Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HOLTVILLE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	Case Nos . 79-CE-114-EC 79-CE-115-EC 79-CE-209-EC 7 ALRB No. 15

DECISION AND ORDER

On August 8, 1980, Administrative Law Officer (ALO) Robert L. Burkett issued the attached Decision in this proceeding. Thereafter Respondent and General Counsel each timely filed exceptions and a supporting brief. General Counsel also filed a reply to Respondent's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and supporting briefs, and has decided to affirm the ALO's rulings, findings, and conclusions as modified herein.

Introduction

Respondent is a growing operation, employing a relatively small number of workers, including irrigators, tractor drivers and mechanics. On February 13, 1978, there was an election conducted among Respondent's agricultural employees. The United Farm Workers of America, AFL-CIO (UFW) won that election by a vote of 20 to 7; there were 4 challenged ballots insufficient in number to affect the results of the election.

Respondent filed a timely objection to the election, alleging that the UFW's Petition for Certification was filed when Respondent was not at 50 percent of peak employment, as required by Labor Code section 1156.4. Issues raised by this objection were heard by an Investigative Hearing Examiner (IHE) on March 29, 1978. On July 18, 1978, the IHE issued her Decision upholding the Regional Director's peak determination based on the crop, acreage, and employment data supplied by Respondent at the time of the election. As Respondent had not reached peak employment for 1978 at the time of the election, the IHE estimated the 1978 peak on the basis of Respondent's 1977 employment data and Respondent's testimony as to projected acreage increases during 1978. This was done by calculating Respondent's employees-per-acre in 1977, then extrapolating a 1978 peak figure from that data.

Respondent filed exceptions to that Decision, arguing that the IHE improperly considered a report of the California Employment Development Department (EDD). That report, which estimated the person-hours of work required to perform specific agricultural tasks on a per-acre basis, was used by the IHE to corroborate her calculations based on Respondent's data. The Board reviewed Respondent's exception in light of the investigative record and concluded that the IHE was correct in upholding the peak determination, with or without the EDD report.[1/] Holtville Farms, Inc. (July 19, 1979) 5 ALRB No. 48. The UFW was therefore

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[1/]Labor Code section 1156.4 states, in relevant part, that "the board shall estimate peak employment on the basis of acreage and crop statistics which shall be applied uniformly throughout the State of California and upon all other relevant data."

certified as the exclusive representative of Respondent's agricultural employees on July 19. 1979. Technical Refusal to Bargain

On July 31, 1979, the UFW requested that Respondent begin negotiating a full collective bargaining agreement. Another request to bargain was made on August 17, 1979. Respondent informed the UFW on September 21, 1979, that it was refusing to bargain in order to test the validity of the certification. The UFW filed charges on November 8 and December 10, 1979, alleging that Respondent had refused to bargain in good faith regarding a collective bargaining agreement, that Respondent had raised its employees' wages without notice to or negotiation with the UFW, and that Respondent had encouraged its employees to decertify the UFW by direct statements, threats, and promises of benefits.

Complaints were issued on November 29, 1979, and January 17, 1980, based on the above-described charges. On February 20, 1980, a First Amended Complaint was issued and set for hearing before an ALO.[2/]

Respondent stipulated that it had refused to bargain and had raised wages unilaterally, but denied violating Labor Code section 1153(e) and (a) since it contends the UFW was not properly certified. Respondent further argued that because its election objection was "reasonable," under our decision in J. R. Norton Co.

[2/]The amended complaint consolidated the two complaints previously issued against Respondent and also consolidated two additional charges which related to a company called Grower's Exchange. The parties stipulated at the hearing to the severance of the allegations relating to Grower's Exchange as the Charging Party had withdrawn the charges.

(May 30, 1980) 6 ALRB No. 26, review den. by Ct.App., 4th Dist., Div. 1, Jan. 7, 1981, the make-whole remedy was not applicable.

In spite of Respondent's stipulation, General Counsel proceeded to offer evidence of Respondent's conduct, apart from the "technical" refusal to bargain, which allegedly demonstrated Respondent's lack of good faith in pursuing its post-election objections.

In his Decision, the ALO found that Respondent's refusal to bargain and continued refusal to recognize the UFW as the exclusive bargaining representative of its employees were "motivated by a desire to gain time and to take action to dissipate the Union's majority." (ALO Decision at 16.) He therefore concluded that the totality of Respondent's conduct indicated a lack of good faith as defined by J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, and recommended that Respondent be ordered to make its employees whole for economic losses suffered due to its illegal refusal to bargain.

Respondent excepts to the ALO's conclusion as to bad faith and particularly to the ALO's express refusal to consider the reasonableness of Respondent's peak objection as part of the totality of the evidence. While we affirm herein the ALO's overall findings and conclusions as to Respondent's bad faith, and adopt his recommendation as to the make-whole remedy, we find merit in Respondent's argument regarding the need to consider both "reasonableness" and "good faith" in determining whether the make-whole remedy is applicable.

The Make-Whole Remedy Under the Norton Standards

The California Supreme Court in J. R. Norton Co., supra, 26 Cal.3d 1, struck down the. Board's rule that the make-whole remedy was applicable in all cases where the employer refused to bargain, including those cases where the refusal was utilized as a means to obtain judicial review of the Board's action in certifying the union.[3/] Such a blanket imposition of make-whole relief, the Court reasoned, would discourage an employer from seeking judicial review of a meritorious claim that an election did not represent the free choice of the employees as to their bargaining representative. The first lesson from Norton, then, is that in technical refusal-to-bargain cases we must proceed on a case-by-case basis.

In Norton, the Court advised us to use the following standard in determining when to apply the make-whole remedy:

> ... the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hindsight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice.

[3/] An order in a certification proceeding is not directly reviewable in the courts, since it is not a "final" order within the meaning of Labor Code section 1160.8. It is only by refusing to bargain with the certified union that an employer may obtain judicial review of the Board's certification and its finding that the refusal was an unfair labor practice. Nishikawa Farms, Inc. v. Mahony (1977) 66 Cal.App. 3d 781, 787. Such employer conduct is known as a "technical refusal to bargain."

> As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election. 26 Cal.3d at 39.

We took this language to mean that to avoid make-whole liability, in a technical refusal-to-bargain case, the employer's litigation posture before the Court of Appeal must be both reasonable and in good faith. We further recognized:

> ... that an employer may act in good faith, while not having a reasonable basis for his position. An employer may also offer a reasonable basis, while not acting in good faith as shown by the totality of the circumstances. 6 ALRB No. 26 at p. 3.

Following the Supreme Court decision in J. R. Norton, supra, 26 Cal.3d 1, a number of technical refusal-to-bargain cases were remanded to this Board from the Courts of Appeal. In deciding whether make-whole was appropriate in those cases, based on the Norton standards, we decided to inquire first whether the employer's litigation posture was reasonable.[4/]

In several of these cases the make-whole remedy was affirmed and ordered again, since we determined that, based on controlling legal precedent or the insufficiency of the evidence, the employer's position was not reasonable. See J. R. Norton Co.

[4/]The Board decided to consider "reasonableness" before "good faith" for reasons of administrative economy, since reasonableness can generally be decided on the record of the representation case. Good faith, on the contrary, requires examination of a set of facts which may be completely outside the record of the representation case and may require another hearing.

(May 30, 1980) 6 ALRB No. 26, review den. by Ct.App., 4th Dist., Div. 1, Jan. 8, 1981; George Arakelian Farms, Inc. (May 30, 1980) 6 ALRB No. 28; C. Mondavi & Sons dba Charles Krug Winery (May 30, 1980) 6 ALRB No. 30; and Waller Flowerseed Co. (Sept. 4, 1980) 6 ALRB No. 51, review den. by Ct.App., 2nd Dist., Div. 5, Jan. 9, 1981.

In other cases, the employer's litigation posture was held to be reasonable, due generally to the novelty of the legal issue presented. See D'Arrigo Bros, of California (May 30, 1980) 6 ALRB No. 27; Charles Malovich (May 30, 1980) 6 ALRB No. 29; and High & Mighty Farms (May 30, 1980) 6 ALRB No. 31. In these cases, however, we uniformly declined to consider the good-faith aspect of the Norton standards, since the evidence available at the time of the litigation of the refusal to bargain did not reveal that the employers acted in bad faith in seeking judicial review of the certification. Ibid.

Norton Standards Applied

In the instant case, Respondent asserts that an incorrect peak employment determination is the basis for its refusal to bargain. We considered Respondent's assertion in Holtville Farms, Inc., supra, 5 ALRB No. 48, and found it without merit since the formula used was consistent with methods approved in our prior decisions on the peak employment issue. See Charles Malovich (May 9, 1979) 5 ALRB No. 33; High & Mighty Farms (Nov. 29, 1977) 3 ALRB No. 88; and Bonita Packing Co., Inc., (Dec. 1, 1978) 4 ALRB No. 96.

This Board has adopted the National Labor Relations Board's (NLRB) broad proscription against relitigation of representation

issues in related unfair labor practice proceedings. D'Arrigo Brothers of California (July 14, 1978) 4 ALRB No. 45. We therefore will not reconsider the merits of Respondent's assertion as to the peak employment issue in determining whether Respondent has refused to bargain in good faith. In deciding whether the make-whole remedy is appropriate, however, we must consider the merits of Respondent's objections and determine whether those objections are reasonable and in good faith.

The ALO used the standards set out in Joy Silk Mills v. NLRB (D.C.Cir. 1950) 185 F.2d 732 [27 LRRM 2012], cert. den. (1951) 341 U.S. 914 [27 LRRM 2633] to determine whether Respondent's refusal to bargain was in good faith. In Joy Silk, the employer refused to bargain after the union presented authorization cards indicating majority support for the union. The case turned on whether the employer had a good-faith doubt as to the validity of the union's majority. While we consider Joy Silk instructive and agree that an employer's delay and other unlawful conduct is evidence of bad faith, the decision is not directly on point here and is too limited for our purposes.

In relying on Joy Silk alone, the ALO expressly refused to consider the reasonableness of Respondent's peak objections as part of the totality of the circumstances. Then, having found bad faith, the ALO refused to consider the reasonableness of the objections at all. We reject the ALO's approach. First, as stated above, this Board has chosen to review technical refusal-to-bargain cases for reasonableness and then to consider the good-faith issue only in cases where the employer's election objections are found to be

reasonable. Second, as we stated in J. R. Norton, supra, 6 ALRB No. 26 at p. 3, "the good faith aspect requires consideration both of the employer's belief as .to the validity of its objection and of the employer's motive for engaging in the litigation."[5/] We therefore will consider the reasonableness of Respondent's objections in attempting to determine Respondent's real motive.

In Charles Malovich, supra, 6 ALRB No. 29, we considered a similar technical refusal to bargain based on the peak employment question.[6/] In Malovich, we found that the uniqueness of Labor Code sections 1156.3(a)(l) and 1156.4, and the absence of any judicial decisions involving these statutory provisions or the Board's methods of determining peak employment, resulted in "a close case that raises important issues." J. R. Norton Co., supra, 26 Cal.3d 1, 39. We therefore concluded that the employer's litigation posture was reasonable and did not include the make-whole remedy in our remedial Order.

As the law applicable to the instant case is substantially similar to that in Malovich, we conclude that Respondent's litigation posture is reasonable. This conclusion, however, does

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[5/]Despite his concurrence in J. R. Norton, Member McCarthy would now have this Board focus solely on Respondent's election objection in determining whether Respondent has litigated in good faith. To the extent that good faith requires an inquiry into motive, this Board will consider all of Respondent's conduct regarding the Union. This approach is consistent with our treatment of "surface bargaining" cases and cases involving discrimination, which also involve finding unlawful intent from the totality of the circumstances. See 0. P. Murphy Produce Co., Inc. (Oct. 26, 1979) 5 ALRB No. 63 at 4 and S. Kuramura, Inc. (June 21, 1977) 3 ALRB No. 49 at 12.

[6/]We note that the petition for review by the employer in that case was summarily denied in Charles Malovich v. Agricultural Labor Relations Board (June 18, 1981) 5 Civil No. 5751, Ct.App., 5th Dist.

not dispose of the make-whole issue in this case. We must now consider whether Respondent has acted in good faith as shown by the totality of the circumstances. This is the first case which presents a full evidentiary record on the issue of good faith.

Bad-Faith Conduct

Turning to the bad-faith issue, we must determine whether the totality of Respondent's conduct indicates that it was motivated by a desire to delay bargaining and undermine support for the union.

In February 1979, Respondent's employees were called to a meeting, on company time, in one of Respondent's fields by foremen Larry Martinez and Rudy Garcia. There they were addressed by Gilbert Chell, the general manager, who encouraged the employees to form a small independent union, promising better benefits if they did so. He also urged them to elect representatives to gather the signatures of the employees to show support for such a union to the Agricultural Labor Relations Board (ALRB).[7/] Ramiro Ambriz and Isaac Moran Rios were chosen by the employees to represent them in this effort. Rios then collected signatures and was given eight hours pay by Respondent for this activity.

[7/]Respondent offered testimony that the employees asked for the meeting because they were concerned about strike violence which was occurring in the Imperial Valley at that time. There was also testimony that the employees, not Chell, brought up the issue of a small, independent union. However, Respondent's primary witnesses, Gilbert Chell, Rudy Garcia, and Ramiro Ambriz, contradicted one another on crucial points. The ALO has carefully considered these contradictions and other improbable statements by Respondent's witnesses in generally discrediting Respondent's defense. (ALOD, pp. 10-14.) We have reviewed the ALO's credibility resolutions and find them supported by the record. Our findings of fact therefore are based on the credited testimony of General Counsel's witnesses.

On July 28, 1979, several weeks after the UFW was certified, Respondent held a meeting, again on paid time, in the company cooler at which Respondent provided carne asada and beer for the employees. At this gathering, Gilbert Chell again encouraged the employees to form a small, independent union.[8/]

In November 1979, supervisor Rudy Garcia met several times with groups of employees. At one meeting, in a field called "El Burro," Garcia told the employees that Respondent would never sign a contract with the UFW and would go out of business first. He also made disparaging comments about UFW president Cesar Chavez, stating that Chavez uses membership dues for his own purposes. At another meeting, in a field called "La Quinta," Garcia expressed anger that someone had filed a charge with the ALRB and interrogated the

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[8/]Three witnesses testified that foreman Larry Martinez informed them about the meeting. Respondent initially presented no rebuttal to this testimony, then on surrebuttal, called Larry Martinez who testified that he did not inform the employees of the meeting because he was on vacation in Salinas on July 28, 1979. Respondent did not corroborate Martinez' testimony with any attendance or leave records. The ALO found that this testimonial conflict raised serious questions as to the credibility of General Counsel's witnesses concerning the July 28 meeting, and therefore he credited neither party's version and disregarded the July 28 meeting in reaching his conclusions.

We do not agree with the ALO's approach to the July 28 meeting. We find that due to the conflict in testimony, General Counsel has failed to prove by preponderant evidence that Larry Martinez informed employees of the July 28 meeting. However, that fact is not material to this case. Moreover, the contradiction of General Counsel's witnesses as to this fact is not sufficient to discredit their testimony in general. We therefore credit the testimony of Miguel Verduzco and Apolinar Gerardo that Gilbert Chell encouraged the employees to form a small union on July 28, 1979, over Chell's testimony that he said nothing about a small union at that meeting.

employees as to who was responsible.[9/]

Conclusions

We conclude that Respondent has not challenged the election results in good faith. Rather, Respondent has demonstrated a desire to delay bargaining and to dissipate support for the union by its acts of interference and coercion.

Gilbert Chell's statements to Respondent's employees in July 1979, regarding the formation of a small, independent union, constitute an unlawful attempt to promote a decertification drive, particularly where such solicitation is accompanied by threats and promises of benefits.[10/] NLRB v. Birmingham Publishing Co. (5th Cir. 1958) 262 F.2d2 [43 LRRM 2270].

Respondent has also violated section 1153(a) by disparaging the character of union officials and by interrogating

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[9/] Garcia's denial of these events was discredited by the ALO due to Garcia's repeated self-contradiction and the conflicts between his testimony and that of other of Respondent's witnesses.

[10/] In finding a violation of section 1153(a) herein, we rely solely on the July 1979 incident. We do not find a violation of section 1153(a) based on the February 1979 incident, as it occurred more than six months prior to the filing of the charge in November 1979, and is therefore barred by the limitation period created by Labor Code section 1160.2. The February 1979 incident has been considered, however, as evidence of a pattern of anti-union animus and, as such, sheds light on the true character of events within the limitation period. Julius Goldman's Egg City (Dec. 1, 1980) 6 ALRB No. 61.

We reject the ALO's conclusion that Gilbert Chell's statements regarding a small, independent union also constitute unlawful assistance or domination of a labor organization under section 1153(b) and (a). There is no evidence that Respondent's employees ever formed an organization or attempted to negotiate with Respondent over working conditions. See Brownsboro Hills Nursing Home (1975) 244 NLRB No. 47 [102 LRRM 1118].

employees after a charge was filed with the ALRB. Safeway Trails, Inc. (1978) 233 NLRB 1078 [96 LRRM 1614] and Bacchus Farms (April 28, 1978) 4 ALRB No. 26.

Respondent's delay in responding to the UFWs request to negotiate is further evidence of bad faith. Masaji Eto (April 25, 1980) 6 ALRB No. 20. The Union made its request on July 31, 1979. Respondent did not inform the UFW of its refusal to bargain until September 21, 1979. We find that Respondent's duty to bargain arose when the Union made its first request. NLRB v. Columbian Enameling & Stamping Co. (1939) 306 U.S. 292 [4 LRRM 524]. Respondent has cited no authority for its argument that the duty to bargain was tolled by filing a Request for Reconsideration.

Finally, we find that Respondent's grant of a unilateral wage increase without giving the certified representative prior notice or an opportunity to bargain is a per se violation of section 1153(e) and (a) of the Act. O. P. Murphy Produce Co. (Oct. 26, 1979) 5 ALRB No. 63. This conduct further evidences Respondent's disregard for the Union's status as representative and shows bad faith toward the process of collective bargaining.

We have considered all of Respondent's conduct, including the reasonableness of its election objection, and are convinced that Respondent's refusal to bargain was motivated by a desire to delay, and to undermine the Union. The instances of illegal conduct are numerous and serious and clearly discredit Respondent's alleged

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belief in the validity of its peak-employment objection.[11/] We therefore conclude that Respondent has violated section 1153(e) and (a) and shall order Respondent to bargain with the UFW and make its employees whole for all economic losses suffered as a result of its refusal to bargain in good faith. The make-whole period shall run from August 3, 1979, until Respondent begins to bargain in good faith and continues such bargaining to the point of a contract or a bona fide impasse.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Holtville Farms, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO (UFW), as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Changing the wage rates of its agricultural

[11/] In addition to Respondent's unlawful conduct, testimony given by Gilbert Chell further belies the sincerity of Respondent's peak employment objection. The General Counsel asked Chell whether the majority of the employees voted for the UFW in the election. Chell answered yes, but explained that the reason the Union won was that the men were upset and "emotions were running high" because they had been mistreated by several foremen. We infer from this testimony that Respondent's true motive in challenging the certification was its desire to have the election run at a time when the employees could exercise an unemotional choice. While this motivation is certainly not unlawful, it is also not valid grounds to appeal an election or refuse to bargain.

employees without first notifying the UFW of the proposed change and affording the UFW a chance to negotiate.

(c) By direct statements, promises of benefits, threats of reprisal, or otherwise, encouraging its agricultural employees to decertify their certified collective bargaining representative.

(d) Disparaging the character of its employees' collective bargaining representative or its agents.

(e) Interrogating its agricultural employees regarding the filing of charges under the Agricultural Labor Relations Act (Act).

(f) In any like or related 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 and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, meet and bargain in good faith with the UFW regarding the past unilateral changes in wage rates.

(c) Make whole its agricultural employees for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain.

(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 Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Post copies of the attached Notice at conspicuous locations on its premises for 60 days, the time(s) and place(s) of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may become altered, defaced, covered, or removed.

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

(h) 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 payroll period immediately preceding July 28, 1979, and to all employees employed by Respondent at any time from July 28, 1979, until the date of issuance of 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 time(s) and place(s) 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.

(j) 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 or her periodically thereafter in writing what further steps have been taken in compliance with this Order.

ORDER EXTENDING CERTIFICATION

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: July 8, 1981

RONALD L. RUIZ, Acting Chairperson

HERBERT A. PERRY, Member

MEMBER McCARTHY, Concurring and Dissenting:

The majority finds that Respondent engaged in various forms of bad-faith conduct which warrant the imposition of a make-whole order. I agree only with the majority's conclusion that Respondent violated Labor Code section 1153(e), by its grant of a unilateral wage increase, and Labor Code section 1153(a), by its interrogation of employees regarding the filing of an unfair labor practice charge under our Act. Such conduct, when measured against the reasonableness of Respondent's post-election objections, and its clear right to seek judicial review thereof, is not, in my view so harmful to the purposes and policies of the Act as to justify make-whole relief.

DECERTIFICATION EFFORT

I believe the majority has erred in concluding that Respondent called two meetings on company time, in February 1979, and again the following July, in an effort to persuade its employees

to decertify the incumbent union. In this regard, I rely on my independent evaluation of the evidence, parts of which, I believe, both the ALO and my colleagues have selectively ignored, and parts to which, I believe, they have accorded unwarranted weight.

Decertification - February Meeting

The ALO ruled that the critical factual disputes arise from conflicts in testimony as to who in fact called for a meeting in February, 1979, and what was said during the meeting. He found that Gilbert Chell, Respondent's general manager, summoned employees to a meeting at which he promised them increased benefits if they would reject the UFW and form a small, independent union.[1/] Towards this

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[1/]The extravagance of the ALO's interpretation of relevant events is apparent when the evidence is considered in context. For example, his finding with regard to Chell's alleged instigation of an independent union as an alternative to the UFW is flawed by his failure to consider the whole of Foreman Rudy Garcia's testimony. Based on Garcia's testimony, he concluded that Respondent "did indeed raise the issue of workers forming a small, independent union at the February, 1979 meeting." Actually, Garcia testified only that the workers wanted to meet with Chell in order "to go see if they could form their own little union." Once relying on Garcia's testimony to find that the matter of a small union had been discussed, the ALO has no reason to reject Garcia's further testimony that Chell told the workers, "it was up to them." Such response does not constitute or even suggest unlawful assistance or interference. Next, the ALO observed that Garcia claimed that it was Ramiro Ambriz who asked him to invite Chell to this meeting, over Ambriz's denial. While the ALO is essentially correct, he utilized this contradiction between witnesses only to again discredit Respondent's defense, thereby disregarding significant and uncontroverted evidence which establishes conclusively that the employees, Ambriz among them, told Garcia they needed to talk to Chell. As Ambriz himself explained, the employees had decided they wanted to meet with Chell and so, "that day we called for him ... [the employees] wanted to go to the state to see if they could get a letter of power, because they had been intimidated by other unions." Finally, the ALO would have us believe that such a gathering of employees and management was somehow out of the ordinary and thus inherently suspect. The record reveals, however, that this was a routine work-assignment meeting between the irrigator and tractor driver crews and their respective foremen.

end, according to the ALO, Chell directed employees to select from the workforce two representatives who would be charged with obtaining employee signatures on a decertification petition in order to demonstrate to the ALRB the lack of unit support for the UFW. All of these findings have been affirmed by the majority.

The ALO credited all witnesses for the General Counsel who testified on direct examination that Chell called them to the meeting for the purpose of initiating the decertification drive.— But the ALO failed to consider and explain the testimony of these same witnesses who, on cross-examination, declared that the employees only wanted to seek information from the ALRB concerning their rights in a strike situation and the status of the then pending election case in Holtville Farms, Inc., Case No. 78-RC-2-E. Accordingly, they designated two colleagues to take their inquiry to a Regional Office of this Agency. General Counsel's witnesses testified fairly consistently on direct examination, each of them being able to recall precisely the substance of Chell's purported statements regarding the alleged decertification drive. However, on re-direct, the General Counsel was unable to rehabilitate the testimony they gave under cross-examination.

[2/]According to the testimony of Miguel Verduzco for the General Counsel, a majority of the workers met with a representative of the UFW on the day following Chell's alleged promise of benefits in conjunction with the decertification effort and the selection of two employee representatives to solicit employee signatures on the decertification petition. Given these circumstances, it is inconceivable to me that Chell's alleged conduct would not have been asserted as the basis of a timely-filed unfair labor practice charge, had such conduct in fact occurred. Chell's alleged conduct was not raised until the filing of the refusal to bargain charge in this matter some eight months later.

Miguel Verduzco, General Counsel's first witness, answered affirmatively when asked on cross-examination whether it was true that the workers asked for those meetings because they wanted to inquire about certification. On re-direct, General Counsel asked Verduzco,". . . what did Chell say about choosing representatives?", and received this response: "So that they [the two employee representatives] could be commissioned to be informed from the state in order to find out, to see if we could certify the union." Isaac Moran Rios, one of the two chosen employee representatives, explained on re-direct by General Counsel that, "the idea to circulate the petition was made by the same group of fellow workers. . . I will repeat again that initially it was made by the fellow workers, all of them." Since the ALO did not qualify his crediting of the testimony of these witnesses, I would find that the internal inconsistencies therein cast doubt on the whole of their testimony. At the very least, I would find that the ALO's reliance on only that testimony which supports his ultimate conclusion is misplaced.

The ALO found, without specifically analyzing the facts, that Respondent permitted Moran to collect employee signatures on the purported decertification petition over a nine-day period and that during that time Moran performed no work but received full pay. Wisely rejecting the ALO's nine-day time frame, the majority nevertheless affirms his conclusion by substituting Moran's testimonial reference to his having been paid for eight hours. When Moran was asked whether Respondent paid him for the time he spent collecting signatures, he replied, "Yes, I got paid eight hours," adding that he was paid during "about a week and a half but did not

continue to collect signatures during this time." A fair reading of the record reveals that Moran was describing only his normal work schedule during the times relevant herein. The improbability that such solicitations in these circumstances would require nine days, according to the ALO, or even eight hours, as the majority finds, is self-evident. It is uncontroverted that as many as 22 of Respondent's 25 employees attended the pre-work meeting at which the purported petition was circulated. Those in attendance comprised all employees who reported for work that day. Moran himself testified that all who were present signed the petition at that time. Thus, the evidence upon which the ALO and the majority rely for their finding that Moran was paid to solicit employee signatures is factually defective.

Ramiro Ambriz, a witness for Respondent and Moran's counterpart in the solicitation of employee signatures, testified at length concerning the relevant February events. His testimony was corroborated on certain key points by witnesses for the General' Counsel and, when examined against the totality of circumstances which prevailed at the time, reveals that the purpose of the petition was not that of decertification, but rather that of seeking state protection from strike violence.[3/] As the ALO correctly observes, Respondent's employees stopped work for approximately one week in early February 1979, during a strike against Grower's Exchange, Inc., which was then harvesting in Holtville's fields.

[3/]Interestingly, the ALO found that Ambriz "generally testified in an apparently honest and forthright manner...."

Employees were concerned for their safety because they had been subjected to intimidation and harassment by strikers. Consequently, they discussed the situation with Chell. As Ambriz testified:

> "We asked him, and exposed our problems that we were having through the pressures that we were experiencing in those days by the employees ... of another company, the strikers from other companies . . . some kind of pressure that they were calling us to help them .... We asked Chell to take a week off for the pressures we were experiencing within the field . . .Chell listened to what we told him about the situation that was happening, that we were all fearful and many of them asked from two to three weeks [time off]"

Chell testified that he agreed to give them a week off with half-pay because, "... I figured it was the safest thing for them to do. . . to stay away for a week until we saw how things were going to go." Chell also testified that he offered the workers loans because:

> "At that particular time, they were just working a few hours before they'd leave the field, be forced to leave the field, and they were running short of funds, so I asked them if they needed the money, that I was willing to help them."

Ernesto Verduzco testified for the General Counsel that Chell had indeed told the workers to take a week off "so that we would not be hurt by the strike," and, further, that Chell offered the employees loans "to help us ... because we had not worked in those days." It is clear that a second meeting with Chell took place, following the employees' return to work. It was at this meeting, according to witnesses for the General Counsel, that Chell urged them to decertify the UFW. But Ambriz insisted that the workers were still concerned about their safety under continuing strike conditions, therefore:

"The purpose of [the meeting] was that we come to an accord, to go to the state and ask for protection of what was happening, and where we were at . . .[to find out from the state] if it was legal for the people to come and stop us from work. We agreed that two representatives should go to the state and ask if it was possible to get some protection. Isaac Moran and myself went to the state. I only told them what was happening. State told us there was no reason why we could not work."

According to the combined testimony of Ambriz and Moran, the petition purportedly filed with the ALRB was initiated by the employees for the purpose of requesting protection from strike violence. General Counsel alleges, and the ALO found, however, that the petition was a decertification petition. General Counsel stipulated at hearing that the list of employee signatures in question herein had indeed been filed with a regional office of this Agency but that he was unable to procure this document. As this critical piece of evidence has not been produced, both the General Counsel and the ALO could only speculate as to its contents and purpose. Absent this pivotal documentary evidence, the record, considered as a whole, simply does not warrant the conclusion that the petition was in fact a petition for decertification.

Decertification - "Carne Asada" Party for Employees.

Since I believe that my colleagues' analysis of this matter overlooks material facts, I dissent from their conclusion that Respondent's conduct on the occasion of a "carne asada" party for employees on July 28, 1979, constitutes an independent violation of section 1153(a) of the Act.

Witnesses for the General Counsel testified that Chell utilized this gathering to urge employees to decertify the UFW. These same witnesses also testified that Foreman Martinez had

informed them of the party one day prior to the event. Martinez, on the other hand, corroborated by Chell, insisted that he had left the area with his family to visit relatives in Livingston and Salinas during a two-week paid vacation which began on July 15 and that he did not learn of the party until after his return on August 1.[4/] Respondent's employee-witnesses, who also were at the party, testified that Chell visited with employees individually or in small groups, chatting with them casually about various topics but never, as alleged, urging that they decertify the UFW.

Thus, the credibility problem posed by this record concerns precisely what Chell discussed with employees during the carne asada party. When credibility is an issue, the ALO's conclusions assume added importance because he "has the responsibility of evaluating the credibility of witnesses and the weight to be given their testimony." NLRB v. Vegas Vie, Inc. (9th Cir. 1976) 546 F.2d 826,

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[4/]Respondent contends that witnesses for the General Counsel had fabricated their testimony as to who told them about the party, suggesting that the whole of their testimony should be discredited. I note that the ALO erred in drawing an adverse inference against Respondent for not raising its defense, insofar as it concerns Martinez, until surrebuttal. The evidence was admitted into the record by the ALO absent objection by any party and is not any less valid or relevant because of the stage of the hearing at which it was adduced. The ALO commented that the single most convincing piece of corroborative evidence Respondent could have produced in support of Martinez's testimony would have been his time-cards, demonstrating that he was absent from work during the period pertinent herein. However, the matter of time-cards or other payroll records as to Martinez was not raised during the course of the hearing by the ALO or any party, and there is no record evidence that Martinez, or any other supervisor, is required to submit a time-card showing hours and days worked. On the contrary, Respondent points out in its exceptions brief that no time-cards are maintained with respect to Martinez because he is a salaried year-round employee.

829 [94 LRRM 2652]. In this instance, however, the ALO considered himself unable to resolve witness credibility because of serious contradictions in the testimony.

Acknowledging the ALO's failure to resolve the conflicts in testimony, the majority nevertheless selects and credits the testimony of two witnesses for the General Counsel who, over Chell's denial, stated that he promised them increased benefits on July 28 if they would disavow the UFW and form a separate, independent union. I seriously question the soundness of such independent resolutions of critical issues of witness credibility where, as here, the ALO, who saw and heard the witnesses testify, has failed to make the necessary credibility determinations, and where my colleagues neither observed the demeanor of nor have heard the testimony of the witnesses, and where neither version of what Chell said and/or did is inherently more probable, especially since the cross-examination of the General Counsel's witnesses as to the February meetings casts serious doubt on their credibility and/or their powers of recall.

In light of the foregoing facts, the majority's conclusion that Respondent violated section 1153(a) of the Act by urging employees at the carne asada party to decertify the UFW lacks the requisite preponderance of evidentiary support.

MAKE-WHOLE AWARD

The majority has found that Respondent had a reasonable basis for contesting the Board's certification of the union and has indicated that it would consider the reasonableness of the Respondent's objections in deciding whether Respondent was acting in

good faith. With this I am in agreement. However, in making its determination as to Respondent's good faith the majority has failed to apply standards which will give full effect to the intent of the Supreme Court's decision in J. R. Norton v. ALRB (1979) 26 Cal.3d 1.

My reasoning in this regard begins with the same langauge from the Norton decision which the majority opinion cites:

> "... the Board must determine from the totality of the employer's conduct whether it went through the motions of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good-faith belief that the union would not have been freely selected by the employees as their bargaining representative had the election been properly conducted. We emphasize that this holding does not imply that whenever the Board finds an employer has failed to present a prima facie case, and the finding is subsequently upheld by the courts, the Board may order make-whole relief. Such decision by hindsight would impermissibly deter judicial review of close cases that raise important issues concerning whether the election was conducted in a manner that truly protected the employees' right of free choice. As discussed above, judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their discretion. On the other hand, our holding does not mean that the Board is deprived of its make-whole power by every colorable claim of a violation of the laboratory conditions of a representation election: it must appear that the employer reasonably and in good faith believed the violation would have affected the outcome of the election." 26 Cal.3d at 39.

The Court appears to be contemplating two different kinds of cases: (1) close cases that raise important issues concerning whether the election was conducted properly, and (2) cases which primarily reflect an objection to some minor departure from the conduct or conditions of an ideal representation election. With regard to the first type of case, the Court underscores its concern by stating that "judicial review in this context is fundamental in providing for checks on administrative agencies as a protection against arbitrary exercises of their

discretion." Furthermore, the Court has indicated that it has a liberal attitude toward the appropriateness of judicial review where the right to freely select a bargaining representative is at stake:

> ". . .[s]uch review undermines ALRA policy only when the employer's election challenges lack merit and are pursued as a dilatory tactic designed to stifle union organization." (Emphasis added.) 26 Cal.3d at p. 36.

This relatively low threshold for judicial review makes it abundantly clear that the Court would take a dim view of any "good-faith" test that would discourage or deter parties from seeking judicial review in technical refusal-to-bargain situations where the post-election objections are reasonable. The majority applies such a test in this case.

Through its interpretation of "good faith," the majority attempts to use the make-whole remedy as a sanction against an employer for engaging in any questionable conduct, regardless of whether that conduct has anything to do with employee rights related to the election process. Under the majority's view, making disparaging remarks about the union or questioning employees after a charge is filed with the ALRB are acts that can warrant imposition of the make-whole remedy. However, conduct of that nature does not constitute an interference with the employees' right to representation by a freely chosen collective-bargaining agent. When such conduct violates the Act, it can be remedied by the customary cease and desist order and/or other routine remedies. The make-whole provision, on the other hand, is an extraordinary remedy that properly applies only to acts and conduct which truly tend to demonstrate that the employer is engaged in an effort to use a

technical refusal-to-bargain for dilatory purposes related to collective bargaining.[5/]

The majority places undue emphasis on the Norton Court's statement that "the Board must determine from the totality of the employer's conduct" whether the employer litigated on the basis of a reasonable, good-faith belief that the election should have been set-aside. The "totality of the employer's conduct" does not imply that the Board must consider every act of the employer irrespective of its relevance to the question of whether the employer had a good-faith belief in the validity of his objections to the election. Nowhere in the Norton opinion is there a suggestion that every act which bespeaks an anti-union attitude also belies an honestly-held belief that the election would have had a different outcome had the conduct complained of not occurred. In short, the question of "good faith" goes to the employer's belief in the validity of its objections, not to its attitude toward the union.

The majority's approach is not only overbroad with respect to the kinds of employer conduct to be considered, but also appears to be over-broad with respect to the relevant time period. Some of

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[5/]An unwarranted delay in seeking judicial review may be an appropriate consideration in determining Respondent's good faith. However, the delay cited by the majority is attributable to Respondent's timely-filed Motion for Reconsideration of the Board's Decision in the underlying election case. While it may be true that the filing of such a motion does not suspend Respondent's duty to bargain, the Board has never decided whether the filing of a Motion for reconsideration affects the question of what is reasonable or unreasonable delay in commencing negotiations. Within two weeks of the denial of the Motion, Respondent notified the union of its intent to challenge certification. Under the circumstances, I would not view the timing of the refusal to bargain to be indicative of bad faith.

the employer conduct upon which the majority bases its make-whole determination occurred prior to certification, and outside the six-month jurisdictional period preceding the filing of the refusal-to-bargain charge. There is no indication that the majority would not also consider conduct which occurred prior to the election. Conduct that is remote in time from the point at which the employer decides to challenge the certification is apt to have little or no bearing on whether the employer has a good-faith belief in the validity of his objections to the election. Moreover, under a system where any conduct over a long period of time is considered relevant, an employer who has eminently reasonable grounds for challenging a Board certification might unwittingly subject himself to make-whole liability because of some prior unfair labor practices with which he had not yet been charged. Such a situation could encourage the filing of stale charges for the sole purpose of bolstering the make-whole case against the employer. Under these circumstances, employers are likely to be deterred from challenging a certification even though they have most reasonable grounds for doing so, and that is a situation which the Supreme Court clearly found to be unacceptable in its Norton decision.[6/]

Applying the foregoing analysis to the instant case, I

[6/]Contrary to the statement in footnote 5 of the majority opinion, I do not focus solely on Respondent's election objection in determining whether Respondent has litigated in good faith. It should be quite evident from my lengthy discussion of Respondent's conduct that I am concerned with more than the reasonableness of Respondent's election objections. What I hope I have done is demonstrate that, based on a careful reading of the record,

[Fn. 7 cont. on p.]

would first find this to be a close case which raises important issues concerning whether the election was conducted in a manner that truly protected the employees right of free choice. It is therefore a case which, in order to warrant imposition of the make-whole remedy, requires a strong showing that the employer did not have a good-faith belief in the validity of its objections. I do not believe that has been established in the record herein. The conduct of Respondent which is established in the record does not provide sufficient grounds, when viewed in relation to the strength of its objections/ to warrant imposition of the make-whole remedy.

Dated: July 8, 1981

JOHN P. McCARTHY, Member

[Fn. 6 cont.]

Respondent's conduct is not as aggravated as the majority would have us believe and that the actually proven conduct does not, when measured against the clearly reasonable objection presented here, warrant imposition of the make-whole order.

Assessing an employer's good faith in light of the reasonableness of its objections is a proper approach to make-whole determinations, and the majority has so found. However, the majority's unfocused consideration of conduct and time periods demonstrates a failure to employ the balancing test with sufficient sensitivity to the Supreme Court's clearly expressed view in J. R. Norton, supra, that application of the make-whole remedy must not act as a deterrent to the employer's incentive to seek judicial review of meritorious challenges to the integrity of an election.

NOTICE TO AGRICULTURAL EMPLOYEES

The Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act by refusing to bargain about a contract with the United Farm Workers of America, AFL-CIO (UFW). 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 you and all California farm workers these rights:

1. To organize yourselves;
2. To form, join, or help any union;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT refuse to bargain with the UFW, as exclusive collective bargaining representative of our employees, over a contract.

WE WILL NOT change your wage rates without first notifying the UFW and giving the UFW a chance to bargain about such changes on behalf of our employees.

WE WILL NOT encourage our employees to decertify the UFW by promising benefits or threatening reprisals.

WE WILL NOT disparage the character of UFW agents or officials or interrogate any employee as to whether a charge has been filed with the ALRB.

WE WILL, on request, meet and bargain with the UFW about a contract and about past unilateral wage increases.

WE WILL reimburse each of the agricultural employees employed by us at any time after August 3, 1979, for all losses of pay and other economic losses which he or she has suffered because of our refusal to bargain with the UFW.

Dated: HOLTVILLE FARMS, INC.

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California The telephone number is (714) 353/2130. 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

Holtville Farms, Inc. (UFW)

7 ALRB No. 15
Case Nos. 79-CE-114-EC
79-CE-115-EC
79-CE-209-ED

ALO DECISION

This case arose as a technical refusal to bargain. However, after stipulating to the facts regarding the election, certification, and refusal to bargain, General Counsel presented evidence that Respondent's refusal to bargain was in "bad faith," as defined by J. R. Norton Co. v. ALRB (1980) 26 Cal.3d 1.

Crediting the testimony of General Counsel's witnesses, the ALO found that Respondent delayed its response to the union for two months, encouraged a decertification drive, encouraged the formation of an independent union, interrogated employees, and unilaterally raised wage rates without notice to or bargaining with the union. He therefore concluded that Respondent's conduct indicated a desire to delay bargaining as long as possible and destroy the union's status as exclusive representative. Without deciding whether Respondent's election objection was reasonable the ALO found that Respondent acted in bad faith and that the circumstances of its refusal to bargain and other unfair labor practices warranted imposition of the make-whole remedy.

BOARD DECISION

The Board upheld the ALO's finding, conclusions, and recommendations, with minor modifications. The ALO refused to consider the reasonableness of Respondent's election objections. The Board held, rather, that reasonableness will be considered first, then good faith. Further, the reasonableness of the election objections and Respondent's conduct up to the time of the hearing will be weighed when considering Respondent's good faith in continuing to litigate. In addition, the Board rejected the ALO's conclusion that Respondent violated section 1153(b) since there was no evidence that the employees ever formed a labor organization.

DISSENT

Member McCarthy would dismiss, for lack of evidence, that portion of the complaint in which it is alleged that Respondent urged its employees to decertify the UFW and form a new, independent union. The dissent also contends that the majority has failed to apply standards which will give full effect to the intent of the Norton decision. Member McCarthy finds the majority's approach to be overbroad, both with respect to the kinds of employer conduct to be considered and with respect to the relevant time period, and that, under those circumstances; employers are likely to be deterred from challenging certifications even though they have reasonable grounds for doing so. He would conclude that the conduct of Respondent which is established in the record does not provide sufficient grounds, when viewed in relation to the strength of its election objections, to warrant imposition of the make-whole remedy.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HOLTVILLE FARMS, INC.

Respondent,

and

Case Nos. 79-CE-114-EC
79-CE-115-EC
79-CE-209-EC

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Charging Party

Barbara Dudley, for General Counsel
William F. Macklin, for the Respondent
Helen Moss, for Charging Party

DECISION

Statement of the Case

Robert L. Burkett, Administrative Law Officer: This case was heard before me on February 20, 21, 22, 1980 and March 4, 1980, in Holtville, California; all parties were represented by counsel. The complaint alleges that the Respondent, Holtville Farms, Inc., refused to bargain collectively in good faith with the labor organization certified persuant to the provisions of Chapter Five of the Agricultural Labor Relations Act., herein referred to as the Act, and has thereby violated Sections 1153 (e) and 1153 (a) of the Act. Additionally, the complaint alleges that the Respondent, Holtville Farms, Inc., did interfere with, restrain and coerce and is interfering with, restraining and coercing agricultural employees in the exercise of rights guaranteed by 1152 of the Act thereby engaging in unfair labor practices effecting agriculture within the meaning of 1153 (a) of the Act. This complaint is based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as the "union"), a copy of which was served on the Respondent. Briefs in support of their respective positions were filed after the hearing by the General Counsel and Respondent.

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

Findings of Fact

I. Jurisdiction

Respondent, Holtville Farms, Inc., is a California corporation engaged in agriculture within the state as admitted to by Respondent. Accordingly, I find that Respondent is an agricultural employers within the meaning of Section 1140.4 (c) of the Act.

Further, I find that the Union is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act as admitted to by Respondent.

II. The Alleged Violations

The complaint as amended alleges that the Respondent violated Sections 1153 (e) and 1153 (a) of the Act, by its refusal to bargain collectively in good faith with the UFW.

The complaint as amended also alleges that the Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing agricultural employees in the exercise of rights guaranteed by 1152 of the Act. The Respondent admits that it has continued to refuse to bargain with the United Farm Workers as its only means of testing the validity of the election certification by the Agricultural Labor Relations Board. The Respondent denies every other allegation in the Charging Party's complaint.

III. The Facts

A. Background

Holtville Farms, Inc. is a strictly growing operation, employing a relatively small number of workers, including tractor drivers, irrigators, and mechanic employees. Gilbert Chell is the general manager while Larry Martinez is the foreman for the irrigators, Rudy Garcia for the tractor drivers, and "Sparky" Leslie Carr for the shop. Mr. Chell has been the manager of Holtville Farms, Inc., for three years.

On February 13, 1978, there was an election held at Holtville Farms, Inc., conducted by the Agricultural Labor Relations Board (hereinafter referred as ALRB). The United Farm Workers won that election by a majority of 20 UFW to 7 'no Union'. Holtville Farms, Inc., contested the election on the grounds that the election had been held when the work force was at considerably less than its peak.

The ALRB untimately upheld the hearing officer's decision in this case which held that the requirements 1156.4 had been met and that it was a properly conducted election.

Following the issuance of the Board's final order on July-19, 1979, a decision was made by Mr. Chell, possibly with the advice of counsel, to refuse to bargain with the Union. The UFW twice requested to bargain, first on July 31, 1979 and again on August 17, 1979. On September 21, 1979 Holtville Farms, Inc., responded to the UFW's request to bargain by informing the Union that it refused to bargain due to the Company's belief that the election was incorrectly certified.

There is no factual dispute about Holtville Farm's refusal to bargain. It is the Respondent's position that the certification of the Union is invalid inasmuch as the election was not held in a timely manner (i.e., during peak of season). Respondent argues that the only means available to challenge the certification by the ALRB was to refuse to bargain and thus force the Union to file unfair labor practice charges alleging such a denial. This would be the only method to get the certification issue before "competent jurisdiction".

The basis of charge 79-CE-209-EC is that the employer unilaterally raised the wages it was paying its employees without negotiating this wage increase with the UFW. The Respondent does not deny this allegation taking the position that if the certification were invalid it was under no duty or obligation to negotiate such a wage increase with the Union.

The Respondent denies all other allegations contained in the complaint.

The major factual disputes that arose during the hearing in this case revolved around the Respondent's conduct during the time it was refusing to bargain. If the facts support the Respondent's contention that its refusal to bargain was motivated by a reasonable, good faith belief that the election was not properly conducted, the make whole relief sought by General Counsel, would be inappropriate. (J. R. Norton, Inc. v. ALRB, 26 Cal 1, (1979)).

The Sequence of Events

The testimony and evidence presented at the hearing basically centered on three time periods during the calendar year, 1979. The first took place sometime in February, 1979, and involved a meeting at a field location between General Manager Gilbert Chell and a number of field workers of Holtville Farms, Inc. The second involved a carne - asada party that occurred in July at the company shop facility. The third occurred sometime in November, 1979, and

and involved alleged conversations between foreman Rudy Garcia and a group of employees under his supervision.

I. The February 1979 Meetings

It is uncontroverted that at sometime during February,1979, a meeting took place between Holtville Farms, Inc. General Manager, Gilbert Chell, and many of the company's employees. The meeting took place in field in Calexico called "Eddy's-". The critical factual disputes arise from conflicts in testimony as to what parties called this meeting, and what was said during the meeting.

As background, Holtville Farms employees stopped work for approximately one week in early February, 1979, during a UFW strike against Grower's Exchange, Inc. which was harvesting in the Holtville Farms lettuce fields. The testimony is clear that a number of workers were concerned with the possibility of intimidation or violence during this period of time. The meeting in the Eddy's field was held as the workers returned from the work stoppage.

Mr. Chell testified that he was informed by the employees that they wished to meet with him. He stated that he learned of the employees request from foreman Rudy Garcia who had called him on the radio.

General Counsel's witnesses generally testified with consistency that they were told by their foreman to report to the meeting because Mr. Chell wished to speak with them.

It is apparent that the tense atmosphere at this time gave rise to a considerable amount of discussions among the workers. It is likely that a number of workers did, in fact, request that a meeting take place, and it is equally likely that other workers were asked by their foreman to attend this meeting, since Mr. Chell would be appearing. It should be noted, however, that Rudy Garcia claimed that Ramiro Ambriz was the individual that had asked him to call Mr. Chell to attend the meeting. Mr. Ambriz, called as a witness for the Respondent, denied asking Mr. Garcia to call Mr. Chell to the meeting.

More critical is the conflict in testimony over what was actually said at this meeting, (it should be noted that General Counsel's witnesses referred to two meetings taking place on consecutive days in February while witnesses for the Respondent referred to only one meeting having taken place. The stipulation entered into by General Counsel and Counsel for Respondent that the workers were paid for the time spent at the various meetings in February would seem to support General Counsel's witnesses). The key issue is whether or not Mr. Chell, at either of these two meetings, ever stated to the workers that they could form a small independent union that would in effect dissolve the UFW Union and would provide better benefits and protect the workers from strike-related problems.

Gilbert Chell categorically denied discussing the formation of a

small union with the company's employees, testimony that was corroborated by Ramiro Ambriz. Mr. Chell further stated that the reason the meeting took place was because of problems the workers were having due to strike activity that was taking place in the Imperial Valley. It certainly is clear that many of the workers, including some of General Counsel's witnesses, were concerned about harassment from strikers, and wanted some kind of protection.

It was Mr. Chell's testimony that at this meeting he advised the workers to go to the ALRB in El Centro and explore their legal rights and what could be done about their predicament. This testimony was in part corroborated by the testimony of Jesus Chavez, a surrebuttal witness for the Respondent. However, Augustin Vasquez another surrebuttal witness for the Respondent testified that Mr. Chell said nothing at this meeting.

A number of General Counsel's witnesses stated that Mr. Chell had, in fact, raised the issue of a small independent union at this initial meeting.

Subsequently, the workers did choose two representatives who were Isaac Moran Rios and Romiro Ambriz. While a second meeting apparently took place, for the purpose of clarity I will treat the two meetings from here on as one. At this time a number of General Counsel's witnesses testified that Mr. Chell again addressed the workers about forming an independent union of their own in lieu of the UFW. It should again be pointed out that Romiro Abriz, an employee of the Company and a witness for Respondent corroborated Gilbert Chell's statement that he at no time discussed the formation of a small union with the company's employees.

Mr. Chell denied that he had ever been in a conversation where the formation of a small or independent was discussed. He claimed to have heard no one mention forming an independent union at the February meeting at Eddy's ranch.

Foreman Rudy Garcia, a witness for Respondent, stated specifically that he heard the workers ask Mr. Chell if they could form their own little union, and Mr. Chell said it was up to them.

This contradiction in testimony is crucial, for it establishes, conclusively, that the issue of an independent little union was indeed discussed at a February meeting. What makes it that much more significant is that Mr. Garcia when asked who first suggested the forming of a small union replied unequivocally that it was Ramiro Abriz. Mr. Abriz flatly denied that he suggested or said anything about forming a small union.

There was a petition or list drawn up at the meeting that was signed by the workers, the purpose and content of which is somewhat confused by the testimony. The list was apparently left at the ALRB office, and was never introduced into evidence.

There was some testimony that Mr. Chell had stated that the Company could provide the workers with an attorney to solve their problems

with the union. Mr. Chell testified that when the issue came up he told the workers they would have to pay for it themselves. Isaac Moran Rios, a witness for the General Counsel, testified that Mr. Chell had in fact at a later date told him that he would have to look for a private attorney himself.

Isaac Moran Rios testified that he spent nine days on a project of correcting signatures from employees and during this time did no work for the Company and yet was paid for the entire nine days. This testimony was never disputed other than Mr. Moran's testimony that at the end of the nine days Mr. Chell asked him to return to work.

Finally, a stipulation was entered into by Counsel that the workers were paid for time spent at the meetings in February. Rudy Garcia testified that the workers were not paid for the February meeting.

II. July, 1979, Carne-Asada Party

There was conflicting as to how the carne-asada party originated. It is clear that it was held on or about July 28, 1979, at Holtville Farms cooler/shop complex in Holtville, California. It is the Respondent's position that it did not initiate this party.

Mr. Chell stated that he learned that the workers wanted a party, and had requested a party and that one thing led to another and they had one. Mr. Chell further testified that he learned of this request from foreman Rudy Garcia who corroborated his testimony.

There was some testimony from other witnesses for Respondent and a witness for General Counsel, Apolinar Gerardo, that they learned of the party from their fellow workers.

There was some testimony that the Company had previous carne-asada feeds on working days and that it was normal to be paid for that time.

This was, clearly, the first time there had been a carne-asada party at the Company's cooler/shop facility.

Mr. Chell testified that he paid his respects to the workers on a more or less individual basis by having what he termed "a chit chat" with them. He stated that he did not assemble the workers into a group nor address them collectively, testimony that was corroborated by Respondent witness Augustin Vasquez, who further stated that he at no time heard him talk about any increased benefits or wages for the workers.

Mr. Chell testified that he remembered having a conversation with Apolinar Gerardo where they discussed the insurance program that the Company already had in existence for its workers. This conversation was corroborated by Mr. Romiro and Mr. Ruiz.

General Counsel's witnesses for the most part testified that they were told by their foreman to attend the carne-asada. They stated that they were going to have a carne-asada and beer and that Mr. Chell was going to be there to give them a message. Witnesses for General Counsel claim that they "stopped work after only four hours and were paid for an eight-hour day."

Ernesto Verduzco, Salvador Moya, and Alfredo Salvana all testified that foreman Larry Martinez was the one who informed them about the carne-asada. On surrebuttal Larry Martinez testified that he was on vacation at the time and did not attend, or even know about, the carne-asada. It is difficult to evaluate this enormous conflict in testimony in that Larry Martinez was not called during the defense's initial rebuttal nor did Mr. Chell, when called by his own Counsel during the initial rebuttal, testify to that fact. On surrebuttal he was able to testify, from memory, and from his own personal knowledge that he took his vacation in thelatter part of July.

There were no records introduced to corroborate Larry Martinez' testimony. As General Counsel points out in her brief, Mr. Chell testified that this would have left Rudy Garcia in charge of the irrigators, and he presumably would have prepared their time cards, yet he seemed unaware of the time the irrigators had actually worked that day, and was certainly unaware that they were paid for the time they spent at the carne-asada.

On the other hand, the only testimony that Mr. Martinez was at the carne-asada came from the three irrigators. There were general statements made by witnesses that all the employees or all the foremen were there but Mr. Martinez was never specifically placed at the carne-asada by other witnesses. No testimony was ever presented to contradict the testimony of Larry Martinez but again it should be Respondent's surrebuttal.

Regardless of the variations in testimony concerning prior carne-asadas among the Holtville Farms workers, the record is clear that this particular carne-asada was out of the ordinary in that it was attended by Mr. Chell, who could not recall ever attending a carne-asada or other social function with the workers before, and that the Company bought the beer and meats for the carne-asada as stated by Mr. Chell.

There is testimony by a number of workers that Mr. Chell discussed decertifying the Union at the carne-asada and again discussed forming an independent union apart from the UFW.

III. November, 1979, Meeting at “La Quinta"

Sometime in November, 1979, in a field known as "La Quinta", a meeting took place between a group of employees gathered around that field. Again there is strong conflict between the testimony of General Counsel's witnesses and Respondent's witnesses.

Foreman Rudy Garcia testified that he had no personal feelings about whether the workers should be under the United Farm Workers Union and didn't care either way what the employees chose to do. He denied ever having made derogatory comments about Caesar Chavez, that the Company might go out of business, or that the Company might quit planting before signing a contract with the Union. He further stated that he never interrogated any of the workers about filing any charges with the state nor had he ever stated that the Company was going to sue any employees for filing such charges.

He also stated that he was unaware that some workers had filed charges with the state against the Company and that he had not become aware of any charges in the complaint until noontime on the day he was to testify.

Augustin Vasquez, witness for the Respondent, who has no supervisory duties, corroborated Rudy Garcia’s testimony.

Fellow employee, Jesus Chavez had difficulty recalling what took place during the conversation.

Witnesses for General Counsel, many of whom were related and members of the Verduzco family, testified that at the field known as La Quinta Mr. Garcia threatened to take the workers who had placed demands to court.

Miguel Verduzco and Ernesto Verduzco Favela both testified that at different times Mr. Garcia stated that the Company would never sign. Apolinar Gerardo also reported several conversations with Mr. Garcia in the shop where he testified that Mr. Garcia said that the Company would rather close than sign a contract. Respondent's witness, Manuel Casillas contradicted Mr. Garcia's testimony when he stated that he and Mr. Gerardo sometimes had discussions about the United Farm Workers Union with Mr. Garcia. He further went on to state that before the problems arose there had been lots of conversations but since then they have retired and withdrawn from those conversations.

One conversation that was testified to and never rebutted was Alfredo Saldana's recollection of a conversation with Mr. Garcia at a field known as "El Burro". He stated that Mr. Garcia said that the Company would never sign and had enough money to form another company. He further stated that Mr. Garcia said that they had plenty of men to work and they should not be afraid of the 'Chavistas'. He further recollected that Caesar Chavez was doing what he was doing in order

(9) to make

money and go someplace else.

IV. The Refusal to Bargain

Perhaps the most significant statement exchanged in the entire hearing took place between General Counsel and Mr. Chell during her cross examination. After asking him if he agreed that the majority of workers who voted in the election did vote for the UFW he agreed and offered the following explanation. "I had several foremen that were mistreating the workers; they were abusing them and using foul language. In fact, I fired the tractor foreman, and shortly, later, I fired the irrigator foreman because of drinking and other things, and he wouldn't follow the seniority rule. So, the men were upset, and I don't blame them."

Q* Was that the reason you'd rather have an election at a different time?

A. Emotions were running high at that particular time.

Q. Do you feel that the results would be different if you had an election some—at some other point in time?

A. Personally, I don't care which way it goes as long as there is an election in peak season.

General Counsel offered testimony that Ernesto Verduzco, Claudio Val and Apolinar Gerardo met with Mr. Chell and asked him to sign a contract with the UFW. Miguel Verduzco further stated that Mr. Chell replied that he could not sign a contract because the state had not certified the' Union. Mr. Verduzco then went on to testify that workers again talked with Mr. Chell and that he showed him a copy of the certification which the UFW had loaned him to which Mr. Chell replied, "That paper was not valid—that would probably still have to go to court, and would probably would be delayed; probably would be delayed a year—a year and a half, probably two years." It should be noted that Mr. Chell stated that he had never had any conversations regarding certification with his workers.

Finally, Ernesto Verduzco Favela testified that Mr. Chell asked him to align himself with the Company in return for a better job.

Discussions of Issues and Conclusions

A. Introduction

In response to Respondent's position as set forth on page 3 and 4 of his post hearing brief, I have considered Respondent's exhibit No. 1, the Representation Pleadings, in reaching my conclusions.

In response to Respondent's argument that the testimony of Apolinar Gerardo, in regard to the reduction of the hours of his employment not being part of any allegation in the Complaints as amended, and having occurred at point in time subsequent to the filing of the charges listed in the Complaint, Counsel had ample opportunity to raise the appropriate objections during the course of this hearing and, failing to do so, may not use a post hearing brief as a forum for his relevancy argument. However, in reaching my findings in fact and conclusions of law I have given little, if any, probitive value to that part of Mr. Gerardo's testimony, as it is a minor and relatively insignificant part of the fact pattern and the testimony itself was confusing and sometimes contradictory.

B. Witness Credibility

I am in accord with Counsel for Respondent when he states in his post hearing brief that, "to a great extent the determination in this case as to whether or not the Company violated any of the alleged provisions of the Agricultural Labor Relations Act depends upon the resolution of each witnesses credibility at the hearing." While it is true that there was some uncontroverted testimony most of the key factual issues produced vast testimonial conflicts.

Counsel for Respondent appears to rely heavily upon the assertion of Mr. Chell and Mr. Martinez that Mr. Martinez was in Salinas on vacation during the carne-asada party and that therefore several of the General Counsel's witnesses fabricated testimony as to who told them about the party and who was, in fact, present at the party. He specifically cited testimony of Apolinar Gerardo, Alfredo Salvana, Salvador Moya, and Miguel Verduzco. Counsel also argues that the fact that a large number of General Counsel's witnesses were related further impeaches their testimony. Finally, as a further attack on the credibility of the General Counsel witnesses Counsel for Respondent cites various instances of witness confusion and contradiction particularly on the issue of certification or decertification of the Union.

Additionally, Counsel argues on a number of occasions that witnesses were biased by their personal beliefs and Union affiliation in favor of the Union's position.

As was stated earlier, the question of Larry Martinez' absence from the carne-asada and indeed from the Valley was never raised during Respondent's initial rebuttal, while Mr. Chell, who later testified as to the precise time of Mr. Martinez' vacation was sitting next to Counsel during the entire hearing. Additionally, the single most convincing piece of corroborative evidence that could have been offered would have been time sheets or time cards demonstrating the fact that Mr. Martinez was on vacation at this date.

While other witnesses both for General Counsel and Respondent fail

to place Mr. Martinez at the carne-asada their statements were not directed towards the issue of whether or not he was there, but rather they answered in passing who they recollected being at this event. The only two witnesses that testified specifically that Larry Martinez was not in the Valley and was, in fact, in Salinas were Mr. Martinez himself and Gilbert Chell both of whom were highly interested parties in this proceeding.

Counsel for Respondent presents a strong argument in establishing the credibility of Ramiro Ambriz. Mr. Ambriz testified in an apparently honest and forthright manner though he often had gaps in his memory—gaps that came at critical times. I am in agreement with Counsel for Respondent when he states that General Counsel failed to impeach Mr. Ambriz credibility by trying to establish bias in favor of the Company as a result of special favors granted to him. The evidence would indicate that Mr. Chell has done favors for most of the workers in the past not dissimilar to those he granted Mr. Abriz.

The testimony of witness Manuel Casillas who was called by the Respondent at the request of the Administrative Law Officer does not conform to the description offered by Counsel for the Respondent. While it is true that the defense was unable to impeach Mr. Casillas' testimony by demonstrating that he had received any special favors, it is not at all clear that his testimony was supportive of the Respondent's account of disputed incidents, particularly during his testimony when he was asked if he had ever had any conversations with Rudy Garcia and Apolinar Gerardo. In describing what the conversations were about he was asked,. "During the course of these discussions, did you ever discuss the United Farm Workers Union?" Answer, "Sometimes we talked about the Union and all those things." This response was solicited by Attorney for Respondent on direct examination. Finally, a few moments later, under cross examination by Ms. Dudley, Mr. Casillas completely contradicted his earlier answer by stating that he himself had never been involved in a conversation with Mr. Garcia and Apolinar Gerardo about the UFW.

His testimony about this and other matters appeared to me to be evasive at times and certainly did not go a long way in strengthening Respondent's defense.

The most damaging testimony in this hearing, if taken on face value, would be the remarks elicited by General Counsel from her witnesses that Gilbert Chell, at a meeting or meetings in February of 1979, advised the workers that they would make a small union independent from all the other workers so that they would have better benefits and that they would then dissolve the UFW Union. If these statements had gone unchallenged, they would certainly stand as crippling testimony to the Company's defense of a good faith refusal to bargain.

Of course, these allegations were categorically denied and the testimony that was presented was diametrically opposed to that presented

by General Counsel. In weighing the testimony and judging the credibility of the witness my focus centered primarily on the phrase "small or little union". Just as each of General Counsel's witnesses who were present during the February meetings testified that Mr. Chell discussed the formation of a small or independent union so witnesses for Respondent testified that not only had Mr. Chell not used those words or that phrase, that in fact they had not heard anybody make reference to a small or independent union/with one exception.

Appearing as a witness for Respondent, foreman Rudolph Garcia during direct examination by Mr. Macklin, stated that he was present at the February meeting.

Q. "Did you have the opportunity to hear what was discussed?"

A. "Yes, some of it."

Q. "Could you tell me what the contents of that discussion was?"

A. "What they asked Mr. Chell was that they wanted to go see if they could form their own little union, and Mr. Chell said it was up to them."

Mr. Garcia was then asked who, if anybody, was the first to suggest the forming of a small union and replied, 'Mr. Romiro', who was then identified as Romiro Ambriz. Mr. Ambriz later testified that at no time had he suggested or said anything about forming a small union.

This testimony, while contradicting that of Mr. Ambriz, also contradicts that of Gilbert Chell who denied that he had ever been in a conversation where the formation of a "small" or independent union was discussed. He also claimed to have heard no one mention forming an independent union at the February meeting at Eddy's Ranch.

This is a fundamental contradiction in the defense presented by Respondent, and is one that is never addressed. It lends important credibility to the witnesses for General Counsel who testified about the issue of a small union, while at the same time casting serious doubt on the self-serving testimony of Mr. Chell, and particularly Mr. Garcia.

It should be further pointed out that Mr. Garcia also claimed that Mr. Ambriz was the one who asked him to call Mr. Chell to initiate. this meeting. Mr. Ambriz likewise denied that he had asked Mr. Garcia to call Gilbert Chell to the meeting.

These contradictions in testimony by the two principal witnesses for the defense leave serious doubts about the subsequent testimony and about the Company's good faith belief in the invalidity of the election.

The credibility of Respondent's good faith defense is further undermined by the uncontroverted testimony of Isaac Moran that he spent nine days on a project of collecting signatures during which time he did no work for the Company and for which he received full pay for the entire nine days. He also stated that in that time period he met two or three times with Gilbert Chell at his office.

Counsel for Respondent argues that as soon as Gilbert Chell learned that Mr. Ambriz had not been working he ordered him back to work, but the testimony does not support this contention. Mr. Ambriz merely testified that at the end of nine days Mr. Chell ordered him back to work. It strains ones credulity to imagine that a worker could spend nine days in the field soliciting signatures without his supervisor's knowledge.

In the context of the above testimonial contradictions, the pattern of behavior on the part of Holtville Farms, Inc.'s General Manager, Gilbert Chell, must be analyzed. While the stated objection to the certification of the Holtville Farms, Inc., election revolved around whether the election had been held when the work force was at 50% of its peak, Mr. Chell's explanation as cited above in the facts seem to indicate his belief that the conditions at Holtville Farms during the time of the election—foremen abusing workers and using foul language, and irrigation foremen drinking and offering favoritism, were detrimental to his interests and favorable to a UFW climate.

Mr. Chell also made some highly unlikely comments in answer to preliminary questions about whether or not there was a Union election at Holtville Farms, Inc., in February of 1978. When asked if he knew who won that election he stated, "I don't remember." Since this whole hearing is an exercise to present the certification issue to the Court of Appeals, such a response is astonishing.

Following the refusal to bargain with the UFW on July 31, 1979, there was almost two months delay before Respondent notified the Union that it would not provide the requested information and that it would not bargain. This delay was unexplained except that it was due to "the slowness of the Attorney" and/or vacations of Chell and the Attorney.

For reasons stated above, the testimoney of Rudy Garcia is judged to be unreliable. Respondent's own witness in two critical situations contradicted Mr. Garcia’s testimony, and in fact, Mr. Garcia's testimony during this hearing was on a number of occasions in direct contradiction to that of his employer Mr. Chell.

While Mr. Garcia denied each and every allegation testified to by General Counsel's witnesses, he also went so far as to claim that he didn't even know if the Company was negotiating or not. This in spite of the fact that Mr. Chell testified that Mr. Garcia was present at a meeting in November where he, Mr. Chell, explained to the

workers that the Company was not negotiating because it was challenging the certification.

Mr. Garcia while admitting to having frequent conversations with Mr. Gerardo and Mr. Casillas denied ever discussing the Union. Mr. Casillas, certainly not a witness for General Counsel, contradicted this testimony and then later contradicted his own testimony.

Finally, the conversation that was alleged to have taken place in the field know as "El Burro" was never challenged by the Respondent, other than the arguments raised as to the witnesses' credibility in the post hearing brief.

Counsel for Respondent does raise significant questions of doubt as to witnesses' credibilty concerning the affair surrounding the came-asada. It was unfortunate that this testimony came in on surrebuttal at the very end of the hearing; it was therefore never competently explored. Certainly, Respondent's argument would be far stronger had he been able to introduce documents to support his testimony.

The Analysis and Conclusions

The Norton decision (infra at 3) established the standard to be used in determining whether or not make whole relief is appropriate when an employer refuses to bargain with a certified bargaining representative.

"Board must determine from the totality of the employer's conduct whether it went through the merits of contesting the election results as an elaborate pretense to avoid bargaining or whether it litigated in a reasonable good faith belief that the Union would not have been fairly selected by the employees as their bargaining representative had the election been properly conducted."

I am in accord with Counsel for Respondent's argument, that the California Supreme Court stated the make whole remedy must not be applied unless the employer's motive and intent in refusing to bargain have been analyzed. If an employer has a meritorious belief that the certification is invalid and has pursued it in a good faith effort, the make whole rememdy is inapplicable.

In determining the "good faith" aspects of the Norton test—whether the employer's reasonable election challenges constitute the actual reason for its refusal to bargain--The Board should consider evidence of the employer's conduct before or after the election or in any period relevant to its refusal to bargain—in short, any evidence which may tend to show that the employer acted out of ulterior bad faith motives in refusing to bargain.

There is ample precedent, both under the National Labor Relations Act and the Agricultural Labor Relations Act, for utilizing the employer's over all conduct in judging its attitude in a bargaining context. In Joy Silk Mills v. NLRB (DC Circuit 1950) 185 Fed. 2D 732 Cert. den. (1951) 341 U.S. 914, the U.S. Court of Appeals for the District of Columbia Circuit sustained the NLRB's approach of looking to the employer's contemperaneous conduct in determining that its refusal to bargain with the Union was not grounded in good faith. The Court's analysis in Joy Silk as presented by General Counsel in her brief is relevant to the issues raised at this hearing;

> "The question then presented is whether Gilbert's refusal to bargain was permissible under the Act. It has been held that an employer may refuse recognition to a union when motivated by good faith doubt as to that union's majority status. When however such refusal is due to desire to gain time and to take action to dissapate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8(a)(5) of the Act . . .
>
> "We think there was 'substantial' evidence, viewing the entire record, from which the Board could conclude that the original refusal of recognition was in bad faith. The employer engaged in coercive activities in the period immediately preceeding the election. Interference commenced only five days after the consent election had been agreed upon. The time lapse between the first request to bargain and the election was only twenty-six days. In view of the totality of the evidence, it is a reasonable conclusion that the employer suddenly suffer a change of heart. "We are in a field where subtleties of conduct play no small part.' Neither the Board nor the Courts can read the minds of men as the Board has stated: 'In cases of this type the question of whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.' Petitioner has transgressed the bounds of permissible conduct to a sufficient extent to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its other actions." (infra et 74) (Citations ommitted)

In reaching my conclusions in this hearing, I have relied upon the

Joy Silk totality of evidence standard in judging whether the refusal to bargain was motivated by a desire to weaken the Union's bargaining power.

I reject General Counsel's assertion that the Board should judge the employer's position according to whether it is reasonably likely to prevail in Court. While it is true that the reasonableness of the employer's election objections must be judged solely on the representation case record, the standard set forth by General Counsel is prohibitively narrow.

Whether an employer is extremely unlikely to persuade the reviewing Court to overturn the certification does not in and of itself indicate that the Respondent's claim is not meritorious or potentially meritorious. While it is true that a Court review of a certification decision issued by the ALRB or NLRB is quite limited and is governed by the substantial evidence rule (which means that it is bound to accept the Board's factual determinations if supported by substantial evidence in the record considered as a whole), the burden of establishing a meritorious claim is quite different from the burden of having a certification decision set aside by the Appellate Court.

In applying the totality of conduct standard if necessarily it excludes the adoption of the frivilous/debatable standard for make whole relief. I concur with General Counsel that precedents interpreting Section 10(c) of the NRLA is not "applicable" to the ALRB's construction of this deliberately included remedy. "Labor Code 1148" It should be noted that Counsel for Respondent did not argue in his post hearing brief that the frivilous/debatable standard for make whole relief should apply.

The totality of the conduct of the employer, Holtville Farms, Inc., through its General Manager, Gilber Chell, and its foreman, Rudy Garcia, establishes that the refusal of the Respondent to bargain with the Union and the original refusal of recognition was in bad faith.

The evidence presented substantially demonstrated that the Respondent's refusal to recognize the Union was motivated by a desire to gain time and to take action to dissapate the Union's majority.

Based primarily upon the testimony of Gilbert Chell and Rudy Garcia, I have concluded that Mr. Chell did indeed raise the issue of workers forming a small independent union at the February, 1979, meeting.

It is clearly established law that an employer may not instigate directly or indirectly, an effort to decertify a union which represents its employees. NLRB v. Skywolf Sales, (CA 9, 1972) 470 F 2nd 827, ENF'G 189 NLRB No. 135, 82 LRRM 2051.

In Skywolf Sales, supra, the Ninth Circuit found that the

involvement of the General Manager of the employer, in only one incident, where he polled an employee to sign the decertification petition and offered improved benefits, was sufficient to find a Section 8 (a)(1) NRLA violation. The Court also held that the subsequent refusal to bargain of the employer, based on an alleged 'good faith doubt' as to the Union's majority status, to be a Section 8(a)(5) violation because of the Employer's role in causing the dissatisfaction from the Union.

Mr. Chell's activities in encouraging his employees to form a small union of their own, his promises of improved benefits it they did so is evidence of an attempt at direct domination, in violation of Labor Code 1153 (b).

Furthermore, his subsequent payment of a week and a half wages to Mr. Moran was in direct violation of the holding in NLRB v. Somers Fertilizer,"(CA 1, 1958) 251 P. 2nd 514, where a worker received payment of wages for time spent in formation of an employee organization"

Respondent's Counsel argues that since it was legally impossible for Mr. Chell to "decertify" the election there is no violation. In this instance we do not analyze the legal impossibility but rather the motives and animus that the Respondent demonstrates in his course of conduct. If Mr. Chell was encouraging his employees to participate in a decertification effort whether or not it was legally possibly this effort is evidence of his bad faith.

The Respondent admits to the allegation of charge 79-CE-209EC that the employer unilaterally raised the wages it was paying its employees without negotiating this wage increase with the UFW, AFL-CIO. When judged by the totality of the circumstances this conduct is seen as a unilateral granting of benefits without notifying or bargaining with the authorized representative of ones employees as a per se violation of the statutory duty to bargain. NLRB v. Katz, 369 U.S. 736 (1962) OP Murphy, 5 ALRB No. 63 (1979).

The delay of almost two months before the Respondent notified the Union that it would not provide the requested information and that it would not bargain was never adequately explained and indicates, that in light of the totality of bad faith activities, a purposeful stalling. "See Robert H. Hickham, 4 ALRB No. 48 (1978)."

The interrogation by Rudy Garcia of a number of his tractor drivers after a charge had been filed with the ALRB against him and the Respondent when he threatened to go to Court to see who had filed the charges was designed to "restrain and coerce" the employees who were attempting to exercise the rights guaranteed them by the ALRA. Backus Farms, 4 ALRB N. 26 (1978), McNally Enterprises, Inc. 3 ALRB No. 82 (1977).

Counsel for Respondent urges that the allegations of Paragraphs 9 and 10 of the First Amended Complaint are beyond the six month Statute of Limitations and that I therefore may not find any violations based upon conduct which occurred during this period of time. While it is true that they occurred beyond the six month statute, the testimony taken concerning this conduct goes to the totality of the employer's conduct and is critical background information as' to whether an apparently good faith refusal to bargain was actually motivated by a desire to weaken the union's bargaining power.

The actual refusal to bargain was subsequent to this conduct and does fall within the Statute of Limitations. The prior conduct falling outside the Statute of Limitations period is highly relevant in showing the employer's state of mind, animus, and motivation. It does not constitute the actual refusal to bargain itself but has evidentiary weight in determining whether or not the refusal to bargain was made in good faith.

Paragraph 10 of this Complaint was stricken during the course of the hearing.

Paragraph 14, Sub-section C will be dismissed in that no testimony was offered to support the allegations.

Paragraph 14, Sub-section D is dismissed in that there is no testimony to support this allegation.

Paragraph 15 of the First Amendment Complaint will be dismissed because there was no specific testimony given to support the allegation.

I would like to express my belief that Gilbert Chell had been a benevolent and concerned supervisor of his employees. That was never an issue in this case, as does not mitigate in any way the Company's bad faith refusal to bargain.

In reaching my conclusions I have relied heavily on the Norton Court's totality of employer's conduct test. It is therefore unnecessary to rule on the second Norton standard-whether the employer's ground for challenging the election was meritorious.

I find that the Respondent refused to bargain in good faith and did in fact bargain for purposes of delay rather than out of a desire to test the Board's certification order; dilatory tactic designed to stifle self-organization by his employees.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist from and take certain affirmative actions designed to effectuate the policies of the Act.

The unfair labor practices committed by Respondent strike at the heart of the rights guaranteed to employees by the Act. The inference is warranted that Respondent maintains a attitude of opposition to the purposes of the Act with respect to protection of employees in general. It will be accordingly recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed by the Act.

The General Counsel urges that the Administrative Law Officer issue a Bargaining Order. While this in fact might be an appropriate remedy, it was not prayed for in the Complaint, and Respondent was given no opportunity to be heard on this issue. I will therefore, deny General Counsel's request for a Bargaining Order.

As a result of these findings Respondent will make employees whole for economic losses resulting from the refusal to bargain in good faith.

Respondent will immediately furnish all information requested by the UFW which is relevant to collective bargaining and update the information to the time of the Order.

Notice of the violations and remedies and the rights of the employees protected by law will be posted, common mailed and read to the employees of the Respondent. Upon the basis of the entire record, the findings of fact, conclusions of law I hereby issue the following recommendations:

ORDER

Respondents, their officers, their agents, and representatives shall:

1. Cease and desist from:

   a. Discouraging membership of any of its employees in the United Farm workers of America, AFL-CIO, or any other labor organization, by refusing to bargain collectively in good faith.

   b. In any other manner interfering with, restraining and coercing employees in the exercise of their rights to self-organization, to form, to join, or assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized

in Section 1153 (c) of the Act.

2. Take the following affirmative action which is necessary affectuate the policies of the

   a. Make employees whole for any and all loss of pay and other benefits resulting from Respondents refusal to bargain in good faith since the UFW's first request to bargain after the date of certification;

   b. Bargain in good faith with the UFW;

   c. Respondent make a public apology to its employees for its violations of the Act in front of an assembly of all Respondent's employees;

   d. Respondent grant access to the UFW during working hours to meet with its employees;

   e. Respondent give notice to its employees signed by Respondent advising them of their rights under the ARLA and its promise not to interfere with these rights;

   f. Respondent assemble its employees for one hour of paid time so they may be advised by the representatives of the ALRB of their rights under the Act and ask the representatives any questions they might have regarding the Act.

   Dated: August 8, 1980, at Los Angeles, California

ROBERT L. BURKETT
Administrative Law Officer

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which parties presented evidence, an administrative officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agriculatural Labor Relations Act. In order to remedy such conduct we are required to post this notice and to mail copies of this notice to our employees. We intend to comply with this requirement and to abide by the following commitments:

1. We will not refuse to bargain in good faith with representatives from the UFW.

2. We will make our employees whole for economic losses resulting from our refusal to bargain in good faith.

3. We will immediately furnish all relevant information requested by the UFW and will update that information to the time of the Order.

4. All our workers/employees are free to support, become or remain members of the United Farm Workers of America, AFL-CIO or of any other union. We will not in any manner interfere with the right of our employees to engage in these and other activities or to refrain in engaging in such activities, which are guaranteed them by the Agricultural Labor Relations Act.