Santa Maria, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AS-H-NE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 78-CE-l-SM 6 ALRB No. 9

ERRATUM

In Hickmott Foods, Inc., 242 NLRB No. 177 (1979), the NLRB announced that it would not issue a broad cease and desist order except when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees ' fundamental statutory rights. We intend to follow this standard, and we hereby substitute the following for Paragraph l(g) of the Board's Order :

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

Dated: February 26, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

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DECISION AND ORDER

On November 27, 1978, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision in this proceeding, in which he concluded that Respondent had violated Section 1153 (e) and (a) of the Act by failing and refusing to furnish the United Farm Workers of America, AFL-CIO (UFW), the certified bargaining representative, with the addresses and dates of hire of its employees . The ALO recommended that the employees be made whole for the period during which Respondent failed and refused to provide that information to the UFW.

Thereafter, the General Counsel and Respondent each filed exceptions with a supporting brief and a brief in reply to the other ' s exceptions.

The Board has considered the record and the attached 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 opinion.

The parties' exceptions to the ALO's Decision raise

fundamental questions about the bargaining obligation imposed by the Act. General Counsel challenges the ALO's conclusion that Respondent's "general course of conduct" did not constitute a refusal to bargain in good faith. Respondent contends that the totality of its conduct demonstrates that it complied with its duty to bargain in good faith.

Good faith collective bargaining requires the agricultural employer and the representative of its employees :

> ... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. [Labor Code §1155. 2 (a).]

The basic principles which we must apply to allegations of surface-bargaining violation are set forth in our decisions in 0. P. Murphy Produce Co., Inc. dba O. P. Murphy & Sons, 5 ALRB No. 63 (1979), and Montebello Rose Co., Inc. et al., 5 ALRB No. 64 (1979). We must determine by examining the totality of its conduct whether Respondent acted with "a bona fide intent to reach an agreement if agreement is possible." Atlas Mills, 3 NLRB 10, 1 LRRM 60 (1937); West Coast Casket Company, 192 NLRB 624, 78 LRRM 1026 (1971), enf'd in part 469 F. 2d 871, 81 LRRM 2857 (9th Cir. 1972).

Background

This is the second time that Respondent has been before us. Our decision in the earlier case, AS-H-NE Farms, 3 ALRB No. 53 (1977), arose out of the CTFW s organization

of Respondent's employees in 1975. In that decision, Respondent was found to have violated Section 1153(c) and (a) of the Act by discharging union sympathizers and by distributing and soliciting its employees to sign an agreement not to join a union. Statements made by George Neidens, president and principal owner of Respondent, found in the earlier case to be violations of Section 1153(a) of the Act, included an announcement to his assembled employees that he had not signed any contract with a union and he had no intention of doing so. These prior unfair labor practices serve as background for the instant case. See Heck's Inc., 172 NLRB 2231, 69 LRRM 1177 (1968), affirmed 433 F. 2d 541, 74 LRRM 2109 (D.C. Cir. 1970), and Crystal Springs Shirt Co., 229 NLRB 4, 95 LRRM 1038 (1977).

In December 1976, a representation election was held among Respondent's employees. After the tally of ballots revealed that the UFW had won the election, Peter Cohen, the union negotiator, approached Neidens, who said, "[I]t's not much of a mandate, and we'll see what happens when we try to negotiate a contract." Subsequent developments appear to have validated the prophetic implications of this comment.

Access and Refusal to Provide Employees' Addresses

The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on March 31, 1977, and requested an initial meeting and bargaining information on April 7. On June 16, the UFW requested access to Respondent's property to speak with its employees. Neidens

denied the request. The UFW renewed its request on July 14, and again was denied access. On July 18, when Cohen reiterated the request, Neidens referred him to Fred Morgan, Respondent's attorney. When Cohen called Morgan, however, the attorney told him that it was "George's decision," referring to Neidens.

Throughout the negotiations, the union repeated its request for access to the employees, in order to consult with them about the bargaining. All of the requests were rebuffed. During the first negotiation meeting, on July 26, 1977, Respondent rejected a proposal that Cohen be allowed to meet with employees, during their lunch period, in the company parking lot. At the third meeting, on September 28, Respondent submitted a counterproposal on access which Cohen agreed to accept if Respondent would implement the plan immediately. Neidens refused, stating that the access provision would not be put into effect until final agreement on a complete contract.

In O.P. Murphy Produce Co., Inc., 4 ALRB No. 106 (1978), we held:

> A certified bargaining representaive is entitled to take post-certification access at reasonable times and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit. Where an employer does not allow the certified bargaining representative reasonable post-certification access to the unit employees at the work-site, henceforth such conduct will be considered as evidence of a refusal to bargain in good, faith.

We issued O.P. Murphy Produce Co., Inc., supra on December 27, 1978. As our holding concerning post-certification access had not yet been enunciated at the time of the events herein, we

do not find that Respondent's denial of access was in itself a violation. We do find, however, that Respondent's reaction to the union's repeated requests for access indicates an effort to cause delay and- to prevent communication between employees and their certified collective bargaining representative.

Respondent's denial of access to the union was compounded by its refusal to provide the UFW with its employees' addresses. We affirm the ALO's conclusion that Respondent's refusal to provide the UFW with the employees' addresses violated Section 1153(e) and (a) of the Act. Repeated requests for the addresses brought responses that the union could obtain them from the employees themselves or that the Respondent was protecting its employees' right of privacy. The NLRB has held that employers are obligated to provide the addresses of the employees in the bargaining unit upon request of their collective bargaining representative. Autoprod, Inc., 223 NLRB 773, 92 LRRM 1076 (1976); Sumner Home, 226 NLKB 976, 93 LRRM 1489 (1976), modified 599 F. 2d 762, 101 LRRM 2494 (6th Cir. 1979). The employer must supply information which is necessary and relevant for collective bargaining. CNA Insurance Co., 235 NLRB No. 181, 98 LRRM 1254 (1978); Wagner Electric Corp., 232 NLRB 780, 97 LRRM 1335 (1977).

Combined with its denial of access, Respondent's refusal to provide addresses of employees for approximately 10 months clearly restricted the UFW's ability to communicate with the employees, deprived the union of its right to involve the employees in the bargaining process, and frustrated efforts to achieve an agreement. We find that Respondent's conduct in

relation to access and employee addresses is evidence of its bad faith approach to negotiations.

Information and Counterproposals

In reviewing Respondent's conduct during the contract negotiations, we find that it consistently refused and delayed in providing information and in submitting counterproposals. In addition, it often refused to provide information which later proved relevant and necessary to the union's understanding and replying to Respondent's counterproposals.

General Counsel excepts to the ALO's findings that Respondent did not delay or fail to provide information. We find merit in this exception. Respondent delayed producing information requested by the union during the course of negotiations, including: the race, sex, and age of employees; dates of hire; social security numbers of employees; pesticides and crops; information about companies with which Respondent was connected; and supervisors doing bargaining-unit work. We disagree with the ALO's finding that the information was provided when requested or shortly thereafter, and with his reliance on the General Counsel's failure to show that "the delay in furnishing such information slowed down negotiations. The General Counsel must show only that the information was necessary and relevant for collective bargaining, not that delay in providing such information impeded, negotiations. East Dayton Tool and Die Company, 239 NLRB No. 20, 99 LRRM 1499 (1978).

Information of the type requested herein by the UFW has been held to be data necessary and relevant for collective

bargaining by the NLRB. Universal Building Services, Inc., 234 NLRB No. 82, 97 LRRM 1376 (1978) (supervisors doing bargaining-unit work); Westinghouse Electric Corporation, 239 NLRB No. 19, 99 LRRM 1482 (1978) (race, sex and age of employees)? Andy Johnson Co., Inc., 230 NLRB 308, 96 LRRM 1366 (1977) (social security numbers).

Respondent's delays in providing the requested information ranged from three months for information on the race, sex, and age of employees to almost one year for information about supervisors. The NLRB has held that this type of delay is indicative of bad faith. International Union of Operating Engineers, Local 12, 237 NLRB No. 204, 99 LRRM 1196 (1978) (six-week delay); The Colonial Press, Inc., 204 NLRB 852, 83 LRRM 1648 (1973) (two-month delay); and Ellsworth Sheet Metal, Inc., 232 NLRB 109, 94 LRRM 1256 (1977) (three-month delay).

General Counsel also excepts to the ALO's finding that Respondent did not delay in providing economic data. On April 7, 1977 the UFW first requested information relevant to collective bargaining, including economic data. On April 25, 1977, Respondent provided the UFW with a general breakdown of its pay schedule. On July 18, 1977, the UFW reiterated its request for information, expressly stating that it required more extensive economic data. On July 26, 1977, at the first negotiation meeting, Neidens informed Cohen that his staff would begin compiling the economic information, adding that his staff had other work to perform and that the job would increase their workload. Neidens also questioned the priority of the union's request with respect to his

office's other work. Respondent eventually provided the requested economic data during the course of the next four meetings on September 20 and 28, November 2, and December 7, 1977. We find that Respondent's failure to begin compiling the data until July 26, 1977, constituted inexcusable delay.

General Counsel further contends that Respondent was dilatory in submitting counterproposals and that its overall conduct indicates a lack of good faith. We agree. The union included a contract proposal on noneconomic items with its initial request for bargaining and information, which was sent to Respondent on April 7, 1977. At the second bargaining meeting, on September 20, 1977, the parties reviewed the union's initial proposal. Respondent rejected out of hand, without any explanation or counterproposal, many of the more significant items, including subcontracting, seniority, and successorship. Moreover, Neidens was not prepared to review all of the union's proposal at that time. Respondent stated that it would have a written counterproposal to a "considerable amount" of the union's proposal by the next meeting.

Respondent 'did present a partial counterproposal at the third meeting. Neidens stated, however, that the counterproposal was "rough" in that Respondent's attorney, Morgan, had not yet even seen it. In this counterproposal, some important articles., including union security and seniority, were dealt with only summarily.

Respondent eventually submitted the balance of its noneconomic counterproposals during the course of the next three

meetings, on September 28, November 2, and December 7, 1977. Although the UFW had submitted a comprehensive proposal to Respondent on January 25, 1977, Respondent did not present its counterproposals until March 11 and June 8, 1978.

The record thus reflects that Respondent required at least seven months to submit counterproposals to the noneconomic items, and another five-and-one-half months to prepare a response to the economic items. We find such a delay to be further indication of a bad faith approach to negotiations. See Lawrence Textile Shrinking Co., Inc., 235 NLRB No. 163, 98 LRRM 1129 (1978).

We find that in several different subject areas, the Respondent's refusals and delays in providing information were especially problematic. For example, during the period in which Respondent was refusing to provide information on dates of hire it submitted its seniority counterproposal, which required a knowledge and consideration of the dates of hire. Respondent continued in its refusal to provide any information on dates of hire until after the charge herein was filed. The parties did reach tentative agreement on this issue on April 27, 1978.

Respondent excepts to the ALO's finding that it violated Section 1153(e) and (a) of the Act by refusing to provide the UFW with the employees' dates of hire, arguing that the union had been able to make an initial proposal before the dates of hire were provided and that there is no evidence that the union actually used the information it finally received to change its position. This argument has been rejected by the NLRB and the courts. In Sun Oil Company of Pennsylvania, 232 NLRB 7, 96 LRRM 1484 (1977), the NLRB

found that merely because the union submitted wage proposals and accepted proposed contract terms does not establish a clear and unmistakable waiver of its right to information. Moreover, information is not made irrelevant simply because a union is able to negotiate a contract without the requested data. NLRB v. Fitzgerald Mills Corporation, 313 F. 2d 260, 52 LRRM 2174 (2d Cir. 1963), enforcing 133 NLRB 877, 48 LRRM 1745 (1961), cert, den'd., 375 U.S. 834, 54 LRRM 2312 (1963).

Respondent also failed to provide information concerning the pesticides it uses in its agricultural operation. In the context of agricultural employment, where pesticides are so often used and may affect the health and safety of employees working with or near them, pesticides and chemicals constitute a mandatory subject of bargaining. As such, information about pesticides is relevant and necessary for meaningful collective bargaining. In this case, Respondent not only failed to provide the pesticide information but also proposed a contract provision which would allow it to subcontract out its pesticide work, thus compounding the effect of the failure to provide the information. We find Respondent's conduct "in this regard to be a further indication of its intent to frustrate negotiations.

Negotiations were also stymied when Respondent refused to provide information to the UFW concerning its relationship with other agricultural interests and also rejected a union proposal on recognition. In the course of negotiations, George Neidens refused to provide information about his other agriculture interests, including Santa Maria Valley Transplants, which inter alia, raises

vegetable seedlings. At the hearing, Neidens testified that he was "connected" with Santa Maria Valley Transplants, and that there was some interchange of employees between Respondent and Santa Maria Valley Transplants. The information requested by the UFW was relevant because it related to a contract proposal, recognition, which Respondent had rejected and because the information concerned the scope of the bargaining unit and, as such, was fundamental to the union's full knowledge of which employees it represented. See Ohio Power Company, 216 NLRB 987, 88 LRRM 1646 (1975), enf'd 531 F. 2d 1381, 92 LRRM 3049 (6th Cir. 1976).

Respondent argues that the UFW did not "probe too deeply" for the information about its other agricultural interests, but this argument is without merit. The union requested the information, and that request was sufficient to preserve its right to the data. Aero-Motive Manufacturing Co., 195 NLRB 790, 79 LRRM 1496 (1972), enf'd 475 F. 2d 2, 82 LRRM 3052 (9th Cir. 1973).

We find that Respondent's refusal and delay in providing requested information and in submitting counterproposals to the UFW, constitute evidence of Respondent's bad faith in the negotiations. Respondent's General Bargaining Table Conduct

In addition to Respondent's failure to provide information and counterproposals in a timely fashion, we find that other aspects of Respondent's conduct at the bargaining table furnished further indicia of its lack of good faith. We agree with General Counsel that Respondent was not adequately prepared for the first four bargaining sessions. The record reveals that although

Respondent received the union's noneconomic proposal in early April of 1977, it was not prepared to discuss the proposal at the first meeting on July 26. Moreover, Respondent's counterproposal, which was submitted at the third meeting on September 28, 1978, was rough and incomplete, and Respondent was not prepared to submit a counterproposal with the remaining noneconomic issues until December 7, 1977.

The record also discloses that Respondent initially rejected the union's proposal on seniority and subcontracting with little or no explanation and with no counterproposal. We find that such an outright rejection of a union proposal without any attempt to explain or to minimize differences, is inconsistent with a bona fide desire to reach an agreement. See Akron Novelty Mfg. Co., 224 NLRB 998, 93 LRRM 1106 (1976). Rejection of the Union as Collective Bargaining Representative

It is a basic principle of collective bargaining under the ALRA that the certified collective bargaining representative is the exclusive representative of the employees and that the employer may not assume that role. Montebello Rose Co., Inc. et al. , 5 ALRB No. 64 (1979); NLRB v. General Electric Co., 418 F. 2d 736, 72 LRRM 2530 (2d Cir. 1969), cert, denied 397 U.S. 965 (1970) .

We find that throughout the bargaining relationship, Respondent took various positions which are inconsistent with an acceptance of the union as the collective bargaining representative of the employees. Respondent often, attempted to interject itself between the union-and the employees, e.g., when it refused to

provide their addresses to the union by claiming that it was protecting its employees' right of privacy. Employers have no legitimate interest in protecting their employees[1] right of privacy unless the disclosure of their addresses would present a clear and present danger to the employees. Shell Oil Co. v. NLRB, 457 F. 2d 615, 79 LRRM 2997 (9th Cir. 1972). Respondent has made no showing that the disclosure of addresses here would endanger its employees in any way.

Respondent also attempted to speak for its employees when Neidens questioned the union's proposal on various trust funds. He argued that the money should go directly to the employees and expressed concern about whether they understood where the money would go. In Respondent's June 8, 1978, counterproposal, it proposed that in the third year of the contract the employees would vote on whether to direct five cents of the increased wages to the pension fund. This proposal, like the ballot clause described in Borg-Warner, 365 U.S. 342, 42 LRHM 2034 (1958):

> . . . substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with the employees rather than their statutory representative.

While Respondent's proposal was not in itself unlawful, it does provide further indication of Respondent's general approach to bargaining .

Union security proved to be the main bone of contention for the parties. Respondent objected to a union security shop because, as Neidens commented, given the slight election margin,

the union had not received much of a mandate. Neidens stated that he did not want to force his employees to join the union. Later at the meeting of June 21, 1978, Respondent's counsel, Morgan, stated that Respondent might accept a "union-agency" shop. However, Respondent never abandoned its attempted role as protector of the employees, and it thereby failed and refused to recognize or accept the union as the exclusive representative of the employees as required by law.

"Conduct reflecting a rejection of the principle of collective bargaining ..., in the Board's view, manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands." Akron Novelty Mfg. Co., supra. Respondent has refused to recognize that, however well-intentioned, it cannot usurp the union's position as the employee exclusive representative.

Although the evidence does show that Respondent was willing to compromise on its position as to union security, we find that throughout the negotiations period it sought to retain its role as protector of the employees against the union. We find that this conduct constituted further evidence of bad faith, based on Respondent's failure to accept the union as the representative of its employees.

Our dissenting colleague would find that Respondent's bargaining posture on union security was not indicative of bad faith bargaining because, late in the negotiations, Respondent expressed some willingness to compromise. We believe this position overlooks the requirement that in surface bargaining cases a

party's conduct must be viewed in light of the totality of circumstances. Montebello Rose Co., Inc. et al., supra; Continental Insurance Company v. NLRB, 495 F. 2d 44, 86 LRRM 2003 (2d Cir. 1974). We believe that our dissenting colleague has instead treated the union security issue in isolation. This is demonstrated by his reliance upon S & L Co. of Billings, 159 NLRB 903, 62 LRRM 1362 (1966). There, the NLRB found no refusal to bargain where the only issue of bad faith litigated in the case was the employer's opposition to a union security clause. The "totality of circumstances" thus involved no more than the employer's bargaining posture on union security. Were we faced here with a fact pattern similar to that in Billings, we might agree that Respondent's position on union security did not constitute a violation of the Act. However, when Respondent's "bargaining" on union security is viewed in the context of its other conduct, both at and away from the bargaining table, the conduct clearly supports an inference of bad faith.

As discussed above, Respondent consistently interjected itself between its employees and the UFW, attempting to assume .the role of the employees' "protector". Thus, Respondent refused to provide the UFW with the employees' addresses in order to protect their privacy, argued that money should be given directly to employees rather than placed in benefit funds, asserted that the employees should vote on whether to direct part of their earnings to a pension fund, and bargained directly with employees over wages and working conditions. Respondent's position on union security is thus revealed to be a continuation of its prior

Conduct, which constituted a rejection of the UFW as the exclusive collective bargaining representative of its employees. When the position is viewed in light of the many other indicia of bad faith discussed in this Decision, Respondent's bad faith is clear.

Conduct Away From the Table

We find that during the negotiation period Respondent engaged in certain conduct which further interfered with the possibility of reaching an agreement. This conduct included effecting unilateral changes and bypassing the union by negotiating directly with the employees.

On July 14, 1977, Cohen learned from an employee that Neidens had spoken to the carnation crew about changing the crew assignments. The change would require the employees to perform more work with a slight modification in wages. Cohen called Neidens that night and told him that Respondent could not unilaterally change the crew assignments. Neidens explained that the change was only a proposal and, in any event, would not be effective until the next payroll period, July 15 to July 28, 1977. On July 23 or 24, 1977, a few days before the first negotiations meeting of the parties, Respondent, without notice to, or discussion with, the UFW, introduced new work assignments in its carnation crew.[1/]

[1/] Respondent challenges this finding on the procedural ground that the event was not included in a charge filed within the six-month limitation of Section 1160.2 of the Act. The law is clear, however, that the statutory limitation is not jurisdictional, but must be the subject of an affirmative defense. See, e.g., Chicago Roll Forming Co., 167 NLRB 961, 971, 66 LRRM 1228

[fn. 1 cont. on p. 17]

The ALO concluded that Respondent improperly altered the working conditions of the carnation crew. He declined to issue a remedial order, however, because he found that Respondent "cured the deleterious effects on the bargaining relationship by immediately afterwards negotiating to a mutually-agreeable resolution of the matter". The General Counsel excepts to this treatment of the issue.

We agree with the ALO that Respondent unilaterally changed the working conditions of its carnation crew. By so doing, Respondent failed and refused to bargain with the certified collective bargaining representative concerning a mandatory subject of bargaining. This conduct constitutes a per se violation of Section 1153(e) and (a) of the Act and is evidence of Respondent's overall failure to bargain in good faith. Montebello Rose Co., Inc. et al., supra7 NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962); and Central Cartage, Inc., 236 NLRB No. 163, 98 LRRM 1554 (1978). However, we do not agree with the ALO's conclusion that a remedial order is inappropriate. The record does not support the finding that the parties reached a mutually agreeable resolution to the problem;, neither the UFW nor the carnation crew employees were satisfied. We will, therefore, impose our standard remedies for a unilateral change in the working conditions of unit employees.

[fn.1 cont.]

(1967), enf'd. 418 F. 2d 346, 72 LRRM 2683 (7th Cir. 1969). Respondent failed to raise the defense at the hearing, or in its post-hearing brief. Respondent's failure to raise the statutory limitation constituted a waiver of the defense. Shumate v. NLRB, 452 F. 2d 717, 78 LRRM 2905, 2908 (4th Cir. 1971), accord, Vltronic Division of Penn Corporation, 239 NLRB 9, 99 LRRM 1661 (1978).

We agree with the General Counsel that Respondent bypassed the union by negotiating directly with employees. On July 15, 1978, Ted Palpant, vice-president and general manager, asked the members of the chrysanthemum crew to stay after work so that he could speak to them. According to Palpant, four or five members of the six-person crew remained after work. At the meeting Palpant presented the employees with a new plan for assigning the crew's work and wages. Palpant presented the plan in response to an inquiry from one of the members of the crew.

The Act makes it the duty of the employer to bargain collectively with the chosen representative of its employees. As the obligation is exclusive, it demands "the negative duty to treat with no other". Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944). Moreover, it is irrelevant who originated the idea for discussion or requested the meetings. Popular Volkswagen, 205 NLRB 441, 84 LRRM 1002 (1973); Medo Photo Supply Corp., supra.

Our dissenting colleague claims that the idea for the contract method of payment originated with the employees rather, than the Respondent. His characterization of the record would imply that the incident was one-sided, that Respondent's conduct was simply a benign reaction to an employee initiative. We find that Respondent's action, in preparing a proposal and presenting it to the employees, albeit at the employees' request for a separate contract for their crew, went beyond merely providing "support" for the employees' request. Further, the court stated Medo Photo Supply Corp., supra:

> ... petitioner was not relieved of its obligations because the employees asked that they be disregarded. The statute was enacted in the public interest for the protection of the employees' right to collective bargaining and it may not be ignored by the employer, even though the employees consent.

We find that Respondent's implementation of the new work assignments in its carnation crew and its direct negotiations with the chrysanthemum crew constitute further evidence of its failure and refusal to bargain in good faith with the union.

Respondent's Defense

In its defense, Respondent contends that the ALO failed to consider the comparative conduct of the parties. Respondent argues that any delay it may have caused is matched by the conduct of the union.

Although it is true that the union negotiator cancelled four meetings, this occurred over a long period of time, and the union's conduct here does not begin to compare with the facts in NLRB v. Stevenson Brick & Block Co., 393 F. 2d 234, 68 LRRM 2086 (4th Cir. 1978), cited by Respondent in support of its contention. In that case, the union negotiator failed to attend one-half of the bargaining sessions, the union withdrew its consent from articles previously agreed upon, and it failed to tender counterproposals. We reject Respondent's contention that the union's conduct in this case is equivalent to the conduct portrayed in the Stevenson case.

We also reject Respondent's argument that the failure of the parties to sign a contract is attributable to the UFW's submission of a second economic proposal, one that was costlier

than the first. The union increased its wage proposal in order to compensate employees for the long period during which they had gone without a raise, according to Peter Cohen. At the time of the second wage proposal, July 14, 1978, negotiations had been going on for almost a year.

Moreover, the pace of the negotiations can be attributed, in part, to Respondent's failure to meet its obligations under the Act. Cohen testified that the late presentation of its economic proposal was due to the union's difficulty in communicating with employees and Respondent's delays in providing information. We therefore find that it was Respondent's bad faith course of conduct in negotiations which precluded the possibility of an agreement being reached by the parties, and that the minimal delays attributable to the union cannot serve as a defense for Respondent Conclusion

The combination of tactics used by Respondent clearly establishes that it was engaged in surface bargaining with no bona fide intent to reach an agreement. Respondent delayed providing, and refused to provide, information about addresses, business operations and necessary economic data; it also delayed submission of counterproposals, denied the union access to the employees, instituted unilateral changes during negotiations, bypassed the union, directly negotiated with the employees, and attempted to substitute itself for the union as protector of the employees' interests.

We disagree with our dissenting colleague that Respondent rectified its bargaining posture on March 22, 1978, the date on

which it supplied necessary information. Although Respondent's action helped to produce some progress and fuller discussion on several bargaining subjects, it is hardly sufficient to rectify Respondent's posture. We therefore conclude that Respondent has violated Section 1153(e) and (a) of the Act by failing and refusing to bargain in good faith with the UFW.

Remedy

We shall order Respondent to meet, upon request, with the UFW and to bargain in good faith, and to make whole its agricultural employees for the loss of wages and other economic losses incurred as a result of Respondent's refusal to bargain with the UFW, plus interest thereon computed at seven percent per annum. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978). The make-whole period ordinarily commences upon the date a respondent first evidences its underlying bad faith. P.P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979). In this case, however, the make-whole period shall commence from July 26, 1977, six months prior to the date the UFW filed the charge, even though there were earlier indications of Respondent's bad faith.

Labor Code--Section 1160.2 provides that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge ...". In Montebello Rose Co., Inc. et al, supra, we applied this section to surface bargaining cases and held that a charge is timely filed if the charging party files it within six months of the date it should have known of the respondent's underlying bad faith. Here, the UFW should have known of Respondent's underlying bad faith by

July 23 or 24, 1977, the date upon which Respondent implemented a unilateral change. While the unilateral change standing alone, may not have been sufficient to convey Respondent's underlying intentions, notice was established by the unilateral change combined with Respondent's treatment of the UFW's requests for access. Therefore, the charge was not timely filed with respect to events which occurred before July 26, 1977, and the make-whole period commences oh that date, six months prior to the filing of the charge.[2/]

Respondent did not waive its Section 1160.2 defense to the surface bargaining allegations in this case. On page 17, supra, we held that Respondent violated Labor Code Section 1153(e) and (a) by unilaterally changing the wages and working conditions of its employees, notwithstanding the fact that Respondent implemented the change prior to July 26, 1977, six months before a charge was filed. We concluded that Respondent had waived its time-limit defense by failing to raise it at the hearing or in its brief to the ALO. Respondent was on notice that it might be found in violation of the law by its implementation of the change because the General Counsel fully litigated the issue and, in its post-hearing brief to the ALO argued that the unilateral change was a per se violation of Labor Code Section 1153(e) and (a). However, the General Counsel did not allege in the complaint, at the

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[2/]Although the charge was not timely filed as to conduct prior to July 26, 1977, surface bargaining is a continuing violation. Therefore, the late filing is not a defense' to the violation, but merely limits the time period during which the Board may find a violation. Boise Implement Company, 106 NLRB 657, 32 LRRM 1530 (1953), enf'd 215 F.2d 652, 34 LRRM 2788 (9th Cir. 1954).

hearing, or in its brief to the ALO that Respondent's surface bargaining commenced before July 26, 1977. Therefore, Respondent was not on notice that the Board might hold it liable for unlawful surface bargaining prior to July 26. Without such notice, Respondent's silence cannot be construed as a waiver of its Section 1160.2 defense to the surface bargaining issues. Perry Farms, Inc. v. Agricultural Labor Relations Board, 86 Cal. App. 448, 469 (1978).

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, AS-H-NE Farms, Inc., its officers, agents, successors and assigns is hereby ordered to:

1. Cease and desist from:

a. Changing any term or condition of employment of its employees without first affording the UFW adequate prior notice and a reasonable opportunity to bargain with respect thereto;

b. Failing or refusing to furnish the UFW with requested information relevant to collective bargaining;

c. Dealing directly with its employees with respect to terms and conditions of employment;

d. Failing to prepare adequately for collective bargaining meetings;

e. Delaying the furnishing to the UFW of counterproposals or requested information relevant to collective bargaining

f. Failing or refusing by general course of conduct, to bargain collectively in good faith with the UFW as the certified

exclusive collective bargaining representative of its agricultural employees; and

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

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

a. Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees with respect to past unilateral changes regarding wage rates and work assignments in the carnation crew.

b. Promptly furnish to the UFW all information it requests which is relevant to the preparation for, or conduct of, collective bargaining negotiations.

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

d. Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's failure and refusal to bargain, as such losses have been defined in Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978), for the period from July 26, 1977, until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or impasse.

e. Preserve and, upon request, make available to

the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of this Order.

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

g. Post at conspicuous places on its premises copies of the attached Notice for 90 consecutive days, 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.

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

i. Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from July 26, 1977, to the present.

j. Arrange for a representative of the Respondent or a Board agent to distribute and read the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights

under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year starting on the date on which Respondent commences to bargain in good faith with said union.

Dated: February 8, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

MEMBER McCARTHY, Dissenting in Part:

I agree with the majority that Respondent was engaged in bad faith bargaining during the period that it withheld relevant and necessary bargaining information from the union.[1/] However, I disagree with the majority's conclusion that Respondent's bad faith bargaining continued beyond the point at which it provided the information in question. I would therefore impose the make-whole remedy only for the period from July 26, 1977, to March 22, 1978.

Although we must examine the totality of Respondent's conduct in order to determine whether Respondent fulfilled its bargaining obligation, we are not precluded from finding that good faith bargaining occurred for a significant period of time before or after a period of bad faith bargaining. Here, following an

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[1/]This information included, inter alia, employees' addresses, dates of hire, race, sex, age, and matters such as the scope of the bargaining unit. It appears that this information could not otherwise be obtained since Respondent concurrently denied the union any work site access for the purpose of consulting with employees about bargaining matters.

initial period of bad faith bargaining, Respondent rectified its bargaining conduct and, in my view, acted in a manner entirely consistent with a good faith intent to arrive at a collective bargaining agreement. After a series of meetings during the period after full information had been provided, the UFW negotiator himself indicated that the parties were progressing toward an agreement. The record reveals that at the time the talks broke down, all subjects had been fully discussed and, with the exception of the economic issues and union security, agreement had been reached on all of them. It also appears that there was room for movement on economic issues as long as the union security issue could be resolved. However, despite several substantive steps which Respondent took toward the UFW's firm position on union security,[2/] the union refused to accept or offer any compromise o that issue and allowed the talks to break down.

Respondent's reason for not acceding to the union security proposal was that because the union won the election by a small majority, it did not have a clear mandate and that Respondent was therefore reluctant to force union membership on the substantial segment of the electorate which had voted against the union. The majority considers that this reasonable concern on Respondent's part derogates from the union's role as exclusive collective

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[2/]See ALO's Decision (A.L.O.D.)., pp. 42-44. Contrary to the majority's assertion, Respondent displayed considerably more than "some willingness to compromise". Although the union displayed a resolve not to compromise on union security, Respondent proposed three successive compromises beginning at a point about half way through the bargaining period. Each was substantive, specific and more favorable to the union than the last. All were rejected by the union without any sign that it was willing to compromise.

bargaining representative of the employees and therefore indicates an absence of a desire to reach agreement with the union. However, applicable NLRA precedent shows that the rationale for Respondent's position on union security will support an inference of bad faith only when the employer either refuses to compromise or engages in conduct that is inconsistent with its professed reasons for opposing union security. See Glomac Plastics, Inc. v. NLRB, 592 F. 2d 94 (2nd Cir. 1979), 100 LRRM 2508; Queen Mary Restaurants v. NLRB, 560 F. 2d 403 (9th Cir. 1977), 96 LRRM 2460; Furr's Cafeteria, Inc., 179 NLRB 240, 72 LRRM 1326 (1969); S & L Co. of Billings, 159 NLRB 903, 62 LRRM 1362 (1966). Here, as noted by the ALO, "Short of complete surrender on this issue [union security], Respondent compromised to the maximum." [A.L.O.D., p. 43] At no time did Respondent make statements or engage in conduct that would indicate that its position on union security was pretextual or that it was attempting to usurp any aspect of the union's role as exclusive bargaining representative.

The majority relies upon Akron Novelty Mfg. Co., 224 NLRB 998, 93 LRRM 1106 (1976) in concluding that Respondent's position on union security supports an inference of bad faith. Unlike the Respondent in the instant case, the employer in Akron maintained an intransigent stance on many issues throughout the bargaining period and rejected the proposed union security clause simply because "he did not believe in it", a totally unreasoned position. Nowhere does the Akron decision imply that an employer's opposition to a full union security provision can be used to support a finding of bad faith where such opposition is flexible and is

based upon an articulated and honestly held belief.

In resisting a full union security provision for the reasons and in the manner that it did, Respondent acted no differently than the employer in S & L Co. of Billings, supra. There, the Trial Examiner, in a decision adopted by the NLRB, cited the following circumstances as the basis for dismissing the complaint against the employer:

> . . . What Respondents had argued, and all the witnesses agreed on this, was that a union-security clause would not be fair to all the employees since the Union had won the election by the narrow margin of seven to five. There had been, according to Respondents, a turnover in personnel since that date and Respondents were unwilling to impose a union-security clause upon what might possibly be a majority of nonunion employees. It did not assert this doubt as grounds for discontinuing bargaining negotiations, it was raised only with respect to the security clause. Respondents offered the Union a maintenance of membership clause, an offer rejected by the Union. [159 NLRB 904] --

It is evident from the foregoing that the NLRB does not consider such opposition to union security to be in contravention of an employer's bargaining obligation.

The majority all but concedes that Respondent's position on union security is lawful in and of itself. However, the majority uses a collection of circumstances which have no bearing on union security to convert Respondent's position on that issue into one which supports an inference of bad faith. In its blind adherence to a "totality of circumstances" principle in surface bargaining cases, the majority loses sight of a fundamental and overriding principle which provides that the bargaining obligation "does not compel either party to agree to a proposal or require

the making of a concession". Labor Code §1155.2; also, National Labor Relations Act, Section 8 (d) . Yet that is exactly what Respondent is being forced to do when the majority holds that a reasonable and lawfully maintained position on a substantive issue can be used to support an inference of bad faith. In order to avoid such an inference under the majority's approach Respondent would have had to completely capitulate to the union on the issue of union. security. As stated in National Labor Relations Board v. American National Ins. Co., 343 U.S. 395, 405 (1951), "it is ... clear that the Board may not, either directly or indirectly, compel concession or otherwise sit in judgment upon the substantive terms of collective bargaining agreements".

The only remaining conduct which the majority points to as evidence of bad faith during the period after March 22, 1978, is a counterproposal by Respondent which calls for an employee vote on whether to direct five cents of a wage increase to the pension fund and a series of short conversations between Respondent's general manager and so me of its employees. Although the majority finds that the proposal was "part of a pattern designed to frustrate. bargaining", they concede that Respondent did not insist on the proposal. In the absence of such insistence it cannot be said that Respondent was trying to use the proposal to frustrate bargaining. The Borg-Warner case cited by the majority does not hold that a proposal of this type is in any way indicative of bad faith bargaining. It merely holds that a collective bargaining agreement may not be made contingent on such proposals since they are not mandatory subjects of bargaining. The court specifically stated

that each of the two clauses there in question was lawful in itself.

The conversations between Respondent's general manager and some of its employees were considered by the majority to have been acts of bypassing the union by means of direct negotiations with employees. I do not agree with this assessment.

An employee member of the negotiating committee, Juan Aguila, had asked the general manager, Ted Palpant, for his thoughts on a contract method of payment for the chrysanthemum department [a method of payment that already existed in other departments] so that Aguila and other members of the six-man chrysanthemum crew would have time to think about the matter prior to the next negotiating session. A few days later, on the morning before the negotiating session, Palpant set forth the company's reactions in a short talk with the crew but engaged in virtually no discussion of the matter.[3/] During the week following the negotiating session, Palpant was strongly entreated by the workers to discuss the contract method of payment relating to their department. Palpant declined to do so, saying that such a discussion would have to be taken up in a formal negotiating session. He agreed with them that a particularized-contract for their department was needed, but explained that no changes could be effectuated until overall negotiations were concluded., When further pressed for answers, Palpant reiterated that nothing could

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[3/] Since Aguila, having gone home early, was not present at this meeting, Palpant asked the crew members to be sure to convey the information to Aguila at his home prior to his attendance at the negotiating session.

be put into effect "until we get this thing off our back".

I do not consider Palpant's remark to have been coercive, and I agree with the ALO's finding that the conversations

> ... were simply an informal exchange of ideas on a proposed change in the method of payment for the chrysanthemum crew and were strictly at all times ancillary to the bargaining on this subject that took place at the regular negotiations meetings.

Here, unlike the situation in Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944), cited by the majority, the union was not ignored, no actual negotiations with employees took place, and there was no attempt to induce employees to abandon the union with promises of higher wages. The idea for a contract method of payment for the chrysanthemum department came from the department employees and their spokesman who served on the negotiating committee. These employees were attempting to enlist support from the Employer for their proposal,[4/] a reversal of the usual pattern in cases of alleged bad faith bargaining. Unlike the employer in Popular Volkswagen, 205 NLRB 441, 84 LRRM 1002 (1973), also cited by the majority, Respondent showed due deference to the union and did not allow the employees' effort to derogate from the union's role as collective bargaining representative. I cannot regard this conduct as evidence that Respondent was bargaining without an intent to reach an agreement.

With due regard to the totality of Respondent's conduct, I find that the period following the date of full disclosure was

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[4/]The record indicates that members of the chrysanthemum crew were worried that negotiations would end without a contract method of payment for their department having been worked out.

characterized by good faith bargaining on the part of the Respondent. By the time bargaining ceased, the parties had sett all but one of the noneconomic issues and Respondent had demonstrated its willingness to compromise on that issue. Economic matters had been discussed, and there was reason to believe that they would not prove intractable.

It must be remembered that Respondent was negotiating an initial contract which required agreement on a myriad of proposals that would alter existing business practices. Considering that Respondent negotiated to agreement on all but two issues, and remained flexible as to those, the record reflects a degree of progress that would be highly unlikely if Respondent had been maintaining a bad faith approach throughout negotiations. I therefore strongly disagree with the majority's conclusion that Respondent was continuously engaged in surface bargaining with no bona fide intent to reach an agreement.

Dated: February 8, 1980

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had the chance to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by failing and refusing to bargain with the UFW in good faith about our employees' working conditions.

The Board has ordered us to post this Notice and to take other action. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives 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 in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement on a collective bargaining contract concerning your wages, working hours, and other terms and conditions of employment.

WE WILL pay all of the employees who worked for us at any time from July 26, 1977, to the present the amount of money they lost because we refused to bargain in good faith with the UFW.

WE WILL NOT delay or refuse to provide the UFW with information it needs for bargaining.

WE WILL NOT delay the production of counterproposals during negotiations with the UFW.

WE WILL NOT change your work assignments without negotiating with the UFW.

WE WILL NOT ignore the UFW and try to negotiate directly with our employees.

Dated: AS-H-NE FARMS, INC.

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

AS-H-NE FARMS, Inc. (UFW) 6 ALRB No. 9
Case No. 78-CE-1-SM

ALO DECISION

The ALO concluded that from July 26, 1977, to February 7, 1978, Respondent failed to provide the UFW with bargaining information and thereby violated Section 1153(e) and (a) of the Act. However, the ALO found that Respondent's general course of conduct did not evidence a refusal to bargain in good faith.

BOARD DECISION

The Board examined the totality of Respondent's conduct and found that it was engaged in surface bargaining with no intent to reach agreement. Respondent delayed and refused to provide bargaining information, delayed submission of counterproposals, instituted unilateral changes during negotiations, negotiated directly with employees, and attempted to usurp the union as protector of the employees' interests. The Board concluded that Respondent violated Section 1153(e) and (a) of the Act by refusing to bargain in good faith.

REMEDY

The Board ordered Respondent to meet, upon request, with the UFW and to bargain in good faith. Further, the Board ordered Respondent to make whole its agricultural employees for the losses resulting from its refusal to bargain with the UFW. The make-whole period was deemed to commence on July 26, 1977, six months before the charge was filed.

DISSENT

Member McCarthy would find that Respondent rectified its bargaining conduct on March 22, 1978, the date on which Respondent provided bargaining information. Accordingly, Member McCarthy would impose make-whole only from July 26, 1977, to March 22, 1978.

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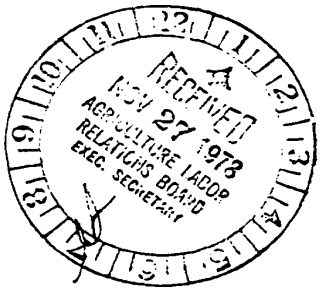
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
ASHNE FARMS INC.,	)	Case No. 78-CE-1-SM
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	



James Flynn for the General Counsel

Robert J. Stumpf for the Respondent

Ellen Greenstone for the Charging Party

DECISION OF ADMINISTRATIVE LAW OFFICER

ARIE SCHOORL, Administrative Law Officer: This case was heard by me on August 14, 15 and 16 in Santa Maria, California, The complaint herein which issued on May 25, 1978, based on a charge filed by the United Farm Workers of America, AFL-CIO (hereinafter called UFW), was duly served on Respondent Ashne. Farms Inc. on-January 26, 1978. It alleges that Respondent committed various violations of Section 1153 (e) and (a) of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). A first amended complaint was issued on August 10, 1978 and was duly served on the Respondent.

At the outset of the hearing a motion to intervene, made by the UFW, as Charging Party, was granted. Each party was given full opportunity to participate in the hearing and the

General Counsel and the Respondent each filed a post-hearing brief.

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following:

FINDINGS OF FACT.

I. Jurisdiction

Respondent admitted in its answer, and I find, that it is an agricultural-employer within the meaning of Section 1140.4(c) of the Act and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

Respondent is alleged to have violated Section 1153(e) and (a) in the following respects: instituting unilateral changes in the wages, hours, and conditions of employment of its carnation crew during the certification period without prior notice to or bargaining with the UFW and by hiring additional employees to perform bargaining unit work without such prior notice and bargaining; refusing to provide information requested by UFW and relevant to bargaining, including, but not limited to, a complete current list of the names and addresses of all employees in the bargaining unit; misrepresenting the number of employees in the bargaining unit; refusing to bargain with the UFW regarding access by the UFW to Respondent's business premises in the post-certification period for the purpose of communicating with employees in the bargaining unit about the course of negotiations; refusing to bargain in good faith with the UFW on the subject of union security; since July 26, 1977, refusing to bargain in good faith with the

intent to reach agreement by: (a) the acts and conduct described above; (b) failing to designate a bargaining representative with authority to bind the Respondent or with adequate knowledge and availability necessary to engage in meaningful negotiations; (c) bypassing the UFW by bargaining directly with employees in the carnation crew with respect to wages, hours, and other terms and conditions of employment; (d) undermining support for the UFW, the certified bargaining representative, by communicating directly with employees in the bargaining unit in order to induce them to withdraw their support from the UFW; (e) expressing doubts during negotiations about the majority status of the certified bargaining representative; (f) refusing to discuss or attempt to find compromise positions for the UFW's major proposals; (g) putting forth counterproposals clearly unacceptable to the UFW; (h) lack of preparation by its bargaining agent at the meetings of July 26, September 20, September 28, and November 2, 1977; (i) dilatory tactics, including, but not limited to, delays in providing information relevant to bargaining and written counterproposals requested by the UFW; (j) engaging in surface bargaining on seniority, subcontracting and successorship from July 26, 1977 to March 22, 1978.

III. The Employer's Operations

Respondent is engaged in the business of raising flowers and potted plants in its nursery just outside Santa Maria, California. It has been in business since 1972 and specializes in carnations, roses, chrysanthemums and a variety of potted plants.

It employs approximately 70 employees on a year-round basis.

IV. Chronology of Collective Bargaining Negotiations March 31, 1977 to July 7, 1977 [1/]

The UFW was certified as the bargaining representative for Respondent's agricultural employees on March 31, 1977. On April 7, 1977 the UFW sent a letter to Respondent requesting a preliminary negotiations meeting. Attached to the letter was a "Request for Information" which sought data concerning the employees in the bargaining unit, their names, addresses, ages, sex, job classifications, current wages and dates of hire. In addition, the UFW requested additional data with respect to the fringe benefits Respondent provided to its employees, and also data with respect to crops, pesticides and equipment.

The UFW requested that this information be sent to its headquarters in La Paz, California within ten days and explained that it needed this information in order to formulate its economic proposals.

On April 25, 1977 George Niedens, Respondent's president and principal stockholder, sent a letter with a portion of this information to Respondent's attorney, Frederick Morgan, in San Francisco for him to review and forward to the UFW in La Paz. As Morgan was on vacation when the letter arrived at his office, he did not forward it to the UFW in La Paz until he returned' on or about May 9, 1977. Somehow, (there was no clarifying evidence) the letter was either lost in the mail or the UFW office in La Paz

[1/] The finding of facts in both IV Chronology of Collective Bargaining Negotiations and V Chronology of Events Concerning Other Issues is based on a synthesis of the testimony of various witnesses.

never forwarded it to Peter Cohen, the UFW representative in Santa Maria.

On June 7, 1977 Peter Cohen sent a letter to George Niedens, with a copy to Frederick Morgan/ informing him that the UFW had not received a response to its letter of April 7. On June 13 and 14, Niedens and Morgan each sent a reply letter to Cohen's June 7 letter, including the information they had previously sent to the UFW in La Paz.

On June 16, 1977, Cohen telephoned Niedens and asked for access to Respondent's nursery to distribute literature to the employees and to notify them of a meeting to be held at the UFW's headquarters in Santa Maria. Niedens told Cohen he was going on vacation and he preferred that Cohen not take any action along those lines until he returned from his vacation. As to Cohen's request for a first negotiations meeting, Niedens suggested that Cohen contact him in early July, after his vacation.

Cohen called Niedens on July 7 and they agreed on a meeting date of July 19. Cohen again asked for access; Niedens replied that he had to consult with his attorney and that it might not be a very good idea because there had been some problems in the past. Niedens said he preferred to meet in the afternoons, except on Mondays and Tuesdays.

On June 14 Cohen telephoned Niedens and informed him the meeting would have to be on July 26 because the meeting place would be occupied on July 19. Cohen again asked for access and explained to Niedens that it was necessary so he could keep the bargaining unit members informed of the progress in the

negotiations and also consult with them about their desires concerning the contents of the collective bargaining agreement. Niedens said that such access was not a very good idea and he would have to consult with his attorney.

On the afternoon of July 14, Diego Molina, a member of Respondent's carnation crew, told Cohen that Niedens had talked to the carnation crew about a new method of assigning the carnation work. Previously, each crew member had 21 rows of regular carnations to take care of on a piece-rate basis. Under the new plan, each crew member would be assigned 18 rows of regular carnations and 7 rows of miniature carnations. According to Molina, it would mean a considerable amount of additional work with only a slight increase in earnings. Cohen contacted Niedens that evening and called his attention to Respondent's proposed row assignments in the carnations. Cohen pointed out it was a unilateral change by Respondent which was not in accord with its duty to bargain with the union. Cohen added that under the law Respondent had to negotiate with the UFW about any proposed change in work assignments. Niedens explained it was only a contemplated change and wouldn't take effect until the next pay period. [2/] Two or three days before the July 26 negotiations meeting, Molina informed Cohen that the new carnation row assignments already had been put into effect by management.

On July 18, Cohen went to Respondent's nursery and Niedens gave him a 30-minute tour of the operations at the nursery.

[2/]Evidence was introduced showing that the next pay period was from July 29 to August 11, 1977.

Cohen hand-delivered to Niedens a letter which repeated the request in the April 7 letter for detailed information that the UFW needed for negotiations. Cohen mentioned in this letter that the UFW still had not received most of the data listed in its April 7 letter. Cohen again brought up the question of access and Niedens told him it was now a legal matter and he should speak to his attorney Fred Morgan in San Francisco about it, and he gave Morgan's telephone number to Cohen.

Cohen telephoned Morgan on July 20 and told him the UFW needed access to properly fulfill its obligations as the certified bargaining representative for Respondent's employees. Morgan replied that the UFW had no legal right in this respect and he wanted to be clear on that. Cohen explained he wanted a voluntary agreement so the UFW could contact the workers and get them involved in the negotiating process. Cohen suggested that the access the UFW was requesting would have reasonable limitations and that if Respondent continued to refuse access the UFW would take it as an indication of bad faith. Morgan said, "I'm not impressed with your threats; George (Niedens) will be doing his own bargaining and the decision on access is George's."

July 26, 1977

At this meeting, the parties discussed the general rules of the negotiations, details of the authority Niedens had to negotiate, the frequency and times of the meetings, and similar general topics. They agreed to meet weekly from 1:00 to 5:00 p.m. Niedens gave Cohen a list of the employees' names, crews, social security numbers, and hourly rates of pay. Cohen immediately

pointed out that the employees' addresses and dates of hire had not been included. Cohen explained that the UFW needed the addresses of the employees, especially as it was being denied access. Niedens explained that he was not supplying the addresses because of the employees' right to privacy. Niedens added that he saw no relevancy as to the dates of hire because seniority was just one of many factors in deciding questions of continued employment and commented that it would be difficult to figure out the dates of hire because of frequent lay-offs, leaves of absences, etc. Cohen suggested that he give all the dates; Niedens refused to - do so, but said he would provide such data after the execution of a collective bargaining contract.

Cohen brought up the subject of the UFW's request for information that it needed to calculate piece-rates. Niedens replied that it was very time-consuming, he would have his office staff begin work on compiling that information, and that Respondent would provide it as the meetings progressed. The parties discussed access and Niedens said that he did not want to grant access because the ALRB regulations did not give the unions this right during the post-certification period, and that Respondent had access problems during the pre-election period, such as the interruption of work activities and accusations of surveillance. Niedens pointed out to Cohen that the UFW had alternative means of communications with the workers, that the UFW could handbill the workers as they entered and left the nursery through a single entrance-and-exit gate, and that members of the UFW negotiating

committee could contact their fellow-workers on the job and keep them posted on the negotiations.

The UFW had drawn up a list of their non-economic proposals and Cohen made an oral presentation thereof, item by item.

Cohen told Niedens that he had been informed that Respondent had instituted unilateral changes in the work assignments of the carnation crews. Niedens commented that perhaps he had done something wrong according to the ALRB, but that as the parties were now together they could negotiate about the matter. They worked out an agreement providing that each worker would take care of 18 rows of regular carnations and only do the work with the miniatures if such work were available after finishing their work on the regular carnations. The regular carnation work would be paid at piece rate and the miniatures at an hourly rate.

July 15, 1977 to September 20, 1977

On or about July 29, Niedens called Cohen to his office and told him that it was virtually impossible to implement their agreement on the carnation row assignments for the payroll period July 15 to 28. The reason given was that it was too complicated 'for the office staff to go back over that payroll period and figure out the earnings according to piece-rate in the regular carnations, and at an hourly rate in the miniatures. Niedens suggested that Respondent simply pay the employees for the total number of hours worked' and then start the system agreed upon in the next pay period. Cohen agreed. On August 20, Diego Molina informed Cohen

that the agreement was not being carried out, as the workers were not being assigned any miniature carnation work and they were upset. Cohen telephoned Niedens, who denied that the workers were upset about the carnation assignments and stated that any dissatisfaction was due to an agitator among them. Several days later, Niedens informed Cohen that Diego Molina had quit and that his rows had been divided up among the other workers, who were then satisfied.

On September 10, Cohen wrote Niedens a letter and reviewed all the -reasons that the UFW wanted access to the nursery. Cohen stated that the UFW did not want to make decisions without full participation of the unit employees, that the union would abide by the ALRB regulations and stay out of the greenhouses and that any continuing refusal would be interpreted as evidence of bad faith. Cohen did not receive a reply to the letter. Later Cohen and Niedens conversed and arranged to have the next negotiations meeting on September 20.

September 20, 1977

The employees' negotiating team did not attend this meeting, to demonstrate their displeasure over the carnation assignment dispute and because they expected that only preliminary matters would be covered at the meeting.

Niedens provided partial information for Cohen on piece-rate pay for the carnation and rose crews, but no information on the chrysanthemum and foliage plant crews. According to Niedens, the office staff was still compiling the requested data and would be supplying it as the meetings progressed. Cohen indicated that, this was acceptable to him.

Cohen asked Niedens whether he had received his letter of September 10 requesting access. Niedens replied that a legal right to access existed only before an election and Cohen reminded him it was a. voluntary agreement the UFW sought. Niedens was not prepared to agree to that because of Respondent's past problems with access. Niedens asked Cohen for any legal authority, cases, or citations to prove that a union had a right to post-certification access. Cohen said the ALRB had not decided on that point yet. Cohen went on to say that because Respondent was refusing to grant access, he was demanding an up-to-date list of the bargaining unit members, their addresses and dates of hire.[3/] Niedens responded that Cohen had the list of the employees with their addresses that was used in the election in 1976, and that in any event Miguel Diaz of the negotiating team could gather the addresses of the employees at work, Cohen replied that that was unsatisfactory and that the UFW had a right to a complete list of names, addresses, and dates of hire, explaining to Niedens that the dates of hire were needed so the UFW could propose specific seniority provisions. Niedens declined to furnish any such data, and then proceeded to go through the UFW's initial proposal and made comments on each article.

On Article 1, Recognition, the parties discussed each clause, Respondent rejecting some, accepting others, and agreeing on modifying some. Respondent was much opposed to Article 2, Union

[3/]Cohen informed Niedens that he knew that there had been 4 or 5 new employees hired since July 26.

Security, paragraph A, which provided for a union security shop. Niedens said that because of what the country stood for, nobody should be forced against his will to join and pay money to any organization. He added that they could sit and argue all afternoon because neither of them would change the other's mind on the subject. Niedens saw no problem with paragraph B, whereby Respondent would furnish the UFW in writing, one week after the execution of the contract, a list of its employees, with names, addresses, social security numbers and job classifications. He rejected paragraph C, Dues Checkoff, saying he saw no reason for doing the union's bookkeeping, for them. Cohen told Niedens that because the UFW was just starting to organize, it needed a union security clause. On Article 3, Hiring, Respondent suggested many changes, which Cohen said he would have to see in writing in order to revi same and determine whether such modifications would be acceptable to the UFW. Niedens agreed to present them in writing.

Next in order was Article 4, Seniority, and Niedens said he was "deleting" it for the time being. He explained it was a problem area, as he believed that a person's ability to hold a job should be on the basis of productivity rather than seniority. Niedens stated that the Grievance Procedure set forth in Article 5 was too long and drawn out and should be simplified. Niedens said he hadn't had the time to digest all of it, but he would write it out and have something for the UFW at the next meeting. He suggested inserting, after Article 5, a No-Strike clause providing that there would be no strikes, slowdowns, work stoppages, boycotts, or other

interruptions of work by the union, and no lockout by Respondent. Niedens also suggested new wording for Article 6, Discipline and Discharge. Niedens agreed to Article 7, which provided the right of access to UFW representatives, limited to three union agents, and prohibited unnecessary interference with production.

As to Article 22, Subcontracting, Niedens stated that Respondent disagreed with the article at the present time and was therefore deleting it from the UFW proposal. On Article 22, Modification, Niedens said he saw no need for it, as it would put Respondent in an unfavorable position, that if any other employer signed a contract with the UFW containing clauses more favorable to the UFW, such clauses would automatically replace the corresponding clauses in an agreement between Respondent and the UFW. Niedens rejected Article 24, the Successor clause, stating that it was too broad and didn't give Respondent any freedom in the event it sold its business.

Niedens stated that he had not had time to analyze many of the other articles but he believed that most of them had to be reworded. He told Cohen he would try to have a written counterproposal ready for the next meeting. Cohen asked him whether it would be complete, and Niedens replied he could have a considerable amount of it ready. Cohen said he would try to have ready a proposal on economic contract items, at least as to those areas in which the UFW could make intelligent proposals based on the partial piece-rate and hourly-rate information which Respondent had already provided.

September 28, 1977

At this meeting, Respondent presented the UFW with a written counterproposal on the first 13 articles. Niedens explained it was a rough proposal, something to work from, and that Respondent's attorney, Fred Morgan, had not yet looked at it. Niedens supplied more information on piece rates and hourly rates of pay in the chrysanthemum work, and stated that the office staff was still compiling additional information which would be later provided to the UFW so that it would have sufficient data upon which to base an economic proposal. Cohen said that perhaps the UFW would put together an economic proposal as to those crews for which the UFW had already received data and would defer proposals as to the other employees until the remaining information was provided by Respondent.

As to Union Security, Respondent's written counterproposal was a rejection of a union security shop and simply stated that union membership would not be made a condition of employment by Respondent. Respondent submitted a reworded Hiring article, which Cohen said he would take into consideration in framing another proposal in that regard.

As to Seniority, Respondent's proposal was, "The individual with the most skill and ability to do the type of work required is the type of worker this company is looking for. Time employed with the company will be one of the factors considered in time of layoff, promotions, or change in job classification." Cohen told Niedens that it appeared Respondent was not really-bargaining about seniority but just rejecting it and that he

hoped that they could agree on some middle ground, adding that the employees wanted some protection and a procedure that would be understood by everyone.

Cohen again raised the issues of lack of addresses of employees and Respondent's refusal of access. Niedens suggested that Miguel Diaz, a member of the negotiating committee, should be given the responsibility to contact the unit employees at work and to obtain their names and addresses. Cohen told Niedens that Diaz did not feel authorized to do that and also that the workers did not understand why the union organizers were not able to talk to them at the work site. Cohen pointed out to Niedens that there was a provision for access in Article 7 of the proposed agreement and that perhaps they could agree to an access provision that could be put into effect immediately. Niedens replied that he was not prepared to put any contract provision into effect until everything was agreed to.

Cohen told Niedens that the UFW would consider Respondent' partial counterproposal but that it was concerned about receiving the remaining proposals as only 13 articles had been covered.

Niedens mentioned rumors of a strike and Cohen denied he had done anything to promote any such movement. Niedens said that he considered that the bargaining was moving along favorably and asked Cohen for his opinion. Cohen replied that he could not characterize the bargaining as favorable because of the lack of access and addresses.

November 2, 1977

Although Cohen had arranged a meeting for October 12,

he had to reschedule it for October 19, and then to October 26, because of an illness in his family. The October 26 date was la changed to November 2 because Cohen was obligated to attend an out-of-town meeting.

Niedens submitted to the UFW written counterproposals on Articles 16 through 25. He stated that he saw no point in including Article 16, No Discrimination, because it was no more than a repetition of federal law. In a reworded article, Respondent agreed to provide one bulletin board in each area of major operations for UFW notices.

Respondent rejected the UFW proposals on Credit Union Withholding, Subcontracting, Modification, and Successor. The exact terminology of the Employer's counterproposals as to Subcontracting and Successorship is as follows:

> Subcontracting: "The parties understand and agree the hazards of agriculture are such that subcontracting may be necessary and proper. Subcontracting may be necessary in areas such as agricultural chemicals and where specialized equipment not owned by the Company is required."
> Successor: "This agreement shall not be binding upon the successors, administrators, executors, and assignees of the parties thereto."

Respondent--agreed to the articles on Income Tax withholding and Saving Clause. It stated that it did not believe that Article 20, Location of Company Operations and Family Housing, was applicable to it.

Again, Cohen asked for an up-to-date list of names and addresses and some sort of access to the employees at their worksite. Cohen explained in detail why it was necessary to have contact with the workers, stating that lack of contact was slowing

up negotiations, especially in formulating economic proposals because the UFW could not consult with the workers in each crew about details as to piece-rate and hourly pay. Again, Niedens said that -Diaz and other members of the negotiating committee could secure this information from their fellow workers. Cohen explained that these committee members were not experienced in such activity and that they considered it was a job the union organizers should do. Cohen told Niedens that he was considering filing an unfair labor practice charge against Respondent because of its refusal .to grant access and to provide employees' addresses, Niedens questioned Cohen closely about his intentions and Cohen stated that he would probably file such a charge.

November 3 to December 6

During this period, employee Miguel Diaz contacted the workers at Respondent's place of business, but was able to obtain the addresses of only 35 employees. Cohen was busy with hearings and other conflicts in his schedule, so the next meeting was set for December 7.

December 7, 1977

Cohen had reviewed Respondent's counterproposals and was ready to respond to them. He told Niedens that Respondent was not bargaining on union security but had simply rejected it. Niedens replied that the UFW had no mandate since it had won only 49.5% of the vote and Respondent was not going to force the employees to join the union. According to Niedens, it was the responsibility of the union to win the employees over.

Cohen said he considered the Respondent's response on seniority a rejection rather than a counterproposal, stating that

he hoped Respondent would give further consideration to the matters of union security and seniority and make a serious effort to bargain about them.

The UFW then made a proposal for a provisional across-the-board wage increase of 5% for all hourly and piece-rate work. Cohen explained to Niedens that, for a considerable period of time, wages had been frozen and the union did not want the employees to feel they had been punished for voting for the union. After Respondent caucused for some time, Niedens said in order to determine the economic costs of a contract he needed to know the union's total economic package, including the various fringe-benefit plans.

Niedens delivered the last of the information the office staff had been compiling on the piece-rate and hourly pay for the various crews.

December 7 to January 25

After the December 7 meeting, Cohen telephoned Niedens and informed him that the UFW was withdrawing its interim wage proposal. There was no meeting during this period, as it was a very busy season for Respondent and the UFW agreed to suspend negotiations meetings until the latter part of January.

January 25, 1978

The UFW delivered to Respondent a comprehensive proposal, including its first wage proposal. At the hearing, Cohen explained that there were two reasons for the late presentation of a complete contract offer: that the UFW had not received the complete information from Respondent on the piece-rate and hourly rates of pay in the various crews until December 7; and the UFW's diffi-

culty in communicating with the unit employees which resulted from Respondent's refusal to provide addresses and its denial of access.

Cohen went over the UFW proposal with Niedens, showing him where the UFW had made modifications in their positions in their previous proposal and where, in some articles, it had adopted ideas and language from the Respondent's counterproposal. As to the UFW's proposal on union security, Niedens repeated that the UFW did not have much of a mandate. Then Cohen went over the UFW economic proposals, explaining them in detail. Respondent caucused, returned and called the UFW economic proposals absurd. Niedens said he preferred that the money go directly to the workers rather than into the medical, pension, and economic development funds and he wondered whether the workers really understood the true aspects of these funds. He added that the overall cost was inappropriate since he had to compete with flower producers in the San Diego area who paid a lot less than he did.

Cohen reminded Niedens that the employees' wages had been frozen for some time and that the UFW expected a response immediately. Niedens said Respondent would get to work on it.

January 26 to March 22, 1978

The next day, January 26, the UFW filed a refusal-to-bargain charge against the Respondent.

On February 7, Niedens sent a letter to Cohen in which he informed him that Respondent would soon be sending written counterproposals to the UFW's proposals of January 25. Niedens said he was personally disturbed because the UFW had filed an unfair-labor-practice charge and that the UFW had, through its employee negotiating committee, access to all employees and had

only 40 people to represent. Niedens added that, in the interest of meeting any possible objection the union might have, he would be willing to: (1) give the UFW names and addresses of all of Respondent's employees; (2) give the UFW space for a bulletin board, provided the UFW used it in a reasonable manner; (3) make some arrangements, to be mutually agreed upon, for printed materials to be distributed on behalf of the union at an agreed upon place. Respondent provided a list of 62 employees and their addresses. The UFW did not accept Respondent's offers as to a bulletin board and distribution of printed materials. Cohen testified he did not believe a bulletin board was an appropriate way to communicate with the workers, because when a message from the union was posted, a message from the company might be there also. As to the offer for distribution of printed materials, Cohen considered that, as he already had that right on the public, road just outside Respondent's entrance gate, the proposal did not offer the UFW anything it didn't already have.

On March 11, 1978 Respondent sent a written counterproposal to the UFW covering Articles 1 to 26, all non-economic items.

March 22, 1978

At this meeting for the first time, Frederick Morgan, Respondent's counsel was present. The UFW agreed to continue the discussion of Respondent's counterproposal of March 11.

Respondent had proposed that an employee not wishing to join the union would pay an amount equal to union dues to a charity of his choice. Cohen said that was not acceptable. Niedens responded that at least it would solve, the union's

objection that non-members should not get a "free-ride." Cohen retorted that the UFW couldn't go along with that proposal because donations of money to an employee's favorite charity would not help the union administer the contract. Niedens said that he doubted the constitutionality of a union security shop and stated that there were many unit employers who did not want to join the union. Fred Morgan stated that he had made no recommendation as to the favorite-charity clause, and that it was Nieden's decision. He added that later on in the negotiations Respondent would be willing to take another look at the issue.

As to the hiring-hall provision, Morgan said that the UFW couldn't expect Respondent to be the first employer in the Santa Maria Valley to utilize a mandatory hiring hall but that if the UFW should have a functioning hiring hall in the future, Respondent would be willing to renegotiate on that subject.

As to the seniority article, Niedens commented that there were negligible up-and-down movements in job classifications, but much more lateral movements.

As to the grievance procedure, Morgan made it clear that stewards would have to attend to grievances on their own time rather than company time.

Cohen stated that the one-hour-per-week maximum that Respondent had placed on access time for union representatives to administer the contract was unacceptable, adding that it would be a handicap to adequately service the contract.

Cohen said that the UFW would be cooperative with Respondent as to subcontracting so long as the job security of

the employees were not jeopardized. Niedens explained he had done subcontracting for fumigation, fertilizing, large-scale maintenance and new-greenhouse construction. Cohen stated he would take all this information and talk to the unit employees so as to formulate further proposals on this issue.

Cohen raised the matter of access, and Morgan stated that it was a phony issue because Respondent had made offers concerning a bulletin board and distribution of UFW literature and had also provided the addresses of all the unit workers. Morgan said that up to that point the union had not shown a need for access and that, if they did have one, they were free to discuss it with Robert Stumpf of Morgan's law firm, Cohen insisted the UFW had shown a need for access right from the beginning.

Cohen inquired about a response to the UFW's economic proposals of January 25 and Niedens explained that Respondent was in the process of doing an analysis and figuring out a counter proposal but that it would take some time. He said he preferred that the money for fringe benefits go directly to the workers rather than into the funds. The UFW had proposed a 16 1/2¢ per hour contribution into the Robert F. Kennedy medical plan, 15¢ per hour into the DeLa Cruz pension, plan and 5¢ an hour into the Martin Luther King economic development plan.

At this meeting, the parties reached agreement on some other articles, which they initialed and dated.

March 23 to April 14, 1978

Respondent sent Cohen a letter dated March 27, defining family members, proposing that no more than 3 family members would do bargaining unit work at any one time, and including

data as to the number of supervisors and the work performed by each.

April 14, 1978

There was much discussion on this meeting on the less-controversial issues and agreement was reached on Discrimination, Worker's Security (right to cross picket line and not have to work on struck goods), Health and Safety, Income Tax Withholding, and Subcontracting.

April 21, 1978

More discussion on the less-controversial articles. Agreement was reached on a No-Strike clause and a Maintenance of Standards clause. Niedens brought up the subject of purchasing flowers from other producers in order to fill Respondent's contract commitments.

April 27, 1978

There was general discussion at this meeting on many items. Agreement was reached on: Article 1, Recognition; Article 4, Seniority; Article 12, Records and Pay Periods; Article 22, Bulletin Boards; Article 25, Modification; and Article 26, Saving Clause.

May 19, 1978

Respondent submitted new proposed language to the UFW on Discipline and Discharge, Grievance Procedure, Supervisors, New & Change Jobs. There was discussion, mainly on leaves of absence, access to administer the contract, wage rates, and benefit funds.

May 25, 1978

The ALRB issued the complaint in this matter against Respondent, alleging refusal to bargain.

June 8, 1978

Respondent presented its complete counterproposal on economic items. Respondent offered one week of vacation after one year of employment, and two weeks after two years, which was Respondent's current practice. The UFW had asked for 8 paid holidays and Respondent countered with 4, up 1 from its current 3. As to the pension fund, Respondent proposed that in the 3rd year of the contract the workers would take a vote on whether they wanted to divert 5¢ of the agreed upon increase in wages to go into the fund. Cohen reviewed the situation and said he thought the parties were moving toward an agreement. The UFW had modified its hiring provisions in accordance with Respondent's suggestions and Respondent had modified the position with respect to the UFW's medical plan. Niedens asked Cohen to come back with a counterproposal on union security, stating that he thought the parties could work something out on that issue.

June 21, 1978

At this meeting, Cohen informed Respondent's representatives that the UFW was formally rejecting Respondent's counterproposal to a-- union security provision, i.e., that each non-member of the union pay a fee, equal to union dues, to the charity of his or her choice. Morgan said he had not recommended that offer but he felt that Niedens was making an effort to compromise. Morgan suggested that Respondent would be agreeable to compulsory union membership for new hires and maintenance of membership for present employees who were already members Cohen said he would look into that proposal and later decide. Respondent representatives then suggested that its economic counterproposal

be discussed. Cohen said he did not wish to do that until Miguel Diaz of the negotiating committee arrived. Cohen explained that Diaz always wanted to finish his work before attending the meetings. Respondent's representatives indicated that they were unhappy about that, and Cohen pointed out to them he would not have the problem of keeping in contact with the employees if Respondent would grant access to the UFW. Morgan repeated Respondent's argument that the UFW did not need access because it had alternative means of contacting employees, including some already suggested by Respondent and rejected by the union.

Diaz subsequenlty arrived and the economic items were discussed. Respondent agreed to review and revise its economic proposal. There was additional discussion on seniority and the grievance procedure. According to Cohen, Morgan had to explain in detail to Niedens the meaning of the clauses concerning these two subjects. Morgan also worked out compromises with Cohen on discipline and discharge as well as seniority and grievance procedure, and also recommended to Niedens that he accept the language of the compromises.

July 14, 1978

The UFW came into this meeting with new proposed language on supervisors and the grievance procedure, based on discussions at a previous meeting. The UFW accepted a number of Respondent's proposals submitted at a previous meeting, discharge and discipline, subcontracting and management rights.

The UFW presented a new economic proposal (costlier than the proposal in January). Morgan said Respondent could not agree to such a drastic wage increase, that Respondent's representatives were there voluntarily because the UFW's certification

year was up and also that it would take no responsibility for the delay in negotiations. He suggested the parties settle the unfair-labor-practice case by agreeing to extend the certification until the end of 1978. The UFW rejected this offer, pointing out that under the law Respondent still has a duty to bargain even though the certification year is over,

July 15, 1978

At this meeting, the parties discussed economic issues: holidays, vacations, pension, and the Martin Luther King Fund, Peter Cohen mentioned that union security was still a very significant issue. Morgan said that although Niedens was philosophically opposed to it and that although Respondent had doubts as to UFW's continuing majority, Respondent was nevertheless willing to give the UFW a new proposal on union security. Morgan said he did not have a written copy of the proposal with him but he would try to bring one the next day, adding that it provided for dues check-off, that new hires would have to join the union, that present employees who did not join the union would have to pay a service fee to the UFW or be discharged from employment, and that present employees who were already UFW members would have to maintain their membership. Morgan pointed out to Cohen that the UFW had agreed to a union-security clause similar to the one proposed by Respondent in their negotiation with another employer, McFarland Rose. Cohen responded that he would check with the union negotiators involved. (He did so and found out the UFW had not accepted such a proposal.)

July 16, 1978

Both parties continued to discuss the wage proposal.

July 26, 1978

Cohen informed Respondent's representatives that the UFW had reviewed Respondent's proposals on union security and economic items and had rejected them. The UFW made a contingent proposal that if Respondent would agree to a union security shop, the UFW would modify its economic demands downward to a point about midway between the union's and Respondent's proposals. Niedens said he would have to check with Morgan and that Cohen should contact him about this matter in a few days. Cohen telephoned Niedens about 6 days later and was informed that Niedens had spoken to Morgan. Cohen asked Niedens whether he thought another meeting would be appropriate and Niedens replied that it would not be appropriate as long as the UFW held to its position on union security. Since that conversation, no meetings have been held or scheduled.

V. Chronology of Events Concerning Other Issues

1. For some years, the members of the chrysanthemum crew had wanted to work by contract, the same "system used in the carnations and roses. On or about July 11, 1978, employee Juan Aguila approached Ted Palpant, Respondent's vice-president and general manager, and asked him about his thoughts on the subject. Palpant said he would think about it.

On Friday July 14, Palpant met with Niedens and they worked out a new contract proposal for the chrysanthemum crew. The next day, Saturday, Palpant talked to four members of the crew about the new system. However, as another member of the crew, Juan Aquilar, had left early, Palpant told two of the 4 crew members present to go to Aguila’s house and tell him about the chrysanthemum proposal so he would know about it before the

bargaining session scheduled for that afternoon. Aquila was a. member of the employees' negotiating committee.

The following Monday at work, Aquila asked Palpant about the status of the contract matter. It had been discussed at the bargaining session on Saturday at which Aquila was present, but he did not understand everything because of his limited knowledge of English. Palpant answered, "They want to change. They're not going to be the same." On the same day, Niedens showed to Miguel Diaz a list of employees' salaries and told him if they worked 90 hours their salaries would be $381 per two-week pay period. This was the same list of salaries that was discussed at the negotiations on the preceding Saturday, at which both Niedens and Diaz were present.

Three days later, four members of the chrysanthemum crew asked Palpant about the proposed contract system and he told them he couldn't talk to them about it, adding that any discussion had to be done at the negotiating meeting with Peter (Cohen) present. The four of them said they could do the contract work all by them- -selves at $320 per two-week pay period. Palpant told them to talk to Cohen about it and that he would talk to Niedens so he could be prepared to discuss the matter at the next bargaining session. Palpant told them the proposed system could not be put into effect until the Respondent and the UFW reached an agreement about it. Palpant testified they seemed upset, so he told them Respondent could not put the system into effect until "we get this thing off our back."

2. In mid March 1978, Rita and Elva Arellano, mother and daughter, requested a two-week vacation, plus a one week leave in order to take a trip to Mexico. According to Ted Palpant,

he told them they could go and, if they came back within the three-week period, they would be reemployed but that he would probably assign them to the foliage department. According to Rita Arellano, Palpant told them that upon their return they would work in the foliage department for a few days and then return to their regular carnation work.

When they returned on time, April 7, Palpant assigned them to the foliage department and, despite their protests, he has not yet re-assigned them to the carnation work. Palpant explained the reason was that during their absence he had assigned two men to work their carnation assignments and that the men did not want to leave the carnation work because they were making more money in that work. Rita Arellano testified that she and her daughter earned $284 per two-week pay period and that they only earned $270 per pay period in the foliage work. Palpant explained to them that he had not promised them a return to their carnation work but only reemployment at Respondent's operations.

In the latter part of July, Palpant told the Arellanos that from then on workers would be returning to Mexico and as soon as there was an opening he would reassign them to carnation work.

Neither Respondent's management nor any of the employees, including the Arellanos, ever informed Peter Cohen about this problem. He did not learn of it until late July, after the last negotiations meetings, when Rita Arellano told him about it.

Palpant testified that at times he would reassign workers to their previous work when they returned from leaves of absence and at other times he would give them a new assignment, in the same or a different department.

3. Approximately 2 to 3 months before the hearing

in the instant case, Niedens spoke to Miguel Diaz, an employee of Respondent who was a member of the UFW negotiating team, during a bargaining season. Peter Cohen had left the room and Niedens asked Diaz whether he thought the union was good for the workers. Diaz replied that he really didn't know because he had never worked under a union. Diaz stated that he wanted the union because he wanted to have job security, a better medical plan and better salaries. The conversation stopped just before Cohen reentered the room.

4. On approximately August 1, 1978, George Niedens handed a copy of the periodical entitled "Ag Alert" to an employee, Linda Arrelanes. It contained an article on a successful ALRB election to decertify a union.

According to the testimony of Niedens, he gave it to her because she had mentioned to him several times in November and December of 1977 her interest in getting rid of the UFW. He had told her to check with the ALRB office in Santa Maria' because he was not aware of the ALRB regulations in that regard.

Linda Arrelanes testified that Niedens had given her the periodical and told her to give it to Miguel Diaz. Diaz testified he had found it on the door handle of his car and that he had a girl friend read it to him.

VI. Analysis and Conclusions

Labor Section 1153 (e) makes it an unfair labor practice for an agricultural employer to refuse to bargain collectively

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[4/]Niedens denied telling Arrelanes to give the copy to Diaz. However I credit Arrelanes' testimony over Niedens on this point because, as she was interested in decertifying, the UFW, it is unlikely that she would have testified to any fact in favor of the UFW unless it were true.

in good faith with a labor organization certified pursuant to the provisions of the Agricultural Labor Relations Act. Substantively, the section is identical to Section 8(a)(5) of the National Labor Relations Act.

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

> "To bargain C9llectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution or a written contract..., but such obligation does not compel either party to agree to a proposal or require the making of a concession."

The complaint alleges that Respondent has refused to bargain by instituting unilateral changes in its employees' wages, hours and working conditions, without prior notice to or bargaining with the UFW; refused to provide information requested by the UFW relevant to bargaining; misrepresented the number of employees in the bargaining unit; refused to bargain with the UFW regarding post-certification access; and refused to bargain in good faith with the UFW on the subject of union security. General Counsel contends these five allegations constitute per se violations.

The complaint also alleges that Respondent has refused to bargain in good faith with the intent to reach agreement. Resolution of this allegation requires an examination of the totality of Respondent's conduct, both away from and at the bargaining table, to ascertain whether it engaged in negotiations with a sincere desire to find a basis for agreement. Independent acts or instances of a refusal to bargain during the period of

negotiations are factors to be evaluated in determining whether, by its course of conduct, an employer has also violated the Act by failing to bargain in good faith, but such independent acts or refusals to bargain do not automatically transform its conduct at the bargaining table into a failure or refusal to bargain in good faith.

A. Instituting unilateral changes in the wages, hours and working conditions of its carnation crew without prior notice to or bargaining with the UFW and by hiring additional employees to perform bargaining unit work without' such prior notice or bargaining. [5/]

The record established that Respondent did introduce new work assignments in its carnation crew without prior notice to the UFW but shortly thereafter it did bargain with the Union on that subject. A few days later, at the first negotiations session, Niedens admitted that perhaps he had done something wrong according to the NLRB but then offered to, and did, negotiate with the UFW and reached a mutually-agreeable solution on the issue; The UFW claimed that the Respondent did not live up to the agreement because it did not give an opportunity to the carnation crew workers to work on the regular carnations. Respondent claimed it did comply with the agreement. Shortly thereafter, a member of the crew quit and his rows were divided up amongst the rest of the

[5/]General Counsel offered no proof at the hearing other than uncorroborated hearsay that Respondent ever hired additional workers to do the work of the carnation crew and did not argue this point in his post-hearing brief.

crew and the matter was resolved in a manner satisfactory to both the Union and the Respondent.

Clearly, Respondent made an improper unilateral change in working conditions without prior notice to the UFW, but just as clearly, it cured deleterious effects on the bargaining relationship by immediately afterwards negotiating to a mutually-agreeable resolution of the matter. Accordingly, I find that Respondent's action in effecting the unilateral change in work assignments does not warrant a remedial order.

General Counsel also alleges that Respondent made a unilateral change in working conditions when it transferred Rita and Elva Arellano, mother and daughter, from the carnation work to foliage plants.

In April, 1978, Respondent assigned the two Arellanos to the foliage plants after their return from a three-week visit to Mexico (two weeks vacation and one week leave of absence). The two protested to General Manager Ted Palpant because they wanted, to stay in the carnations. At the time of the hearing, Palpant had promised them their old assignment once some openings occurred. The UFW never learned anything about this problem until late July, after the last negotiating session with Respondent. There was no evidence that the UFW had contacted the Respondent before the hearing in the instant case about his controversy.

As General Counsel has pointed out, it is unlawful for an employer to unilaterally effect changes in working conditions which are mandatory subjects of collective bargaining. Such conduct undermines the union's authority by disregarding its status as exclusive bargaining representative. However, the NLRB

and the courts have also held that not all unilateral actions are unlawful.

In NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) the U.S. Supreme Court held that are three exceptions to this rule, and one of them occurs when the unilateral action is not a change, but rather a continuation of past regular and consistent changes in wages, hours and working conditions. Respondent's action in transferring the Arellanos into the foliage plants was a continuation of a past regular and consistent change in working conditions.

Palpant testified, and it was not contradicted, that it was his custom, when employees left and later returned, to assign them to the same department, but if there was no opening he would assign them to another department where there was an opening. There was some controversy at the hearing whether Palpant had promised the Arellanos their old jobs back in the carnations. However, this factual issue need not be resolved. The overriding fact is that Palpant acted in an accustomed manner and did not introduce a unilateral change in the way of handling these post-vacation transfers. It was simply a continuation of past operational practices and thus qualified for one of the exceptions established in the Katz case. Accordingly, I find the General Counsel has failed to establish that Respondent made a unilateral change in the wages, hours and/or working conditions of its employees on this occasion.

B. Failure to provide a current list of the names and addresses of all employees in the bargaining unit,

During the whole course of negotiations, from July 1977 to January 1978, Cohen repeatedly requested the addresses

from Niedens, explaining the UFW's need to contact the employees and involve them in the bargaining process. Niedens remained firm in his refusal, contending that the UFW had alternative means to contact the employees. It was not until after January 27, 1978, when the UFW filed unfair labor practice charges against Respondent (among which was the allegation concerning refusal to supply addresses), that Respondent furnished the UFW with the addresses. On February 7, 1978, ten months after the Union's request, Respondent sent a letter to the UFW which contained among other items, a list of the employees' names and addresses.

The law is now well settled that an employer's duty to bargain in good faith, includes an obligation to provide the employees' bargaining representative with information that is necessary and relevant to the proper performance of its duties. See NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 Fafnir Bearing Co., v. NLRB, 362 F.2d 716, 62 LRRM 2415 (2d Cir. 1966). I find that the addresses requested by the UFW are information both necessary and relevant to the proper performance of the UFW's duties to represent the employees of Respondent and thus the Respondent did have a duty to promptly provide the UFW with this information.

1. Necessity

In Prudential Insurance Co., v. NLRB, 412 F.2d 77, 71 LRRM 2254 (2nd Cir. 1969) the employer, as .did the Respondent in the instant case, argued that the union had no need for the list because it had adequate alternative means of communicating with all the members of the unit.

The court in the Prudential case explored four alternative means: bulletin boards, grievance committees, hand-distribution of literature, and union meetings, and found them all inadequate and that the employer therefore had a duty to provide the addresses.

Here the Respondent contends that the UFW had adequate alternative means and could have obtained the addresses or communicated with the-employees by handing out leaflets at Respondent's gate, at union meetings, by utilizing the December 1976 certification election list of names and addresses, and lastly through the members of the employees negotiating committee. I find that these four methods were inadequate.

The evidence reveals that it was extremely difficult to handbill at Respondent's gate, as the employees' parking lot was inside the gate and the employees passed in and out of the gate in their automobiles. The highest turnout at the union meetings was 25% and a probable cause of the low turnout was the inability of the UFW to notify all the unit employees because they had addresses of only 60% of them. Miguel Diaz, a member of the negotiating committee, attempted to collect employees' addresses at work but obtained only 35. Cohen utilized the 1976 election lists, but due to a high percentage of moves and employees no longer working for Respondent, he found the addresses of only 5 or 6 employees in addition to the 35 Diaz had secured. Thus, the UFW was able to gather only 60% of the addresses of the unit employees. These four alternatives were clearly inadequate for the Union to either communicate with all the members of the unit or to obtain their addresses. As Respondent refused the UFW's

continuing requests for access to its premises, the Union could not use this avenue to communicate with or to obtain the addresses of the remaining employees. I find that the UFW had a definite need for Respondent to furnish it with the addresses of the employees of the unit and no adequate alternative means of obtaining such data.

2. Relevancy

In Prudential, supra, the court found that there was no error in the NLRB's determination that the requested information regarding addresses was relevant.

> "It seems manifest beyond dispute that the Union cannot discharge its obligation unless it is able to communicate with those in whose behalf it acts. Thus, a union must be able to inform the employees of its negotiations with the employer and obtain their views as to the bargaining priorities in order that its position may reflect their wishes. Indeed, the information sought, was particularly relevant to the Union at the time of its last request, since it was then engaged in negotiating a new agreement with Prudential."

It is clear from the Prudential decision that employees' addresses are relevant to a union's duty to bargain as it must keep" in contact with the unit employees in order to adequately represent their interests at the bargaining table. In the instant case, this information was particularly relevant because all during the period when the UFW was requesting such information, from April 7, 1977 to February 7, 1978, it was engaged in negotiating its first agreement with Respondent. Therefore, I find that the requested information concerning addresses of the unit employees was relevant.

Because this information was both necessary and relevant to the proper performance of the UFW's duties, Respondent had a

duty to promptly provide that information to the UFW and, in failing and refusing to do so between July 26, 1977[6/] and February 1, 1978, it has breached its duty to bargain in good faith and thereby violated Section 1153 (e) and (a) of the Act.

In his post-hearing brief in the section on the totality of conduct, General Counsel contends that Respondent also had the duty to provide the UFW with the dates of hire of the unit employees As has been explained above, an employer has the duty to provide a union all the information that is necessary and relevant for collective bargaining purposes. In the instant case the information was both necessary and relevant to the Union because the Union had to have the information in order to bargain intelligently on seniority. Moreover the only reliable source of this data was Respondent.

The UFW first requested the dates-of-hire information in its letter of April 1977 to Respondent and repeated this request at the first bargaining session in July 1977. Niedens refused to provide this information claiming dates of hire were difficult to calculate because of leaves of absence, rehires, etc. When Cohen suggested he provide--them with all the information Respondent possessed on dates of hire, Niedens refused, maintaining he did not consider it important even though he admitted that dates of hire were a factor Respondent took into consideration regarding

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[6/]The earliest date that conduct can be found violative of the Act under the limitation provision of Section 1160.2 of the Act.

transfers, etc.

Despite repeated UFW requests for this information, Respondent failed to furnish it until March 22, 1978. Accordingly, I find that the Respondent breached its duty to bargain by its failure and refusal to provide necessary and relevant information to the Union between July 26, 1977[7/] and March 22, 1978 and thereby violated Section 1153(e) and (a) of the Act.

C. Misrepresenting the Number of Employees in the Bargaining Unit.

On February 7, 1978, Respondent delivered a list of the unit employees and their addresses to the UFW. In the accompanying letter, Niedens stated that the bargaining unit included 40 employees but the attached list included over 60 names. General Counsel contends that Respondent was trying to mislead the UFW into believing there were only 40 employees in the unit. I find that there was no conscious effort by Niedens to mislead the UFW. If there were, he would not have sent an attached list with the names of over 60 current employees and their addresses.

General Counsel also maintains that Respondent, in its attempt to mislead the UFW about the size of the bargaining unit, presented a list of current employees and somehow implied that it was a list of all the employees who had worked in the unit in 1977 and 1978. However, elsewhere in his brief General Counsel pointed out that Niedens did not realize that a bargaining unit included more than just the employees currently employed. There is no

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[7/]The earliest date that conduct can be found violative of the Act under the limitation provision of Section 1160.2 of the Act.

evidence that Respondent ever misrepresented the number of employees in the bargaining unit. When Respondent provided lists of the current employees, it did not include the names of employees who had terminated during previous pay periods. However, Cohen never requested these additional names nor was there any showing by General Counsel how it was relevant.

D. Refusing to bargain with the UFW regarding access by the UFW to Respondent's-business premises in the post-certification period for the purpose of communicating with the employees in the bargaining unit about the course of negotiations.

General Counsel contends that Respondent denied the UFW a statutory right to post-certification access and also that Respondent refused to bargain concerning such access.[8/]

General Counsel has tried to show that there is a "statutory right" to post-certification access under the ALRA. His reasoning is that the NLRB provides for post-certification access on a case-by-case basis when alternative means' are lacking for a union to communicate with bargaining-unit employees during collective-bargaining negotiations. He points out that the ALRB has already declare that these alternative means are lacking in California agriculture in promulgating a regulation which provides for pre-election access and that therefore a statutory right to post-certification access may be said to exist under the ALRB.

General Counsel cites no NLRB precedent holding that a union is entitled to post-certification access for the sole purpose of

[8/]The Board has promulgated regulations which provide for pre-election access but has not done so in respect to post-certification access. There are no ALRB cases that have passed on this subject.

communicating with employees during collective bargaining negotiations The cases he cites deal only with situations in which a union has been found entitled to access to inspect premises or to observe the workplace or work performance. Moreover, it does not necessarily follow that because the Board has decided that there is no adequate means of communicating with employees in a pre-election situation, that no alternative means of communications exists in a post-certification situation, especially when the Board's regulation does not apply to post-certification access. As I disagree with General Counsel's two premises I must disagree with his conclusion that there exists a statutory right to post-certification under the ALRA.

Even if there were NLRB precedent for post-certification access to communicate with employees when no alternative means are available, such access would not be warranted herein because alternative means are available to the UFW since it is entitled to the names and addresses of bargaining-unit employees.[9/] The names and addresses can be used to contact employees at their residences personally or through use of the mails and telephone.

General Counsel also contends that Respondent refused to bargain on the subject of post-certification access. There is abundant and uncontradicted evidence that all during the course of the negotiations the representatives of the two parties frequently discussed the question of access, including an alleged statutory right of the union[10/] and/or possible voluntary agreement for access.

[9/] NLRB precedent establishes this right and I have so found in the instant case.

[10/]Respondent asked the UFW to provide some legal authority requiring union access to an employer's premises and if the DFW could provide his authority, Respondent would comply. ' The UFW never did provide Respondent with any such legal authority.

Cohen repeatedly informed Respondent of the UFW's need for access, i.e. to communicate with the employees concerning negotiations and Niedens repeatedly explained the reasons Respondent resisted this request, i.e. to avoid accusations of surveillance, interruptions of work and that the UFW had alternative means to communicate with employers. The record shows there was frequent discussion, but never agreement on the issue. As the Act does not compel any party to agree to a proposal or require the making of a concession, Labor Code Section 1155.2(a), I find that Respondent did not fail or refuse to bargain with the UFW about post-certification access.

E. Respondent's refusal to bargain in good faith over the subject of union security is a violation of Labor Code Section 1153 (e).

It is well established that union security is a mandatory subject of collective bargaining and if a party refuses to bargain in this respect it will be guilty of a violation of the statutory duty to bargain in good faith. General Counsel contends that Respondent absolutely refused to negotiate on the subject of union security from July 1977 to January 1978, and thereafter submitted proposals it knew would be unacceptable to the UFW.

At the first bargaining session Niedens said that the two parties could discuss the particular subject all day and neither would change the other one's mind. What he expressed was the firm attitude of both parties not to compromise on that subject and the UFW representative never disclaimed it.

In February 1978, Respondent proposed that each employee who did not join the union would be required to donate an amount, equivalent to and in lieu of union dues, to the charity of his or her choice. General Counsel claims that the Respondent knew full well previous to its offer that the UFW would never accept it. Be that as it may, at least Respondent changed its position somewhat while the union remained steadfast in its initial stance. Then in June and July Respondent made considerable changes in its position on union security. Respondent went from a modified maintenance of membership (with dues check-off) to a combination union security shop for new hires and maintenance of membership plan for current employees (with dues check-off). Meanwhile the UFW did not deviate from its firm stance of a union security shop. Its explanation has always been it was interested in worker participation in the union and not merely the money from the dues and/or service fee.

Short of complete surrender on this issue, Respondent compromised to the maximum. Respondent's conduct in this subject matter does not support a conclusion of bad faith bargaining. General Counsel goes into much detail about how Respondent must not have been bargaining In good faith about union security because it gave such reasons for its postion as: did not want to force its current employees to join the union against their will, that the UFW was selected by just a little over half of the employees, etc. General Counsel quotes from Queen Mary Restaurants v. NLRB, 560 F.2d 403, 96 LRRM 2456 (9th Cir. 1977) as standing for the proposition that an employer bargains in bad faith over the subject of union security when it attempts to justify its refusal to compro-

mise on the ground it was representing the interests of the employees who had voted against the union and would not betray them by compromising. However, in the instant case, the Respondent did compromise but the UFW did not. So the cases cited by the General Counsel are clearly distinguishable from the present case.

Also there was much evidence and argument whether Respondent's final offer should be interpreted as making the payment of union dues or a service fee clearly mandatory on all employee both currently and newly hired. I consider this a moot question since the UFW made it clear during the negotiations that the interpretation of Respondent's offer was unimportant since the UFW would be only agreeable to a union shop.

F. Refusing to bargain in good faith with the intent to reach agreement.

Resolution of this allegation requires an examination the totality of Respondent's conduct both away from and at the bargaining table to ascertain whether Respondent engaged in negotiations with a sincere desire to find a basis for agreement.

From a review of the bargaining negotiations over a period of one year, it is evident that Respondent has met with the UFW on a regular basis without any complaints from the UFW about the frequency of the meetings. Respondent has not refused to discuss any issue or subject the union has broached. It is true that during the first few months of the negotiations Niedens "deleted", or declined to consider, certain proposals by the UFW but almost always with the comment "for the present time." However, the parties subsequently returned to consider every subject and, with the except of the economic issues and union security, reached agreement on every one.

It has already been discussed how the UFW has maintained its initial firm position on union security while Respondent has modified its stand from no kind of union security to a combination union security-agency shop. On the economic issues, both sides have presented counterproposals and discussed at length the general wage level and the costs of various fringe benefits. The UFW presented its economic package in January 1978. Respondent presented its wage and fringe benefits proposal in April 1978. In July 1978 the UFW submitted a new economic proposal involving even higher costs than its initial January proposals. The UFW then informed Respondent that it would compromise halfway between the parties' respective economic proposals if Respondent would accept a union security shop. Respondent rejected this latest proposal and the discussions reached an impasse.

General Counsel, in his post-hearing brief, sets forth in detail background incidents to show Respondent's union animus. However there is no evidence in the record that this animus was carried over to the negotiations period. The closest thing to an indication of union animus was Nieden's expressions about his reluctance to agree to any form--of union security shop. Any effect this might have had on the negotiations has been dissipated by Nieden's eventua agreeing to a combination union-agency shop.

We shall now consider General Counsel's specific allegatio which he claims constitutes a totality of conduct amounting to a refusal to bargain in good faith.

1. Respondent failed to discuss or attempt to make compromises on major issues.

General Counsel, in his post-hearing brief provides no

details of incidents along these lines. The record of the negotiations as can be seen from the brief description supra & contains no evidence to support General Counsel's contention that Respondent failed to discuss or attempt to make compromises on major issues.

2. Respondent utilized dilatory tactics, including, but not limited to delays in providing information relevant to bargaining and written counterproposals requested by the UFW.

General Counsel argues that Respondent provided information relevant to the formation of a union economic proposal over such a protracted period that the UFW was forced to delay its economic issue proposal until January 25, 1978. It is true that Respondent did not provide the UFW with all the requested economic data until December 7, 1977. The information provided was detail data about the contract rate of pay workers received for taking care of so many flower beds per two-week pay period. Nancy Niedens, wife of Respondent's president, who was in charge of Respondent's office operations, credibly testified that due to a limited office staff, she, assisted by her husband, George Niedens, diligently working, were unable to compile this information any sooner. She also testified that Peter Cohen, the UFW representative, never protested about any slowness in providing the Union with this information. General Counsel never presented any evidence to contradict this point.

General Counsel argues that Respondent also delayed in providing the UFW with information on the following four subjects family members and supervisors doing bargaining unit work; doing transplant work; subcontracting and successorship; and

chemicals being developed to perform certain job operations currently being performed by bargaining unit employees.

The record discloses that Respondent provided information on each of these matters when the subject came up for discussion or at the following meeting. There was no evidence that Respondent ever failed or refused to provide information on these four subjects or ever failed to provide such information when requested to do so by the UFW or shortly thereafter. General Counsel failed to show that the short delay in furnishing such data slowed down the negotiations in any way. Moreover, as the parties eventually reached an agreement on all four of these subjects, I find that the short delays involved do not evidence a desire to avoid reaching a collective bargaining agreement with the UFW, as General Counsel contends.

3. Respondent was guilty of surface bargaining concerning seniority, sub-contracting and successorship up to March 22, 1978.

The UFW's initial proposal contained clauses on all three of these subjects. George Niedens first response was to "delete" them from the proposal but added his usual comment "for the present." Judging from an objective point of view, this could be in no way interpreted as an outright rejection of those three clauses.

Respondent's long delay in furnishing the unit employees' dates of hire to the UFW has been previously discussed and found to be a per se violation of Section 1153 (e). However, it must be considered again in order to evaluate Respondent's conduct in respect to seniority.

In response to the UFW's request for the employees' dates of hire at the first meeting, Niedens said he did not

"seniority" was not very important because it was just one of the factors involved in laying off, promoting, etc. He added that if the UFW could show him that seniority was important he would pro that information. In its written counterproposal of September 28, 1977, Respondent incorporated the concept of seniority as a factor in personnel decisions. Later Respondent negotiated on the subject, supplied the requested dates of hire and reached an agreement with the UFW on the matter.

On subcontracting and successorship, Niedens gave reasons for his "deletion" of the UFW proposals at the September and November meetings. This' information enabled the UFW to prepare proposals that took into account Respondent's reservations and eventually the parties reached agreement on these two items.

There is nothing in this set of events to indicate that Respondent was only going through the motions of bargaining on these three subjects and not providing the UFW with enough information, so as to prevent an agreement from being reached.

Respondent's alleged initial rejections and/or deletions never hampered or slowed down discussions on these subjects. The union's proposals appeared initially to the Respondent to greatly interfere with its operations but when it later discussed its fears with the UFW, the parties were able to find a common ground for agreement. This is the dynamics of the collective bargaining process rather than an unfair labor practice on the part of the Respondent.

4. Bypassing the UFW by bargaining directly with the employees and undermining support for the UFW, the certified bargaining representative by communicating directly with employee in the bargaining unit.

In Proctor & Gamble Mfg. Co., 160 NLRB 334 62 LRRM . 1617, the Board said, "An employer is not foreclosed from communicating to his employees his positions on subjects involved in bargaining, to express opinions regarding the proposals and positions of the collective bargaining representative, or to criticize the union with which he deals or its leadership. To be sure, a communication program, which not illegal per se, may reflect a bargaining frame of mind not compatible with the good faith bargaining obligations of the Act -- and in later weighing the aspect of the case it will be necessary to consider the Company's literature and oral communications as they bear upon the issue of good or bad faith."

In the instant case there was no communications program, merely three separate incidents in which Respondent, through its owner on two occasions, and through its general manager on one occasion, dealt separately with employees.

The most extensive incident involved conversations between Palpant and the chrysanthemum workers about a new contract method of pay. First, it was the workers rather- than Palpant who initiated these conversations. Later, when Palpant provided them with the requested information, he advised them to pass the data on to a co-worker, a member of the negotiations committee, so he would be informed of it before the next bargaining session. Later, he answered a question by this same member of the negotiations committee about the status of the new chrysanthemum pay proposal. A few days later, he was asked again by workers about the same subject and he refused to discuss it because, as he explained to them, he considered it only proper to discuss it at a bargaining meeting.

Palpant's actions certainly cannot, be categorized as an attempt to bypass the union and undermine its bargaining authority. The workers initiated the conversations and Palpant, in his responses, always showed his deference to the Union's bargaining authority by making sure the members of the negotiations committee had this information available for the bargaining sessions and, later, by refusing to discuss the subject at all. Niedens also showed this same deference when he chose to talk to a member of the negotiations committee about the chrysanthemum pay proposal.

It is clearly evident that these conversations were simply an informal exchange of ideas on a proposed change in the method of payment for the chrysanthemum crew and were strictly at all times ancillary to the bargaining on this subject that took place at the regular negotiations meetings.

In another incident, Niedens asked a worker-member of the negotiations committee why he thought the union was good for workers and the worker told him his reasons and that was the end of it.

In another incident, Niedens gave a copy of a periodical containing an article on an ALRB election to decertify a union to an employee who had expressed an interest in getting rid of the union. He asked her to pass it on to another worker.

In these two incidents, Niedens speech and actions fall far short of establishing that he did not have a sincere desire to find common grounds for an agreement with the Union.

I find that the statements and conduct of Palpant and Niedens in respect to the workers in all three incidents did not reflect a bargaining frame of mind incompatible with the good faith bargaining obligations of the Act.

5. Failing to designate a bargaining agent with authority to bind the Respondent or with adequate knowledge and availability necessary to engage in meaningful negotiations and lack or preparation by its bargaining representative at the meetings of July 26, September 20, September 28 and November 2, 1977.

George Niedens, as President and chief executive, clearly had authority to bind the Respondent. He bargained and initialed tentative agreements on each article all during the negotiations and his authority was never questioned by the UFW. He conferred periodically with Respondent's counsel, as Cohen admitted he did with the UFW's counsel.

The record establishes that Respondent's bargaining agent was available at all reasonable times to engage in meaningful negotiations. The only time Niedens was unable to attend sessions was during his June 1977 vacation, the Christmas season, and a period before Mother's Day when the Respondent's increased business called for his presence. The UFW agreed to these interruptions and never protested about them.

General Counsel claims that Respondent's bargaining representative failed to prepare for the first four negotiations meetings. However, at each meeting Niedens was fully occupied, making oral comments and reading from some notes on the UFW's initial non-economic package during the first two meetings, and presenting written counterproposals-on the entire UFW package during the third and fourth meetings. At each session, there were detailed discussions on many, if not all, of the articles. The so-called lack of preparation had no adverse effect on bargaining and did not delay or hamper full discussion of the issues at these four meetings.

General Counsel contends that Niedens was lacking in the necessary experience and knowledge to negotiate for the Responded He claims that the two preparation sessions he had with his attorney Frederick Morgan were not adequate to sufficiently equip him for the negotiations ahead.

Although Niedens was far from being an expert on collective bargaining it is apparent that he learned fast and from his testimony and his notes of the bargaining sessions, it would appear that he did an adequate job in the give-and-take of the bargaining table.

In view of the above and the record as a whole, I find that there is no merit in General Counsel's contentions that the authority, availability, preparation and knowledge of Respondent's bargaining agent were inadequate, and therefore constituted a refusal to bargain.

6. Expressing doubts during negotiations about the majority status of the certified bargaining representative.

It is evident from the record that Respondent frequently mentioned the union's majority status in relation to its reasons for not agreeing to a union security shop. There is no basis for finding that such comments constitute evidence that Respondent was not willing to negotiate in good faith with the UFW.

General Counsel's allegations with respect to a refusal to bargain by Respondent's general course of conduct are hot true and therefore do not constitute individually or in the aggregate a violation of Section 1153 (e) of the Act and I so find.

THE REMEDY

Having found that Respondent engaged in unfair labor practices within the meaning of Section 1153(e) and (a) and Section

1155.2 (a) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designe to effectuate the policies of the Act.

(1) Having found that Respondent failed and refused to furnish the certified bargaining representative of its employees with, a list of the addresses of the unit employees from July 26, 1977 to February 7, 1978, and with the dates of hire of the unit employees from July 26, 1977 to March 22, 1978, I recommend that Respondent promptly provide an up-to-date list of all unit employees their names, addresses, sex, dates of birth, social security numbers, dates of hire, job classifications and wage rates to the UFW at its office in Santa Maria, California. I also recommend that within 3 days after the hire of any new employee Respondent shall provide to the UFW, at its Santa Maria office, information concerning said employee, as set forth above.

(2} Having found that Respondent failed and refused to furnish the UFW with the addresses of its employees between July 26, 1977 and February 7, 1978 and the dates of hire between July 26, 1977 and March 22, 1978 thereby violating Sections 1153 (e) of the Act, I shall recommend that each person employed by Respondents during such period shall be made whole for the loss of pay and other economic losses resulting from these above described unfair labor practices.

As I find that Respondent's delay in furnishing the list of addresses and dates of hire substantially delayed the negotiations and as it would be difficult to determine the exact extent of such delay, any such difficulties should be determined against the party guilty of the conduct which caused the delay. Therefore,

I shall recommend that the employees be made whole for the period from July 26, 1977 to March 22, 1978. The Regional Director is hereby directed to determine the amount of the award herein based in general upon the criteria set forth in Perry Farms, 4 ALRB No. 25 (1978) and Adam Dairy, 4 ALRB No. 24 (1978).

ORDER

Pursuant to Labor Code Section 1160.3, Respondent, AS-H-NE FARMS, INC., its officers, agents, successors and assigns is hereby ordered to:

1. Cease and desist from:

(a) Failing and refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Failing and refusing to furnish promptly, at the UFW's request, information and data relevant to subjects of collective bargaining.

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

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

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

(b) Promptly provide the UFW, on request, with all

information and data relevant to collective bargaining issues and subjects.

(c) Make whole its agricultural employees employed between July 26, 1977 and March 22, 1978 for all losses of pay and other economic losses sustained by them as the result of Respondent' refusal to bargain.

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

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

(f) Post copies of the attached Notice for 90 consecutive days at times and places to be determined by the Regional Director.

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

(h) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order to all employees employed by Respondent from and including July 26, 197 until compliance with this Order.

(i) Arrange for a representative of Respondent or a Board Agent to distribute and read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the

Board Agent shall be given 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.

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

IT IS FURTHER ORDERED that the certification of the United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of Respondent's agricultural employees be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with said union.

DATED: November 27, 1978

ARIE SCHOORL
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing in which each side had an opportunity to present its evidence the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to meet and bargain in good faith about a contract with the UFW. The Board has ordered us to post this Notice and to take certain other actions. We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives 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, on request, meet and bargain with the UFW about a contract because it is the representative chosen by our employees.

WE WILL, on request, promptly give the UFW information and data it needes to represent you in dealing with us for a contract to cover your wages, hours and working conditions.

WE WILL reimburse each of the employees employed by us between July 26, 1977 and March 22, 1978, for any loss of pay or other economic losses sustained by them because we have refused to bargain with the UFW.

DATED: AS-H-NE FARMS

By: _____
Representative Title

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

DO NOT REMOVE OR MUTILATE.