Soledad, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

O. P. MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 78-CE-113-M 78-CE-113-1-M 78-CE-113-2-M 79-CE-330-SAL 7 ALRB No. 37

DECISION AND ORDER

On September 15, 1980, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW), each timely filed exceptions and a supporting brief. Respondent also filed exceptions and a brief, but not in a timely fashion. Respondent, General Counsel, and the UFW all timely filed reply briefs.

The Agricultural Labor Relations Board (ALRB or Board)[1/] has considered the record and the attached Decision in light of the timely exceptions and supporting briefs and has decided to affirm the ALO's rulings, findings, and conclusions as modified herein, and to adopt his recommended order dismissing the consolidated complaint. Because of the importance of the issue to which Respondent has excepted, and due to a recent U. S. Supreme

1/ Member McCarthy took no part in the decision in this case.

Court decision bearing on that issue, the Board has decided to review the entire record and Decision in light of all relevant material.

Procedural Background

On August 8, 1978, the UFW filed a charge in Case No. 78-CE-113-M alleging that Respondent violated Labor Code section 1153(e) and (a) (all citations herein will be to the Labor Code unless otherwise specified), by engaging in bad-faith bargaining, and section 1153 (c) and (a) by mechanizing its fresh market tomato harvest as a means of discriminating against its employees for their union activity. Based on those charges, which were twice amended thereafter, the General Counsel, on August 24, 1978, issued a complaint. On August 31, 1979, the General Counsel issued another complaint (Case No. 79-CE-330-SAL) alleging that Respondent violated section 1153 (c) and (a) by discriminating against former employees by failing to rehire them because of their union activity. On September 4, 1979, the complaints were consolidated for hearing.

Factual Background

Respondent is a Texas corporation engaged in the harvesting and packaging of fresh market tomatoes. Respondent grows no tomatoes, but did select seed and harvest the crop for some of its customers. In the Salinas Valley, Respondent purchases tomatoes from various agricultural employers, including Braga Ranch, Bruce Church, Borzini, Huntington Ranches, Pryor Farms, Petit Ranch, Merrill Farms, and Charley's Farms. For most of those growers Respondent also harvested the crop and selected

the seed. Francis P. Murphy (Murphy) acted as Respondent's corporate secretary and is 40% owner of the corporate stock. Murphy was the primary representative of Respondent for its California operations.

Respondent's operations in California are concentrated in the months of August to November, during the harvest season for fresh market tomatoes. Although planting occurs from February to July, apparently few of Respondent's staff are required during these months.

In a Board-conducted representation election on September 30, 1975, the UFW received a majority of the votes and was certified on March 17, 1977. O. P. Murphy (March 17, 1977) 3 ALRB No. 26 (O.P.M. I). During the 1976 harvest, Respondent altered its method of hire and began hiring employees directly rather than using the employees engaged by a labor contractor. Respondent created a seniority list intended to give preference to those workers who had completed the prior season's harvest. However, the practice was not uniformly applied and the Board concluded that Respondent violated section 1153 (c) and (a) of the Agricultural Labor Relations Act (Act) in 1976 by refusing to hire families of workers who had been involved in union activity. O. P. Murphy (Sept. 19, 1978) 4 ALRB No. 62 (O.P.M. II)

The Board subsequently concluded that Respondent committed several violations of the Act during the 1977 harvest. Besides our finding that it followed discriminatory hiring and discharge practices, Respondent was also found in contempt of a court injunction ordering it to cease its discrimination. We

also concluded that Respondent violated the Act by causing the arrest of a UFW representative for trespass. O. P. Murphy (Dec. 27, 1978) 4 ALRB No. 106 (O.P.M. III). In that case we held that a labor organization certified as their collective bargaining representative may take access to employees at the worksite to communicate with employees about the progress of negotiations.

Most recently, we found that Respondent violated section 1153 (e) and (a) by failing to bargain in good faith with the UFW up to October 13, 1977. O. P. Murphy (Oct. 26, 1979) 5 ALRB No. 63 (O.P.M. IV). This prior history serves as background for the instant matter. AS-H-NE Farms, Inc. (Feb. 8, 1980) 6 ALRB No. 9, p. 3.

Bargaining History

The UFW negotiated with Respondent in a three-part process, first discussing relatively standard, industry-wide non-economic articles of the proposed contract with Respondent, then submitting economic proposals and following with specific proposals tailored to Respondent. Parts one and two of the UFW process form a master contract model applicable to representative employers. The UFW attempted to obtain Respondent's agreement to bargain article by article, agreeing to each article as consensus was reached. However, Respondent prevailed on this issue and the parties reached only tentative agreement on each article, pending agreement on the contract as a whole. Pursuant to this bargaining process, on August 19, 1977, the UFW sent to Respondent its economic and local issues proposal, including an article on

mechanization. [2/]

Respondent presented its counterproposal on August 24, 1977. This document contained no specific proposal on mechanization except for a general Management Rights clause. [3/] During the period from August to October 1977, the primary discussion on machinery concerned a machine called La Banda that had previously been used by O. P. Murphy. On September 2, 1977, Respondent told the UFW that La Banda was irrelevant, for Respondent intended to use no machines for the harvest of fresh market tomatoes. In late September 1977, Charley Stoll became the chief negotiator for Respondent, appearing generally at bargaining sessions with Mrs. O. P. Murphy until October 1977 and thereafter with Francis P. Murphy. The Union was primarily represented by Marion Steeg during the negotiations. Stoll followed the negotiating procedure described above, i.e., the parties would reach tentative agreement on each article and move on. Stoll testified that he would view the breach of a tentative agreement as an indication of bad-faith bargaining.

In early October 1977, Respondent orally proposed that if the UFW could adopt the mechanization clause which was contained

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2/The mechanization article stated: "Article 41; Mechanization. The Company agrees not to utilize harvesters or to introduce any other type of machinery or mechanical device which displaces workers unless there are negotiations and agreement with the union."

3/This proposal stated in relevant part: "Management Rights. The company retains all inherent rights of management including but not limited to the following, unless they are limited by some other provision of this Agreement: to decide the nature of equipment, machinery, methods or processes, and to change or discontinue existing equipment, machinery or processes; ...."

in a contract between the UFW and Meyer Tomatoes (the Meyer Contract)[4/] for three years, Respondent would accept the Union's maintenance-of-standards clause. This offer was rejected by the Union because it considered that a period of three years was too long to be bound by the mechanization language of the Meyer Contract. The Union testified that the reason it negotiated the mechanization language with Meyer was because it had expected that mechanization of fresh market tomatoes would not be economically feasible during the life of that contract.

In November 1977, Respondent made a package offer to the Union: Respondent would accept the entire Meyer Contract (with local supplements) in consideration for the Union's withdrawal of all pending unfair-labor-practice charges and the settlement of Chavez v. Fitzsimmons, a lawsuit charging antitrust violations engaged in by certain growers and the International Brotherhood of Teamsters. This offer was pending when the parties resumed negotiations in 1978.

During late 1977, Murphy, in furtherance of his continuing interest in mechanization, purchased all the mechanical-harvest-variety seed, Petoseed #29074, that he could locate. Murphy had commissioned a test plot of a few acres of this variety

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4/The Meyer Contract provided, in relevant part: "Article 15; Mechanization. In the event the Company anticipates mechanization of any operation of the Company that will permanently displace workers, the Company before commencing such mechanical operations shall meet with the Union to discuss training of displaced workers to operate and maintain the new mechanical equipment, the placement of displaced workers in other jobs with the Company, or placing of such workers on a preferential hiring list which the Company and the Union will use in conjunction with Article 3, Hiring."

during Respondent's 1977 harvest and had hand-picked the crop, finding its quality comparable to that of other fresh market tomatoes. Murphy further found that the stem was easily severed from the fruit in picking, which eased hand picking and made mechanical harvesting feasible. Murphy felt that this seed was promising and, that if a sufficient stand of plants developed for the upcoming 1978 harvest, [5/] mechanical harvesting of fresh market tomatoes would be likely. Murphy had previously investigated fresh market tomato harvesting machines, generally padded-process tomato harvesters, in Florida and at Davis, California.

On January 6, 1978 (all dates hereinafter will refer to 1978 unless otherwise stated), the parties met in negotiation with Jerome Cohen, Steeg, and a ranch crew from O. P. Murphy for the Union, and Stoll primarily representing Respondent. Respondent formally offered the Meyer Contract and Cohen conditionally accepted. The major issue separating the parties was the piece-rate, Respondent offering 33-1/2 cents per bucket and the Union demanding 40 cents. On February 10, Cohen implied the Union would accept a piece-rate of 35 cents if all local issues were settled. By March 28, when every other issue had been settled, the Union was formally seeking a piece-rate of 36 cents, but was prepared to accept 35 cents, and Respondent was still offering 33-1/2 cents.

On March 29, Murphy requested advice from Stoll and

5/When seeds are germinated in a greenhouse, once the seedlings have germinated and taken hold, a stand has developed. Respondent's prior history with Lebar Greenhouses indicated that a sufficient stand would probably develop no later than February or March 1978.

Wayne Hersh, a member of the law firm representing Respondent in negotiations, on mechanization for the 1978 harvest. Stoll informed Murphy that the issue had been negotiated and the language from the Meyer Contract would be controlling. In other words, Murphy was free to mechanize his 1978 harvest, provided he informed the Union prior to implementing the decision, so that there could be negotiation with respect to training, rehire, and other issues arising from mechanization as set out in the Meyer Contract. Soon thereafter, Murphy told Stoll to inform the Union of his anticipated mechanization and on April 17 Stoll informed Cohen by phone that Respondent anticipated some mechanization and wanted to discuss the effects of that decision on the bargaining unit.

The next meeting between the parties was on April 18, at which Respondent increased its piece-rate offer to 34 cents and the Union demanded 35 cents. Cohen testified that he thought that an informal understanding on 35 cents had been reached and when he reacted to the apparent breach of this understanding, Stoll walked out. Mechanization was not discussed. Stoll sent the Union a letter later that day reiterating Respondent's intent to mechanize. Another letter was sent notifying the Union that Respondent had requested the State Conciliation Service to intervene in the negotiations.

The Union responded by letter dated April 18 from negotiator Steeg. The letter did not request either bargaining over mechanization or a new meeting date. Cohen wrote for the Union on April 24, mentioning the proposed machine rate (and hence mechanization) but without demanding bargaining over the

decision to mechanize or over its effects on the bargaining unit. However, this letter proposed meeting dates of May 4, 5, 9-12, 15-19, and 22-26. The letter stated that the only issues separating the parties were the one-cent difference on the piece-rate and certain unspecified local issues. The parties set a meeting for May 18 which Respondent cancelled and the Union rescheduled for June 1. During this six-week period, the Union made no request for information regarding seed, harvester model, testing data, or other factors that might have formed the basis for Murphy's decision to mechanically harvest the tomato crop. Moreover, the Union did not respond to Stoll's suggestion on sorter rates, or mention layoff, rehire, retraining, or any other bargainable issue.

Because the Union believed that mechanization was not economically feasible, it failed to take Respondent's mechanization proposal seriously, apparently viewing it as merely a device to put additional pressure on the Union to accede to Respondent's proposal of a piece-rate of 34 cents.

On April 27, Murphy signed a purchase agreement with Johnson Farm Machinery, making a deposit of some $10,000 on the total price of nearly $96,000 for the tomato harvester. Delivery was scheduled for July 1, but was not effected until the first week in August. The conditions of the sale included an option for Respondent to cancel, in which case the deposit would either be forfeited or credited toward the purchase of a harvester in a later year. The Union was not informed of this purchase agreement,

On June 1 the parties met with a conciliator from the

State Conciliation Service. After they initially listed major areas of disagreement (the Union listing mechanization and Respondent not mentioning that issue), the parties were separated. The Union asked the conciliator to ascertain how serious Respondent was about mechanization. After meeting each party separately, the conciliator declared the parties at impasse on the piece-rate and recessed them subject to his call, without addressing the Union's request regarding Respondent's intentions as to mechanization.

On June 19, Stoll again requested the Union's position on mechanization, specifically asking for a response to the previous proposal suggesting machine-sorter rates. The Union responded on June 26 with a list of questions on mechanization. In that letter, the Union stated that it objected to any mechanization which displaced workers, essentially reiterating the original Union mechanization article first proposed in August of 1977. The Union's questions concerned the scope of mechanization intended. No request was made for harvester type or seed variety.

Respondent answered the Union's questions when the parties next met on July 20. Specifically, Stoll stated that Respondent anticipated "from zero to one hundred percent" mechanization. Tom Dalzell attended this meeting for the Union in order to further explore the seriousness of Respondent's intent to mechanize. It was Dalzell's opinion, based on his research, that fresh market tomatoes could not be mechanically harvested economically for another five years. Dalzell requested the model of the harvester and also asked to look at the machine. Stoll responded that he did not know the model or manufacturer.

Murphy, who was at that meeting, did know the model and manufacturer but neglected to give that information to Dalzell. Respondent asked whether the Union was withdrawing from its agreement as to the language from the Meyer Contract, including the article on mechanization. The Union responded that it was not doing so because it was still investigating the seriousness of Respondent's intent to mechanize. The parties met again on July 21 and Respondent gave the Union a booklet on mechanical harvesting of fresh market tomatoes, from which Dalzell again concluded that mechanization was not economically feasible.

By letter dated July 25, Dalzell requested further information, including the model and type of the harvester, and its economic feasibility. The answers to these comprehensive questions should have allowed the Union to appreciate the seriousness of Respondent's decision to harvest fresh market tomatoes by machine and to bargain about that decision. The variety of seed was specifically requested, as Dalzell had begun to appreciate that the major problem with the mechanical harvesting of fresh market tomatoes would be the development of a suitable seed.

At the next meeting, July 27, Stoll answered the aforesaid questions to Dalzell's satisfaction, except that Murphy refused to disclose the seed variety. Murphy viewed the information as secret.[6/] Respondent requested the Union's counterproposal to

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6/Murphy believed he had cornered the market on the seed and wanted to sell it to other growers. The variety was Petoseed MH #20974 and cost $300.00 a pound (compared with other tomato seed that sold at $25.00 per pound). Petoseed was a commercial entity that would sell seed, even MH (mechanical harvest) #20974, to any purchaser.

its letter of April 18 on the effects of the mechanization on the bargaining unit and the Union responded that it was still investigating.

The parties met again on July 28, but the Union still was unwilling to bargain about mechanization. Cohen stated that Respondent should consider distributing some of the projected labor cost savings to the displaced workers, but Respondent rejected this suggestion. Dalzell testified that he viewed Respondent's position in requesting the Union's counterproposal as one open to bargaining over both the decision and its effects on the bargaining unit, but he felt unprepared to bargain without knowing the variety of the seed. Respondent had written the Union on July 21 that although Respondent was willing to negotiate the effects of mechanization, the mechanization decision would be implemented on August 7, with or without agreement with the Union.

Dalzell continued his investigation and the parties met again on August 3, but did not discuss mechanization. They met again on August 7, and at this meeting Respondent formally accepted the proposal of March 28 (the Meyer Contract language and a piece-rate of 35 cents per bucket). Murphy took Dalzell aside and told him the seed variety. The Union again refused to discuss mechanization, stating that investigation was still in process on that decision. The Union filed the present charge on the next day, August 8.

Subsequent to the filing of the charge, the parties continued to meet. According to Dalzell's testimony, the Meyer Contract language, including Article 15 on mechanization, was

still on the table. The parties met on August 16, 23, and September 7, during which time the Union requested and received more information. On September 11, the Union presented a new mechanization article and formally withdrew its proposal of the Meyer Contract language. The parties continued to meet through the 16th of October, when Respondent joined a larger group with which it continued negotiations until July 1979.

Discriminatory Discharges

In early August 1978, various members of the Chavez family (Amelia, Amelia L,, Angelina, Jose, Trinidad, Jr., and Joaquin) applied to Respondent for work as hand-pickers. As set out above, Respondent gave first preference in hiring to persons who had completed the previous season and then hired other applicants on a first-come, first-served basis as needed throughout the season. The Chavez family members were recalled to work in 1978 on the basis of their seniority. When the family members reported for work, they were informed that Respondent was hiring no hand-pickers and that the only positions available were as machine sorters. The family members started to fill out the applications but did not complete them as they lacked certain necessary information. They took the forms home to return the next day.

Trinidad Chavez, Sr., who had been attending the negotiations on behalf of the Union as a member of the ranch committee for Respondent's employees, heard of this development when he returned home that evening. He told his family members that Respondent had promised that day that if workers passed up

the harvest for 1978 because they desired only hand-picking work they would not lose their seniority for 1979. In reliance on this, no member of the Chavez family returned with completed applications. Steeg testified that both during the break and during the main negotiations on August 7, 1978, Stoll and Murphy agreed that hand-pickers would retain their seniority even if they declined to accept machine work. Respondent did not deny having made such a promise.

In 1979, the members of the Chavez family were not recalled as they had been in 1978. At the appropriate time (approximately July 1979) Angelina, Amelia L., and Trinidad Chavez, Sr., applied for hand-picking work. They requested applications but they were not allowed to apply. The bookkeeper told the applicants that Respondent had already hired enough hand-pickers for 1979 and was planning to lay off some of them in the near future. The bookkeeper took their names and telephone numbers and promised to call if work became available, but they were not thereafter called for work.

Respondent used the same hiring procedure for 1979 that it had used in previous seasons. It gave priority to those applicants who had completed the 1978 season and hired other workers as available on the day needed. The effect of this practice was to revoke the statements made at the August 7, 1978, negotiating session. Respondent's failure to abide by the agreement reached in 1978 and its refusal to rehire the Chavez family members based on their 1977 seniority is alleged to be a violation of section 1153 (c) and (a).

The Duty to Bargain Over the Decision to Mechanize

Respondent excepts to the ALO's conclusion that its decision to mechanize the fresh market tomato harvest was a mandatory subject of bargaining. Although the exceptions were not filed in a timely matter, and although Respondent relies on San Clemente Ranch v. ALRB (1980) 107 Cal.App.3d 632, which decision the Supreme Court has overturned in relevant part, (1981) 29 Cal.3d 874, we nonetheless address the issue. On June 22, 1981, the U. S. Supreme Court issued First National Maintenance Corporation v. NLRB (1981) 101 S.Ct. 2573 [107 LRRM 2705] (hereafter FNMC) finding an economic decision to go partially out of business not to be a mandatory subject of bargaining. The Court specifically rejected contrary reasoning in cases such as Brockway Motor Trucks v. NLRB (3d Cir. 1978) 582 F.2d 720 [99 LRRM 2013] and Ozark Trailers, Inc. (1966) 161 NLRB 561 [63 LRRM 1264]. Since the ALO relied on Brockway Motor Trucks and Ozark Trailers in formulating his decision, we find it necessary to take up this section of the ALO's Decision.

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

> ... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. Labor Code section 1155.2(a).

The basic principles which we must apply to allegations of

surface-bargaining violations are set forth in our decisions in O. P. Murphy Produce Co., Inc., dba O. P. Murphy & Sons (Oct. 26 1979) 5 ALRB No. 63 (O.P.M. IV, supra), and Montebello Rose Co., Inc., et al. (Oct. 29, 1979) 5 ALRB No. 64. We must determine by examining the totality of its conduct whether Respondent acted with a "bona fide intent to reach an agreement if agreement [was] possible." Atlas Mills (1937) 3 NLRB 10 [1 LRRM 60]; West Coast Casket Company (1971) 192 NLRB 624 [78 LRRM 1026], enf. in part (9th Cir. 1972) 469 F.2d 871 [81 LRRM 2857].

Here, the initial issue presented is whether Murphy's decision to mechanize his tomato harvest is a matter with respect to wages, hours, and other terms and conditions of employment and hence a mandatory subject of bargaining. In NLRB v. Wooster Division of the Borg-Warner Corp. (1958) 365 U.S. 342 [42 LRRM 2034] , the Supreme Court approved a distinction between mandatory and permissive subjects of bargaining which had evolved through lower court and NLRB cases. To determine whether a certain area is mandatory or permissive, several indicia have been established through the adjudicative process. With respect to decisions affecting business operations, the test created by the National Labor Relations Board (NLRB) has generally been whether the decision would result in the elimination of bargaining unit jobs.[7/] Under this test, Respondent's decision to mechanize would be a mandatory subject of bargaining because it would be likely to cause

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7/See Ozark Trailers, Inc. (1966) 161 NLRB 561 [63 LRRM 1264]; Brockway Motor Trucks (1977) 230 NLRB 1002 remanded Brockway Motor Trucks v. NLRB (3d Cir. 1978) 582 F.2d 720 [99 LRRM 2013] ; Note, Automation and Collective Bargaining 84 Harv.L.Rev. 1822, 1838-42.

an eventual elimination of approximately eighty percent of the bargaining unit jobs. The ALO herein adopted this test.

If an employer decides to subcontract bargaining unit work, the Supreme Court has created a broad presumption that before implementing that decision the employer must submit it in tentative form to the collective bargaining process. Fibreboard Paper Products v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. Although Fibreboard is limited by its language to the specific facts of that case (Id. 57 LRRM at 2613) , the analysis undertaken therein is applicable to a broad range of managerial decisions. In that case the employer, motivated by economic concerns, [8/] decided to subcontract the unit work and gave the union no opportunity to bargain about the decision. Chief Justice Warren, writing for the majority, stated:

> The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. [Citation.]
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> To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace. Id., 57 LRRM 2612.

8/The motivation of the employer was used solely to show that, had the employer allowed the union to bargain, the union presumptively could have contributed useful ideas on the issue of reducing the employer's labor costs. Fibreboard Paper Products v. NLRB, supra, 57 LRRM at 2613.

In response to this broad analysis, Justice Stewart concurred separately, arguing that the majority holding was really quite narrow. Justice Stewart stated that if the impact of a managerial decision on job security is

> ... extremely indirect and uncertain ... this alone may be sufficient reason to conclude that such decisions are not 'with respect to ... conditions of employment.' Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery Another may decide to liquidate its assets and go out of business. Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepeneurial control. Id., Stewart, J., concurring, 57 LRRM at 2617, emphasis added.

However clear and pertinent the emphasized language may be to the present case, Justice Stewart could only convince two other Justices to agree with his reading of the majority opinion. The NLRB, consistently, and with fairly uniform support from the Courts of Appeal, has viewed Fibreboard as mandating bargaining over any business decision that can be characterized as subcontracting bargaining unit work. See American Cyanamid Co. v. NLRB (7th Cir. 1979) 592 F.2d 356 [100 LRRM 2640] enf. (1978) 235 NLRB 1316 [98 LRRM 1429]; Industrial Feeding & Catering Ser. (1975) 216 NLRB 1098; Florida-Texas Freight (1973) 203 NLRB 509 [83 LRRM 1093] enf. (6th Cir. 1974) 489 F.2d 1275 [85 LRRM 2845]; Pay N Save Corp. (1974) 210 NLRB 311; NLRB v. Amer. Mfg. Co. of Texas (5th Cir. 1965) 351 F.2d 74 [60 LRRM 2122] enf. as mod. (1962) 139 NLRB 815 [51 LRRM 1281]; Blue Grass Provision Co. (1978) 238 NLRB 910 [99 LRRM 1608] enf. (6th Cir. 1980) 636 F.2d 1127 [105 LRRM 3487].

But see, Hollywood Roosevelt Hotel (1978) 235 NLRB 1397 [98 LRRM 1151] and Sucesion Mario Mercado E Hijos (1966) 161 NLRB 696. However, when the decision reached is not categorized as subcontracting, but rather as a decision to go partially out of business, the Supreme Court now mandates broad deference to managerial prerogatives, FNMC, supra, 101 S.Ct. at 2584.

Writing for the majority in FNMC, Justice Blackmun found that an economically-motivated decision to shut down part of a plant was not a mandatory subject of bargaining. He gave great deference to the employer's need for unencumbered decision making, stating that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business." FNMC, supra, 101 S.Ct. at 2581. The decision to partially close one's business is not generally one that will require bargaining, reasoned the Court, for it "involve (s) *a* change in the scope and direction of the enterprise [and] is akin to the decision whether to be in business at all." Id. at 2579-80.

In the course of reaching this conclusion, the Court rejected the approach taken by the Third Circuit in Brockway Motor Trucks v. NLRB, supra, 582 F.2d 720, i.e., which created a rebuttable presumption that a decision to partially close a business is a mandatory subject of bargaining. The Court also necessarily rejected a substantially similar approach the Second Circuit had taken in First National Maintenance Corp. v. NLRB

supra, 627 F.2d 596.

In light of the holding in FNMC, it is now clear that the fact that a management decision necessarily results in the elimination of bargaining unit jobs does not of itself mandate bargaining over that decision. Rather, we must focus on the nature of the decision itself, the motivation of the employer in reaching its decision, the effect the decision has on the scope and direction of the business, and the burden which would be placed on the management process by requiring bargaining with the elected representative.

We conclude that managerial decisions to automate or mechanize are mandatory subjects of bargaining under the Act. The Fibreboard decision notes the interest of the employees and the possible contribution that the union could make to the economic decisions to reduce labor costs by subcontracting. Although the balance struck in FNMC weighs the collective bargaining process against the burden placed on the employer's conduct of its business, the underlying rationale is that a partial closing represents a decision involving the scope and direction of the enterprise itself and as such is akin to the decision to be in business at all. Respondent's motivation appears to be primarily economic, and Respondent's business remains substantially unaltered in either scope or direction. Further, we note that by requiring bargaining here over the decision to mechanize, no burden was placed on Respondent's decision-making process. As Respondent's decision regarding mechanization does not require altering the scope and direction

of the enterprise, [9/] only a minimal burden is placed on the employer's free conduct of its business by requiring bargaining over its decision. The purpose served thereby, i.e., enhancing collective bargaining and allowing the union to participate in the process, outweighs that burden.

We are not unmindful of the employer's right to invest substantial sums of capital in labor-saving machinery and to modernize its enterprise by changing from antiquated processes to more modern techniques. We conclude, however, that the decision here does not rise to the level of "a change not unlike opening a new line of business or going out of business entirely" (FNMC, supra, at 101 S.Ct. at 2579-80; Textile Workers v. Darlington Co. (1965) 380 U.S. 263, 268. Rather, we find that this decision is of such a sort that requiring collective bargaining about it will promote the smooth operation of labor-management relations and be conducive to labor peace (see FNMC, supra, 101 S.Ct. at 2578, n. 11; Fibreboard Paper Products v. NLRB, supra, 57 LRRM at 2612) to a far greater extent than it will burden the conduct of the employer's business.

We reject the UFW's argument that would forbid employers from reaching even a tentative decision prior to collective bargaining. Tentative decisions are all that Fibreboard and its progeny allow an employer to reach before bargaining. An employer

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9/ We view this decision as more akin to subcontracting bargaining unit work than to a decision to go out of business, partially or completely, with the new machinery representing an analogue to a subcontractor. See Fibreboard v. NLRB, supra, 57 LRRM at 2613; Otis Elevator (1981) 2556 NLRB No. 5 [106 LRRM 1343].

which makes a firm decision before bargaining would automatically violate its obligation to meet with an open mind and consider proposals by the union. Brockway Motor Trucks (Brockway II) (1980) 251 NLRB No. 23 [104 LRRM at 1518]; City Hospital (1977) 234 NLRB No. 3 [97 LRRM 1125, 1126]; Globe-Union (1976) 222 NLRB No. 173 [97 LRRM 1341].

In sum, we find that Respondent had a duty to bargain, if the Union requested it to do so, over its decision to mechanize because the decision is not a change in the scope and direction of the business and the burden such bargaining places on the conduct of the business of harvesting tomatoes is outweighed by the benefit to labor management relations. Otis Elevator (1981) 255 NLRB No. 5 [106 LRRM 1343]. However, we agree with the ALO that Respondent was free to reach a tentative decision to mechanize based solely on its research and managerial acumen. Lange Company (1976) 222 NLRB 558, 563.

We now address the issue of whether Respondent met its obligation under the Act. This matter will be considered in light of the specific exceptions raised to the ALO's conclusion that Respondent fulfilled its obligation under the Act. Our analysis is primarily factual and involves all the relevant evidence. We note that the totality of circumstances must be considered. AS-H-NE Farms, supra, 6 ALRB No. 3; O. P. Murphy TV, supra, 5 ALRB No. 63. We agree with the ALO's conclusion that Respondent did not violate section 1153 (e) and (a). Respondent notified the Union of its decision at a time when meaningful bargaining could take place and in general it responded promptly and completely to

the Union's requests for information. The Union made no formal response to Respondent's notification of its tentative decision to mechanize until nearly seven months had passed and the harvest was well under way.

The Union excepts to the ALO's conclusion that it acknowledged agreement on the Meyer Contract language in March. As several letters and the testimony of Union negotiator Jerome Cohen, Marion Steeg, and Tom Dalzell all support the conclusion that the Union did then manifest agreement to the Meyer Contract language, this exception is not persuasive. The fact that the ground rules of the negotiation process made that agreement tentative does not negate the fact of the agreement. The Union also excepts to the ALO's finding that Respondent's negotiator, Charley Stoll, notified Union representative Jerome Cohen of the proposed mechanization on April 17. The conclusion is supported by the record, which shows that Stoll so testified and that Cohen did not contradict Stoll's testimony.

Both the UFW and the General Counsel except to the ALO's conclusion that the Union failed to withdraw the Meyer Contract language until September, notwithstanding notification of the proposed mechanization in April. The UFW's belief in March that mechanization was economically unfeasible is consistent with, and explains, the Union's failure to timely request bargaining about the decision. That Murphy may have formulated his decision as early as October 1977 and delayed notifying the Union until April 1978 has not been shown to have prejudiced the Union. We note that on other facts, such a long delay in providing notice could

result in prejudice to the collective bargaining process. Here we find merely that the Union evidenced no desire or willingness to bargain over Respondent's proposed mechanization once it learned about it, and that Respondent gave the Union adequate notice of the proposed change. Globe-Union, Inc. (1976) 222 NLRB 1081, 1083.

We reject the ALO's conclusion that the Union engaged in bad-faith bargaining over the effects of the decision and thereby relieved Respondent of its bargaining obligations. Rather, we find that the Union's mistaken assumptions about Respondent's motivations, which led to its intransigent bargaining posture, amounted to a waiver by the Union of its statutory right to bargain over the machine-sorter rate and other issues regarding the effect on bargaining-unit employees of Respondent's decision to mechanize. In City Hospital, supra, 234 NLRB No. 3, the employer notified the union of a contemplated decision to eliminate the position of head nurse in obstetrics. The NLRB held that although the union was notified, its first counterproposal or response, besides a grievance under the existing collective bargaining agreement, was nearly two months later. This delay, stated the NLRB, waived the union's right to bargain. "The statute does not compel the respondent to seek out employees or require participation in negotiation for the purpose of collective bargaining. ... [E]mployees must at least have signified to the employer their desire to negotiate." Id. at 97 LRRM 1126. Similarly, in Industrial Feeding and Catering Service (1976) 216 NLRB 1098, a union took a fixed position that the subcontracting

proposed by the employer would violate the existing collective bargaining agreement. The NLRB found that this fixed position represented either an implicit impasse on the effects issues or, alternatively, waiver of the union's right to negotiate about that subject. The national board rejected the contention that the union's position constituted bad faith. See also, American Can Co. v. NLRB (2nd Cir. 1976) 535 F.2d 180 [92 LRRM 2251] enfing. 218 NLRB No. 17 [89 LRRM 1585]; Globe-Union (1976) 222 NLRB No. 173 [97 LRRM 1341]; American Buslines, Inc. (1967) 164 NLRB 1055; Sucesion Mario Mercado E Hijos, supra, 161 NLRB 696; Moffitt Building Material Co. (1974) 214 NLRB 582 [87 LRRM 1491; Vegas Vie, Inc. (1974) 213 NLRB 841 [87 LRRM 1269]; Seafarers, Local 777 v. NLRB (D.C. Cir. 1978) 603 F.2d 862 [99 LRRM 2093]; Highland Ranch (Aug. 16, 1979) 5 ALRB No. 54 (ALO opinion at pp. 45-6).

We conclude, therefore, that the Union, in the mistaken belief that Respondent was not seriously considering mechanization but was using the threat of mechanization as a bargaining tactic to induce the Union to agree to a piece-rate of 34 cents, waived its right to bargain over the effects of that decision.

Discriminatory Motivation in Mechanization

To establish a prima facie violation of section 1153 (c) of the Act, the General Counsel must initially show that the union activity of employees was a substantial or motivating factor in Respondent's decision to mechanize its tomato harvest. Once this has been accomplished, the burden shifts to Respondent to show that it would have reached the same decision even absent the

employees' union activities. Nishi Greenhouse (August 5, 1981) 7 ALRB No. 18; Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169]. The General Counsel relied on the following evidence to demonstrate that the employees' union activity was the motivating factor: the timing of the decision, Respondent's past violations of the Act, and Respondent's alleged manipulation of the bargaining process. The ALO implicitly found that this did not constitute the prima facie showing necessary to establish a violation, stating that a respondent's past violations can be used only to clarify present conduct. The ALO found the present conduct unambiguous. Therefore the only evidence considered relevant by the ALO concerned the bargaining sessions in 1978, during the course of which Respondent complied with the mechanization language then on the table and mechanized its operation with the intent to save money. [10/] Even assuming, arguendo, that the General Counsel presented a prima facie case of discrimination, Respondent then has the burden of establishing a lawful motive in mechanizing by showing a valid business justification for the decision. Nishi Greenhouse, supra 7 ALRB No. 18; Martori Brothers Distributors v. ALRB (1981) 29 Cal.Sd 721 [175 Cal.Rptr. 626].

The record demonstrates that Respondent would have

10/The General Counsel argues also that evidence involving the relationship of Respondent and Charley's Farms should be considered, As the General Counsel failed to file an interim appeal of (or except to) either the ALO's ruling on the second day of the hearing that Charley's Farms was not a joint employer with Respondent, or the ALO's removing Charley's Farms from the case, that evidence is not properly raised by the General Counsel's exceptions.

decided to mechanize even absent the union activity of its employees. This determination is supported, first, by Murphy's testimony that he had a longstanding desire to investigate mechanization; second, by his having grown a test patch of Petoseed in 1977; third, by the subsequent bargaining history in 1978 when Respondent gave the Union ample opportunity to bargain over the decision itself; and, fourth, by demonstrating the profitable nature of the proposed change in its operations. We find that the employees' union activity was not a basis for Respondent's mechanization and that Respondent has not been shown to have violated section 1153(c) or section 1153 (e) by planning or implementing the mechanization of its tomato harvesting.

Failure to Rehire the Chavez Family

The General Counsel excepts to the failure of the ALO to enforce Respondent's oral agreement, during negotiations, to alter its seniority system so as to protect employees who refuse to perform machine-picking work. We find no merit in this exception. The ALRB does not enforce contracts, oral, written, or implied, unless the breach thereof is also an unfair labor practice. Moreover, it is axiomatic labor law that an employer may discriminate with respect to hiring or tenure for any reason, or for no reason, so long as its conduct does not tend or amount to interference with employees' section 1152 rights. German, Labor Law, pp. 137-8; Morris, Developing Labor Law, Chap. 6, p. Ill, et seq. and suppl.; Lu-Ette Farms (May 10, 1977) 3 ALRB No. 38; Borin Packing, Inc. (1974) 208 NLRB 280.

To establish that Respondent violated section 1153 (c)

by failing to rehire the Chavez family, the General Counsel must establish, by a preponderance of the evidence that Respondent would not have failed or refused to rehire the members of the Chavez family but for their union membership or union activity. Lawrence Scarrone (June 17, 1981) 7 ALRB No. 13; United Credit Bureau of America (4th Cir. 1981) 242 NLRB No. 138 enfd. 643 F.2d 1017 [106 LRRM 2751]; Wright Line, Inc., supra, 251 NLRB No. 150. In other words, the General Counsel must prove a causal connection between the employees' union activity and Respondent's subsequent failure or refusal to rehire them. Such a causal connection has not been established. We therefore affirm the ALO's conclusion that the General Counsel has failed to present a prima facie case that Respondent violated section 1153(c) and (a) of the Act by failing to abide by promises made at the bargaining table during the course of negotiations.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the consolidated complaint herein be, and it hereby is, dismissed in its entirety.

Dated: November 3, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Board Member

JEROME R. WALDIE, Board Member

CASE SUMMARY

O. P. Murphy Produce Co., Inc.
dba O. P. Murphy & Sons (UFW)

7 ALRB No. 37
Case Nos. 78-CE-113-M
78-CE-113-1-M
78-CE-113-2-M
79-CE-330-SAL

ALO DECISION

The ALO found that Respondent's decision to mechanize its fresh market tomato harvest operation was a mandatory subject of bargaining because the decision resulted in the layoff of bargaining unit workers. He concluded that Respondent met its duty under the Act by bargaining in good faith over the decision, i.e., by giving notice to the Union at a time when meaningful bargaining could have taken place, and by responding promptly to Union requests for information. The ALO found that Respondent was relieved of its obligation to bargain over the effects of its decision to mechanize by the bad-faith bargaining of the Union.

With respect to the allegation in the complaint that Respondent's mechanization of its operation was an act of discrimination against its employees for engaging in union activity, the ALO found that the General Counsel had failed to present a prima facie case. The ALO also concluded that Respondent did not violate the Act by its failure to rehire employees seeking only hand-picking work in the season following mechanization, notwithstanding its prior bargaining-table promise to allow hand-picking employees to retain seniority should they refuse machine-harvest employment. He found that the General Counsel failed to prove a prima facie case in this regard also.

BOARD DECISION

In light of a recent U. S. Supreme Court decision, First National Maintenance Corp. v. NLRB (1981) 101 S.Ct. 2573 [107 LRRM 2705], rejecting the test utilized by the ALO to determine whether Respondent's decision to mechanize was itself a mandatory subject of bargaining, the Board reconsidered this portion of the ALO's decision. The Board concluded that the nature of Respondent's mechanization decision could not be equated with a decision to go out of business, either partially or completely. Moreover, the decision to mechanize did not alter the scope or direction of Respondent's business. Noting that unilateral decision-making is a major cause of labor unrest, the Board concluded that the mechanization decision was itself a mandatory subject of bargaining. The Board affirmed the ALO's conclusion that Respondent had met its obligation under the Act by bargaining in good faith with the Union over that decision. Contrary to the ALO, the Board concluded that the Union did not engage in bad-faith bargaining over the effects of that decision, but rather waived its right to bargain by its dilatory conduct which involved an investigation of that proposed decision which extended over six months.

The Board discussed the case of discrimination under section 1153(c) of the Act that had been presented by the General Counsel, noting that a prima facie case would shift the burden to Respondent to show that its decision to mechanize was supported by substantial business reasons and was not a retaliation for its employees' prior union activity. The Board considered the prior history of Respondent before the ALRB as well as the totality of its conduct, and concluded that Respondent had rebutted the prima facie case, demonstrating a substantial business justification underlying its decision to mechanize.

The Board affirmed the ALO's conclusion as to the loss of seniority of the hand-picking employees, finding that Respondent's breach of its bargaining-table promise did not establish a violation under section 1153 (c) of the Act.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

O. P. MURPHY PRODUCE CO., INC., dba O. P. MURPHY & SONS Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	Case Nos. 78-CE-113-M 78-CE-113-1-M 78-CE-113-2-M 78-CE-330-SAL

APPEARANCES:

William G. Hoerger and
James W. Sullivan
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For the General Counsel

Western Growers Association
By Jasper E. Hempel
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and

Grower-Shipper Vegetable Association of Central California
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Salinas, California 93902
For the Respondent

Chris Schneider
P. O. Box 1049
Salinas, California 93905
For the Charging Party

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STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: The above-captioned cases, consolidated for hearing, were heard before me in Salinas, California, on February 11, 12, 13, 14, 15, 19, 20, 21, 22 and on March 4 and 5, 1980.

Complaint and Notice of Hearing issued August 22, 1978, in Case No. 78-CE-113-M, alleging that Respondent, O. P. Murphy Produce Co., Inc., d/b/a O. P. Murphy & Sons,[1/] violated Sections 1153(a) and (e) and Section 1155.2(a) of the Agricultural Labor Relations Act in that it made unilateral changes in its harvest operations by using a machine harvester thereby displacing approximately 200 agricultural employees heretofore used to harvest its crop. The complaint was grounded on a charge filed August 8, 1978. The complaint and charge were duly served upon Respondent.

Respondent filed a timely answer consisting of a general denial and three affirmative defenses.

On October 2, 1978, the United Farm Workers of America, hereafter "UFW," filed a First Amended Charge naming Charley Duncan and Francis Murphy, d/b/a Charley's Farms (Farms) and O. P. Murphy as joint employers. On October 16, 1978, an Amended Complaint issued alleging that Respondents had made unilateral changes in their operations by instituting mechanical harvesting and thereby displacing those employees previously used to hand harvest their crops. It was additionally alleged that the unilateral change was made in order to punish agricultural employees for their support for the UFW. Unilateral changes in wages and working conditions were also alleged. Said conduct was alleged to violate §§1153(a), (c) and (e) and §1155.2(a) of the Act. Respondent Murphy filed a timely answer. No answer was filed by Respondent Charley's Farms.

On August 30, 1979, the charge was filed in Case No. 79-CE-330-SAL alleging that Respondent Murphy violated the Act by failing to hire certain workers because of their participation in a strike against Respondent. Complaint, alleging a refusal to hire the Chavez family in August, 1979, to be violative of §§1153 (a) and (c), issued September 19, 1979. The charge and complaint were duly served upon Respondent Murphy who filed a timely answer. During the hearing the complaint was amended to allege a refusal to hire the Chavez family because of their Union activities.

Though standing unexplained in the record, it appears an order issued on September 14, 1979, consolidating 330-SAL and 113-1-M for hearing.

[1/] Hereafter "OPM" or "Murphy."

On January 8, 1980, a Second Amended Complaint issued stating with more particularity the relationship between Respondent Charley's Farms and Respondent Murphy. Farms appeared specially and moved to dismiss the complaint with respect to it on the ground of lack of service. The motion was denied and thereafter on February 11, 1980, said Respondent filed an answer.

Upon the completion of the General Counsel's evidence of the issue of the joint employer relationship between Murphy and Farms, Farms' motion to dismiss the complaint with respect to it was granted. The hearing proceeded with OPM as the sole Respondent.

During the course of the hearing, General Counsel's Motion to Amend Second Amended Complaint to allege a course of conduct in violation of §1153(e) commencing February 8, 1978, was granted.[2/]

All parties were given full opportunity to participate in the hearing. Respondent Murphy and the General Counsel filed post-hearing briefs in support of their respective positions.

Upon the entire record, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

A. Jurisdictional Facts

O. P. Murphy Produce Company, Inc., is a Texas corporation engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of §1140.4(c) of the Agricultural Labor Relations Act (Act).

The United Farm Workers of America (UFW) is and was, at all times material, a labor organization within the meaning of §1140.4 (f) of the Act.[3/] It was certified as bargaining representative for OPM's agricultural employees on March 17, 1977.[4/]

At all times material Francis Murphy was corporate secretary, and a director and 40% owner of the Company. OPM is licensed to do business in California under the fictitious name O. P. Murphy & Sons. Since 1973 Francis Murphy has managed its day-to-day operations. OPM is engaged in the harvesting, packing and selling of fresh market tomatoes. It does not grow tomatoes

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[2/] Motion made and argued on February 22, 1980. Thereafter pursuant to 8 Cal. Admin, Code §20222, the amendment was filed in writing on February 25, 1980.

[3/] Respondent admitted the Jurisdictional facts in its answer.

[4/] O. P. Murphy & Sons, 3 ALRB NO. 26 (1977).

and is not involved in the harvest, packing or sale of crops other than tomatoes.

Respondent has two basic arrangements with growers, the difference being whether it is to harvest the grower's crop or whether the crop is to be harvested by the grower and transported to OPM for packing and sale.[5/]

On April 17, 1977, the UFW directed a letter to Respondent requesting negotiations. The initial meeting was held June 29, 1977. Between that date and October 21, 1977, the parties held a series of meetings. The Respondent's conduct during that period was the subject matter of the proceedings in 5 ALRB No. 63. With the exception of one meeting, there was an hiatus in bargaining sessions from October 21 until January 6, 1978.

B. History Of Bargaining During 1978

January 6, 1978:

The parties met on January 6 and discussed wages, vacations, holidays, retroactivity and settlement of the Chavez v. Fitzsimmons lawsuit. Charley Stoll, Respondent's attorney and negotiator, suggested that the parties consider forming a multi-employer group consisting of Meyer Tomato, Gonzales Packing and O. P. Murphy since these firms made up the Salinas Valley tomato industry.[6/]

Stoll proposed that the language of the then existing UFW agreement with Meyer be the basis for settlement with OPM, Jerry Cohen, then General Counsel for the UFW, responded that the Employer proposals seemed to be leading toward a resolution of differences. He said "the Union needed time to think about the entire issue"; that the majority of the Meyer language would be acceptable, but that seniority and recall issues would have to be otherwise dealt with. Cohen also set forth .the UFW position on wages, retroactivity and the settlement of Chayez v. Fitzsimmons.

There was no discussion during the course of the meeting of mechanization. The Meyer contract contained language on the subject matter.

During the interval between meetings there was an exchange of correspondence between Steeg and Stoll[7/] By letter of January 10 Steeg set forth the UFW understanding of the OPM-

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[5/]See O. P. Murphy Produce Co., Inc., dba O.P. Murphy & Sons, 5 ALRB No. 63 (1979), for a more extended discussion of Respondent's operations, particularly the decision of the Administrative Law Officer.

[6/]The UFW was negotiating jointly with Gonzales and OPM.

[7/]Marion Steeg was the principal UFW negotiator.

Gonzales proposal of January 6. It was as follows:

> 1. The Meyer Master in its entirety, with further discussion of certain issues such as recall procedures for seniority workers.
>
> 2. Settlement of existing unfair labor practices against both companies.
>
> 3. Settlement of Chavez v. Fitzsimmons.
>
> 4. Formation of the three company multi-employer unit to negotiate together at end of 1978.
>
> 5. No retroactivity for the 1977 season, 33-1/2 cents per bucket and the right to use any 25 pound bucket.

Steeg's letter also noted the UFW position to be that the "Meyer's Master" language was acceptable "in general."

Letters were exchanged regarding the appropriateness of the wage positions being taken by each party. By letter of February 22, Stoll suggested a meeting on March 10. The date was acceptable to Steeg.

March 10, 1978:

At the meeting of March 10, the Union proposed a piece rate of $.36-1/2 per bucket, the Meyer contract including the January 1, 1979, expiration date, and stated it was open to multi-employer negotiations after the expiration of the initial agreement. In proposing the Meyer agreement, the Union proposal thus included the following provisions bearing on the issue of mechanization:

> ARTICLE 15--Mechanization
>
> In the event the Company anticipates mechanization of any operation of the Company that will permanently displace workers, the Company before commencing such mechanical operations shall meet with the Union to discuss training of displaced workers to operate and maintain the new mechanical equipment, the placement of displaced workers in other jobs with the Company, the training of such workers for other jobs with the Company, or the placing of such workers on a preferential hiring list which the Company and Union will use in conjunction with Article 3, Hiring.

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ARTICLE 16--Management Rights

The Company retains all rights of management including the following, unless they are limited by some other provision of this Agreement: to decide the nature of equipment, machinery, methods or processes used; to introduce new equipment, machinery, methods or processes, and to change or discontinue existing equipment, machinery or processes; to determine the products to be produced, or the conduct of its business; to direct and supervise all of the employees, including the right to assign and transfer employees; to determine when overtime shall be worked and whether to require overtime.

ARTICLE 18—-New or Changed Operations

In the event a new or changed operation or new or changed classification is installed by the Company, the Company shall set the wage or piece rate in relation to the classification and rates of pay in Appendix "A" and shall notify the Union before such rate is put into effect. Whether or not the Union has agreed to the proposed rate, the Company may put the rate into effect after such notice. In the event such rate cannot be agreed upon mutually between the Union and the Company, the same shall be submitted to the grievance procedure including arbitration for determination beginning at the Second Step. Any rate agreed upon or as determined by the arbitrator shall be effective from the installation of such new or changed operation.

Cohen testified credibly that since November, 1977, OPM had consistently been willing to accept the Meyer language with some modifications on local conditions not applicable to its operations.

March 28, 1978:

The next meeting was held March 28, 1978. Proposals were exchanged on local issues and on wages. The UFW stated that $.35 per bucket piece rate was their "bottom line." There was no discussion of mechanization by either party.

OPM's position remained unchanged: Meyer's would form the basis for institutional language; wages and local issues would have to be resolved.8/

8/Testimony of Jerry Cohen defined — [continued]

March 29, 1978;

Stoll and Francis Murphy met, among the topics discussed was the possibility of mechanization.

Stoll told Murphy that mechanization had been discussed and agreed upon during negotiations. He advised Murphy that if he intended to implement mechanical harvesting he should notify the Union to make sure there would be no problem and to .ascertain whether the Union might have any opposition to the proposed mechanization.

April 4, 1978;

Under date of April 4, 1978, Steeg wrote Stoll summarizing the items discussed at their March 28 meeting. She stated; "At this time we have agreed to the Master Contract Language and Economics for both companies with the exception of wage, local issues, and recall procedure." Thus, the UFW was acknowledging agreement on the three Meyer clauses set out above.

Sometime during the first week of April, Murphy told Stoll; "[H]e had thought over the issue of mechanization, and that he had made a decision that he would like to go ahead with notifying the Union." Stoll telephoned Cohen on the 17th to apprise him of Murphy's decision and to say that OPM wanted to discuss the issue of mechanization at their meeting the next day.

April 18,1978;

The meeting of the 18th was devoted to a discussion of the differences between the parties on the piece rate issue. The Union moved from $.36-1/2 per bucket to $.35 per bucket; OPM responded by moving from $.33 to $,34 per bucket.

Cohen accused OPM of bargaining in bad faith. After a heated discussion, Stoll and the OPM representatives left the meeting. Since there was no discussion of mechanization at the meeting, Stoll sent Cohen a letter, dated April 18, which stated in part;

> As I discussed in my prior conversation with you on the telephone the Company is desirous of negotiating a tomato harvesting machine sorting rate. The Company is anticipating some mechanization commencing at the beginning of the fall tomato season. We are desirous of having a meeting to discuss this issue and negotiate a rate for the employees

8/[continued]--"institutional issues" as "all the major clauses in the contract, that we try to develop a uniform approach across the board with the industry." It would appear that management rights, new or changed operations and mechanization qualify as institutional issues,

> who would be involved in. the machine harvesting. I would propose using the rate that is contained in the Inter Harvest agreement for tomato machine sorters. I believe that the rate for the time period of the harvest is $3.70. Please advise of available dates to discuss this issue and to negotiate a rate for the machine harvest.

During the period between April 19 and June 1, 1978, there was no request from the UFW for a meeting on mechanization, nor did Stoll receive a reply to his April 18 letter. On April 27 Francis Murphy executed a purchase agreement with E.M.C.O. Tractor Company calling for delivery on or before July 1 of a Button-Johnson Fresh Market Tomato Harvester and accessories. The purchase price was $95,288.70. It is unclear when the UFW was made aware of the purchase.

In a second letter to Cohen dated April 18, Stoll proposed that a state conciliator be invited to sit in on their meetings. Though intimating that Stoll's purpose in suggesting use of a consiliator was to delay negotiations, Cohen by letter of April 24, 1978, agreed. A meeting set for May 17 was cancelled by Stoll due to the unavailability of one of the principals. It was ultimately reset for June 1,

June lf 1978 ;

The parties met with Joe Anderson of the State Conciliation Service. The meeting began with the conciliator meeting jointly with the parties and requesting each to state what it regarded as the issues separating them. Stoll responded that the big issue was one penny on the piece rate and that there were several unresolved local issues. Steeg responded for the UFW and noted that a sorter rate in the context of mechanization was an issue which had come up recently and which had not been resolved. Neither party otherwise discussed mechanization during their joint session. Stoll testified that Anderson made no mention of mechanization when he met separately with OPM representatives.

During a Union caucus with the conciliator, Cohen asked him to attempt to ascertain whether mechanization was a serious issue. Anderson's response was, "That's all, kids. At this point we'll go home."

June 19, 1978;

Stoll wrote to Steeg, stating:

> There was some mention of this issue [mechanization] at our last meeting, but your position was never made known,

Stoll also noted in his letter of June 19 that he had received no formal response to his letter of April 18 proposing a meeting on

mechanization, as well as a machine sorter rate of $3.70 per hour.

On June 26 Steeg responded to Stoll's letter of June 19, stating in part:

> The issues of mechanization and a sorter rate are all subject to the negotiations which are still underway .... The Union at the last meeting on June 1 expressed concern and objections to the Company's proposed mechanization. However, as the conciliator terminated the session until he calls us back, the issue was never discussed in detail,'
>
> The Union's position is that we object to any mechanization which displaces workers without another agreeable and viable option for the workers. We are willing to discuss any alternatives in order to reach a mutual solution to our problems. Until the total issue is resolved we are riot in agreement on the rate, and we would consider any mechanization, including the putting into effect of any rate, a unilateral change until such time as the issue is resolved ... at the bargaining table.

Steeg's letter also contained a request for the following information relative to the mechanization question:

> 1. Crop to be harvested, i.e., fresh market or cannery tomatoes.
>
> 2. Percentage of work to be mechanized.
>
> 3. Number of machines to be used.
>
> 4. Number of workers per machine, their classifications and proposed rates.
>
> 5. Anticipated number of hours per day machines will be worked.
>
> 6. Anticipated duration of harvest season.
>
> 7. Number, classification and rates of pay of other than machine harvest employees.
>
> 8. Number of employees hired during the 1977 season.

Stoll testified he received Steeg's June 26 letter on July 5. Thereafter he called Anderson to arrange a meeting for the purpose of discussing mechanization. A meeting was scheduled

for July 20.

July 20, 1978:

The parties met with Conciliator Anderson who opened the meeting by suggesting that the OPM mechanization problem be discussed. The discussion turned toward Steeg's June 26 request for information, and Stoll answered the questions contained therein, noting that 100% of the work was to be mechanized.

During the course of the joint session, Cohen stated ". . .he was not in agreement with the mechanization . . , and unless there was an agreement, that [OPM] couldn't implement the harvesting machines," Stoll asked Cohen to give OPM a proposal. Cohen responded that the UFW needed some time to review the information it had received from OPM and would also need more extensive information in order to bargain intelligently. He suggested that the meeting be continued until the UFW had submitted its request for additional information and received OPM's response.

After separate caucuses the parties met again with the conciliator, Stoll asked Cohen whether the UFW was withdrawing its agreement on the Meyer mechanization language.[9/] Cohen said he could not answer that question, that the UFW position depended upon the information it received in response to additional questions to be presented to OPM, He said the Union could not state a position without knowing the degree of worker displacement, the predicted number of work hours, the factors in terms of money OPM was prepared to put toward the worker, Cohen also stated: "... there is no agreement on mechanization because we have been dealing in packages and the package had not been agreed to; therefore no language on changed operations or mechanization is binding•" [10/]

Stoll asked for a proposal from the UFW. Cohen responded that he could not give him one, Stoll asked when the request for additional information would be forthcoming. Cohen did not know, Stoll asked why additional information was needed; he stated that the UFW knew what work a sorter performed and that all we had to negotiate was a sorter rate, Stoll treated the problem as an issue of a new or changed operation.[11/]

Cohen requested the make and model of the harvester. Stoll said they did not have that information. He told Cohen that UFW representatives could view the machine when it arrived. In response to a Cohen question, Stoll said that OPM was mechanizing for economic reasons, that in the long run costs would be lowered.

Indicative of the views of the UFW regarding the feasibility of mechanization as of that time is the testimony of its

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[9/] Article 15, supra.

[10/] Steeg testimony.

[11/] Steeg testimony.

representative Tom Dalzell who had done research on the subject. He testified that based upon his reading he concluded that mechanical harvesting of market tomatoes was at least five years down the road because a tomato variety which would be successful for market tomato mechanical harvesting had not yet been developed. This opinion conflicts with that of Francis Murphy who had some months before determined that a Peto Seed variety was satisfactory for mechanical harvesting.

During the period between July 21 and the 27th, Dalzell talked to various experts in the field with the object of ascertaining whether mechanical harvesting was economically feasible. The conclusions of these experts reinforced Dalzell's view that a suitable seed had not been developed, i.e., one which readily permitted separation of the fruit from its stem.

July 21, 1978:

The parties met again with the conciliator, Stoll gave Cohen a copy of the Annual Report 1976-1977 of the Fresh Market Tomato Advisory Board entitled "Fresh Market Tomato Research Program,"

Stoll also presented a letter dated July 21 directed jointly to Steeg and Cohen which outlined what had transpired since April 18 as perceived by Stoll, The letter concluded with the assertion that the UFW had no intention of discussing mechanization in good faith and with the announcement that mechanization would be implemented on August 7, 1978. Stoll's letter also stated that OPM was

> . . . ready to meet 24 hours a day if necessary until the beginning of the season on August 7, 1978 and thereafter if necessary to reach agreement . . . and negotiate the effects of the proposed mechanization on the workers and also reach an agreeable rate for the new operation.

The majority of the discussion during the July 21 meeting was concerned with issues other than mechanization; discussion regarding the manner in which the harvester operated.

July 27, 1978:

The parties met once more with Conciliator Anderson on the 27th, The meeting was devoted to joint OPM and Gonzales issues,

During the interim between meetings, Stoll had received the UFW's request for additional information regarding the harvester. On the 27th he responded to each of the 27 items contained therein, providing the information requested with the exception of the request for the seed variety and one or two items
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about which OPM had no information.12/

Cohen stated that the UFW received no proposals from OPM regarding the workers displaced by mechanization nor had it received any proposal regarding training workers for work on the harvester. He said the UFW representatives would have to meet with "experts" to evaluate the machine's impact. Cohen told OPM representatives that the harvester should not be implemented until the talks ". . . reached a formal culmination."

Piece rates, an hourly guarantee, size of buckets, rejection of buckets, crew size and hand-picking crews were additional subjects discussed at the July 27 meeting. The discussion of these items related both to OPM and Gonzales.13/ The meeting ended in the middle of the afternoon because of the conciliator's medical problems.

July 28, 1978:

The parties resumed negotiations with Anderson present, Stoll asked for a statement of the Union's position on mechanization. The Onion's representative responded that he could not state a position at that time. Cohen said the Union needed to see the machine and to deal with "... issues that had not been dealt with on that issue," There was some discussion regarding how the machine sorter positions would be filled, Cohen said the UFW was not accepting implementation of the machine, because if it were successful, it would decimate the fresh market tomato work force.14/

There was also discussion of seniority, seniority lists, recall, local issues and various economic items such as wages, second picking, hourly guarantees and the hourly picking rate.

August 3, 1978:

The discussions during the meeting on August 3 were devoted to resolving Gonzales' problems. There was no discussion of the OPM mechanization issue.

August 7, 1978:

Regarding mechanization, Stoll stated "we accept the

12/Testimony of Tom Dalzell, The specific designation of seed variety was conveyed privately to Dalzell by Francis Murphy with the understanding that it would be revealed only to persons at U,C. Davis to whom Dalzell talked. Murphy did not want his competitors to learn the specific variety he was going to use.

13/Testimony of Steeg.

14/Testimony of Dalzell.

Union's proposal of March 28th; and as far as we're concerned, the issue of mechanization is closed, Let's move on." Steeg responded, "Well, Pat Bellamy has been out there with the machine for j two days already, so obviously the issue is closed because you j have already done it," Stoll responded that OPM was willing to j negotiate "impact-type things, training, displacement" and the
like.

There was renewed discussion regarding the specific seed j being used. Francis Murphy took Dalzell into the hall and told j
him the name and number of the seed.

During the course of the meeting, Steeg stated the UFW's opposition to the introduction of the harvester and to the recall of strike-breakers to man it. She told Stoll that OPM was implementing the machine at its own risk, because there was no agreement on how to man it. She also stated that ". . .we were neither at agreement or at impasse on putting in the machine."

Stoll asked Steeg to state the UFW position on the mechanization article. Steeg responded that she needed more time to review the information she had received and to see whether the machine would work. An oral request was made for additional information to which OPM responded after a lunch recess,

Stoll announced that the harvester would start operating on August 8. The parties arranged to meet on August 16, Dalzell canceled the meeting because he had not had a chance to talk to the experts at U.C, Davis,

August 23, 1978:

Conciliator Anderson was present at the August 23 meeting. Tom Dalzell was the sole UFW representative present. He I raised questions regarding the employees working on the machines, Stoll told him they were manned by 16 to 18 seniority employees (and four new hires, Stoll said the new hires would be replaced as I seniority employees applied for work,

Dalzell said he could not give OPM a mechanization proposal until he knew when the Company had decided to make the move. He reiterated the UFW's concern about mechanization of the fresh market tomato harvest. He stated it was the Union's first encounter with the problem and the representatives were confused.

At the time of the August 23 meeting the last mechaniza tion position placed on the table by the UFW was Article 15 from the Meyer agreement. No new proposal had been submitted, Dalzell gave Stoll another written request for information. Stoll said he would respond in writing.

On September 7, 1978, Dalzell, accompanied by Paul Barnett of U,C, Davis, inspected the harvester in the field. They viewed the machine in operation, and were aboard when it made a couple of passes.

September 11, 1978:

On September 11, Dalzell sent Stoll a new Union proposal on mechanization. It was accompanied by a letter which stated in part:

> At the time that the United Farm Workers conditionally agreed to Article 15 (Mechanization) of the "Master" or Meyer's contract, the Union anticipated a contract which would expire at the end of 1978. The Union did not expect any mechanization during the 1978 harvest season, and the company said nothing prior to our moving to the Master language on mechanization which could have led us to believe otherwise.
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> * * * *
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> Because you injected the issue of 1978 mechanization into the talks before agreement was reached, because of the substantial change in circumstances, and because of what we have to assume is bad faith on your part in the belated notification ... of your intent to mechanize, the United Farm Workers retract its conditional offer and/or acceptance of Article 15 of the Meyer's Master contract.

The proposal bore the format of an institutional proposal as well as dealing with local issues. It was apparently intended to be substituted for Article 15 in the Meyer agreement. In summary, it dealt with the following matters: notice of intent to mechanize, on-the-job training to fill job openings created by mechanization, a limitation on the rate of displacement of workers, hours of work and a minimum guarantee, a schedule of wage rates, severance pay for those permanently laid off as a result of the mechanization, rates of pay to be paid those demoted as a result of their displacement, the opportunity to bargain about working conditions when mechanization is contemplated, and a provision for arbitration in the event the parties cannot reach agreement, and a prohibition against subcontracting. In addition to these subject matters set forth in its Article 15 proposal, the proposal contained a series of "Local Issues" relating to the manner in which the machine was to be operated,

October 16, 1978 :

Dalzell and Stoll met and agreed to defer further bargaining until master agreement negotiations began in November, The tomato season was nearly over and Murphy was to be part of the master agreement negotiations. It was concluded to be in no one's interest at that late point in the season to try to get a precedent for the industry. OPM participated in the master

negotiations until sometime in September, 1979.

C. Failure To Rehire The Chavez Family

With respect to Respondent's failure to hire members of the Chavez family at the outset of the 1979 tomato harvest, the following findings are made.

During the 1977 OPM tomato harvest, Amelia Chavez, Amelia L. Chavez, Angelina Chavez, Jose Trinidad Chavez, Joaquin Chavez and Trinidad Chavez, Sr., were employed by OPM, There was a work stoppage lasting approximately one month at OPM during the 1977 season. Members of the Chavez family participated in picketing during the course of the dispute, Angelina testified that she was observed picketing by one of OPM's supervisors. Her father, Trinidad Chavez, Sr., was arrested for trespassing during the course of the dispute.

When the work stoppage concluded, the Chavez family was recalled to work the two or three days remaining in the season,

In 1978, in response to recall notices from OPM, Angelina and the other members of her family, her father excepted, went to the OPM shed seeking work. As seniority workers, she and her sister were each given applications for work. The application form requires listing one's green card number. Neither sister had her card at the time. They were instructed to return and give OPM their card numbers.

When they applied, the sisters were told there was machine work available. Neither wanted machine harvester work, and they did not return to complete their application forms. They were later called to come to work but did not do so. Neither worked during the 1978 season. No hand pickers were hired in 1978, There was some hand picking work, but it was performed by the people who also worked as machine sorters.

Trinidad Chavez, Sr., told his daughters that they would not lose their seniority if they declined to work on the machine, He told them Murphy had stated during negotiations that anyone who did not want to work on the machine would not lose seniority,15/ It was their reliance on this information coupled with their Tack of interest in working on the machine which motivated their not returning to work when called.

In 1979, Angelina, Amelia and Chavez, Sr., applied for hand-picking work. They testified they were told that there were only three days hand-picking work, that OPM had enough people for hand-picking and was going to lay off some workers. They were also told that they would be called if needed. The bookkeeper

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l5/The Senior Chavez was on the negotiating committee for the UFW and attended some of the meetings during 1978.

took their names and telephone number.16/ Although the Chavezes said they should be given applications even though no workers were needed, Vasquez did not do so.17/ There is no evidence other persons seeking work under similar circumstances were given applications .

The only testimony elicited regarding when the Chavez family sought work in 1979 came from Respondent's witness, Vasquez. She placed the time as a month prior to the harvest. She testified that she told the sisters that they had lost seniority by not reporting for work when called in 1978. Since the Chavez family had previously worked for OPM, it is reasonable to conclude they were aware of the OPM policy of sending recall notices to seniority people directing them to report for work within the next three days. Thus, it is unlikely they would have sought work a month in advance of the start of the harvest.18/ Therefore, Vasquez's testimony regarding the date the Chavezes sought work is not credited. Since no attempt was made by the General Counsel through his own witnesses to establish the date, there is no clear or direct evidence from which to draw a conclusion regarding when work was sought. The testimony of the sisters regarding what transpired when they sought work supports a finding that the interview took place after the season commenced. However, the record does not show whether the Chavezes sought work on a day on which non-seniority workers were hired or on a day when other non-seniority workers were given applications.

At the meeting of August 7, 1978, there was discussion of classifications and of the seniority list. OPM stated that workers having previously worked for the Company who did not choose to work on the machine would not lose their seniority in their other classifications such as hand picker, dumper, checker or trailer puller. This position was later reiterated to UFW negotiator Steeg by Stoll during the course of a break in the meeting.19/ Steeg was uncertain whether Chavez, Sr., had attended this meeting,

Notwithstanding OPM's representation at the bargaining table in August, 1978, Respondent at the outset of the 1979 season effected its rehire policy in the same manner as it had in 1978. People who did not report when called in 1978 were regarded at the outset of the 1979 season as having lost their seniority. One

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16/Carmen Vasquez.

17/Testimony of the Chavezes. Vasquez was not questioned regarding applications,

18/As long-time tomato harvesters, it is reasonable to infer an awareness of the approximate starting date for the 1979 harvest on the part of the Chavez family.

19/Testimony of Marion Steeg. Although both Francis Murphy and Charley Stoll testified, neither was questioned regarding Steeg's testimony on this point.

hundred twenty-six people, including the alleged discriminatees, were so treated.

Nineteen seventy-six was the first year Murphy hired its own employees, having previously used a labor contractor. A seniority list was prepared in 1977 and is the list the Company used to solicit workers at the start of the 1978 and 1979 seasons, striking therefrom workers who lost seniority.20/

It is OPM's practice to call or write people prior to the start of the season and ask them to come in to fill out applications. Solicitation of the workers starts shortly before the start of the season. Subject to some exceptions, a worker is given three days to respond. If the worker fails to respond to the recall, his seniority is broken, and he is treated by OPM in the same manner as one who has never worked for the Company. This practice was followed in 1979.

By the middle of the 1979 harvest season, the seniority list had been exhausted. People having no seniority were hired. Before the list was exhausted, when seniority people failed to report for work in response to a call, workers were hired off the street. As seniority persons appeared thereafter, the new hires were replaced.

During 1979 OPM did not take applications from every non-seniority person seeking work. There does not seem to have been a fixed policy beyond having a few on hand to cover crew shortages. There is no testimony regarding what, if any, criteria were used to determine when new applications were to be accepted at times other than the date of hire.

When the seniority list was exhausted, people were hired from among those at the shed or from among those from whom the Respondent had accepted applications. An attempt was made to reach those whose applications were on file. Consistent with its practice in 1978, OPM required seniority workers who were recalled to complete new applications.

During the period between July 25 and August 4, there were 54 "new" employees hired, 15 of whom were hired for hand-picking. With the exception of four or five of the applications, there is no indication of whether the person was hired the day of the application or at some later date. From the comments set forth on the application form, it appears likely these persons started work the day their applications were taken, that is they were hired from among those waiting at the shed. Fifty-two of the applications bear dates between July 25 and August 2. Francis Murphy testified that on an occasion OPM issued a call for 50 seniority people who failed to report and who had not notified OPM they were not going to report. Workers were hired from among

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20/There is one seniority roster for all field workers irrespective of classification.

people waiting at the shed seeking work. These persons were later bumped off the job when seniority workers reported. This testimony tends to corroborate the inference that the applications introduced by the General Counsel (G.C. Exh, 45-A) were completed the day the applicant started work. There is no evidence that the Chavez family was at the shed between July 25 and August 4 or that they sought work prior to August 4.

ANALYSIS AND CONCLUSIONS

A. Duty To Decision Bargain

The threshold question presented herein is whether Respondent had a duty to bargain regarding its decision to switch from hand harvesting to machine harvesting of tomatoes. If there be a duty, other questions follow regarding the nature of the duty and how one ascertains whether it was satisfied, when the duty arose and what, if any, defenses are available to the charge.

The Board was presented with a case involving a partial closure of operations in P & P Farms, 5 ALRB No, 59 (1979). The Administrative Law Officer found an obligation to bargain about the effects of the shut-down of the employer's on-site onion packing shed, but he did not find an obligation to bargain regarding the decision to terminate the shed's operations. The Board reversed, but without dealing with the substantive issues, stating:

> In order to establish a Section 1153(e) violation here, General Counsel must prove an obligation to bargain existed at the time changes were decided on or made. Part of that proof is to show the date of the decision or changes . « • . [N]o testimony or other evidence was received as to the date on which Respondent made or effectuated its decision to cease onion production and close its packing shed. In the absence of evidence as to when the decision was made, we can make no determination thereof,
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> Accordingly, we conclude that Respondent did not violate Section 1153(e) and (a) of the Act by failing and refusing to bargain ... concerning the wages, hours and working conditions of the onion-shed workers and/or to bargain over the effects on said workers of the closure of the onion shed.
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> [P & P Farms, supra, Slip Opinion, pp. 3-4.]

In a recent opinion involving the employer's decision to sell its operations, made during the hiatus between dismissal of its election objections and issuance of certification, the Court

of Appeal Second District stated:21/

> An employer has an undoubted right to cease being an employer and to go out of business, and that decision is not subject to negotiation. According an employer anything less "would significantly abridge its freedom to manage its own affairs. Bargaining is not contemplated in this area under the history and usage of §8(a) (5) ." (29 U.S.C. §158(a) (5).) (N.L.R.B. y. Adams Dairy, Inc. (8th Cir. 1965) 350 F.2d 108, 111.) The right to completely go out of business is untrammeled even if the decision is prompted by vindictive animus against the union. (Textile Workers v. Darlington Co. (1965) 380 U.S. 263, 269-274 [13 L.Ed.2d 827, 833-836, 85 S.Ct. 994].)
>
> A decision to change the basic operations of a company receives similar treatment: the decision itself is not a subject of bargaining, at least if it is based on something other than antiunion animus.
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> [Supra, at p. 652; citations omitted.]

In a footnote to the above observations the court notes that there may be a duty to bargain about a decision to partially go out of business if it is motivated by a purpose to weaken the union in other operations of the employer and if the employer may reasonably have foreseen that it would have that effect, citing Textile Workers Union v, Darlington Mfg. Co., 380 U.S. 263, 274-277 (1965).

No contention was made in Highland Ranch that the employer had an obligation to bargain over its decision to cease operations. The issue was neither considered nor discussed by the Board; it was not before the court and the observations set out above cannot be regarded as dispositive of the issue.

Lacking precedent from either the Agricultural Labor Relations Board or state court decisions, we turn to decisions under the National Labor Relations Act (NLRA).22/ Prefatory reference to the ALRA is appropriate.

Labor Code §1153(e) makes it an unfair labor practice to refuse to bargain in good faith. Bargaining in good faith is defined in §1155.2(a) as the performance of the mutual obligation of

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21/San Clemente Ranch..Ltd. v. Agricultural Labor Relations Bd. ,107 Cal.App.3d 632 (1980).

22/Labor Code §1148.

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22/Labor Code §1148.

the union and the employer to meet and confer in good faith with respect to wages, hours and other terms and conditions of employment; an obligation which does not require either party to agree to a proposal or to make a concession.23/

As defined in §1155,2(a), the obligation to bargain extends only to subject matters which fall within the scope of wages, hours and other conditions of employment, i.e., the mandatory subjects of bargaining. It has long been established under the National Labor Relations Act that an employer violates §8(a)(5) by effecting a change in wages, hours and other conditions of employment without notifying the bargaining representative of such proposed changes and affording the opportunity to bargain with respect to the proposed changes.24/

Over the years the National Labor Relations Board has been asked to decide whether such employer actions as going out of business, transferring bargaining unit work to another location or to a subcontractor, partial closure of its operation, or automation are mandatory subjects of bargaining. The cases involve two questions: (1) does bargaining in good faith require that the employer bargain about its decision to effect one of the cited changes; or (2) does the duty to bargain require only that the employer bargain about the impact or effect of its decision upon the members of the bargaining unit. If the answer to the first question is yes, § 8(a)(5) is violated when the employer makes and effects its decision without notification to the union and without affording an opportunity to meet and confer in good faith.

The National Labor Relations Board has held that decisions to subcontract unit work, to transfer or close partially an operation and to automate are all mandatory subjects of bargaining;25/ and despite a less than charitable reception by the courts has persisted in its views.26/

It will facilitate understanding of the result reached herein to review briefly the more significant NLRB cases. The point of origin is Fibreboard Paper Prods. Corp. v. N.L.R.B., 379 U.S. 203 (1964), in which the court enforced a Board order holding

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23/Labor Code §1154(c) requires good faith bargaining by a labor organization.

24/N.L.R.B. v. Katz, 369 U.S. 736 (1962) .

25/Town & Country Mfg. Co., 136 NLRB 1022, 1027, enforcement granted, 316 F.2d 846 (5th Cir.1963); Rochet d/b/a Renton News Record, 136 NLRB 1294 (1962) ; Senco, Inc., 177 NLRB 882, 894 (1969).

26/See: N.L.R.B. v. Winn-Dixie Stores, Inc., 341 F.2d 750 (6th Cir. 1965), cert. denied, 382 U.S. 830 (1965); Weltronic Co. v. N.L.R.B., 419 F.2d 1120 (6th Cir. 1969) , cert, denied, 398 U.S. 939 (1970); but see Royal Typewriter Co. v. N.L.R.B., 553 F.2d 1030 (8th Cir. 1976).

the employer was obligated to bargain not only about the effects of its decision to subcontract but also about the decision itself, even though the decision was motivated by a desire to effect economies and absent any animus toward the union.

The court found that the statutory phrase "conditions of employment" covered contracting out of unit work and the concomitant termination of unit employees. It reasoned that requiring bargaining would advance the statutory objective of "bringing a problem of vital concern to labor and management within the framework" of peaceful resolution.

The court went on to note that Fibreboard had merely substituted one group of employees for another group doing the same work in the same plant. The change did not alter the company's basic operation and did not involve any capital investment; thus, requiring bargaining regarding the decision would not significantly abridge his freedom to manage his business. The court also stated the employer's motivation in subcontracting was the expectation that the work force size would be reduced, fringe benefit costs would be lowered and that overtime payments would be eliminated. These are clearly mandatory subjects of bargaining and although it might be unlikely that agreement could be reached, the union must be given an opportunity to dissuade the employer from going forward with his decision.

Finally, the court limited its decision to the type of subcontracting involving the substitution of the group of employees for another to do the same work under similar conditions of employment, and concluded that its decision did not expand the scope of mandatory bargaining.

In an often-quoted concurring opinion, Justice Stewart stated:

> An enterprise may decide to invest in labor' saving equipment . . . Nothing the court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control. [Supra, at 223.]

Notwithstanding Justice Stewart,s observation, the Board has continued to find a duty to decision bargain regarding mechanization.

The analytical similarity between a situation in which bargaining unit employees are substituted out by a contractor's employees and one in which a machine displaces the employees is clear; however, automation cases have not frequently appeared. The National Labor Relations Board in Rochet, d/b/a Renton News Record, 136 NLRB 1294 (1962) , a case predating Fibreboard, held that the employer had an obligation to bargain regarding its decision to purchase a new press resulting in automation accompanied by a work force reduction. In a post Fibreboard case, Richland,

Inc., 180 NLRB 91 (1969), the NLRB found the employer violated § 8 (a)(5) by not bargaining about its decision to automate.

The rationale of requiring an employer to bargain about a decision which will result in displacement of unit workers has been best articulated in those cases in which an employer unilaterally effects a partial shut-down of its operations. Starting with Ozark Trailers, Inc., 161 NLRB 561 (1966), the National Labor Relations Board has consistently found an employer's failure to bargain over the decision to close part of its business to be violative of §8(a)(5) and (1) of the NLRA.27/ A recent expression of its reasons for so doing is set forth in Brockway Motor Trucks, 230 NLRB 1002, 1003 (1977):28/

> Unilateral changes in employment conditions may not be effectuated without bargaining regardless of whether a collective-bargaining agreement is currently in effect. This obligation remains notwithstanding an employer's contention that such a requirement significantly restricts its ability to manage the business. The underlying rationale for requiring bargaining over such matters is that the union—on behalf of and as representative of the employees—should be accorded an opportunity to engage in a full and frank discussion regarding such decisions. In this way parties are presented with an opportunity to explore possible al ternatives to accommodate their respective interests and thereby to resolve whatever issue confronts them in a mutually accept able way.
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> Although it is unlikely that this Board or any other body could ascertain whether a discussion that is held pursuant to the requirements of the Act will cause any change in the tentative plans of an employer, the results of a bargaining session are not germane to the statutory requirements of the Act. Rather, in the event a party refuses to bargain, the Act requires that this Board order the parties to the bargaining table where they must meet and confer at reasonable times in good faith. In this way, the law leaves undisturbed the parties' sole

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27/See (General Motors Corp., GMC Trucks & Coach Division, 191 NLRB 951 (1971).

28/Enf'd Brockway Motor Trucks y. N.L.R.B., 582 F.2d 720 (3rd Cir. T778). See also Stone and Thomas, 22L NLRB 573 (1970).

> right to determine the substantive terms of their relationship while also guaranteeing, at the very least, the right of each party—in this instance particularly that of the Union—to have an opportunity to influence the final decisions. Whether the final decision is actually influenced is undoubtedly significant to the parties; however, the purpose of the law and the Board's sole function is to assure that such an opportunity in fact exists.
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> [Supra, footnotes omitted.]

As noted herein as well as by both counsel, the NLRB decisions in the plant shut-down and analagous cases have not always been enforced by the Court of Appeals. This situation requires consideration of how an Administrative Law Officer should construe "applicable precedents" as used in Labor Code §1148. An NLRB Administrative Law Judge is bound to apply established NLRB precedent which the Supreme Court or the NLRB has not reversed. 29/ The Administrative Law Judge is bound by Board decisions and not by Court of Appeal decisions until such time as the Board changes its position.30/ It is appropriate, absent ALRB direction, for the Administrative Law Officer to accept the NLRB's position regarding precedents binding upon its Administrative Law Judge's in determining "applicable" NLRA precedent to follow in the instant case. Thus, it is NLRB precedent as enunciated in the NLRB cases cited which is applicable rather than U.S. Court of Appeals decisions in which the circuit refused to enforce an NLRB order. So doing, it follows that Respondent was required by §§1153(e) and 1155.2(a) to bargain with the UFW regarding its decision to mechanize its tomato harvesting operation.

We turn now to determine whether Respondent met its duty to decision bargain. Initially it should be noted that the problem troubling the Board in P & P Farms, supra, is not present here. The only testimony offered regarding when Respondent decided to mechanize was that of Francis Murphy who testified that he made the decision sometime during the first week in April, 1978. Absent any attempt by the General Counsel to prove otherwise, Murphy's testimony is entitled to be credited, particularly since the April date places the decision within the §1160.2 period, and it was arguably against his interest to so testify.

On January 6 Murphy submitted a proposal which contained three provisions dealing with the general subject matter

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29/Iowa Beef Packers, Inc., 144 NLRB 615, 616 (1963); Novak Logging Company, 119 NLRB 1573, 1575-76 (1958).

30/Fred Jones Manufacturing Co,, 239 NLRB No. 9 ( ) ; Ford Motor Co"., 230 NLRB 716, 718 (1977); Roberts Electric Co. , Inc., 227 NLRB 1312 ( ).

of automation or mechanization. OPM proposed that the UFW's existing contract with Meyer Tomato Company, another Salinas Valley tomato harvester, serve as the basis of settlement. The UFW's response was that the majority of its Meyer contract would be acceptable, but that certain issues (unrelated to mechanization) would require separate consideration.

At the March 10 meeting, the UFW, as part of its package, also proposed the Meyer agreement. Thus, the parties on that date had tentative agreement on three Meyer contract provisions bearing on mechanization: "Management Rights," "New or Changed Operations" and "Mechanization." Thereafter, the UFW did not submit another proposal on mechanization until September 11, Its September proposal was accompanied by a letter acknowledging there had been tentative agreement on mechanization in March. The UFW explains its March willingness to adopt the Meyer contract in terms of not expecting mechanization in 1978 and charges that OPM. did nothing to lead the Union to any other conclusion. This position is at odds with credited testimony that Respondent notified UFW representatives as early as mid-April, 1978, of its contemplated mechanization and accompanied its notification with a request to meet.

Respondent's duty to decision bargain regarding mechanization arose at the time the decision was made,

> [I]n no case has the [NLRB] held that an em ployer must defer making a decision concern ing terms and conditions of employment until it has first conferred with the representa- tive of its employees. The requirement is that, after reaching the decision, the em ployer must then notify the representative and afford the opportunity to discuss that decision and to consider alternative propo- sals. Thus, in Ozark Trailers. Incorporated, 161 NLRB 561 (1966), the [NLRB] made It clear that the illegality lay not in the fact that the employer had first made the decision before consulting with its em- ployees' representative, the illegality lay in implementation of that decision prior to affording the representative an opportunity to advance and discuss alternative courses of action.31/

If an employer were required to bargain regarding a de- cision to mechanize prior to making the decision, great instabi- lity would be created in the bargaining relationship. If formula- tion of decision had to be deferred, bargaining would be reduced to being conducted in a vacuum.

31/Lange Company, 222 NLRB 558, 563 (1976).

> Employers are entitled to first reach a decision. This provides the starting point for any bargaining which then might follow. However, employers must then be willing to consider the alternatives proposed by the bargaining representatives before implementing those decisions. Thus, once the employer notifies a representative of a decision affecting employees which the latter represents, the burden is upon the representative to indicate whether it wishes to pursue the matter by obtaining further details and by bargaining with the employer concerning the matter. Conversely, it is the burden of the employer to supply the union with whatever information concerning the decision which the latter seeks and to listen with an open mind to whatever alternative proposals are advanced. [Lange Company, supra, at pp. 563-564.]

As part of its duty to bargain regarding mechanization, Respondent must give the Union advance notice of its intention to mechanize and provide the Union with a fair opportunity to bargain. 32/ Respondent met its duty in this respect by notifying the UFW on April 17 and 18, within two weeks of making the decision, of its intention to mechanize and by simultaneously requesting a meeting on the subject matter. The parties met on April 18, 1978. Because the meeting was nonproductive with respect to discussion of other issues and terminated without discussion of mechanization, Stoll wrote Cohen a letter, dated the 18th, again putting the Union on notice of Murphy's contemplated action and again expressing a desire to meet to discuss the issue and to negotiate a rate for employees working on the harvester. A fair reading of the April 18 letter is that Murphy expressed a willingness to discuss both the decision and its effect upon unit employees. No response was received from the Union until June 1. The failure to respond immediately is, not explained except in terms of the UFW's belief that the feasibility of mechanical harvesting of market, tomatoes was several years in the future. Certainly, prior to June 1, the Union made no demand that Murphy bargain about its mechanization decision. It made no proposals regarding alternatives to mechanization, alternatives aimed at reversing or substantially modifying Murphy's decision. Moreover, the Union's response on June 1 did not seek any discussion regarding the decision, but rather was limited to stating that one of the unresolved issues was a machine sorter rate, clearly an "effects" issue.

Having put the Union on notice of its intended mechanization, Respondent took no further affirmative steps regarding bargaining on the issue. Nor did it have an obligation to do so

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32/P. B. Mutrie Motor Transportation ,Inc., 226 NLRB 1081 (1976); Lange Company, supra, at 563.

in the absence of a response from the Union. Having received notice, the Union must demand bargaining on the issue before a violation of §1153(e) can be found.33/ It was incumbent upon the Union to enforce its bargaining rights by attempting to persuade Murphy to alter its decision if it found that decision unacceptable.34/ The Act does not compel the Respondent to seek out the j bargaining agent or request its participation in collective bargaining negotiations. To put Respondent in default, the Union must signify its desire to negotiate.35/ Since the UFW did nothing which can be construed as an effort to bargain regarding mechanization prior to June 1, 1978, it waived its right to complain that Respondent violated §1153(e) before that time.36/ This is not a case in which the Union can claim it was excused from demanding bargaining because the notice was inadequate; it was received sufficiently in advance of implementation to permit a reasonable scope of bargaining.37/

If implementation is viewed as the acquisition of the harvester, the Union had 10 days' notice. This was sufficient time for the Union to demand decision bargaining or to submit a request for information. In view of the fact that no response to Respondent's notice was communicated for approximately two months after receipt, it is reasonable to infer that notification some two weeks earlier, i.e., immediately after the decision was made, would not have spurred the UFW to action. Alternatively, if implementation be regarded as the day the harvester first operated, the UFW had almost four months' notice.

As noted, the Employer's duty to decision bargain regarding mechanization arose when it made the decision. The Union's burden of requesting negotiations regarding the decision must be satisfied by demand for such negotiations or by a request for information made before implementation of the decision. Once the decision has been implemented without a bargaining demand, the Employer's obligation to bargain regarding the issue expires.

33/Globe-Union, Inc. , 222 NLRB 1081 (1976) ; Lange Company, supra.

34/American Buslines, Inc., 164 NLRB 1055 (1967); U.S. Lingerie Corporation, 170 NLRB 750 (1968),

35/National Labor R. Board v. Columbian & Stamping Co., 306 U.S. 292, 297-298 (1939) .

36/International Ladies' Garment Workers Union, AFL-CIO, v. N.L.R.B., 463 F.2d 907, 918 (D.C, Cir. 1972); American Bus1ines . Inc., Id.; U.S. Lingerie Corporation, Id .See also: | Moffitt Building Materials Company, et al, 214 NLRB No. 110 ( ) ; Association of Motion Picture and Television Producers, Inc., 204 NLRB 807 (1973).

37/International Ladies' Garment Workers Union, AFL-CIO, y. N.L.R.B., supra, at 919.

Thereafter, its obligation is limited to bargain, upon request, regarding the effects of the decision. Thus, in the present case if the date the harvester was acquired [April 17] is the date of implementation, Respondent cannot be held to have violated its duty to bargain on the issue, because no demand was made prior to implementation of its decision,

OPM's decision was implemented upon the purchase of the harvester with the concomitant commitment of a capital expenditure approximating $95,000.00. Certainly the likelihood of effective bargaining regarding OPM's decision can be expected to be less after purchase of the harvester.38/ When the harvester was purchased, the mechanization decision had been effected. Nothing remained except to await the ripening of the vines.

Just as requiring decision bargaining before a decision is made would be disruptive of meaningful collective bargaining, a requirement that an employer engage in decision bargaining subsequent to implementation, absent a demand for such bargaining, would be disruptive of stable bargaining relationships. When there has been no union response to its timely notice of mechanization, an employer reasonably can regard the union as uninterested in decision bargaining and proceed with its plan. The Act imposes upon both the UFW and Respondent the duty to bargain in good faith prior to implementation. In the present context, a request by the Union for decision bargaining was the Union's counterpart notice requirement. Failing to meet this obligation prior to implementation, the UFW cannot successfully claim that OPM violated §1153(e) by failing to decision bargain.

The conclusion that OPM met its duty to decision bargain is not altered by regarding implementation as occurring on the date the harvest commenced, August 8, Since the earliest conduct of the Union which could remotely be construed as a demand to bargain on the issue occurred at the June 1 meeting, Respondent cannot be charged with having failed or refused to bargain on the issue prior to that date. The Union's conduct at the June 1 meeting cannot be construed as a demand to bargain regarding the decision. The only mention of the general issue was Steeg's listing of disagreement regarding a machine sorter rate as one of the issues separating the parties. This is an "effects" issue rather than a "decision" issue,

A demand to bargain regarding the decision was finally made by the Union in the letter from Steeg which Stoll received on July 5. We turn to an examination of Respondent's conduct subsequent to July 5 to ascertain whether a violation of its duty to decision bargain can be found.

38/In this regard it can be noted that OPM's purchase of the Reto seed, an event occurring outside the §1160.2 period cannot be regarded as implementation of a mechanization decision. Francis Murphy testified credibly that he intended to use the seed irrespective of whether he harvested by hand or mechanically.

Upon receipt of Steeg's letter Stoll contacted the state conciliator to set up a meeting. The parties met on July 20. There is no evidence that Respondent is chargeable with preventing an earlier meeting date.

At the July 20 meeting, OPM responded to the request for information which accompanied Steeg's June 26 letter. When asked to state their position regarding mechanization, the Union spokesman responded that he could not do so until he reviewed the information supplied by OPM; moreover, he stated that the Union would require more information and suggested deferring the meeting until the UFW submitted its request for additional information. When asked whether the UFW was withdrawing the tentative agreement regarding the Meyer mechanization language, the Union representative could give no answer.

The parties met on the 21st at which time OPM announced that it was going to commence operating the harvester on August 7. Stoll stated the Company was prepared to engage in marathon negotiations to resolve the mechanization issue.

The parties met again on July 27. Stoll responded to the questions he had received during the interval between meetings. The parties met again the next day, and the Union was still unable to state its position on mechanization and made no proposal regarding the issue. During this entire period, its response was limited to "we're against mechanization, and if the harvester is utilized, it's at your own risk."

The parties met on August 3, but no attempt was made by the Union to discuss mechanization. At the next meeting on August 7, the Union made no proposals and no statement of position beyond blanket opposition to Respondent's use of the harvester; rather, the UFW opted to file the unfair labor practice charge underlying the complaint herein.

The parties met on August 23 and still no proposal was forthcoming from the UFW. On September 11, more than a month after the harvest commenced, the Union submitted its first proposal on mechanization since its Meyer proposal in March, 1978. Thereafter, the parties met in October and mutually agreed to . defer further discussions pending master agreement negotiations in which OPM was to participate.

Respondent during the period it had an obligation to bargain regarding mechanization did not refuse to do so. It did not refuse to meet; it responded promptly to all requests for information; it urged that it be given a proposal regarding mechanization .if the Union's position was other than that tentatively agreed to in March. Its bargaining posture was consistent with the March agreement and responsive to the Union's bargaining posture from June 1 thereafter. Nor, viewing the circumstances as a whole, can it be said that Respondent engaged in surface bargaining on the mechanization issue. The complaint alleges surface bargaining commencing in February, 1978. For the reasons noted

above, Respondent had no duty to decision bargain since no demand was made prior to implementation. Alternatively, if August 8 be viewed as the implementation date, the duty arose on July 5 with receipt of Steeg's letter. Respondent's conduct subsequently does not manifest the indicia of bad faith necessary to establish surface bargaining.39/

B. Duty To Bargain Regarding Effects Of Mechanization

Although the complaint alleges a failure and refusal to bargain regarding the effects of mechanization, the General Counsel makes no argument regarding effects-bargaining in its brief. However, since the charging allegation has not been withdrawn, it must be discussed.

Respondent concedes its obligation to bargain regarding the effects of its decision to mechanize its harvest operation. However, it does not concede that its conduct violated the Act. It presents three defenses: (1) it did not fail or refuse to bargain; (2) the UFW waived its right to bargain regarding impact; and (3) the UFW engaged in bad faith bargaining on the issue. We turn to those arguments.

When Respondent initially notified the UFW of its intent to automate, it proposed a $3,70 per hour wage rate for machine sorters, and requested a meeting to discuss related problems. This conduct was consistent with its obligation to meet and confer in good faith. Nor is there reason to infer from Respondent's conduct during the period between February 5 and April 17 .that its proposed wage rate and request for a meeting on the mechanization issue was not made in good faith.40/ The rate proposed was a rate found in the Union's agreement with Interharvest, and thus not one which could be known patently to be unacceptable to the Union. As noted above, Respondent's action of April 18 elicited no response from the UFW until June 1 when the Union announced to the conciliator that there was no agreement on a machine sorter rate. Having been notified of Respondent's intent to mechanize and having received a proposed wage rate covering the operation, the burden was on the Union to proceed to enforce its bargaining rights by requesting a meeting or by making counterproposals in lieu of a meeting. It did neither until the June 1 meeting. The

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39/See O. P. Murphy; Produce Co,, Inc., dba O. P. Murphy & Sons, 5 ALRB No, 63 (1979), Slip Opinion pp. 2-12, In view of this conclusion, it is unnecessary to consider the merits of Respondent's affirmative defense that the UFW was guilty of bad faith decision bargaining,

40/The Board's determination in O. P. Murphy, 5 ALRB No. 63 (1979) that Respondent had failed to bargain in good faith is not evidence of such a failure or refusal during the relevant time frame in the instant case. The earlier decision can only be used to shed light in drawing inferences from equivocal conduct occurring during the §1160,2 time period involved herein.

Union's failure to request a meeting or to lodge objection to the Company's wage proposal during the period between April 18 and June 1 estops it from now contending that Respondent failed or re fused to bargain during this period.41/

Although voicing disagreement with Respondent's machine sorter rate, the Union made no sorter rate proposal at the June 1 meeting or at any other time during the course of negotiations. Respondent's conduct during the period from June 1 to the mutually arrived at conclusion of negotiations on a single employer basis has been recited above and found not to support the conclusion that Respondent engaged in surface bargaining.

One aspect of Respondent's conduct vis-a-vis machine sorters merits special attention. The complaint alleges a unila- teral change in working conditions in that the work hours of har- vest employees were altered without reaching agreement or im- passe.42/ The facts are undisputed. Francis Murphy testified there was a change in starting time with the advent of the machine harvester as well as an extension of the work day. Neither change was discussed with the UFW before effectuation. Clearly hours of employment is a mandatory subject of bargaining and a change in hours without notice to the Union is a per se violation of §1153 (e) unless Respondent's failure to notify and to bargain is ex- cused by the Union's conduct,

As noted above, Respondent contends the Union waived its right to impact-bargain. When applied to the time frame after the UFW's request to bargain, this defense is unavailing. While the Union cannot successfully contend Respondent violated the statute during the period between receipt of notice of mechanization and its demand for bargaining, it does not follow that the Union is forever foreclosed from bargaining. Respondent, upon receipt of a request to effects-bargain as manifested by the UFW's request for information, had an obligation to do so. Thus, waiver is not a defense to unilateral changes in work hours made after a bargaining demand was received.

Respondent next argues that the UFW bargained in bad faith on the mechanization issue, thereby excusing it from the injunction against changing hours without notice. There is merit in this contention. Viewing the entire course of the UFW's conduct with respect to mechanization, a conclusion that it failed to bargain in good faith is warranted. The time gap between notification of the intended mechanization and its demand for bargaining;43/ its repeated refusals to submit proposals, even with

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41/Citizens National Bank, 245 NLRB No. 47( ); Roman Catholic Diocese, 238 NLRB No. 177 ( ) ; see also cases cited at Footnote 36, Page 26.

42/Paragraph 14 (d).

43/Masaji Eto, 6 ALRB No. 20 (1980).

respect to a wage rate: 44/ the delays in negotiations caused by its repeated requests for information, no reason having been offered as to why most of the information requested could not have been sought in the initial request; the outright rejection of Respondent's proposal without any attempt to minimize the difference;45/ the filing of unfair labor practices rather than engaging in negotiations; the ultimate making of a proposal which could have been forthcoming absent receipt of answers to its information requests; its failure to agree to Respondent's proposal for marathon negotiations; and finally the withdrawal of its tentative agreement on the Meyer mechanization language with the candid admission that mechanization had not been anticipated at the time agreement was reached, are all circumstances supporting a conclusion that the UFW was engaged in surface bargaining on the issue of mechanization. Faced with the Union's conduct which evidenced no desire to reach agreement on the effects of mechanization, it was not unreasonable for Respondent to effect the change from hand harvest to machine harvest and to make changes in work hours necessary to effective use of the harvesting machine.

The statute requires the bargaining representative as well as the employer to engage in meaningful bargaining with the object of reaching agreement.46/ The totality of the UFW's conduct as manifested in the circumstances recited above warrants the conclusion that it failed to bargain in good faith by engaging in surface bargaining regarding the effects of mechanization, thereby providing Respondent with a defense to the allegation it violated §1153(e) by making a unilateral change in hours,

C. Mechanization As Violative Of §1153(c)

The complaint alleges that Respondent mechanized its harvest operation in order to punish its employees for their support of the UFW and to discourage further support of the Union and that such conduct violates §§1153(c) and (a).47/

As noted by the General Counsel, Textile Workers v. Darlington Manufacturing Co, , 380 U.S. 263 (1965) , stands for the proposition that a partial business closure motivated by employer animus toward the union violates §8(a)(3) of the NLRA.48/

The General Counsel correctly argues that the Darlington rationale is appropriate in dealing with mechanization

44/As-H-Ne Farms, 6 ALRB No. 9 (1980) ; Montebello Rose/ Mount Arbor Nurseries, 5 ALRB No, 64 (1979),

45/As-H-Ne Farms, supra.

46/Labor Code §1155,2(a).

47/Paragraph 14 (b).

48/Section 1153(c) is the ALRA counterpart of §8(a}(3).

issues; however, there is not substantial evidence on the record as a whole that mechanization was discriminatorily motivated. Murphy testified credibly that OPM's per ton harvest cost was $35.00 in 1977 and $17.50 in 1978. He also testified that OPM's reason for mechanization was to effect a cost reduction and that lower costs would be effected through a reduction in direct labor costs.

The General Counsel asserts: "The Company's actions in August, 1978, were inherently destructive of employee rights."49/ Unless one is to say that mechanization is proscribed by the statute, it is not sufficient to establish a violation of §1153(c) to show a strong adverse effect upon employees in the work force resulted from Respondent's mechanization. If the employer has a right to mechanize, subject to the structures of §1153(e) , that right exists irrespective of its impact upon §1152 rights if the decision is motivated by other than discriminatory reasons.

The "inherently destructive" language had its genesis in N.L.R.B. y. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), wherein the court stated:

> [I]f it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [Emphasis added.]

In Great Dane the discriminatory conduct consisted of paying accrued benefits to one group of employees and denying them to another group distinguishable only by their participation in protected concerted activity. No comparable discriminatory act has been proved herein; certainly mechanization per se is not a discriminatory act. Until the act of mechanization's proved a discriminatory act by establishing its illicit motivation, the "inherently destructive" analysis of Great Dane does not come into play and anti-Union hostility or animus must be proved. While Respondent has on previous occasions been held in violation of the Act,50/ the earlier violations provide only background and cannot be the" basis for finding an unfair labor practice herein.51/

On this record there is not substantial evidence of a discriminatory motive for Respondent's mechanization; therefore

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49/Post-hearing Brief of General Counsel, at p. 37.

50/O. P. Murphy & Sons, 4 ALRB No. 62 (1978); O. P. Murphy & Sons, 4 ALRB No. 106 (1978); and O. P. Murphy & Sons, 5 ALRB No. 63 (1979) .

51/As-H-Ne Farms, Inc., supra.

Paragraph 14(b) of the complaint must be dismissed.

For all the foregoing reasons, the General Counsel has failed to prove Respondent violated §§1153(c) and (e) of the Act. Since any §1153(a) violation would, in the instant case, derive from a (c) or (e) violation, it follows that there was no violation of §1153(a).

D. Refusal To Rehire Members Of The Chavez Family

Paragraph 11 of the complaint in 79-GE-330-SAL, consolidated for hearing, alleges Respondent refused to hire the Chavez family on or about August 5, 1979, because of Union activity in violation of §§1153(a) and (c).

The Chavez family, including their father who is not a named discriminatee, were participants in the 1977 strike against Respondent. One or more of them was observed picketing by an OPM supervisor. When the strike was settled, the family was recalled to finish out the two or three days remaining of the harvest. With the exception of the father, no family member thereafter engaged in Union or protected concerted activity, Chavez, Sr., served on the UFW negotiating committee in 1977 and attended most bargaining sessions held in 1978. He was not named as a discriminatee. 52/

The discriminatees were recalled in 1978 and were offered and refused work. They wanted to work as piece-rate hand-pickers, but such work was not available. Aside from not wanting machine work, their father told them they would not lose their seniority as hand pickers if they declined machine sorter work. OPM representatives made such a representation at a 1978 bargaining session.

Prior to the commencement of the 1979 season, OPM reverted to its original policy; all workers who had failed to report for work when called in 1978 lost their seniority as did workers who failed to finish the 1978 season. The family was not called back in 1979 and when they sought to file applications were told that no workers were needed. Their phone number was taken, and they were told they would be called if needed. None of the family worked in 1979,

Although the showing is not substantial, it seems probable that Respondent was aware of the alleged discriminatees' picketing activity during the period of the 1977 strike; however, it does not appear that much significance, if any, was attached thereto; the Chavezes were called back to work when the strike was finished, and so far as the record shows, their recall was carried out in a nondiscriminatory manner. Similarly their 1977 Union activities had no impact upon their seniority in 1978 for they

52/This omission is likely related to the fact that he was arrested for trespass occurring during the course of the 1977 strike.

appear properly to have been recalled at the start of the season. The mere fact of Employer knowledge of their 1977 Union activities is insufficient to establish the General Counsel's case; some discriminatory motive for not hiring them in 1979 must be proved.

The General Counsel argues that Respondent discriminated against the Chavezes by terminating their seniority for failing to report when called in 1978. Even if one assumes that a reason for their failing to report was Murphy's representation that people declining to work as machine sorters would not lose their seniority, it does not follow that the refusal to rehire them was a discriminatory act. They were not discriminated against vis-a-vis other workers who failed to report in 1978 or who failed to finish the 1978 season. All persons in those categories were deprived of their seniority. The record does not reveal when OPM made its decision to follow its original practice and the reversion is not I charged as a violation of the Act. There is no evidence of a distinction, based upon Union activity, between the Chavez family and I others who failed to report for work in 1978.

The General Counsel next argues that the Chavezes were discriminatorily denied the right to file applications when they sought work in 1979. It is asserted, correctly, that the Act requires "an employer must consider a request for employment in a lawful, nondiscriminatory manner."53/ However, the General Counsel has failed to prove by substantial evidence on the record "as a I whole that Respondent's failure to accept applications was a discriminatory act. OPM’s policy regarding applications was not clearly established, but it appears when workers were needed seniority workers were called and when they reported they were given j applications to complete. On a given day if the required number of seniority workers failed to report, Respondent hired off the street from among persons not having previously submitted applications or, alternatively, called non-seniority persons having applications on file. With respect to such persons, it appears that OPM had no fixed policy regarding accepting applications at times other than the day the applicant was to go to work. It appears that the 56 non-seniority employees hired between July 25 and August 4 all completed their applications the day they went to work and, thus, were not hired from applications on file.

There is no evidence that the alleged discriminatees were at the OPM shed seeking work on any day when non-seniority workers were hired. Nor is there any evidence that the inability of the Chavezes to obtain application forms was inconsistent with OPM's policy regarding procuring such forms from non-seniority persons, Abatti does not require that every person seeking an application blank must be given one; rather, the requirement is that a person not be denied one for a reason interdicted by the Act. The General Counsel has failed to adduce evidence proving such was the case here.

53/Abatti Farms, Inc., 5 ALRB No. 34 (1979), Slip Opinion, p. 23.

While the General Counsel correctly notes that he need not establish the availability of hand-picking jobs at the time the Chavezes sought work, citing Abatti, supra, it is necessary that he prove that their request for employment was handled in a discriminatory manner.

Here, as in the case involving mechanization, the General Counsel seeks to rely on Great Dane Trailers, supra, and contends that OPM's switch of position on loss of seniority was "inherently destructive" of important employee rights under the Act, The argument misses the point of Great Dane, Here, it does not appear that the only persons deprived of seniority for failing to report for work in 1978 were Union adherents. Thus, unlike Great Dane, there is no evidence that a distinction was drawn among those failing to report in 1978 on the basis of their Union activity. In Great Dane it was the fact that the employer treated employees differently with respect to accrued vacation based upon their participation in protected concerted activity. There is no evidence of such disparate treatment herein.

Finally, the General Counsel asserts that the activities of Trinidad Chavez, Sr., and the Respondent's awareness thereof, is circumstantial evidence that his family members were discriminated against when they sought work in 1979.54/ This argument is unpersuasive, Trinidad was more active during 1977 when he attended all the negotiation meetings. This greater degree of activity was not reflected in any disparate treatment of his family at the outset of the 1978 season. His participation in negotiations during 1978 was sporadic, UFW chief negotiator Steeg was sure he attended some meetings but did not recall how many. It would be speculative indeed to infer that but for his attendance at negotiation meetings the members of his family would not have lost seniority or alternatively have been hired in 1979 despite their loss of seniority.

Finally, since the General Counsel has failed to establish a discriminatory motive for the failure to hire the Chavez family in 1979, the Employer's burden of establishing a legitimate business reason for their treatment does not arise.55/

Having concluded that the General Counsel has failed to prove a prima facie case that Respondent violated §§1153(c) and (a) of the Act, the complaint in Case No, 79-CE-330-SAL must be dismissed,

ORDER

Pursuant to 8 Cal, Admin. Code §20263, Respondent's motion to dismiss the complaints in their entirety is granted,

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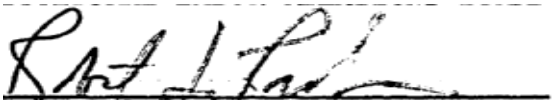
54/Respondent's reversion to a policy of terminating seniority rights for failure to report for work is not charged as a violation of the Act,

55/N.L.R.B. v. Great Dane Trailers, Inc., supra.

The complaint in Case No. 79-CE-330-SAL is so dismissed. The complaint in Case Nos. 78-CE-113-M, 78-CE-113-1-M and 78-CE-113-2-M is so dismissed.

Dated: September 15, 1980

AGRICULTURAL LABOR RELATIONS BOARD

BY 

Robert Leprohn
Administrative Law Officer