Brawley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

N. A. PRICOLA PRODUCE Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE- 155-CE 7 ALRB No. 49

ERRATUM

The first paragraph of Member Waldie's separate opinion should be deleted and the following language substituted in its place:

I concur with Member Song in concluding that Respondent's conduct constitutes a per se violation of Labor Code section 1153 (e) and (a) for refusing to bargain with the UFW over a seasonal wage increase. I further concur in the remedial Order contained in the majority opinion, as far as it goes. However, I would not adopt the ALO's recommendation, nor concur with Member Song, to the extent that the aforesaid Order does not include a make-whole remedy.

Dated: February 23, 1982

Jerome R Waldie

JEROME R. WALDIE, Member

Brawley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

N. A. PRICOLA PRODUCE, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-155-EC 7 ALRB NO. 49

DECISION AND ORDER

On February 18, 1981, Administrative Law Officer (ALO) Brian Tom issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party each timely filed exceptions and a supporting brief, as well as a response to the opposing party's exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent herewith, and to adopt his recommendations as modified herein.

In his Decision, the ALO found that Respondent had committed a per se violation of Labor Code section 1153 (e) and (a) by granting a discretionary, unilateral wage increase to its employees. However, analogizing to the factual situation and

remedy provided in Kaplan's Fruit and Produce Company (July 1, 1980) 6 ALRB No. 36, the ALO concluded that application of the make-whole provision in Labor Code section 1160.3 would not be appropriate considering the circumstances of this case - including Respondent's general lack of bad faith, the United Farm Workers of America, AFL-CIO (UFW)'s responsibility for delays in bargaining, and the fact that Respondent's increase appeared to have brought its workers' wages up to the prevailing rate.

Under both the National Labor Relations Act (NLRA) and the Agricultural Labor Relations Act (Act), an employer is required to bargain collectively with a collective bargaining agent over wages, hours, and other terms and conditions of employment. Generally, an employer's unilateral change in wages without first contacting the union and granting it an opportunity to negotiate, amounts to a per se violation of the duty to bargain regardless of the employer's subjective good or bad faith. NLRB v. Ralph Printing & Lithographing Co. (8th Cir. 1970) 433 F.2d 1058; NLRB v. Consolidating Rendering Co. (2d Cir. 1967) 386 F.2d 699.

In NLRB v. Katz (1962) 369 U.S. 736, the United States Supreme Court distinguished between automatic wage increases which are fixed in amount and timing by company policy, and increases which involve a measure of employer discretion. The Court held that whatever might be the case with automatic wage increases to which an employer has already committed itself, a unilateral wage increase which involves employer discretion as to amount and timing, and which is granted without prior notice to or discussion with the union, amounts to an unlawful refusal to bargain.

Later federal court cases have indicated that the type of unilateral wage increase which will not be considered unlawful is an increase involving virtually no independent action by the employer—for example, a cost-of-living increment automatically granted on the basis of Bureau of Labor Statistics figures, as in State Farm Mutual Automobile Insurance Co. (1972) 195 NLRB 871, or a merit increase automatically granted to new employees after three and six months' employment, as in NLRB v. Southern Coach & Body Co. (5th Cir. 1964) 336 F.2d 214.

In the instant case, Respondent in 1979, without notice to or negotiations with UFW, increased the wages of its melon crop workers in all categories and pay rates except the piece rate for honeydew cutters. Wages for Respondent's melon workers had been increased every year from 1975 through 1978, but the amount of increase varied from one year to the next. For example, honeydew cutters received an increase of 14 cents per hour in 1975, 16 cents per hour in 1976, 30 cents per hour in 1977, 15 cents per hour in 1978, and 80 cents per hour in 1979. Stitchers received an increase of $1.80 per hour in 1975, no increase in 1976, 1977, or 1978, and an increase of 51 cents per hour in 1979.

Respondent's representative testified at the hearing that the timing of Respondent's wage increases varied somewhat from year to year. Testimony also established that a variety of factors were considered before the amount of increase was decided upon, including information obtained from Respondent's workers and from agricultural associations about prevailing rates, and Respondent's ability to pay. Nick C. Pricola testified that his father, the owner of the

company, had the ultimate decision on what wages were paid to the melon workers.

Respondent had absolute discretion regarding the amount and timing of the wage increase, and indeed whether to grant any increase at all. Although the increase was based in part on objective factors, such as the wages other employers were paying, Respondent's owner decided what he was willing and able to pay; his determination of how much he was "able" to pay was necessarily a subjective determination within his total discretion. He had not made any prior commitment to grant automatically an increase of an objectively-fixed amount, as was the case in State Farm Mutual Automobile Insurance Co., supra, 195 NLRB 871, and Southern Coach & Body Co., supra, 336 F.2d 214. Thus we find that the wage increase here does not fall into the category of "automatic" increases to which an employer has already committed itself, and over which there is no duty to bargain. Rather, the increase, although "in line with the company's long-standing practice of granting [an annual review of wages, was] in no sense automatic, but [was] informed by a large measure of discretion," and was thus a proper subject of bargaining. NLRB v. Katz, supra, 369 U.S. at 746.

Our holding is in line with the Board's own precedent in Kaplan's Fruit and Produce Company, supra, 6 ALRB No. 36. In Kaplan's, the Respondent was able to show a pattern of granting a wage increase every year during the pruning season after discussing wages with its workers and taking a quick survey of prevailing wage rates. Although Respondent had granted a similar wage

increase every year from 1973 through 1978, its unilateral increases in 1977 and 1978 were held to be per se violations of Respondent's duty to bargain under section 1153 (e) and (a) of the Act. We find that the unilateral wage increase in the instant case similarly violates section 1153 (e) and (a) of the Act.

In fashioning an appropriate remedy for Respondent's violation, it is necessary to determine whether to apply the make-whole provision in Labor Code section 1160.3. While we agree with Member Waldie that Respondent's good faith is not a defense to a per se violation of the duty to bargain, we also believe that no remedy, including make-whole, should be imposed automatically. Rather, all of the circumstances of the individual case - including the overall conduct of each party, and the probable effect of the remedy on the negotiating process - should be considered before deciding what remedy is most appropriate.

The evidence in this case indicates that the initial bargaining session scheduled for July 30, 1979, was cancelled at the UFW's request, and that the UFW was responsible for the delay in scheduling the next meeting. The parties agreed to exchange information by mail while the UFW found a replacement negotiator for Jose Castrorena who left the area for an extended stay in New York. Respondent received a UFW request for information on August 14, 1979, and mailed its response about 30 days later with a letter indicating it was still waiting for the UFW to name a date, time, and place for the first meeting. On the other hand, the UFW's response to Respondent's request for information was sent more than three months after the UFW received the request.

After a four-month delay by the UFW, the first negotiating session was finally held November 16, 1979. There was one other bargaining session in January or February 1980, and several other written communications between the parties. Prior to the January or February meeting, Respondent received some but not all of the information it had requested in August 1979. Negotiation by letter continued at least through July 1980 (that is, until shortly before the hearing).

We agree with the ALO's conclusion that despite Respondent's unlawful unilateral wage increase, it does not appear from the evidence that Respondent deliberately adopted a plan of action to avoid its statutory duty to bargain collectively, The evidence indicates that the UFW was primarily responsible for delays in bargaining, and while the UFW's conduct was not sufficient to amount to a waiver of its right to bargain about wages, neither is there any evidence that Respondent was ever unwilling to sit down and bargain about wages or other working conditions. Evidence also indicates that Respondent's illegal wage increase brought its workers' wages approximately up to the prevailing rate.[1/]

Taking into consideration all of the facts and circumstances here, we conclude that imposition of the make-whole

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[1/]We do not agree with Member Waldie's statement that General Counsel had no opportunity to litigate the issue of whether the wage increase brought wages up to the prevailing rate. In view of our decision in Kaplan's, supra, 6 ALRB No. 36, General Counsel had ample notice that the Board would consider that issue in determining whether to award make-whole in a unilateral wage increase, per se refusal to bargain situation.

remedy would not be appropriate. In deciding not to award make-whole, we do not downgrade the seriousness of Respondent's per se violation. It is essential to an effective bargaining relationship that an employer communicate and negotiate with the union before implementing proposed changes in wages or other working conditions. Respondent's failure to do so here weakened the UFW's bargaining position and undermined its statutory right to represent the employees.

However, our finding that Respondent's unilateral change constitutes an unfair labor practice does not necessarily determine the appropriateness of the make-whole remedy. Make-whole has been appropriately applied in technical refusal-to-bargain cases where the employer, without having a reasonable good-faith belief in the invalidity of election results, refuses to bargain as a dilatory tactic while it litigates its challenge to election certification. J. R. Norton Co. (May 30, 1980) 6 ALRB No. 26. We have also applied make-whole in cases involving surface bargaining, where the employer's bad faith frustrates the ability to reach any agreement at all, AS-H-NE Farms, Inc. (Feb. 8, 1980) 6 ALRB No. 9, and in cases of an employer's refusal to bargain because of its doubt about the union's majority status, a doubt created by its own actions, Abatti Farms, Inc. (Oct. 28, 1981) 7 ALRB No. 36. The circumstances here are very different: although Respondent unilaterally raised wages, bargaining about all terms and conditions of employment - including wages - was still possible. We are also mindful that a remedy should be designed to be minimally intrusive into the bargaining process

and should encourage the resumption of that process. Adam Dairy (Apr. 26, 1978) 4 ALRB No. 24.

We therefore adopt the ALO's recommendation that Respondent be ordered to cease and desist from unilaterally changing wages or other conditions of employment, that upon request it meet and bargain with the UFW concerning the unilateral wage increase and other terms and conditions of employment, and that it provide for reading, posting, and mailing of a Notice to Agricultural Employees regarding the Board's Order.

We find that because Respondent exhibited no bad faith and committed only one per se violation of section 1153(e) and (a), and because of the UFW's responsibility for delays in bargaining, it is appropriate to omit the provision for 12 months' notification to new employees as excessive under the circumstances. Sufficient notification will be achieved through the 60-day posting and the mailing of a remedial notice to employees employed during the payroll period immediately preceding the illegal wage increase, and the reading of the notice to all current employees.

We also make a modification in the proposed Order's requirement that Respondent periodically notify the Regional Director of compliance actions taken by Respondent. Respondent will be required to continue periodic notification only if the Regional Director determines that Respondent has not fully complied with the terms of our Order within a reasonable time after the issuance thereof.

ORDER

By authority of Labor Code section 1160.3, the

Agricultural Labor Relations Board hereby orders that Respondent N. A. Pricola Produce, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Changing any of its agricultural employees' wages or any other term or condition of their employment without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with Respondent concerning such change (s).

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

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Agricultural Labor Relations Act (Act):

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

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

hereinafter.

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

(d) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order to all Respondent's agricultural employees employed at any time during the payroll period immediately preceding October 10, 1979.

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

(f) Notify the Regional Director in writing within 30 days after the date of issuance of this Order of the steps taken to comply with it. If the Regional Director determines that Respondent has not fully complied with the Order within a

reasonable time after issuance, then upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: December 31, 1981

ALFRED H. SONG, Board Member

MEMBER WALDIE, Concurring in part and dissenting in part.

I concur with Member Song in concluding that Respondent's conduct constitutes a per se violation of Labor Code section 1153 (e) and (a) for refusing to bargain with the UFW over a seasonal wage increase. However, I would reverse the ALO's recommendation that a make-whole remedy is inappropriate in this case.

The ALO found an absence of bad faith on Respondent's part, that Respondent's increase appeared to bring its employees' wages up to prevailing area wage rates, and that the Union delayed in commencing contract negotiations. Relying on Kaplan's Fruit and Produce Co. (July 1, 1980) 6 ALRB No. 36, the ALO concluded that these factors excused Respondent from any obligation to make its employees whole for economic losses caused by its unilateral implementation of a wage increase. The ALO's reasoning and the

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Kaplan's decision are faulty for several reasons.[1/]

First, a unilateral change in a vital term of employment, such as wages, is not considered a per se violation of the duty to bargain because it is technical or insignificant. On the contrary, unilateral action by an employer is an actual refusal to bargain which takes the control over wages out of the bilateral negotiation process and demonstrates to the workers that economic benefits come from the employer alone and not through the union. See NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. The employer's bad faith may be assumed in a unilateral change case, since the employer has clearly refused to bargain and the damage to the union's exclusive representative status is obvious.

The ALO suggests that good faith by the employer, though not a defense to the violation, is a defense to the remedy. I disagree. As the Board noted in Pacific Mushroom Farm (Sept. 22, 1981) 7 ALRB No. 20, unilateral changes in wages have an immediate effect which saps the union's strength as a representative. The Board must use what post-adjudication remedies it has to discourage

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[1/] n Kaplan's, the employer was found to have violated Labor Code section 1153(e) and (a) by its unilateral wage increase, but was excused from make-whole liability because the increase allegedly brought the wages up to the prevailing area rate and the Union, in negotiations, intentionally declined to negotiate wages for approximately nineteen months. Although I disagree with the reasoning in Kaplan's, and would reverse the decision, I also believe that the instant case is an unwarranted extension of Kaplan's. The UFW here delayed six months in beginning negotiations. Refusing to discuss the issue of wages for nineteen months as the employer's wage rates grew increasingly less competitive, is of a quite different magnitude.

such abuses of employee and union rights.[2/]

Second, the Kaplan's decision, as applied by the ALO herein, assumes that Respondent raised wages to prevailing area rates and pre-empts the calculation of damages by an ALRB Compliance Officer. This reliance on Respondent's self-serving characterization of the wage increase is an unwarranted usurpation of the second phase of the unfair-labor-practice hearing process. See ALRB Casehandling Manual, Compliance-Backpay. Since General Counsel was not prepared to offer evidence as to the prevailing area wage rate, the ALO's findings and conclusions were based on a matter not fully litigated. See Sunnyside Nurseries, Inc. v. Agricultural Labor Relations Bd. (1979) 93 Cal.App.3d 922, 933.

Finally, the ALO concludes that Respondent is not liable for economic losses suffered by its employees because the Union did not commence full contract negotiations as quickly as possible. This suggests that an employer's duty to bargain over a proposed change in conditions is somehow lessened by the Union's delay. The analysis misses the point that Respondent is not prohibited from making interim changes which are necessary for the operation of its business; Respondent is simply required to notify the Union of the changes it plans to effect and to give the Union adequate

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[2/]Requests to enjoin unilateral changes in working conditions, under Labor Code section 1160.4, have historically been denied by Superior Courts, because the courts believe that make-whole relief is an adequate post-adjudication remedy at law. If the Board refuses to provide make-whole relief after adjudication, based on equitable considerations like "clean hands," then the workers whose rights were violated have arrived at "Catch 22." Equitable relief is denied because there is a remedy at law, and the legal remedy is denied because it is inequitable.

opportunity to bargain about the matter before implementing the change. Highland Ranch v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 848, 855. Here, an unexplained delay by the UFW in commencing negotiations is being construed as a waiver of the right to negotiate over a vital issue. This Board has held, even in Kaplan's Fruit and Produce Co., supra, 6 ALRB No. 36 at p. 18, that a waiver of the right to bargain must be clear and unequivocal. The UFW's conduct here does not approach the level of a waiver. In effect, the ALO's recommended remedy punishes Respondent's employees for a UFW delay which benefited only Respondent. Member Song, in adopting that recommendation, loses sight of the fact that Respondent, and not the UFW, has violated the law.

The Majority opinion seeks to design a remedy which will be "minimally intrusive into the bargaining process." Adam Dairy (April 26, 1978) 4 ALRB No. 24. In my opinion, the theory applied in Kaplan's and the ALO Decision herein intrude dangerously into the bargaining process by encouraging employers to make unilateral decisions without prior bargaining with the Union. Since the ALO's recommendation to deny make-whole relief is based on irrelevant and inconclusive factors, I would reject the recommendation and order Respondent to compensate its employees for any economic losses they may have suffered as a result of the refusal to bargain found herein.

Dated: December 31, 1981

JEROME R. WALDIE, Board Member

MEMBER McCARTHY, Dissenting:

I disagree with the majority's conclusion that the wage increase granted by Respondent constituted a per se refusal to bargain and a violation of section 1153(e) and (a) of the Act.

The record conclusively demonstrates that the wage adjustment at issue herein falls within the limits of Respondent's established compensation policy and, further, that the amount and timing of the salary changes were determined by objective factors beyond Respondent's control. Therefore, they cannot be characterized as other than automatic, non-discretionary wage increases which are lawful within the meaning of NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

The major factors identified by the majority as supporting its finding that Respondent exercised considerable discretion with respect to the wage increase include year-to-year variances in the amount and timing of the increases as well as Respondent's practice

of consulting with agricultural associations and its own supervisors in order to ascertain the prevailing wage rates among its competitors.

It is undeniable that percentage changes in the prevailing wage rates differ from year to year in every industry, and no less in agriculture, where they depend in large measure on such variable factors as the size of the overall crop, current market conditions, and fluctuating labor supplies. Whereas non-seasonal industries may reasonably time a schedule of their annual cost-of-living increases in accordance with a calendar or fiscal year, a different situation obtains in agriculture where planting, cultivating, and harvest dates for crops are controlled not by the calendar but by weather conditions unique to any given year. As to Respondent's consultations with agricultural associations and/or its own supervisors in order to determine what competitive growers in the area are paying, this is clearly a reasonable and practical method of ascertaining objective data on prevailing wage rates. The majority also suggests that Respondent's consideration of its ability to pay is an additional factor connoting discretion; I submit that whether the amount of money held, or obtainable, by an employer is sufficient to meet the prevailing rate is just as objective a factor as the prevailing rate itself.

As it is apparent that the wage increase was based wholly on objective factors beyond Respondent's control, and was in

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accordance with Respondent's consistent past practice, I would dismiss the complaint in its entirety. Dated: December 31, 1981

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

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

We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because this is true, we promise you that:

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

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

WE WILL, upon request, meet and bargain collectively in good faith with the UFW, as the exclusive certified representative of our agricultural employees, for a contract covering the wages, hours, and working conditions of those employees.

Dated: N. A. PRICOLA PRODUCE

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 92243. The telephone number is 714/353-2130.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

N. A. Pricola Produce (UFW)

7 ALRB No. 49
Case No. 79-CE-155-EC

ALO DECISION

The ALO found that the Employer had committed a per se violation of Labor Code section 1153(e) and (a) by granting a discretionary unilateral wage increase to its melon workers in 1979. However, considering all the circumstances of the case, including the Employer's general lack of bad faith, the UFW's responsibility for delays in bargaining, and the fact that the wage increase appeared to have brought the workers' wages up to the prevailing rate, the ALO recommended that the make-whole remedy in Labor Code section 1160.3 not be applied. The ALO recommended that the Employer be ordered to cease and desist from making unilateral changes, to meet upon request and bargain with the UFW concerning the unilateral change and other terms and conditions of employment, and to post, mail, and arrange for the reading of a Notice to Agricultural Employees of its violation.

BOARD DECISION

The Board afirmed the ALO's finding of a per se violation of Labor Code section 1153(e) and (a), and adopted his recommendation that make-whole not be awarded. The Board found that sufficient notice would be achieved through the 60-day posting and the mailing of a remedial Notice to Agricultural Employees employed during the relevant payroll period and the reading of the Notice to all current employees; thus the Board omitted the ALO's provision of 12 months' notification to new employees. The Board also ordered that if the Regional Director determines that the Employer has not fully complied with the Order within a reasonable time after its issuance, the Employer shall, upon request, notify the Regional Director periodically thereafter of further actions taken to comply with the Order.

CONCURRENCE/DISSENT

Member Waldie would reject the ALO's recommendation regarding the make-whole remedy and reverse the Kaplan's decision (6 ALRB No. 36). The dissent argues that the Employer's good faith, self-serving representations about prevailing area wage rates, and union delay are not grounds to deny make-whole to the employees whose rights have been violated by a per se refusal to bargain.

DISSENT

Member McCarthy would dismiss the complaint in its entirety. He found that the wage increase could not properly be proscribed as constituting a per se refusal to bargain as it fell within the limits of Respondent's established compensation policy and was governed by objective factors germane to agriculture.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

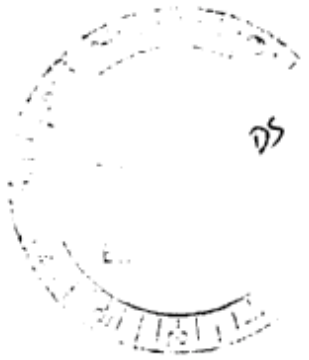
N. A. PRICOLA PRODUCE, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-155-EC

APPEARANCES:

Vickie Lee Steinheimer of Berkeley, California for the General Counsel

Geoffrey A. Gega, Western Growers Association, San Diego, California, for Respondent

DECISION



STATEMENT OF THE CASE

Brian Tom, Administrative Law Officer: This case was heard by me on August 7 and 8, 1980, in El Centro, California. The hearing was held pursuant to a complaint and notice of hearing issued February 21, 1980, and duly served on the Respondent, N. A. Pricola Produce. The complaint is based on charges filed on November 21, 1979, by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). The complaint alleges that the

Respondent violated Section 1153 (a) and (e) of the Agricultural Labor Relations Act (hereafter the "Act").

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs in support of their respective positions after the close of the hearing. At the time of the hearing, General Counsel made a motion to strike the evidence introduced as Respondent's E through I. I took said motion under submission. The motion is hereby denied. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the arguments and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, N. A. Pricola Produce, is a sole proprietorship engaged in agriculture as was admitted by the Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I further find that the UFW is an organization representing agricultural employees vithint eh meaning of Section 1140.4(f) of the Act and was the certified bargaining representatives of Respondent's agricultural employees in 1979 and 1980.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The complaint alleges that respondent violated Section 1153(a) and (e) of the Act by unilaterally increasing the wages of the worker in the melon classifications, without notifying or bargaining with the UFW.

Respondent generally denies each and every allegation alleging a violation of the Act. In addition, Respondent pleads

an affirmative defense that UFW engaged in bad faith bargaining previous to the acts alleged by the UFW.

A. PRELIMINARY FACTS

The Respondent is a company primarily engaged in the growing and harvesting of melons, lettuce and cabbage. The Respondent does not own its own land but rather grows its crops on approximately 140-150 acres of leased land. At the time of the melon harvest in 1979, Respondent employed a total of 50 employees.

B. THE UNILATERAL WAGE INCREASE

On July 23, 1979, Ronald Barsamian, (hereafter "Barsamian") the Respondent's negotiator and Jose Castorena, (hereafter "Castorena"), the UFW negotiator scheduled an initial bargaining session for July 30, 1979. The parties agreed to meet at the Chamber of Commerce offices in Brawley, California, at 10 a.m. Barsamian and Nick C. Pricola, Respondent's representative arrived at the meeting place as scheduled. Castorena did not appear. After waiting over one hour, Barsamian received a telephone call from Castorena advising Barsamian that due to car trouble Castorena was unable to meet as scheduled.

The two negotiators agreed to meet in the future, but no definite time was set. They further agreed to exchange by mail mutual requests for information.

On August 14, 1979, the Respondent received the UFW's request for information. On August 16, 1979, the Respondent sent its own request for information to the UFW. On September 17, 1979,

the Respondent sent its response to the UFW's request for Information.

As stipulated between the parties, on October 10, 1979, Respondent made the following increases in wages:

The cutter or general harvest labor were increased from $3.70 to $4.50 per hour.

The packers were increased from 8 cents per carton $3 9 cents per carton.

The tractor drivers were increased from $3.90 to $4.70 per hour.

The stitchers were increased from $4.74 to $5.25 per hour.

The UFW was not given any notice that these increases in wages were being implemented. On November 16, 1979, Barsamian along with Nick C. Pricola, Nick A. Pricola, Ron Hull met with the UFW negotiators, Jerry Cohen and Ann Smith. At this meeting, the UFW was informed that aforementioned wages increases were made. Shortly thereafter the charges were filed.

ARGUMENT, ANALYSIS AND CONCLUSIONS

Section 1153 of the Act provides in pertinent part:

It shall be an unfair labor practice for an agricultural employer to do any of the following:

(a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152...

(e) To refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of Chapter 5 (commencing with Section 1156) of this part.

The complaint herein alleges a per se violation of Section 1153 (a) and (e) in that the Respondent unilaterally increased the wages of workers in the melon classifications, without notifying or bargaining with their union, the UFW.

In Kaplan's Fruit & Produce Company, (1980) 6 ALRB No. 36 the ALRB held that an employer who changed wages without notice to or negotiations with the Union had, in effect, refused to bargain and that such a refusal constituted a per se violation of 1153 (a) and (e). The employer's contention that the wage increases were lawful because they followed a well-established practice of granting such increases at specific times was rejected. While acknowledging that there might be an exception to the general rule in such a case, the Board noted that in the leading case of NLRB vs. Katz (1962) 369 U.S. 736 [59 LRRM 2177] the Supreme Court specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary. Since Kaplan's increases were discretionary, they were subject to collective bargaining. Kaplan's, supra at 17.

Respondent does not deny its failure to notify the UFW the wage increase which became effective October 10, 1979. In the instant case, Respondent was, however, able to demonstrate an historical pattern of wage increases for melon workers at approximately the same time each year and contends that, as a result, no notice to the Union was necessary. But Respondent's increases were not pursuant to an established obligation, and the amounts varied widely from year to year depending on the Respondent's assessment of the prevailing rate. Thus, though Respondent's

prior wage increases may have created certain expectations on the part of employees, the increases were clearly discretionary and as such, a proper subject for collective bargaining.

Respondent also argues that its October 10th wage increase is comparable to the situation, referred to by the Katz court, wherein an employer, after notice to and consultation with the Union, unilaterally institutes a wage increase identical with one which the Union has rejected as too low. Such an increase, contends Respondent, citing NLRB v. Landis Tool Co., 193 F. 2d 279, 29 LRRM 2255 (1951), should not be considered a violation of the employer's duty to bargain.

Whether or not Respondent's legal argument is meritorious need not be decided, for it is clear that unlike Landis or the situation described in Katz, Respondent had neither given notice to the union nor engaged in negotiations concerning possible wage increases prior to October 10, 1979. There was an unsuccessful attempt to meet on July 30th and Requests for Information had been exchanged. Respondent replied to the UFW's request on September 17th. While these actions may indicate an intention to engage in negotiations, they do not in and of themselves constitute the negotiating process in the course of which Respondent's unilateral wage increase might have been acceptable.

CONCLUSION AND REMEDY

In light of Respondent's discretionary, unilateral wage Increase, without prior consultation or notification to the union, it must be concluded that Respondent refused to bargain and in

so doing committed a per se violation of Section 1153 (a) and (e) of the Act. It is essential to an effective bargaining relationship that an employer communicate and negotiate with the union before implementing proposed changes in wages or other working conditions. Respondent's failure to do so here weakens the Union's bargaining position and undermines its statutory right to represent the employees. Kaplan's Fruit and Produce Company v. UFW, 6ALRB NO. 36 at 18-19.

In fashioning an appropriate remedy for Respondent's violation, it is necessary to determine whether to apply the make-whole provision in Labor Code Section 1160.3. As was stated in Adam Dairy v. UFW, 4 ALRB No. 24 (1978), collective bargaining is a voluntary process which succeeds most frequently in an atmosphere of cooperation. To that end, I will recommend a remedy which is minimally intrusive into the bargaining process and which encourages the resumption of that process. Ibid, at Page 11.

Though Respondent's bad faith, except as manifested in its unilateral wage increase, was not alleged in the complaint filed herein, it is a relevant consideration in determining the most appropriate application of the make-whole remedy. Kaplan's, supra; See, J.R. Norton Company, Inc. v. ALRB, 26 Cal. 3d (1979). The Kap1an's Board having first dismissed the Union's charge of bad faith bargaining went on to note that the Respondent's unilateral wage increase, though illegal, had brought the affected workers up to the approximate prevailing wage. The absence of bad-faith on Respondent's part appeared to influence the Board in its decision not to impose the make-whole remedy. In Norton, the California Supreme Court set aside and remanded to the Board the make-whole

portion of the order under review in a technical refusal to bargain case because the Board had failed to consider whether or not the refusal to bargain was in bad faith J. R. Norton Company, Inc. vs. ALRB, supra at Pg. 54.

In the instant case, the undisputed evidence indicates that an initial bargaining session between the UFW and Respondent scheduled for July 30, 1979 was cancelled at the Union's request. The next meeting did not take place until November 16, 1979, after which negotiations continued on a fairly regular basis.

Whatever the reason for the delay in commencing negotiations after the initial postponement, it has not been alleged that the Respondent utilized dilatory tactics nor does the record reflect any such tactics. In addition, it should be noted that the delay in question was for only three and one-half months, during which time, on September 17, 1979, Respondent forwarded to the Union a response to its formal request for information. In so doing, it manifested at least a willingness to set the stage for negotiations to come. The Union's response to Respondent's similar request was not sent until considerably after the negotiations commenced on November 17th.

The evidence is unequivocal that Respondent raised the wages of its melon workers without prior consultation with or notification to the Union. Respondent contends that wage negotiations were delayed for the Union's convenience and that, in any case, the increases of October 10, 1979, followed an established and well-known practice. The fact remains, however, that Respondent made no effort even to inform the Union of its action which it could easily have done until approximately one

month after the increase went into effect, thus jeopardizing the status of the UFW as the worker's bargaining agent.

The General Counsel argues that Respondent's bad faith is further evidenced by its discussion of wages directly with employees. It appears from the record, however, that rather than "canvassing its employees", Respondent's field supervisor simply reported the information supplied to him by the melon workers as to the wages being offered by other farms in the vicinity. This was apparently an established practice and while it might tend to circumvent the collective bargaining process, there is no evidence that this was the actual intent of the Respondent.

As to the General Counsel's contention that Respondent's demand on August 15, 1979, for "voluminous information" was an attempt to lay the foundation for a defense to a future charge of unilateral wage increases, and further evidence of Respondent's bad faith I find it to be without merit. At the time the July 30th meeting was called off, the parties agreed to exchange requests for information which is a recognized step in the negotiating process. In accordance with that agreement, Respondent submitted a four page request for information, most of which was presumably readily available to the Union. Just as the Union's failure to respond promptly to this request does not justify the Respondent's unilateral action, Respondent's mere propounding of the questions, without more, can hardly be considered evidence of bad faith bargaining.

Despite employer's unlawful unilateral wage increase, it does not appear from the evidence that Respondent in bad faith adopted a plan of action to avoid its statutory duty to bargain

collectively. Taking into consideration that Respondent's increase appears to have brought its worker's wages up to the prevailing rate, the imposition of the make-whole remedy would not be appropriate. Instead, I recommend that Respondent be ordered to post, mail and read the attached Notice to its employees, explaining the illegality of the unilateral wage increases. This Notice is necessary to counteract the negative effects of Respondent's mis-conduct and an appropriate remedy under the reasoning in M. Carton, Inc., 6 ALRB No. 14.

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

ORDER

Respondent, N. A. Pricola Produce, its officers, partners, agents, successors, and assigns shall:

1. Cease and desist from:

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

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

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

2. Take the following affirmative actions which are

deemed necessary to effectuate the policies of the Act:

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

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

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

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

(e) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the Order to all Respondent's agricultural employees employed at any time during the payroll period immediately preceding October 10, 1979.

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

the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this order.

Dated: February 18, 1981

Brian Tom
Administrative Law Officer

NOTICE TO EMPLOYEES

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

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

1. To organize themselves;

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

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

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

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

Because this is true, we promise you that:

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

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

Dated: N. A. PRICOLA PRODUCE

By _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.