutory right of employees freely to organize and bargain collectively. Quoting N.L.R.B. v. Porn's Transportation Co., 405 F.2d 706 (2nd Cir. 1969).

One issue which must be analyzed in reviewing unilateral wage increases of the sort granted by Employer in the instant case is whether the employer has changed the existing conditions of employment in granting the increase. If an employer has an established policy of granting a wage increase which is widely known and has been in effect for a considerable length of time, he may be guilty of seeking to weaken the union by, in effect, taking reprisal for the union's victory in achieving the status of bargaining representative for its employees.

Employer here had granted its agricultural crews wage increases in May or June of each year since 1973. These increases always resulted from the same process. The employees would ask their crew boss to intervene with Bert Berra to request that they be paid the going rate in the neighborhood. Berra would consult with upper-level management and upon obtaining its approval check with neighboring employers to determine the area rate. The employees would then receive a wage increase to the area rate.

In Plasticrafts, Inc., v. NLRB, 586 F.2d 185 (10th Cir. 1978), an employer did not give increases during representation proceedings or collective bargaining even though his employees sought the increases and in the past he had given periodic wage increases, though not pursuant to any fixed schedule.

The court there stated:

> When it would not be clearly apparent to a reasonable employer whether it had an established practice with regard to wage increases, then an unfair labor practice violation is not shown unless there is an adequately supported finding that the

employer was motivated by anti-union sentiments. Id. at 188.

In the instant case the Employer could reasonably argue that it was not readily apparent whether it had an established practice with regard to wage increases. While there was no written policy with regard to these increases, they had been given in every year since 1973 and had always been given after the crew members made their request in May or June.

The question becomes whether the anti-union animus demonstrated by the firing of the Ramos crew and the failure of the Employer to schedule and attend bargaining sessions in any other than a dilatory manner, supports a finding that Employer's granting of the increases had as a purpose the frustration of the statutory right of Employer's employees to bargain collectively.

The motivation of Employer may be determined from an assessment of the effect of the granting of the wage increases upon the bargaining process. The wage increases here in issue were the only increases received each year by the employees. Since the UFW had no notice of the wage increases it was not in a position to utilize its bargaining power, inherent in the Employer's critical need for the presence of its employees in the field during May and June, to encourage the Employer to reexamine and possibly improve proposed increases. The failure of the Employer to notify the UFW, in effect, undermined the authority and defeated the very purpose of the Act to encourage collective bargaining by the Employer with his employees. In Oneita Knitting Mills, 205 NLRB No. 76, 500 (1973), the Board noted that even where an employer has a past history of merit increases, he neither may discontinue that program nor may he continue to unilaterally exercise his discretion with respect to those increases once an

exclusive bargaining agent has been selected.

> What is required is the maintenance of pre-existing practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is to be consulted.

Clearly here the UFW was entitled to be consulted with regard to the timing and amounts of the wage increases and the Employer may not be heard to complain that the emergency created by the timing of the request for increases obviated the need for that consultation. There was nothing to prevent the Employer from anticipating that its agricultural employees would seek an increase as they had in previous years. The failure of the UFW in either 1977 or 1978 to loudly protest these increases does not remove the obligation upon the Employer to consult with the UFW about the timing and amounts of these yearly wage increases. I therefore find that by granting unilateral wage increases in 1977 and 1978 Employer refused to bargain in good faith under the Act.

The bad faith of the Employer's refusal to bargain collectively with the UFW with regard to the wage increases is underscored by the fact that it dealt directly with its employees regarding the wage increases. Plastic Transports, Inc., 193 NLRB No. 10, 54 (1971). Employer's failure to deal only with the designated bargaining representative of its employees, coupled with the granting of the wage increases with out prior notification of the UFW violates the basic purpose of the Act.

III

REMEDY

Having found that the Employer has engaged in certain unfair labor

practices in violation of Sections 1153(e) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policy of the Act.

In addition to recommending that Employer be required to bargain in good faith with the UFW with regard to wages, hours, and other terms and conditions of employment, I shall recommend that Employer's employees be made whole for any losses they may have suffered as a result of Employer's failure to bargain in good faith.

Upon the basis of the foregoing findings of fact and conclusions and analysis of law and the entire record in this proceeding and pursuant to the provisions of Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Respondent, Kaplan and Produce Co., Inc., its officers, partners, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with the UFW as to meeting at reasonable times and conferring in good faith with regard to wages, hours, and terms and conditions of employment of its agricultural employees.

(b) Granting wage increases or other changes in the terms and conditions of employment of its agricultural employees without first notifying the UFW and giving it a reasonable opportunity to respond.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain in good faith with the Union as the certified bargaining representative of its agricultural employees

(1) regarding current and future wages, hours and other terms and conditions of employment, (2) regarding the amount, effective date and other terms and conditions of the wage increase unilaterally granted to agricultural employees in May 1977 and June 1978, and (3) regarding wages and other applicable terms and conditions of employment for the period from March 16, 1977, the time that bargaining for current and future matters is consummated; and if an agreement is reached as a result of this bargaining, to embody such agreement in a written and signed contract.

(b) Make whole all agricultural employees employed by Respondent between March 16, 1977 and the date upon which the Respondent commences bargaining in good faith for any loss of wages incurred by them as a result of Respondent's failure to bargain in good faith.

(c) Mail to each agricultural employee employed by Respondent from March 16, 1977 to the date of such mailing, a copy of the attached Notice to Employee. Said Notice shall be in English and Spanish, signed and dated by a representative of Respondent and in a form approved by the Board's Regional Director.

(d) Post such Notice immediately for a period of not less than one hundred twenty days (120) at locations at Respondent's place of employment where notices to employees are customarily posted, such locations to be determined by the Regional Director.

(d) Notify the Regional Director, in writing, within twenty days (20) from the date of this Order what steps have been taken to comply herewith.

Dated: August 21, 1979

Leonard M. Tillem
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial in which each side had a chance to presents its facts, the Agricultural Labor Relations Board has found that we have refused to bargain in good faith with the United Farm Workers of America, AFL-CIO, as a certified bargaining representative of our agricultural employees. The Board has told us to send out this Notice to all agricultural employees who have worked for us since March 16, 1977. We will do what the Board has ordered and we hereby state to our employees the following:

1. We will, upon request, bargain in good faith with the United Farm Workers of America, AFL-CIO, as a certified bargaining representative of all of our agricultural employees concerning wages, hours of work, and other terms and conditions of employment covering the time from March 16, 1977 to such times as bargaining on these matters is completed. If an agreement is reached as a result of this bargaining we will put it in writing and sign an agreement;

2. We will pay all agricultural employees for any loss of wages they may have had since March 16, 1977, if any, after this has been determined in good faith bargaining with the UFW;

3. We will not make any changes in wages, hours of work or other terms and conditions of employment of our agricultural employees without notifying and consulting with the UFW, the certified bargaining representative of these employees.

Dated: _____

KAPLAN FRUIT AND PRODUCE CO., INC.

By _____

This is an official NOTICE of the Agricultural Labor Relations Board, an Agency of the State of California.