Gilroy California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAUL W. BERTUCCIO, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos.	79-CE-140-SAL 79-CE-196-SAL 79-CE-380-SAL 80-CE-55-SAL
	8 ALRB No. 101	

DECISION AND ORDER

On October 21, 1981, the Executive Secretary ordered transferred to the Board the attached Decision and recommended Order, which was previously issued by Administrative Law Officer (ALO) Marvin J. Brenner in this proceeding. Thereafter, Respondent, General Counsel, and the Charging Party each timely filed exceptions and a supporting brief, and Respondent and General Counsel each filed a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings[1/] and conclusions of the ALC and to

[1/] Although we find that the ALO's description of the bargaining history is supported by the record, we do not agree with certain inferences which the ALO draws from Respondent's bargaining conduct Specifically, we do not find that Respondent herein made "predictably unacceptable offers" or that Respondent's rejection of the Sun Harvest contract was evidence of an uncompromising spirit.

adopt his recommended Order, as modified herein.

Decision Bargaining

General Counsel and the Charging Party except to the ALO's conclusion that Respondent did not violate Labor Code section 1153(e) and (a) by failing or refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) regarding Respondent's decisions in 1980 to sell 40 acres of garlic and to have 650 acres of sugar beets custom harvested.[2/]

In O. P. Murphy Produce Co., Inc. (Nov. 3, 1981) 7 ALRB No. 37, we utilized the balancing approach described by the' U.S. Supreme Court for determining when to require employers to bargain over decisions which affect the employment relationship. The Court stated in First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (hereafter FNMC) that:

> ... In view of an employer's need for unencumbered decisionmaking, 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.

In explaining the need for balancing competing interests, the Court recognized that the employees' representative has & legitimate interest in attempting to mitigate any losses of bargaining-unit work that would reduce wages or hours or result in layoffs. However, the Court also observed that employers must sometimes make business decisions quickly, or with secrecy, and

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[2/]Respondent concedes that it failed to give the UFW prior notice or any opportunity to negotiate over those decisions, but denies that it had a duty to bargain over such managerial decisions.

that a union might attempt to maintain the status quo by delaying the effectuation of a management decision. Applying its balancing test to the facts in FNMC, the Court held that an employer's decision to partially close its business, being akin to a decision to cease its business operations completely, constitutes a change in the scope and direction of the business and is therefore not a mandatory subject of collective bargaining.

In FNMC, the Court adopted the approach used by the Second Circuit Court of Appeals but came to a different conclusion regarding "partial closure" cases. (See, First National Maintenance Corp. v. NLRB (2nd Cir. 1980) 627 F.2d 596 1104 LRRM 2924].) The Court of Appeals had modified the NLRB's rule that any management decision which eliminated jobs was a mandatory subject of bargaining. (See, Ozark Trailers, Inc. (1966) 161 NLRB 561 [63 LRRM 1264].) The appellate court, instead, created a rebuttable presumption favoring bargaining over decisions which result in job loss. However, the presumption would be rebutted by evidence that bargaining would be futile or that exigent business circumstances made bargaining unduly burdensome.[3/]

The Supreme Court in FNMC did not reject the balancing approach used by the Second Circuit. On the contrary, the Court underscored the need to balance conflicting interests, reformulated the test in more general terms, and then based its holding on the factors suggested by the Court of Appeals. In a decision expressly

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[3/] The Second Circuit actually applied an analysis developed by the Third Circuit in Brockway Motor Trucks v. NLRB (3rd Cir. 1978) 582 F.2d 720 [99 LRRM 2013], rem'g (1977) 230 NLRB 1002 [95 LRRM 1462].

limited to the facts of that case, the Court then stated that:

> ... the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision....

The difficulty in applying the Supreme Court's decision in FNMC is that it suggests an analytical approach requiring balancing of interests on a case-by-case basis, then concludes that all partial-closure decisions are beyond the scope of mandatory bargaining. Given that ambiguity, the precedential value of the FNMC decision is limited to cases involving economically-motivated, complete closure or partial closure of an employer's operation.[4/] The NLRB has apparently adopted a similar view of FNMC and has proceeded to analyze allegations of refusal to bargain over management decisions on a case-by-case basis. (See, Bob's Big Boy Family, A Division of Marriott Corp. (1982) 264 NLRB No. 178.)

In O. P. Murphy Produce Co., Inc., supra, 7 ALRB No. 37 this Board applied a balancing analysis to an employer's decision to mechanize its market-tomato harvest. The facts in O. P. Murphy indicated that that decision would greatly reduce employment opportunities for bargaining-unit employees, that the employer intended to remain in the tomato business, that the employer's decision was motivated by a desire to reduce its harvesting costs,

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[4/] This interpretation is consistent with that of the NLRB General Counsel. (See, General Counsel Memorandum.81-57 (Nov. 30, 1981), BNA Daily Labor Report (Jan. 15, 1982) at E-l.) However, this interpretation is not without critics. (See, Irving, Closing and Sales of Business: A Settled Area? (April 1982) 33 Labor Law Journal 218.)

and that the tentative decision was made and publicly disclosed to the union well in advance of the date of implementation. Based on those facts, we found that bargaining over that mechanization decision would place only a minimal burden on the employer's free conduct of its business and, since the union could offer economic concessions in exchange for job security, the benefits of collective bargaining outweighed the burden on the employer's decision-making.

The ALO's analysis of Respondent's crop-related decisions in the instant matter states that crop decisions, like partial closures, go to "the very heart of the farming business." (ALOD at 192). The ALO would therefore create a general rule that crop decisions are not mandatory subjects of bargaining under the ALRA. We believe that such a categorical approach to crop decisions is too inflexible, given the diversity of agricultural operations.[5/] We believe that, particularly with regard to crop decisions, only a case-by-case approach will do justice to the competing interests described by the Court in FNMC.

The Early Garlic Crop

Respondent had grown varying amounts of garlic for market in the years prior to 1980. This garlic was grown by Respondent, harvested for Respondent by its labor contractor employees, then consigned to Vessey Foods, Inc. for marketing. In 1980, subsequent to the certification of the UFW as exclusive collective bargaining

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[5/] In fact, certain crop decisions may also involve subcontracting (where a crop is usually custom harvested) or mechanization (where a crop is usually machine-harvested for processing).

representative of its employees, Respondent agreed to sell its early garlic crop to either Vessey Foods or John Vessey of El Centro, California for seed. That agreement was apparently reached to accomodate Vessey, who needed seed garlic, and did not represent any particular economic need on Respondent's part or a decision to get out of the garlic business.[6/] Pursuant to the agreement, Vessey purchased the crop in the ground and took all responsibility for harvesting. The harvesting operation consisted of mechanical topping and loosening of the garlic, followed by hand-gathering of the garlic heads by Vessey employees.

The ALO characterized Respondent's agreement with. Vessey as a form of subcontracting. That characterization is not entirely accurate because Respondent sold the entire crop while i€ was still in the ground, relinquished all its interest in the crop, and left it to Vessey to decide the method of harvesting. Such a transaction might more properly be characterized as the termination of a particular type of produce, at least for the 1979 season. However, the NLRB has stated in Bob's Big Boy Family, supra, 264 NLRB No. 17S, that the characterization of a business decision does not automatically indicate whether the conflict generated by the decision is suitable for resolution through the collective bargaining process. The NLRB further held that:

> A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the Employer's business before and after the action taken, the extent

[6/] Respondent, in fact, continued to grow market garlic during 1980 on other acreage. That garlic was harvested by Respondent as in prior years.

of capital expenditures, the bases for the action and, in general, the ability of the Union to engage in meaningful bargaining in view of the Employer's situation and objectives.

In the instant case, Respondent's decision to sell its early garlic crop for seed rather than for market did not significantly alter its overall farming operations, although the sale did substantially reduce the amount of bargaining-unit work. The sale required no capital expense to Respondent. Finally, the testimony of Paul Bertuccio indicates that Respondent's only reason for the sale was that Vessey wanted the garlic for seed. There is no evidence that Respondent needed to sell the garlic to avoid the loss of profits or a significant business opportunity.

Absent some compelling circumstances, Respondent here was not free to consider Vessey's needs to the exclusion of the needs of its own employees. Based on the above facts, we find that Respondent had an obligation to notify the UFW and give it an opportunity to request bargaining about its decision to sell the crop, prior to making a commitment to Vessey and by failing to do so, violated Labor Code section 1153(e) and (a).

The Sugar Beet Crop

In September and October 1979, Respondent decided, based on the loss of two cannery contracts, to reduce its tomato acreage from 300 to 80-90. Based on reports that sugar prices were likely to rise in 1980, Respondent decided to increase its sugar beet acreage from 200 to 650, by utilizing acreage which had formerly been allocated to tomatoes. On October 12, 1979, Respondent informed the Union of its plan to reduce its tomato acreage. The

Union responded, indicating a desire to discuss Respondent's plans for a replacement crop and any effect which the crop changes might have on the bargaining-unit employees. Respondent, however, implemented its decisions without negotiation and the Union filed unfair-labor-practice charges alleging a breach of Respondent's duty to bargain.

Respondent's tomato crop was usually custom harvested and therefore, the harvest work was performed by non-unit employees. Sugar beets are usually mechanically harvested, requiring few workers, and Respondent had used a custom harvester-for its beets for 10-11 years prior to 1980. At the time of the hearing herein, Respondent had not yet decided how to harvest its sugar beets. However, Paul Bertuccio testified that he presumed a custom harvester named Guerrido would harvest most of the beets, as in prior years.

We affirm the ALO's conclusion that Respondent had no duty to bargain over either its decision to replace tomatoes with sugar beets, or its decision to custom harvest the sugar beets. We also affirm his findings that, since tomatoes were historically custom-harvested, Respondent's decision to reduce its tomato crop had no effect on the bargaining-unit employees, and that the harvesting of Respondent's sugar beets had bean a non-unit function for ten years. These factors support the conclusion that Respondent's decisions neither eliminated work formerly performed by bargaining-unit employees nor denied bargaining-unit employees reasonably anticipated work opportunities. (Westinchouse Electric Corp. (1965) 150 NLRB 1574

[58 LRRM 1257, 1258].)[7/]

Effects Bargaining

General Counsel and the Charging Party except to the ALO's conclusion that "effects bargaining" is not at issue in this case. We find merit in these exceptions with regard to effects of Respondent's decision to sell its early garlic crop.

It is undisputed that where a management decision affects the unit employees' terms and conditions of employment, the employer is obligated to bargain, on request, with their collective bargaining representative over those effects. (NLRB v. Royal Plating & Polishing Co. (3rd Cir. 1965) 350 F.2d 191 [60 LRRM 2033].) The ALO concluded that Respondent had no duty to bargain over the effects of its decision to sell the garlic crop because the garlic crop, consisting of only 40 acres, was too small to have a substantial effect on employment. We disagree. Although Respondent's garlic crop was small compared to Respondent's other crops, garlic is a very labor-intensive crop, according to the testimony of Paul Bertuccio, and we find that the sale of the garlic resulted in a substantial loss of work previously performed by bargaining-unit employees. We therefore conclude that Respondent

[7/] Although we conclude that Respondent had no duty to bargain, we reject the ALO's alternative analysis that Respondent had no duty to bargain over its decision to custom harvest its sugar beets because it had made no decision in that regard by the time of the hearing. As we indicated in O. P. Murphy Co., Inc., supra, 7 ALRB No. 37, a tentative management decision triggers the duty to bargain, since it is at the tentative stage that union input can be best considered by the employer without intrusion on other commitments. The record is clear that Respondent had tentatively decided to custom-harvest the beets and, barring the unforeseen, expected to utilize the services of Guerrido, as it had for the last ten years.

violated Labor Code section 1153(e) and (a) by its failure or refusal to bargain in good faith, on request, with the UFW regarding the effects on unit employees of the sale of the early garlic crop.

Remedy

Having found that Respondent has failed or refused to bargain in good faith in violation of section 1153(e) and (a) of the Act, we shall order Respondent to bargain in good faith and to make its employees whole for all economic losses suffered as a result of its failure or refusal to bargain. The backpay amounts shall be computed by subtracting the economic benefits Respondent's employees actually received during the backpay period from the economic benefits they would have received under a collective bargaining agreement during that period. Such computations may be based on comparable employers' labor contracts in effect during the backpay period and/or relevant statistics indicating the general level of compensation received by similar workers under labor contracts during the backpay period. The amount owing to each employee shall bear interest in accordance with Board precedent.

Respondent's unilateral decision to sail the 1979 garlic crop resulted in a loss of work to members of the bargaining unit. The record reflects that in prior years that work had been performed by employees supplied by labor contractor Jesus Quintaro. Accordingly, we shall require Respondent to make whole the unit employees who would have worked in the Quintero garlic crew for all economic losses suffered as a result of Respondent's failure to

bargain over the effects of its decision to sail the 1980 early garlic crop.[8/] Backpay and interest thereon shall be computed in accordance with Board precedent from five days after the date of issuance of this Decision until the occurrence of the earliest of the following conditions: (1) the date Respondent reaches an agreement with the UFW about the effects of its decision to sell the garlic crop; or (2) the date Respondent and the UFW reach a bona fide impasse in their collective bargaining over that issue; or (3) the failure of the UFW either to request bargaining within five (5) days after the date of issuance of this Order or to commence negotiations within five (5) days after Respondent's notice to the UFW of its desire to bargain; or (4) the subsequent failure of the UFW to meet and bargain collectively in good faith with Respondent. (See, Highland Ranch and San Clemente Ranch, Ltd. (Aug. 16, 1979) 5 ALRB No. 54, aff'd. (1981) 29 Cal.3d 342.) In no event shall the backpay period exceed the period of time necessary for the affected employees to obtain alternate employment.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act (Act), the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Paul W. Bertuccic, its officers, agents, successors and assigns, shall:

[8/] Although it is not clear precisely which individuals would have worked on the early garlic harvest, for the purposes of the remedial order herein we shall presume that those employees who harvested the garlic in 1979 would also have harvested the garlic in 1980. We leave it to the compliance process to determine which employees are specifically entitled to backpay and in what amount, if any. (See, Kawano, Inc. (Dec. 26, 1978) 4 ALRB No. 104; aff'd. (1980) 106 Cal.App.3d 937.)

1. Cease and desist from:

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

(b) Unilaterally changing its agricultural employees' wages, hours, or other working conditions without giving prior notice to the UFW, and an opportunity to bargain over such changes;

(c) Failing or refusing to furnish to the UFW, at its request, information relevant to collective bargaining;-

(d) Failing or refusing to give the UFW notice and, on request, an opportunity to bargain over the decision to sell its early garlic crop or the effects of any such decision;

(e) Threatening employees with loss of company provided housing or any other change in the terms and conditions of their employment because of their union activities;

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees regarding a collective bargaining agreement and/or any proposed changes in its agricultural employees' working conditions and, if an

understanding is reached, embody such understanding in a signed agreement.

(b) Upon request of the UFW, rescind the wage increases granted in July 1979 and July 1980 and any permanent decision to sell its early garlic for seed instead of for market, and, thereafter, meet and bargain collectively in good faith-with the UFW, at its request, as certified exclusive bargaining representative of its agricultural employees regarding such changes.

(c) On request, provide the UFW with information regarding its employees' hours worked, job classifications, dates of hire, and labor contractors, and other data relevant to collective bargaining.

(c) Make whole all agricultural employees employed by Respondent at any time between January 22, 1979, and September 8, 1980, and from September 9, 1980, to the date Respondent commences good-faith bargaining with the UFW which leads to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, such losses to be computed in accordance with this Board's precedents, plus interest computed in accordance with cur Decision and Order in Lu-Ette Farms, Inc. (Aug. 13, 1982) 3 ALRB No. 55.

(e) Make whole all employees who lost work as a result of Respondent's sale of its 1980 early garlic crop for all economic losses suffered by them, as a result of Respondent's refusal to bargain over the effects of the sale, backpay and interest thereon shall be computed in accordance with Board precedent from five days after the data of issuance of this Decision until

the occurrence of the earliest of the following conditions: (1) the date Respondent reaches an agreement with the UFW about the effects of its decision to sell the garlic crop; or (2) the date Respondent and the UFW reach a bona fide impasse in their collective bargaining over that issue; or (3) the failure of the UFW either to request bargaining within five (5) days after the date of issuance of this Order or to commence negotiations within five (5) days after Respondent's notice to the UFW of its desire to bargain; or (4) the subsequent failure of the UFW to meet and bargain collectively in good faith with Respondent.

(f) Preserve, and upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying all records relevant and necessary to a determination of the amounts of backpay/ makewhole, and interest due to the affected employees under the terms of this Order.

(g) Sign the Notice to Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies thereof in each language for the purposes set forth hereinafter.

(h) Post copies of the attached Notice in conspicuous places on its property for sixty-days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

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

(j) Mail copies of the attached Notice in all appropriate languages, within thirty days after the date of issuance of this Order, to all agricultural employees employed by Respondent between January 22, 1979, and the date the Notice is nailed.

(k) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees nay have concerning the Notice and/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.

(1) Notify the Regional Director in writing, within thirty 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.

IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive collective-bargaining representative of all of Respondent's agricultural employees, be extended for a period of one year from the date following the issuance of this Order

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on which Respondent commences to bargain in good faith with the UFW.

Dated: December 29, 1982

HERBERT A. PERRY, Member

JEROME R WALDIE, Member

MEMBER McCARTHY, Dissenting in Part and Concurring in Part:

I agree with the majority only insofar as it concludes that decision bargaining was not required as to the crop changes involving tomatoes and sugar beets. I find the majority's analysis of the law pertaining to decision bargaining to be erroneous and I cannot agree with the majority's conclusion that Respondent was required to bargain over both the effects of its decision to sell the early garlic crop[1/] and the decision itself.

[1/] Contrary to the majority, I would find that Respondent was not required to bargain over the effects of its decision to sell its early garlic crop. The 40 acres of garlic that Respondent sold is a minimal portion of its total acreage, much of which is devoted to crops at least as labor-intensive as garlic. Respondent grows many different crops and utilizes crop-rotation techniques over a large number of acres. There was no evidence that Respondent was either unwilling or unable to replace the garlic work that would have been performed with work elsewhere in Respondent's extensive operations. Also, there is no evidence that Respondent's sale of its garlic crop caused any loss of work for the bargaining-unit employees. Moreover, the record is devoid of evidence that the Union ever made a request for bargaining over the effects of the crop sale. In these circumstances, it is unreasonable to find Respondent violated the Act by its failure to engage in effects bargaining.

In setting forth its approach to cases involving the issue of decision bargaining, the majority has seriously misconstrued the recent and controlling Supreme Court case, First National Maintenance Corp. v. NLRB (1931) 101 Supreme Ct. 2573 [107 LRRM 2705] (hereafter FNMC). The court there adopted a balancing test for determining whether certain types of management decisions, undertaken solely for reasons of profitability or the like, are subject to bargaining because they have a direct impact on employment:

> [I]n view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact en 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. (101 Supreme Ct. at 2531.)

After weighing various factors as part of the balancing test,[2/] the court concluded that an economically-motivated decision to terminate part of a business is not a mandatory subject of bargaining:

[2/]The following are among the factors the court considered:

1. The union has direct protection under Labor Code section 8(a)(3) against a partial-closing decision that is motivated by an intent to harm a union.

2. The union is entitled to bargain over the effects of a partial-closure decision and may thereby achieve valuable concessions from the employer. Consequently, the union has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered.

3. It is unlikely that requiring bargaining over the decision itself, as well as its effects, will augment the flow of information and suggestions that might be helpful to management or ' forestall or prevent the termination of jobs. If labor costs are an important factor in a failing operation and the employer's

(fn. 2 cont. en p. 18.)

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of Sec (d)'s "terms and conditions" over which Congress has mandated bargaining. (101 Supreme Ct. at 2534.)

In a footnote to the above holding, the court stated:

> In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." (101 Supreme Ct. at 2584.)

Clearly, the court meant that its balancing test might produce a different result when applied to another type of business decision and that the outcome would depend upon the relative weight of the considerations raised by that particular type of business decision. Contrary to the majority's assertion, the court's decision in FNMC does not suggest an approach which requires the balancing test to

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(fn. 2 cont.)

decision to close, management will have an incentive to confer voluntarily with the union to seek concessions that may make it feasible to continue the business.

4. Oftentimes management will have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies.

5. Making this type of decision a mandatory subject of bargaining could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose.

6. Provisions giving unions a right to participate in the. decision-making process concerning alteration of the scope of an enterprise appear to be relatively rare.

7. Labor costs may not be a crucial circumstance in a particular economically-based partial termination and this would lead to difficulty for the employer in determining what amount of bargaining would suffice before it could implement its decision.

be applied to the facts of every individual case.[3/] The court found partial-closure decisions generally to be outside the scope of mandatory bargaining and it indicated that it expected ether "types" of business decisions would fall either within or without the scope of mandatory bargaining, depending on the particular circumstances.[4/] That intent is clearly reflected in the court's concern over an employer's ability to "[determine] beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain." (101 Supreme Ct. at 2533.) Without some degree of certainty as to whether a particular business decision would trigger the bargaining obligation, management could not "proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice" (Id. at 25S1), which charges might result in "harsh remedies forcing it to pay large amounts of backpay to employees who likely would have been discharged regardless of bargaining ...." (Id. at 2533.) The court pointed out other difficulties that management and unions would face if they had to guess on a case-by-case basis whether decision-bargaining was required: (1) The employer "would, have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining

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[3/]To the extent that Bob's Big Boy Family Restaurant (1982) 264 NLRB No. 178, cited by the majority, calls for the balancing test to be applied in such fashion, I find it to be inconsistent with the reasoning of the Supreme Court in FNMC.

[4/]This view is shared by the former General Counsel for the NLRB, John S. Irving, Jr. (See Irving, Closing and Sales of Businesses: a Settled Area? (April 1982) 32 Labor Law Journal 218.)

would suffice before it could implement its decision;" (2) "If an employer engaged in some discussion, but did not yield to the union's demands, the board might conclude that the employer had engaged in 'surface bargaining;" (3) "A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board." (Id. at 2584.) It is thus evident that the court saw a strong need for clear-cut guidelines to assist the parties in determining their rights and obligations in connection with the making of management decisions which may have an incidental impact on the employees conditions of employment. Toward that end, the court created a balancing test and then applied it to partial-closure situations as an entire category of business decision-making. The test was formulated in such terms that it would serve as a guide to the National Labor Relations Board (NLRB) in making judgments about decision bargaining in connection with other types of business decisions as well. Therefore, I believe my colleagues are in error in holding that, the FNMC case does not provide guidelines for dealing with business decisions other than partial closures and that its precedential value is limited to the facts of that case. The majority adopts a case-by-case approach which will serve only to perpetuate the confusion that the Supreme Court sought-to avoid in FNMC.

Turning to the business decisions at issue in this case, I would affirm the ALO's finding that economically-motivated

crop-change decisions are not mandatory subjects of bargaining under the ALRA. For a number of reasons, crop-change decisions should generally not be a mandatory subject of bargaining,' just as mechanization generally is a subject of mandatory bargaining. The ability to make timely crop-changes goes to the very heart of management perogatives in agriculture.[5/] A crop-change is a temporary or permanent change in product line and must be analyzed as such. To the extent that it is an economically-motivated, decision to terminate a distinct part of an agricultural employer's business operations, FNMC would dictate that no decision bargaining is required. To the extent that the change is compelled by factors other than the cost of labor, there is little the employees' collective-bargaining representative can offer in the way of

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[5/] In Bob's Big Soy Family Restaurant, supra, the NLRB stated that,

> If ... the employer action is one that is not suitable for resolution through collective bargaining because it represents a 'significant change in operations,' or a decision lying at 'the very core of entrepreneurial' control' the decision will not fall within the scope of the Employer's mandatory bargaining obligation. (Fns. omitted; emphasis added.)

The national Board found that the employer's decision in that case was a form of subcontracting, rather than a partial closure, and that the nature and direction of Respondent's business was not substantially altered by the subcontract. However, all inquiry did not end at that point. It was still necessary to determine whether the concerns which led to the decision to subcontract "were of the type traditionally suitable for resolution through the collective bargaining process." Only then could it be said that the decision was or was not one which lies "at the very core of entrepreneurial control." The Board subsequently concluded that the decision was a fairly typical case of subcontracting and was therefore particularly suitable to resolution through the collective bargaining process.

(Fn. 5 cent, on p. 22.)

alternatives. Even if decisions of this type would, "in some circumstances, benefit from the discussion of alternatives generated by collective bargaining," that fact does not outweigh the need for some degree of certainty that an obligation to engage in decision bargaining will not be triggered every time market conditions call for a change of crops. The agricultural employer must be able to respond quickly to changes in market conditions. Adequate protection for the union's legitimate interests in such matters is provided by existing legal sanctions against discriminatory conduct and the requirement that the employer bargain, at the union's request, concerning the effects, if any, of its decision on the unit employees. (See FNMC, supra, at p. 2582.)

Crop-change decisions in agriculture are far more frequent than product-line changes in industry. They may also be of a less permanent nature. However, these differences only highlight the need for unencumbered decision-making in this particular area. Unlike industrial producers, agricultural producers are highly subject to the vagaries of weather and market, the destructiveness of pests and the deterioration of the

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(Fn. 5 cont.)

The clear implication of this reasoning is that a decision which does not alter the nature and direction of the employer's enterprise may nonetheless be a decision which lies at the very core of entrepreneurial control and thus should not be subject to mandatory bargaining. Such is the case here. The majority makes the mistake of assuming that simply because the sale of the garlic crop did not constitute a significant change in the nature and direction in Respondent's operations, bargaining over the decision was mandatory. The majority's reliance on Bob's Boy is therefore misplaced.

medium of operations (soil). The industrial producer's slant is protected from the elements and deteriorates very slowly, and its products may be warehoused and stockpiled. An agricultural business has none of those advantages and, moreover, must be operated on a highly-leveraged basis. In order to avoid what may be devastating losses, the agricultural producer must be able to respond quickly to chances in the producing environment and the changing demands of the market. His last line of defense in this effort is to change his product line. That type of decision is more amenable to bargaining in the industrial sector because the need for it usually does not occur quickly and can be expected to entail retooling over a considerable period of time. In agriculture, on the other hand, flexibility is the key to survival. To place the grower in the position of not knowing whether he has to notify and bargain with the union before he can lawfully switch from one crop to another would be to place an unreasonable burden on the conduct of the business.

The benefit that decision bargaining would create in such circumstances is extremely limited. In the industrial setting, a decision to continue or discontinue the manufacture of a particular product often turns on the question of whether the product can be produced better or faster. That question is one which labor may be in a good position to help answer. In all but the most highly automated industries, labor has a critical role to play throughout the production process. In agriculture, nature and the elements generally have more influence over the quality and quantity of the produce than labor. This is not to

say that labor is simply an incidental element in the production process in agriculture, but rather that decision-making about crop changes is not likely to receive significant benefit from union input. The sole exception of any significance would be decisions that center on the cost of labor. That is not the case here or in most instances where there is a need to change crops.[6/] Where it is the case, the employer has, as pointed out by the court in FNMC, an incentive to seek labor's input to the decision-making process. In any event, cases centering on the cost of labor will probably balance out quite differently under the FNMC criteria than would crop changes that are based primarily on non-labor considerations.

In view of the foregoing, I would conclude that decision bargaining was neither required nor desirable in connection with Respondent's garlic and sugar-beet decisions in this matter. I would reach the same conclusion with respect to virtually all crop change decisions that do not turn on the efficiency or cost of labor. Growers should not be put at risk in deciding whether bargaining is required over a decision that goes to the most critical aspects of agricultural management.

Dated: December 29, 1932

JOHN P. McCARTHY, Member

[6/] The decision by Respondent to sell its garlic crop was at the behest of another grower and had nothing to do with factors over which the Union had any control. Thus, the Union's only objective in bargaining over this decision would be to stop the transaction altogether. The court in FNMC specifically did not want to create situations of that type. (FNMC, supra, at p. 2583.) Moreover, the situation presented Respondent with an opportunity to sell his crop and avoid further risk of loss. The ability to seize such opportunities when they present themselves is essential in a business as fraught with uncertainty as is agriculture.

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office by the United Farm Workers of America (AFL-CIO)(UFW), the certified bargaining agent of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present evidence, the Board has found that we failed and refused to bargain in good faith with the UFW in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all 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 try to get a contract or to help or protect one another; and
6. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed chances.

WE WILL NOT threaten employees with loss of housing or any change in the terms and conditions of their employment because of their union activities.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, we will reimburse all workers who were employed at any time during the period from January 22, 1979, to the date we began to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.'

Dated PAUL W. BERTUCCIO

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 112 Boronda Road, Salinas, California 93907. The telephone number is (403) 443-3161.

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

Paul W. Bertuccio (UFW)

8 ALRB No. 101
Case Nos. 79-CE-140-SAL
79-CE-196-SAL
79-CE-380-SAL
80-CE-55-SAL

ALO DECISION

The ALO found that Respondent bargained in bad faith with the UFW regarding a collective-bargaining agreement, based on the following factors: Respondent rejected proposals without explanation; its negotiator was often unavailable or unprepared, without authority to reach final agreement, and inconsistent in his explanations; Respondent made predictably unacceptable offers, gave the UFW useless or meaningless information, made economic proposals with no idea of the cost; Respondent refused to bargain over certain classes of employees on the theory that they were employed by a custom harvester; and Respondent rejected the UFW's union security proposal on the basis of a legal theory which the Board has previously rejected. The ALO rejected Respondent's contentions that the Union also bargained in bad faith, finding insufficient evidence that the UFW refused to -discuss certain issues, delayed, used illegal tactics, or demanded bargaining over illegal subjects.

The ALO recommended dismissal of allegations that Respondent refused to bargain per se by unilaterally changing its method of lettuce harvesting, its past practice regarding labor contractors, and its decisions to change certain crops, but found violations as to wage increases, granted without notice to, or bargaining with, the Union in 1979 and 1980.

Finally, the ALO recommended dismissal of allegations that employees Ruben Guajardo and Juan Mojica were fired for their union activity, finding that Guajardo was fired for cause and that Mojica quit; and that Rodrigo Navarette and Ramiro Perez were evicted because of union activity, since there was a legitimate business reason for their. eviction. The ALO concluded that Respondent threatened Maria Jiminez with eviction and that the threat was a violation of section 1153(a).

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALO with modifications. As to bad-faith bargaining, the Board expressly declined to draw negative inferences from Respondent's substantive bargaining proposals or its rejection of the Sun Harvest contract. As to Respondent's duty to bargain over its decision to sell its early garlic crop, the Board rejected the ALO's analysis and found that the transaction was subject to decision-bargaining. The Board also-.rejected the ALO's finding that the loss of bargaining-unit work caused by the sale was insignificant and therefore concluded that Respondent violated section 1153(e) and (a) by its failure to bargain over the effects of the sale.

DISSENT

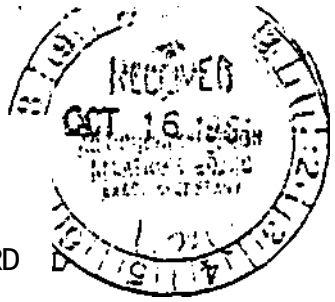
Member McCarthy would uphold the ALO's analysis regarding decision- and bargain the ALO's finding that loss of unit work resulting from

the sale of the early garlic crop was insignificant and therefore would find no effects over which Respondent was required to bargain.

* * *

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

In the Matter of: PAUL W. BERTUCCIO, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos.	79-CE-140-SAL 79-CE-196-SAL 79-CE-380-SAL 80-CE-55-SAL

Martin Fassler
for General Counsel

Alicia Sanchez
United Farm Workers of America
for Charging Party

James G. Johnson
Hill, Farrer & Surrill

and

Sarah Wolfe
Dressier, Stoll, Ouesenberry, Laws & Sarsamian
for Respondent

DECISION

STATEMENT OF THE CASE

Marvin J. Brenner: Administrative Law Officer: This case was heard by me on July 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, 31, August 7, 8, 9, 11, 12, 20, 21, 22, 26, 27, 28, September 2, 3, 4, 5, and 8, 1980. The original Complaint issued on April 2, 1980, and was based on charges filed by the United Farm Workers of America,

AFL-CIO (hereinafter the "UFW" or "Union"). The General Counsel filed an "Amended Complaint" on July 9, 1980, which is identified as the First Amended Complaint. A Second Amended Complaint was filed on August 18, 1980 during the hearing at a time when the General Counsel was close to concluding his case An Answer to Second Amended Complaint was formally filed by Respondent on September 12, 1980, after the close of the hearing. Respondent admitted that it was served with copies of the charges herein.

All parties were given a full opportunity to present evidence[1/] and participate in the proceedings. The General Counsel and the Respondent filed briefs after the close of the hearing.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, Paul W. Bertuccic, is engaged in agriculture in San Senito County, California, as was admitted by Respondent in its Answer.

Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereinafter the "Act").

Respondent also admitted in its Answer that the UFW was a labor organization within the meaning of section 1140.4(f). of the

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1//Hereafter, General Counsel's exhibits will be identified as "G.C. Ex —" and Respondent's exhibits as "Resp's Ex —". References EC the Reporter's Transcript will be identified as "R.T. — " P. —".

Act, and I so find.

II. The Alleged Unfair Labor Practices

The Second Amended Complaint raises three areas of alleged violations. First, it charges that Respondent refused to bargain in good faith in violation of Sections 1153(e) and (a) of the Act by: 1) refusing to comply with or unreasonably delaying complying with the UFW's requests for information and, 2) engaging in surface bargaining. Second, it alleges that Respondent made certain changes in its employees' wages and working conditions without negotiating about said changes or their possible effects with the UFW, also in violation of Sections 1153(e) and (a). Finally, the Complaint charges that Respondent discriminated against its employees in order to discourage their support for the UFW in violation of Sections 1153(c) and (a) of the Act.

The Respondent denied it violated the Act in any way and plead as an affirmative defense that it was the UFW that failed and refused to bargain in good faith with it.[2/]

Respondent admitted in its Answer that the following persons were its agents within the meaning of Sections 1140.4(c), 1140.4(j), and 1165.4 of the Act: Paul W. Bertuccio, Tina Bertuccio, Jose Duran, Edwardo Villegas, and Inez Villegas. Respondent denied that Jasper Hempel, Howard Silver and Richard Andrade were supervisors within the meaning of Section 1140.4(j).

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2/The General Counsel has moved t strike Respondent's affirmative defense. This motion was taken under advisement and is discussed infra.

III. Rulings on Motions

A. General Counsel's Motion to Amend Complaint.

1. Facts.

On August 20, 1980, the day General Counsel closed his case, he offered certain amendments[3/] to the Complaint, to wit: 1) paragraph 9f was amended to allege that Respondent made a change in its employees' working conditions by assigning to a labor contractor the work of harvesting peas and by setting a wage; 2) paragraph 9g was amended to allege that in July of 1980, Respondent raised wages without negotiating same with the Union; and 3) paragraph 10d was amended to allege that Respondent acted to discourage support for the UFW by refusing to reassign Mr. Ramiro Perez to work in the retail store and by its reassignments of Mr. Javier Ceja.[4/]

Respondent objected to the amendments and moved to strike them from the Second Amended Complaint. It objected to the amendment to paragraphs 9f and 10d on the grounds that such evidence had previously been objected to by Respondent when offered and had been allowed only as background evidence of overall, surface bargaining and not as evidence to support an independent unfair labor practice violation. Respondent objected to the amending of paragraph 9g on the grounds that no evidence of this allegation had yet been admitted into evidence to prove an independent unfair labor

3/None of these was mentioned in the General Counsel "Amendment to Complaint" (also referred to in the record as "First Amended Complaint") of July 9, 1980 (G.C. Ex IF).

4/At the preceding session, August 12, General Counsel announced he would be amending the Complaint. Although he referred to the amendment to paragraph 9g, he did not mention paragraphs 9f or 10d.

practice charge at the time the amendment was made.

I conditionally accepted the amendments reserving a final judgment on the objections until such time as the record was reviewed and a decision issued. In view of that ruling, Respondent chose to defend as if the amendments had been allowed.

2. Ruling.[5/]

a) Paragraph 9f—The Motion to Strike this amendment from the Second Amended Complaint is granted. I do not find that an objection was made to the receipt of this evidence, as claimed by Respondent; but that was because the evidence was clearly received for the general purpose of proving elements of the surface bargaining charge. That is to say that this evidence came into the record as part of General Counsel's attempt to show that Respondent failed to provide the Union with complete information of what its cropping pattern would be and further, that Respondent bypassed the Union and did not make a proposal of any kind on wages to be paid workers who harvested peas. It was never made clear to Respondent that this evidence was to represent an independent unfair labor practice charge,[6/] and the matter was not fully litigated.

In any event, the testimony supporting this allegation did not come into the record until after the General Counsel had rested. Had I allowed the amendment at the hearing, (instead of reserving

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5/ Generally speaking, an ALO may, at his/her discretion, refuse to permit an amendment to a complaint. Tennessee Egg Co., 93 NLRB 846; Union Asbestos, 98 NLRB 1055 (amendment offered on last day of General Counsel's case); Victor Chemical, 93 NLRB 1012 (amendment offered at end of General Counsel's case in chief).

6/ See, for example, General Counsel's post-hearing Brief, pp. 20-217

a ruling), I would have dismissed the allegation upon Respondent's Motion to Dismiss at the conclusion of General Counsel's case.

b) Paragraph 9g—the Motion to Strike this amendment from the Second Amended Complaint is denied. Respondent argued that the evidence of the 1980 raise had not yet been allowed in the record to prove any allegation. But General Counsel advised Respondent prior to his close of a proposed stipulation regarding the accuracy of the July, 1980 wage increase and made it clear it was to be an independent unfair labor practice allegation. The reason it was not included in either the original Complaint or the "Amended Complaint" was because the increase had not yet been effectuated at that time. The amendment was also within the scope of the other allegations and was generally related to the Complaint. The amendment is allowed.

c) Paragraph 10d—the Motion to Strike this amendment from the Second Amended Complaint is granted. As to Ramiro Perez, the Respondent properly objected to the receipt of this evidence on the grounds that there was no such allegation in the Complaint.

The General Counsel made it clear when objections to certain areas of Perez' testimony was made that the evidence was sought to be admitted only as background information in order to support the surface bargaining allegations (R.T, IX, pp. 32-33, pp. 82-83).

In the case of Javier Ceja, Respondent did object to certain questions concerning Ceja's activities on the grounds that they were not included in the Complaint; but Respondent did not specifically object to his testimony regarding job reassignments, the

subject matter of the amended Complaint. However, the General Counsel's response to one of Respondent's early objections would have given Respondent the impression that the General Counsel, as in the Ramiro Perez matter, had no intent to litigate an independent unfair labor practice violation. This might also explain why there was no cross examinations about Ceja's reassignments by Respondent. For example, speaking to an objection concerning testimony about an incident involving short handled knives and an OSHA complaint and hearing, the General Counsel stated:

> "There will be testimony after this, about the company's response to Mr. Javier Ceja's activity and involvement -with this complaint and, in particular, his role as a member of the negotiating committee and as a spokesman for the Union. I think the testimony about the company's retaliation against Mr. Ceja as a result of that is relevant to this hearing in view of his role as a member of the negotiating committee." (R.T. X, p. 37)

Later in the hearing, Respondent made a similar objection to the testimony of Ramiro Perez who was also asked questions about the OSHA hearing. In response to the objections, General Counsel stated:

> "...I offer it as a beginning step. There will be testimony, both from Mr. Perez and from another witness...Javier Ceja, about incidents that happened at the company after the hearing, and there will also be testimony about Mr. Perez' role in what appears to have been a conflict between the workers and the company and the role of Mr. Javier Ceja in this conflict between the workers and the company.
>
> Because they are two negotiating committee members and because there are other negotiating committee members in their crew, I think the reaction of the company and its. changes in the company's attitude towards the crew after the hearing and the nature of the work assignments 'they-were given after the hearing is significant with respect to this hearing."
>
> ALO: "Which charge is this going to be related to?"

> General Counsel: "Well, its related to the main charge, No. 140, which alleges a refusal to bargain in good faith.
>
> I think that if, as I expect the evidence to show, the company retaliated against the crew by cutting down on their work and making their work more difficult after the OSHA hearing. I think that's a significant factor in assessing the company's good faith or lack of it in the course of collective bargaining...." (R.T. IX, pp. 32-33). See also, R.T. IX, pp. 82-85.

From this I find that, as in the case of Ramiro Perez, General Counsel was informing Respondent that any evidence of any unlawful reassignment of Ceja because of his position on the negotiating committee was also for background information to support the surface bargaining allegations. That is to say, that the evidence of Respondent's alleged acts of misconduct concerning Ceja (and Perez) was relevant only towards the proof of the surface bargaining question, and I shall so consider it. The evidence was clearly not adduced to establish a new unfair labor practice allegation.[7/]

B. General Counsel's Motion to Strike Portions of Respondent's Answer to Second Amended Complaint

1. Facts.

The Complaint in this case was issued on April 2, 1980, and Respondent filed its Answer on April 13, 1980. In that Answer, Respondent denied the substantive charges and plead an affirmative defense in which it asserted that Charging Party had engaged in surface bargaining with no intent to reach agreement by a)

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[7/] It is extremely unfair that an attorney representing the State should maintain throughout the hearing that evidence is being presented for purposes of background, only to suddenly alleged at t conclusion of his case an independent violation.

presenting Respondent with a "take it or leave it Sun' Harvest Contract"; b) changed negotiators in mid stream without proper justification; c) engaged in dilatory tactics, and d) failed to provide requested information in a timely fashion.

On August 20, 1980, the General Counsel explained the additional allegations contained in the Second Amended Complaint, the formal document having issued on August 13, 1980. The General Counsel then rested, and Respondent commenced its case. Counsel for Respondent announced that he was orally amending the Answer to assert certain additional affirmative defenses:

> "those being the statute of limitations, laches, estoppel of the General Counsel and the Charging Party, and we are also alleging that the Union, during the period involved, has been engaged in bad-faith bargaining and that such bad-faith is relevant in this proceeding for various purposes to show that they are in this proceeding as charging parties with unclean hands, that so long as the Union is engaged in bad-faith bargaining the Union's activities suspend Respondent's duty to bargain under the Act.
>
> We are alleging that the Union was insisting on both illegal and nonmandatory subjects of bargaining; we allege that the Union negotiators were not fully informed with the issues that were placed before them. We also allege that the Union negotiators from time to time reneged on-certain agreements reached in prior negotiations, sometimes by prior negotiators and sometimes by the same negotiator." (R.T. XVI, pp. 23-24.)

When General Counsel inquired which paragraphs of the Complaint the statute of limitations, laches, and estoppel appiled to, Respondent stated:

> "I have not gone through to state with particularity which ones they will apply to. I will, if you go through at

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some point of time, say during one of the breaks, and advise you what those defenses go to." (R.T. XVI, p. 24)[8/]

The hearing ended on September 8, 1980, and on September 12, Respondent filed its "Answer to Second Amended Complaint," which raised, under the category of "First Affirmative Defense", several new defenses not previously placed in its April 13, 1980, Answer to the original Complaint.[9/]

On September 22, 1980, the General Counsel filed a "Motion to Strike Portions of Answer to Second Amended Complaint" asking that First Affirmative Defense paragraphs l(b), l(c), l(d}, I(f) and portions of l(a)be stricken in that they went beyond the limits of what Respondent's counsel stated verbally to be Respondent's affirmative defenses on August 20. The General Counsel claimed that said defenses were raised for the first time after the close of the hearing.

Respondent filed a "Response to General Counsel's Motion to Strike" on September 30, 1980, alleging that all matters had been fully litigated. A reply letter was filed by the General Counsel addressed to me on October 8, 1980.

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8/There is no record evidence to suggest that such a discussion ever occurred.

9/In Respondent's initial affirmative defense of April 13, 1980, it plead that the UFW had engaged in surface bargaining listing four items, in particular. In its Answer to the Second Amended Complaint, Respondent had apparently abandoned three of the said items. The fourth--engaging in dilatory taetics--could arguably fit within paragraph 1(a) of the First Affirmative Defense of the Amended Answer.

2. Ruling.[10/]

The General Counsel contends that Respondent should be estopped from asserting new affirmative defenses for the first time after the close of the hearing. I view the matter differently. Respondent has already raised the affirmative defense—the UFWs bad faith bargaining—in its original Answer, during the course of the hearing, and certainly at the August 20, session. While it is true that it was raised very generally on August 20, (with the exceptions of a few specific allegations presented), General Counsel did not file a bill of particulars or verbally request further particularity with respect to the Union's bad faith allegation. [11/] It seems to me that Respondent made it clear that its allegations of bad faith bargaining on the part of the UFW were issues in the case. Viewed in this light, General Counsel's case support, cited in his Motion to Strike, afford him little help. For example, the respondent in Sam Andrews' & Sons, 6 ALRB No. 44 (1980) admitted in its answer that a certain individual was an agent of respondent only to deny it in a proposed amended answer post-hearing. Similarly, General Counsel's reliance on Houston Sheet Metal Contractors Assn.,147 NLRB 774, 56 LRRM 1281 (1964) is similarly misplaced. Inhere, respondent raised a defense for the first time in its brief to the administrative law judge, and the National Labor Relations Board

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10/The matter was taken under advisement. On December 19, 1980, after post-hearing briefs had been filed, I advised the parties that I would rule on General Counsel's Motion to Strike (as well as his request for the filing of a supplemental brief) at the time I rendered a decision herein.

11/The General Counsel did request particularity with regard to the statute of limitations, laches, and estoppel, however.

(hereinafter NLRB) held that the National Labor Relations Act (hereinafter NLRA) required that all defenses are waived "which are not raised timely either in the pleadings or where appropriate, by motion during the hearing." 56 LRRM at 1283. Here, however, Respondent has maintained since its original answer that the UFW was guilty of bad faith bargaining. Thus, by filing an amended Answer asserting specific examples of bad faith bargaining after the close of the hearing Respondent was, in effect, making a motion to conform the pleadings to the evidence. I shall so treat the matter.[12/] See Frito Company v. N.L.R.B., 330 F. 2d 458, 465. 55 LRRM 2933, 2938-39 (9th Cir. 1964), cited in Respondent's reply to General Counsel's Motion to Strike.

a. Paragraph l(a) of Respondent's Amended Answer, First Affirmative Defense

General Counsel moves to strike a portion of this paragraph. I assume General Counsel is referring to the following allegation: "...moreover, during the course of collective bargaining, the charging party's negotiators have made inconsistent proposals,...." (The remaining portions of this paragraph were arguably asserted by Respondent's counsel on August 20, which was presumably recognized by General Counsel when he only moved to strike a portion of this paragraph). I am not aware of any such evidence in the record. If there is such evidence, it is not clear that it would rise to the level of an affirmative defense.

12/Section 20222 of the Regulations addresses amendments to he complaint before and during the hearing but is silent as to rest-hearing activity. There is no mention of amended answers. I am treating the matter in the same manner I would any post-hearing lotion under Section 2C2-0 of the Regulations.

Counsel was never apprised that this was an issue in the case. The Motion to Strike this portion of the Amended Answer is granted.

b. Paragraphs 1(b), 1(c), 1(d) and 1(f) of Respondent's First Amended Answer/ First Affirmative Defense

The Motion is denied. As to paragraphs 1(b) and 1(c), Respondent made it clear during the presentation of its evidence that the concept contained therein was part of its defense that the UFW had engaged in bad faith conduct by activity away from the bargaining table. Over the General Counsel's objection, I allowed in the evidence. (See, for example, R.T. 22, pp. 82-87). With respect to paragraphs 1(d) and 1(f), there is evidence, particularly from Respondent's negotiator, Jasper Hempel, that the UFW insisted on information that it already had and that the UFW intended to eliminate labor contractor Quintero from Respondent's operation though Ouintero's employees voted in the Union election.

It seems to me Respondent did make it clear during the presentation of its case that these four above-mentioned paragraphs were specific allegations subsumed by its general allegation of Union bad faith bargaining.

C. Respondent's Motion to Strike General Counsel's Supplemental Post Hearing Brief

1. Facts.

After submission of General Counsel's Motion to Strike Portions of Amended Answer, General Counsel wrote to Jorge Carrillo, Executive Secretary, ALRB, on September 22, 1930, requesting that a ruling be made before post-hearing briefs were due. Said Motion was subsequently transferred to me for a ruling. No ruling was

issued prior to the submission by both parties of post-hearing briefs on October 20, 1980. General Counsel claimed in his brief that he was not addressing the affirmative defenses because there was uncertainly as to what Respondent's affirmative defenses were, particularly in view of General Counsel's pending Motion to Strike Portions of Respondent's Answer. General Counsel — requested that he be allowed to submit a brief addressing those issues after I ruled on his Motion to Strike.

On December 19, 1980, I informed the parties that I intended to defer a ruling on General Counsel's "Motion to Strike, as well as his request to establish a due date for the filing of a supplemental brief, until such time as a decision was rendered on the entire case.

In the meantime, General Counsel on January 8, 1981, forwarded a brief to me entitled "General Counsel's Supplemental Post-Hearing Brief". In General Counsel's accompanying letter, he stated that:

> "...This brief considers only those affirmative defenses asserted by the respondent in its Answer filed on April 13, 1980, and those asserted, verbally, by counsel on August 20, 1980, at the beginning of the presentation of evidence on respondent's behalf.... There is no reference in this brief to any of the affirmative defenses "asserted by the respondent for the first time in its Amended Answer on September 12.
>
> I have limited the subject matter of the brief in this manner because of the uncertainty surrounding the status of the respondent's expanded Answer..... In view of your December 16, letter, deferring a ruling on the admissibility of the expanded Answer, I am proceeding on the assumption that the respondent's Answer stands now 'as it did on the last day of the hearing: including only' those affirmative defenses raised on April 13, and August 20."

Respondent filed a "Motion to Strike General Counsel's

Supplemental Post-Hearing Brief" on January 30, 1981, arguing, inter alia, that the Board's Regulations do not permit reply briefs.

2. Ruling.

The Motion to Strike is granted. General Counsel concedes, and properly so, that Respondent's April 13 Answer and August 20 oral Answer were appropriately before me at the time post-hearing briefs were due on October 20, 1980. There was no uncertainty as to what Respondent's affirmative defenses were at that point, insofar as those issues were concerned. Yet, General Counsel chose not to comment on those affirmative defenses in his Brief, which he knew to be at issue at that time. And no proper reason has been advanced for his failure to do so. Basically, for whatever reason, the General Counsel chose to withhold his arguments on Respondent's affirmative defenses (of April 13 and August 20) until such time that same had been fully briefed by Respondent.[13/] Since neither the Executive Secretary nor I granted General Counsel an extension of time to file a supplemental brief, the Brief is improperly before me.[14/]

IV. The Business Operation

Paul W. Bertuccio is a sole proprietorship which is currently farming around 3,000 acres, including those fields that are sometimes planted 2-3 times in the same year. Paul Bertuccio

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13/Interestingly, except for the allegation of dilatory tactics, Respondent does not address any of the September 12 affirmative defenses in his post-hearing Brief.

14/If General Counsel still intends that I rule on whether he may file a supplemental brief addressing only the September 12 affirmative defenses, the request is denied. In any event, the issue is moot in that I have found, infra, that the UFW was not guilty of bad faith bargaining.

is the head decision maker and general manager and makes all decisions on the day to day operation of the farm, as well as the wages to be paid his employees. Sometimes, his wife, Tina Bertuccio, and his supervisors advise him on what wages to pay. Tina Bertuccio also assists him in the running of the farm and the packing sheds.

There are three supervisors. Jose Ouran supervises the general field workers in the weeding and hoeing of crops and the harvest.[15/] Under him, there are two sub-foremen, Eduardo Villegas and his son, Inez Villegas. The second supervisor is Jose Hartinez who is responsible for the preparation of the planting, the actual planting and tilling of the crops, and irrigation. He also supervises 3-4 mechanics. Manuel Arreola is a sub-foreman in irrigation. Finally, there is Robert Correa who is responsible for all work (except irrigation) in the apricot and walnut orchards and oversees around forty workers.

A. Seniority/Transfer/Discipline

Respondent maintains no seniority system, transfer procedure or disciplinary program. Only Paul or Tina Bertuccio decide who may transfer. As to discipline, only Paul Bertuccio decides what disciplinary action is to be taken though he may consult with his supervisors.

B. The Hiring

Only Paul and Tina Bertuccio and the three supervisors, Duran, Correa, and Martinez, have the authority to hire. There is no

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15/Duran, however, is not in charge of the sugar beets, tomato or carlic harvest.

written policy on hiring. However Paul Bertuccio testified that there was an informal rule that those that worked last season would be hired back? but if there were insufficient jobs for the number of applicants, the individual applicant would be told to place his/her name, address, phone number, and type of work the person was qualified to do on a sheet of paper and that if a vacancy arose, he/she would be contacted. This sheet of paper was then retained at the ranch office. According to Bertuccio, this "system" had been used for a long time; and its purpose was to insure that workers were hired in the order in which they applied for work.

C. The Crops

Paul Bertuccio testified that he alone made all the decisions as to what is planted and how much. He also testified that he does not keep records on these matters but either retains the information in his head or asks one of his supervisors or foremen. Bertuccio testified that there were two main factors that influence his decision on what to plant each season: 1) crop rotation and 2) market conditions. (Weather is also a factor.)

1. Crop rotation

If the same crop is planted in the same field more 'than once a year, there is likelihood (in the case of some crops but not lettuce) that it will be attacked by diseases during the second planting[16/].Crop rotation is a means of which these diseases can be thwarted provided that the new crop is not subject to the same

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16/The crop most necessitating rotation is onions followed by garlic.

disease as the previous crop.[17/] Thus, according to Bertuccio, crop rotation is always a consideration in what ought to be planted.[18/] Bertuccio further testified that a farmer would never find himself in a situation where in the 2nd year he could only rotate one other crop; he would always want to leave himself a choice of alternatives.

2. Market Conditions

Paul Bertuccio receives several publications from private and governmental sources on agriculture; e.g., "California Fruit & Vegetable Reporting Service", published by the State Department of Agriculture, "Sugar Beet Bulletin", published by the California Sugar Beet Association, "The Packer", and "TM Hollister Freelance". Mr. Bertuccio testified that he utilized the information contained in these publications to help determine what he should grow in future seasons. For example, in 1979 government reports indicated sugar supplies to be down so Bertuccio decided to grow more sugar beets in 1980.

Respondent grows a wide variety of crops including lettuce, cabbage, onions, bell peppers, garlic, anise, cardoni, chile peppers, corn, and others. Lettuce is by far the biggest crop. It has only one season; it is planted in December (spring lettuce) and is

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17/For example, sugar beets the first year followed by lettuce the second year would be suitable because the diseases that attack the former do not attack the latter. However, in that cabbage contacts the same diseases as sugar beets, it would be unwise to follow beets with cabbage.

18/On the other hand, at times a farmer would want to let the land just lay dormant for a year because some crops; e.g., cabbage, cardoni, sugar beets, devastate the ground where they are planted.

planted every week until September 1, depending on the weather and market conditions. The harvest occurs May through December. Paul Bertuccio testified that between August 20 and September 10 of 1980 he anticipated 1200-1400 acres.[19/]

D. Labor Contractors

Over the years Paul Bertuccio has hired three labor contractors[20/] with regularity, Jesus Ouintero, Jose Martinez, and Manuel Salinas.[21/]

1. Jesus Quintero

Within the last 10 years Quintero has been used for all types of field work (weeding and thinning) and the harvesting of onions, garlic and bell peppers. Bertuccio's regular employees do not usually harvest onions or garlic. During 1980, about 25 of Quintero's workers were hired to weed sugar beets.

The rate of pay for Quintero's workers is agreed upon by Ouintero and Paul Bertuccio. These workers are placed on Respondent's payroll (G.C. Exs. 29 and 30) and paid by checks signed by and from a checking account maintained by Paul Bertuccio.[22/]

19/This does not mean that 1200-1400 different acres were farmed. Since lettuce is sometimes planted in the same field three times during the course of one year, a 100 acre parcel might support 300 acres of lettuce.

20/Paul Bertuccio testified that normally the hiring of a labor contractor is discussed with him personally but that either supervisor Duran or Martinez have the authority to hire Ouintero on their own.

21/A fourth person, Tony Lomano, is considered to be a custom harvester in tomatoes.

22/The checks are actually prepared by Ouintero's daughter, Hope Beltran, and brought to Bertuccio for his signature.

Ouintero usually receives 10% of the weekly gross wages paid to the workers.

2. Jose Martinez

Martinez' workers are usually employed in the apricot orchards in 1980 and for the past several years. Respondent pays Martinez by check and Martinez then pays his own workers from these proceeds.

3. Manual Salinas

There is a third labor contractor, Manual Salinas, only Paul Bertuccio testified he did not consider him such because he didn't have a license. Generally, Salinas provides workers for the hoeing and thinning of lettuce throughout the year. Salinas' workers are also placed on Respondent's payroll, and Paul Bertuccio makes out checks to them. Information regarding the work performed by Salinas' workers is maintained on Respondent's time cards.[23/]

Salinas has been used for the past 5-6 years. During 1979 he provided as many as 75 workers, but in 1980 fewer were used.[24/]

E. Slowdowns and Work Stoppages

In the early spring and continuing through the summer of 1980, some of Respondent's crews participated in a series of slowdowns and work stoppages. The first of these occurred around the first part of March 1980 involving around two-thirds of a

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23/Except for his lack of a license and the fact that he is not paid a commission but is paid by the workers he provides, Salinas functions the same way as any labor contractor.

24/Paul Bertuccio testified that fewer were used because: 1) he was not sure if Salinas had a labor contractor's license and 2) he became aware of the UFW's opposition to Salinas.

weeding sugar beet crew. This was followed thereafter by slowdowns among weeders and thinners in lettuce. In late July and August there were a series of work stoppages.

Paul Bertuccio discussed the March sugar beet field activity with supervisor, Jose Duran; and, after realizing that it was costing Respondent twice as much money as the previous year, decided to utilize Quintero earlier than usual.[25/] Thus, starting in March for around 3-4 days, Quintero was brought in to do pull and cut weeds sugar beets, work that ordinarily would have been performed by the regular employees of Respondent. Initially, Quintero brought 25 workers and then increased it to 40-45. No regular employees were laid off.

Quintero's crews were called back at the end of May beginning of June, 1980, to weed sugar beets, then lettuce, and hoe onions.

V. Failure and Refusal of Respondent to Bargain in Good Faith A.

The Negotiating History

On December 13, 1978, Cesar Chavez wrote to Paul Bertuccio requesting the commencement of negotiations (G.C. Ex. 2). Accompanying this letter was a "Request for Information" (G.C. Ex. 2(a).). There was no immediate response from Respondent so that sometime prior to Christmas, UFW negotiator, Michael Schwartz, contacted Paul Bertuccio on the phone,

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25/In 1979 Quintero was employed in the latter part of May or early June.

requested negotiation dates, and asked for an "access" arrangement in order to visit with workers, set up a negotiating committee and develop a proposal. Bertuccio responded that Schwartz should speak to his attorney, about these subjects, that he did not know who his attorney was, but that it was someone who had worked for Western Growers Association (hereinafter "WGA").

In early January Schwartz learned that the Western Growers Association negotiator assigned to the case was Richard Andrade so Schwartz contacted him by telephone requesting date to commence negotiations. Andrade replied that he was not prepared to begin as he had not yet received the files and had not yet met with representatives of Respondent; but it was agreed by letter that January 22 would be the first meeting. Schwartz had requested that more than one meeting at a time be scheduled and suggested the possibility of back to back meetings, but Andrade declined stating that he had too busy a schedule.

On January 8, 1979, Schwartz wrote to Andrade (G.C. Ex. 4) to indicate his interest in receiving the information requested in the UFW's December 13, 1978 letter attachment in order to develop a contract proposal.

January 22, 1979 Meeting

This was the first meeting between the parties. Respondent's negotiator, Richard Andrade, was present as was Tina Bertuccio. Michael Schwartz was present for the Union, as was its Negotiating Committee consisting of Ramiro Perez,

(President), Jesus Perez, Maria Hernandez, Javier Ceja, and Ernesto Ceja. The meeting mainly consisted of introductions and setting ground rules; the meeting was short. It was agreed the parties would meet again on February 5.

On January 25, 1979, the UFW mailed its first proposal (G.C. Ex. 6) to Respondent. It was a "language" proposal only.[26/]

February 5, 1979 Meeting

Most of this meeting was devoted to Schwartz' explaining the contractural proposals, particularly Hiring, Grievance and Arbitration, and Post-Certification Access proposals.

Andrade testified that it was his suggestion that the parties negotiate the language proposals first and then move on to the economic matters.

Andrade handled Schwartz a partial list (G.C. Exs. 7 and 8) of the information the UFW sought in its earlier request.

There was agreement by Respondent to the Union's, language on family housing, discrimination, and the savings clause..

February 21, 1979 Meeting

Respondent submitted its initial language proposal (G.C. Ex. 21), and it was discussed.

Most of the discussion, though, centered around an interim access agreement, which was agreed to. There were also agreements on Respondent's language on bulletin boards, credit union withholdings, location of Respondent's operation, and a modification clause.

26/Language proposals refer to contractural provisions dealing with non-economic items.

Respondent provided the Union with information on 600 employees and also pesticide information. Schwartz complained that he still had no information on the hours worked of employees, but Andrade told him the information was not available.

March-3, 1979 Meeting

Most of this session was spent discussing a problem that had arisen over the interim access agreement. Under that agreement, Schwartz was given the right to visit the packing shed by March 1; only, Schwartz forgot about the deadline,.' and it had passed by the time of the March 8 meeting. When Andrade refused to allow Schwartz access after March 1, Schwartz accused Andrade of reneging on the spirit of the agreement. After much discussion, Andrade agreed to remove the March 1 deadline from the agreement and to give Schwartz the opportunity to visit the shed at his convenience.

The UFW made some movement in the Grievance and Arbitration section by reducing the time in which a grievance could be filed from 60 days (G.C. Ex. 6) to 45 days (G.C. Ex. 11) and also eliminated a portion of the broad grievability langauge.

Agreements were reached on new or changed job - operations.

March 20, 1979 Meeting

Respondent made a partial language proposal and offered its first contract language on Union Security, Hanage-

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ment Rights, and a No Strike clause.[27/] (G.C. Ex. 15). The discussion of the No Strike clause evoked very strong feelings on both sides. Respondent proposed a provision (section D) which would enable it to by-pass the grievance and arbitration section and seek injunctive relief through the courts. Andrade told Schwartz that the intent of this section was to prevent wildcat strikes and that Respondent wanted the Union to be responsible for any damages flowing therefrom. Andrade attempted to link violence and wildcat strikes with the UFW.

Schwartz argued that one had nothing to do with the other and asked Andrade for examples. Andrade referred to the United Mine Workers and Steelworkers, but could give no examples relating to the UFW.

Respondent proposed a warning system for disciplinary offenses.[28/] According to Andrade, Schwartz said he could never agree to something like that. Andrade testified he informed Schwartz that another UFW negotiator at Stenderup Farms had accepted such a concept.

Schwartz testified that the UFW's proposal of March 20 (G.C. Ex. 12) was more flexible than the early proposal of. January 25, 1979 (G.C. Ex. 6) and gave the 3ecognition, Leave of

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27/Andrade testified that the latter two clauses had inadvertently been left out of his February 21 proposal.

28/Andrade was not certain this occurred on March 20 and said it could have happened on March 8.

Absence, and Maintenance of Standards sections as examples.

There was also much discussion over the Union's informational requests.

April 4, 1979 Meeting

Respondent made a new proposal on non-economic matters, (G.C. Ex. 55) different in many ways from its last proposal; and these sections were discussed. Respondent had made some movement in the Union security, Discipline/Discharge and the Leave of Absence sections.

Health Insurance

In the health insurance area, Respondent represented it was facing a tremendous increase in its premiums for the 17 employees covered under this program, and Andrade asked Schwartz if (until a new insurer was located he would consent to Respondent's switching to a new insurance company (St. Paul Life, Western Grower's own insurance company) within the next 2-3 weeks. Andrade testified that Schwartz respondend that it was all right with him. Schwartz testified that he told Andrade that as changes were negotiable, he wanted to be informed but that he would not take a position until he saw the specifics of the new plan.

Hiring

Andrade testified he informed Schwartz the hiring hall had not been working at other companies, and he suggested a localized hiring hall where members of the Negotiating Committee had authority to refer workers to the grower in place of the hiring hall itself.

Labor Contractor

Andrade testified that he suggested putting the labor contractor's employees on the seniority list and hire them from the list. However, he did not withdraw Respondent's Subcontracting proposal. According to Andrade, Schwartz said the Union was definitely against the use of labor contractors and wanted them out.

There were two sections that were closed out Right of Access and Workers' Security.

April 12, 1979 Meeting [29/]

The UFW offered a language proposal (G.C. Ex. 56)' different from the one of January 25. Schwartz testified the Union had made movement on Hiring, Union Security, Health and Safety and Leave of Absence.

Andrade testified he asked Schwartz where his economic proposal was, and Schwartz replied that he was working on it.

On the new health insurance plan, Andrade testified that Schwartz was still not given the information about the change of carrier but that since the move was still 2-3 weeks away, there would be sufficient time later on for Schwartz to review the matter.[30/]

The parties agreed to the Union Label proposal.

29/Originally a meeting had been scheduled for April 11 but was cancelled by Andrade.

30/In fact, Schwartz was sent a copy of the new plan on April 18 and told that if the Union did not respond by April 26, 1979, it would be assumed there was no disagreement and the plan would be instituted. At the May 7 negotiating meeting, Schwartz indicated that the UFW had no objection.

Andrade testified that two weeks prior to the meeting he became aware that he no longer would be the negotiator for Respondent and that he told Schwartz this; adding that his replacement would be Jasser Hempel effective at the end of the meeting.[31/] (Andrade confirmed this by letter on April 18, 1979 (G.C. Ex. 16)). The next meeting was scheduled for April 17.[32/]

April 23, 1979 Meeting

Jasper Hempel appeared as Respondent's new negotiator. As Hempel claimed that he was just getting acquainted with the negotiating history, each and every article was reviewed. Afterwards, Hempel stated that he was not yet prepared to really negotiate at this meeting because 1) he had just gotten into negotiations (though he had previously attended other sessions to assist Andrade? e.g., February 21 and March 8 (Jt. Ex. 2)); 2) he had not yet reviewed Andrade's files; and 3) he had not talked to either Andrade or Paul Bertuccic.

Schwartz, who had wanted to discuss Subcontracting, Grievances and Arbitration, Discipline and Hiring, expressed to Hempel his dissatisfaction with the latter's unpreparedness, especially since the April 17 meeting had been cancelled because

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31/Hempel, however, testified that he was not informed he was to be the new negotiator until April 16.

32/The originally scheduled April 17 meeting was cancelled by Hempel on April 16 because he claimed (despite Andrade's above representation at the April 12 meeting) that he (Hempel) had just learned that he was to be Respondent's new negotiator.

Hempel stated he was not prepared at that time either.

No proposals were made at this meeting. There was, however, agreement to the UFW's language on Income Tax Withholding.

Hempel testified that he asked Schwartz for the Union's economic proposal but that Schwartz responded it was hard to prepare because of the lack of information in his possession, especially on job classifications.

May 7, 1979 Meeting

There were no UFW or Respondent proposals offered-at this meeting and no agreements reached. All items were discussed, as had happened at the April 23 meeting, and Hempel was a little more prepared, according to Schwartz.

The parties continued to be far apart on major items. Hempel continued to oppose good standing and Citizenship Participation Day (hereinafter CPD). Hempel opposed CPD on the grounds that it coerced workers into doing something against their will and that it was, what he referred to as a slush fund for the Union. Hempel felt there was a connection between the good standing clause and CPD and that if a worker refused to pay into the fund, he could be discharged. Therefore, Hempel asked for a copy of the UFW-7's Constitution because he wanted to know under what conditions a worker could be terminated. He further testified that he-was aware of an ALRB case in Watsonville in which a worker had

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been discharged for failing to contribute to a political fund.[33/]

Hempel also testified that Schwartz told him that he (Schwartz) had inadvertently left off a page in the xeroxing of the Health and Safety article relating to equipment. Hempel replied that he would discuss the equipment matter but that so far as he was concerned, said Health and Safety proposal was no longer on the table.

Following this meeting, Schwartz became ill and was not able to continue as negotiator.[34/] As of the time of what turned out to be his last session, May 7, 1979, after nine negotiating sessions, agreements had been reached on 12 of the 28 articles contained in the UFW's original language proposal (G.C. Ex. 6), none major, as follows: New or Changed Job Operations, Discrimination, Bulletin Boards, Credit Union Withholding, Location of Respondent's Operations, Modification, Savings Clause, Family Housing, Right of Access, Union Label, Income Tax Withholding, and Worker Security.

Sometime in June of 1979 Ms. Marion Steeg was assigned the Bertuccio negotiations as a replacement for Schwartz.

Hempel testified that he first spoke to Steeg on July 27 and set up meetings for August 1 and 2. He also testified that he told her that the ALRB was investigating certain charges and

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33/Hemnel was referring to United Farm Workers (J. Jesus R. Conchola) 6 ALRB No. 16 (1980).

34/May 24, had been the next scheduled meeting but was cancelled by the Union. Although the reason for the cancellation is not clear, it was probably associated with Schwartz' illness.

had custody of his contract proposals, but that he would try to construct a summary from his negotiation notes so that he could discuss the status of negotiations at the meeting.

August 2, 1979 Meeting [35/]

This was Steeg's first meeting, but it got off to a bad start. The meeting was delayed 30 minutes because Steeg continued to confer with her committee after Hempel arrived, and Hempel demanded that in the future all meetings should start on time. In addition, Hempel testified he told Steeg he didn't want any grievances discussed prior to negotiations because to do so would set a bad tone for the session.

Steeg used the occasion of her first meeting to review the Union's informational requests and to ask for some new information. In particular, Steeg asked for information on: 1) Respondent's relationship with Let Us Pak, 2) labor contractors and custom harvesters utilized by Respondent, 3) production information, particularly acreage of crops, units produced, hours worked and rates paid at piece rates and, 4) job classification information, particularly why some workers within the same job grouping were paid different rates.

Hempel responded that he "had no idea that there was that information that needed to be obtained by the Union" because, as he explained during the hearing, in the previous two meetings with Schwartz, the information had not been requested. In any event, according to Steeg, Hempel said he

35/There were no meetings between May 7 and August 2. The originally scheduled meeting of August 1 was cancelled. Each side blamed the other for the cancellation.

would have to check with representatives of Respondent to determine what information had in fact been given to the Union.

The Union presented its first economic proposal (G.C. Ex. 61),[36/] and Respondent presented a written summary of its view of the progress of negotations up to that point. (G.C. Ex. 53). Steeg did not think that the summary was an accurate account, and Hempel agreed. He testified that he/ told Steeg he was severely handicapped because the ALRB had taken his last proposal when investigating the charges.

Prior to this meeting, Steeg had reminded Hempel that he owed her a language proposal in that the Union had made the last one on April 12, 1979 (G.C. Ex. 56) and had not received a response.

Hempel made no proposal; and instead, indicated that he had not brought any of Respondent's proposals with him.

August 15, 1979 Meeting

Hempel came into the meeting and stated he still did not have copies of the previous proposals. He testified that it was Steeg who gave him a set of the Union's proposals.

Steeg complained of the absence of Mrs. Bertuccio, but Hempel assured her that he had the authority to negotiate a contract.

Steeg reviewed, her request for information on Let Us

36/In tendering this economic proposal, Steeg maintained that she was not waiving her rights to additional information from Respondent but was doing so only to further negotiations because Respondent had insisted on receiving a wage proposal. As a consequence, many items in the proposal had the designation, "pending information" such as garlic, gourds, or cardoni. One of the reasons for this, according to Steeg, was that Respondent had maintained these workers were paid hourly;- but the workers had reported to- the Union that they were paid piece rates.

Pak, but according to Steeg, Hempel, referring to Respondent's Exhibit 1, replied that he had given her all the information she needed. [37/] Steeg indicated she needed to know exactly how the contractural arrangement between Let Us Pak and Respondent was decided in order to protect the bargaining unit lettuce workers. According to Steeg, Hempel stated that bargaining unit workers were not affected by Let Us Pak but that he wasn't sure.

Hempel requested information from the Union. He wanted copies of the collective bargaining agreements the UFW negotiated with Harden Farms and Almaden, [38/] and information on the Union's medical, pension and Martin Luther King plans.

Hempel testified that, pursuant to his previous request, Steeg did provide him with a copy of the UFW constitution.

According to Steeg, Hempel, who had now had an opportunity to review the Union's economic proposal of August 2, totally rejected and would not offer counters to the Union's proposals on Mechanization, [39/] Cost of Living, Injury on the Job, Union Representatives [40/] and the Apprenticeship Fund. Hempel also

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37/Hempel testified he told Steeg he was still gathering information from their first meeting.

38/They were provided at the next meeting.

39/According to Steeg, Hempel stated: "There would be no clause on mechanization cause it was management's right."

40/Under this provision, the workers elect a representative who serves as a full (or part time) contract administrator' resolving grievances and avoiding disputes. He is paid by the employer what he would have earned had he been working.

indicated that Respondent would remain firm on its April 4, proposals on Union Security, No Strike, Discipline and Discharge, Supervisors doing bargaining unit work, and Successorship. On some of the remaining articles, Hempel stated that he did not want to take any position on them, but that they would be held in abeyance—Wages, Vacations, Subcontracting, the Medical Pension and Martin Luther King Plans, Durations and Delinquencies.[41/]

Respondent made two proposals, Hours of Work and Overtime and Rest Periods (G.C. Ex. 59). With respect to the latter, Respondent proposed a rest period of ten minutes. When certain members of the Union's negotiating committee pointed out that they already had fifteen minutes under present conditions, Hempel responded that nevertheless, this was Respondent's proposal.

On Union Security, Hempel wanted to eliminate the Union's proposal that Respondent should withhold the dues money and turn it over to the Union. Though Steeg pointed cut that Hempel already agreed in his summary that Respondent would take out the dues,[42/] (G.C. Ex. 58) Respondent apparently adhered to this new position.

On Health and Safety, Steeg explained that Schwartz had made a mistake by leaving a provision cut, but Respondent continued to follow its previous position that there was

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41/Under this provision, if Respondent was delinquent in making dues payments or pension payments, for example, the no strike provision of the contract would be lifted.

42/Respondent had previously accepted the concept that dues money would be deducted from workers' checks and turned ever to the Union. (See Respondent's proposal of April 4, 197$, G.C. Ex. 55)

an agreement and the matter was no longer on the table.

August 29, 1979 Meeting

In a telephone conversation prior to this meeting Hempel again complained to Steeg that he still did not have his own proposals — that the ALRB must have lost them. Steeg brought him a set of copies of his -own proposals.

The meeting was held at the UFW offices. Hempel' testified he felt uncomfortable there because it was not a neutral site and that he told Steeg he wouldn't meet there again.

Once again Steeg complained of the absence of Mrs. Bertuccio; again Hempel explained that he had the authority to sign an agreement.

Respondent offered its economic proposal (G.C. Ex. 60) Except for the two proposals on Hours of Work and Overtime and Rest Periods, offered at the previous session, this was Respondent's first written economic article. However, it did not include any wage increase. Hempel testified he only offered the wages Respondent was then paying because workers in all job classifications had already just received their regular increase in July when wages were raised to[43/] $3.25 per hour.[44/] Hempel also indicated that onions, gourds, garlic, sugar beets and ornamental corn were custom harvested by Quintero, were not bargaining unit work, and therefore, there

43/This raise is the subject matter of an unfair labor practice allegation litigated in this proceeding. See, infra.

44/Piece rate compensation was raised proportionately.

would be no wage proposal concerning these crops.

Respondent did make changes in some of its language proposals; e.g., No Strike (deleting section B, as the Union wanted), Leave of Absence (adding pregnancy leave), Maintenance of Standards, Reporting and Standby (four hours), Vacation (eligibility for employee who worked 800 hours in the previous year), Funeral Leave (five days without pay), and Holidays (Christmas and Labor Day).

There was some discussion of Union Security. Respondent wanted the payment of dues and initiation fees to be the sole criteria of good standing. On this occasion Hempel referred to a pending legislative bill to outlaw the good standing clause. Rather than defer the question until the Legislature acted, Hempel stated he wanted the subject matter deleted from the negotiations. Steeg suggested putting it in the contract and that if it were to be declared illegal, such provision would be eliminated through the Savings Clause.

August 31, 1979 Meeting

Steeg presented Hempel with information on its various proposed plans; e.g., Medical, Pension, and Martin Luther King.

The Union made a new proposal covering both language and economic. (G.C. Ex. 61). It included several changes from previous positions.

On September 21, 1979, Kempel wrote Steeg (G.C..Ex. 40) enclosing a counterproposal (G.C. Ex. 62) and a list of employees with their job classification (G.C. Ex 28). In the meantime,

Sun Harvest had entered into a collective bargaining contract with the UFW (approximately September 1, 1979), and many Salinas Valley growers, including Harden Farms, had followed suit and accepted the basic Sun Harvest formula, including retroactive pay. These events set the framework for future negotiations.

Meeting of October 12, 1979 [45/]

The meeting was short (lasting about an hour) even though the parties had not met for five weeks. The only business conducted was Steeg's offer of settlement. Steeg testified that she suggested to Hempel that the recently negotiated Sun Harvest agreement be used as a basis for a contract with Respondent and that the parties negotiate only over those crops not grown by Sun Harvest, local issues and retroactivity back to November 7, 1978. In the alternative, Steeg stated that the parties would have to continue bargaining, as they had been doing, on an article by article basis.

Hempel testified that Steeg presented the proposal as a "take it or leave it" proposition and that if he refused to accept Sun Harvest, his client would be in for a "long hot summer." Hempel testified that he took this to mean mass picketing, "strikes, the possibility of violence, and unfair labor practice charges being filed. He also testified that Steeg told him his latest proposal could not be serious, that he should bring back another proposal (though she had not countered to this one) and that his

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45/The original meeting of September 12, 1979, gwas cancelled by mutual agreement in that strikes had broken cut in the vegetable industry, and Hempel and Steeg were both involved in those disputes In addition, Hempel testified that he and Steeg were both negotiating a Sakata contract at that time. According to Hempel, he tried to arrange other meetings between September 26 and October 12 with Steeg, but that she was tied up in other negotiations.

wage proposal amounted to a "declaration of war."

According to Steeg, Hentpel gave an immediate response that he was not interested in settling along the Sun Harvest lines and that it was the Union's fault they had not yet reached an agreement. After Steeg asked him to at least take the offer to Paul Bertuccio, Hentpel agreed that he would.[46/]

Meeting of November 1, 1979

The first order of business was that Marion Steeg introduced herself to Tina Bertuccio. Although Steeg had been Union negotiator since June 7, 1979, this was the first negotiating session since that time that Mrs. Bertuccio had attended.[47/] No other management representatives had appeared in her absence during that time.

Steeg then gave a verbal review of negotiations and pointed cut that of the 28 language articles, only about one-half had been agreed to, all on minor articles, and that only one section had been closed out in the five meetings held since she had become the UFW's negotiator. As to the economic articles, Steeg pointed out that although Respondent had rejected

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46/Hempel testified that he told Steeg in a telephone conversation on October 17, that the Bertuccios were not interested in considering any kind of a Sun Harvest settlement.

47/Mrs. Bertuccio, the only management representative of Respondent that attended any of the negotiating sessions, had missed the last five meetings in a row—August 2, August 13, August 29, August 31, and October 12, 1979. Steeg had previously told Hempel (August 15, 1979) that the Union felt it was necessary to have a representative from Respondent, who was familiar with the operations of the business and authorized to make decisions, present at every negotiating session. Hempel responded that he had all the information the Union needed and had the necessary authority to make decisions; that Paul Bertuccio would not attend any sessions and that if representatives of the Union wanted Tina Bertuccio, they would have to wait until the end of the season in October.

Sun Harvest for an article by article approach to negotiations, its proposal evidenced no significant movement. In short, it was Steeg's assessment that negotiations were going nowhere.

At that point Steeg offered the West Coast[48/] agreement as a basis for settlement, but Hempel rejected this saying that Respondent wanted to bargain out their own contract.

Next, Steeg presented Hempel with both an economic and language proposal (G.C. Ex. 64),[49/] and the parties engaged in a comparison between this latest Union proposal and Respondent's last one (G.C. Ex. 62) of September 21.

Among those matters discussed were:

Discipline and Discharge

Steeg pointed out that Respondent's latest proposal (G.C. Ex. 62) was a step backwards in that it had added a new section (section B) which deprived employees of the right to be disciplined only for "just cause." By defining what just cause was, it would prevent an arbitrator from finding otherwise. In addition, Steeg pointed out that Respondent also added a sentence (in section 3) that would prevent an employee from ever grieving a suspension; only discharges would be subject to the grievance process.

48/West Coast Farms is a mixed vegetable, lettuce, celery. and cauliflower grower in Watsonville, California. At peak the company employs approximately 250-350 workers.

49/Hempel testified this was a counterproposal to his last proposal (G.C. Ex. 62) and that he had previously asked Steeg (on October 1) to send one to him but that Steeg had replied that his September 21 proposal was so low, she was not even sure she would make a proposal.

Medical Insurance (Robert F. Kennedy Farmworkers Plan)

Hempel proposed the WGA medical plan and stated that he would briny in an expert from Western Growers Assurance Trust to explain the differences between the two plans and the advantages of WGA's.

Mechanization

The Union changes its position here by agreeing "to allow mechanization in the second and third years of the contract provided that no seniority worker was displaced by reason of such machinery.[50/]

Wages

Several of the workers present complained of the low wages and absence of any retroactivity in Respondent's last offer. Hempel replied, according to Steeg, that Respondent wanted to stay competitive with its neighbors and that if these employees weren't satisfied, they should look for work elsewhere.

Steeg inquired as to why the harvesting rate for walnuts (G.C. Ex. 62, Article 50, Item 7) had no fixed rate but was between $3.35-$3.60 (for the first year), $3.60-53.85 (for the second year), and $3.35-$4.10 (for the third year). Hempel stated he couldn't explain it just that some got more than others. Steeg replied that information showing the reasons for these distinctions was precisely what she had been seeking from Respondent for some time. Steeg testified she reminded

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50/The Union's previous proposal of August 2, 1979 (G.C. Ex. 57) had simply stated: The Company agrees not to utilize harvesters, or use or introduce any other type of machinery or mechanical device which displaces workers unless there are negotiations and agreement with the Union.

Hempel that her information requests had still not been fulfilled and that General Counsel Exhibit 28 was all she had received since her August 2 request. Steeg repeated her request for information concerning hours worked, production information, the history of wage increases, and job classifications.

Hempel testified that he told Steeg that Respondent had given the Union information intended to assist in this area, and that if a worker performed work as a general laborer and in the shed, he would have two separate classifications; and same would be reflected on the lists given to the Union. Hempel also testified he told Steeg he couldn't get the information she wanted on how long it took to prune certain trees because Respondent did not keep records like that. As to Steeg's informational requests regarding piece rate, Hempel could not recall if he responded then or, for that matter, ever responded.

There was one article agreed to—Rest Periods—because the Union had, on August 31, reduced its proposal from twenty minutes to fifteen (G.C. Ex. 61). This was also the first economic article in which agreement was reached.

November 13, 1979 Meeting

Mrs. Bertuccio created quite an uproar when, during negotiations, she proceeded to read a magazine article which Steeg testified was an anti-UFW article.

Hempel testified that the article had raised some serious questions in his mind about the Union's utilization of funds for CPD, Martin Luther King, and Juan de la Cruz and that

he brought the magazine in order to verify some of the allegations contained therein.[51/] But Steeg testified that Hempel never did ask any questions based on this magazine' article. Hempel was not questioned about it.

There were other items of interest.

Grievance and Arbitration

In Respondent's counterproposal of September 21, 1979 (G.C. Ex. 62), it had agreed to make Union stewards available immediately to workers wishing to submit their grievances and to make the "Grievance Committee" of the Union available to perform their second step duties under the agreement, which included meeting with a committee designated by Respondent to help resolve disputes before arbitration.

However, at the November 13 meeting, Respondent expressed a desire to drop the "Grievance Committee" concept; and in addition proposed the following new language:

> "The party (sic) has agreed that all grievances shall be submitted, processed, and/or discussed after working hours." (G.C. Ex. 43)

Medical Plan

Again Hempel promised to bring into negotiations -a WGA Trust analyst who would compare the two plans. (G.C. Ex. 43)

Hiring

The problem the Union had with Respondent's counterproposal of September 21, 1979 was that it did not

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51/Hempel initially testified that he had previously requested information on some of the funds, that Steeg said she would get it for him but she never did. Later in his testimony, Hempel admitted receiving cost information on the Martin Luther King Fund and stated that he had been in error when he testified he had never received any information. He stated he had confused this fund with CPD.

address the Union's central problem of supervisor Jose Duran's favoritism in hiring. Resoondent's language set no criteria for hiring[52/] (such as first applicant gets first available position, etc.). The Union continued to propose the hiring hall as the only method to solve the problem of discriminatory hiring.[53/] Herapel suggested that under Respondent's hiring proposal, the Union could always file a grievance if it was not happy, but Steeg pointed out that since there were no contractural guidelines as to whom could be hired, there would never be anything to grieve.

Because of the significance of this subject matter to the Union, Steeg suggested a special meeting to deal with it separately. Hempel declined, saving it would be a waste of time.[54/]

52/Article 3B of Respondent's proposal stated: "Whenever at the beginning or in an operating season, the company anticipates the need for new or additional workers to perform any work covered by this Agreement, the company shall hire such qualified new or additional employees as its requirements dictate."

53/Earlier, Hempel did discuss the possibility of an alternative to the hiring hall; i.e., that the Ranch Committee would hire. Steeg replied that she might consider it and then asked if he was proposing it. According to Steeg, Hempel said "No", that he just wanted to see if she would accept it. In any event, Respondent apparently never put this idea into writing.

54/Paragraph E of Respondent's counterproposal (G.C. Ex. 62) stated "The company and the Union shall mutually agree upon a fair and equitable hiring procedure to be used by the company pursuant to this Article...." Steeg's position, was that if hiring procedures could not be agreed upon during the bargaining, how was it possible to agree once the contract had been signed.

Wages

Hempel offered to raise wages $.05 per hour across the board for all classifications for the next two years. Thus, general labor rates, for example, were raised from $3.35 to $3.40 in the first year, $3.40-$3.45 in the second year and $3.45-$3.50 in the third year of the contract. Hempel's rationale for this was that Respondent intended to pay what the majority of non-union companies in Hollister were paying. In fact, Hempel offered to put this in writing; i.e., that. Respondent would agree to pay whatever the majority of non union[55/] growers in Hollister[56/] paid for the next year.

Reporting and Standby Time

Here the Union had moved in its November 1, 1979 proposal (G.C. Ex. 64) by eliminating the guarantee from applying to those situations where "rain, frost, government condemnation of crop, or other causes beyond the control of the company" prevented work from being available.

Cost of Living, Union Representative, Mechanization, Injury on the Job and Delinquencies were also discussed, although Hempel failed to mention them in his November 20 letter summarizing this meeting.[57/] (G.C. Ex. 43)

55/The only union companies under contract in Hollister were Harden Farms and Almaden, although West Coast Farms and Growers Exchange also have fields there.

56/In a subsequent conversation with Steeg on November'29 (to set up the December 5 meeting), Hempel expanded the Hollister area to include Gilrcy. (The only union company under contract in Gilroy is Mistral Vineyards).

57/These were among the same contractural provisions which Hempel had said he wanted the Union to delete from its proposal

Respondent made two written proposals on Hours of Work and Overtime and Reporting and Standby Time. (G.C. Ex. 66)

December 5_, 1979 Meeting

Prior to this meeting, Steeg had written Hempel to complain about negotiations (G.C. Ex.44) and referred to Hempel's November 20 letter to her (G.C. Ex. 43). Steeg felt there was little enough progress at the table and that negotiating by mail would not improve the situation.

At the table, Respondent offered a package deal—if the Union accepted Respondent's Hiring proposal, Respondent would accept the Union's Union Security proposal. Steeg rejected this offer. According to her, hiring had long been one of the areas the Union's Negotiating Committee felt the strongest about because they had been beseiged with complaints about Duran's discriminatory treatment of workers. The fact that there was no seniority system only further exacerbated the situation. In that Respondent's Hiring proposal did not solve the discrimination problem, this limited package deal was rejected.

There were numerous other discussions:

Funeral Pay

Hempel stated he had accepted Sun Harvest. Steeg pointed out that since Sun Harvest included days off for a grandfather's/grandmother's death, and extra days pay for travel in excess of 300 miles, Hempel's current proposal did not match Sun Harvest. Hempel checked and agreed.

Medical Plan

As the WGA expert was still not in attendance, Hempel was unable to make any comparison between the two plans, as he had promised. Hempel represented he would attend the next session.

Pension Plan

Hempel complained that this plan would cost Respondent too much money. When Steeg asked what the probjected cost was, Hempel replied he didn't have any figures but just knew it would be too high.

Vacations

The parties remained very far apart. The Union had proposed 350 hours for eligibility on August 31, 1979, and at this meeting Respondent proposed that if an employee worked 1,700 hours in the preceding season, he would receive 50 hours of vacation credit. When Steeg pointed out that that would mean a worker with twenty years seniority would get the same vacation as one with one year. Hempel said he would take another look at the proposal.

Mechanization

Hempel testified that mechanization was an inherent management right and that Respondent's article on management rights was consistent with Hempel's intent not to have a mechanization clause.

Steeg testified that Hempel's objection to a mechanization provision was his belief that it would mean' Respondent would have no right to introduce machines. Steeg

testified that she pointed out to Hempel that this was not true in that the Union proposal actually provided that there would be no mechanization only until the second and third year of the contract and that at that point mechanization would be permitted except that workers with seniority could not be displaced. Hempel, on the other hand, testified that this proposal was still unreasonable for the very reason that it would limit mechanization in the second or third year of the contract.

Paid Union Representative

Respondent continued to refuse to discuss the paid Union Representative. Hempel stated that it couldn't even be discussed because Mrs. Bertuccio wasn't there (she had left) and that the Union would have to convince her.

Hours of Work and Overtime Respondent had proposed that for general laborers the normal work schedule[58/] should be ten hours, Monday through Friday, eight hours on Saturday and four hours on Sunday (G.C. Ex. 66).

Economic Proposal

There was discussion on the economic proposal. According to Hempel, he pointed out that though he wasn't pleading poverty, if Respondent were to accept all the wage demands plus the fund contributions demanded by the Union it would amount to almost a 100% labor cost increase the first year; and Respondent could not absorb that kind of cost.

58/Meaning the maximum work hours which may be worked before Respondent would be obligated to pay overtime.

Hempel also testified that Steeg responded that Respondent's wage proposal was so unreasonable as to be like a declaration of war and that the parties were near impasse. Hempel testified that it was at this meeting that he first told Steeg he was assuming a new position at Western Growers Association, Director of Governmental Affairs, and that there was possibility in the future that' he would be replaced by another negotiator.

January 7, 1980 Meeting

The Union made a language and economic proposal which included movement in the economic package (G.C. Ex. 67). Steeg testified that since Respondent had complained so much about money, that she was hoping her proposal would constitute a breakthrough. Compared to the last Union proposal of November 1 (G.C. Ex. 64), it feature the following changes.

Wages

The proposal was reduced for many categories in the first year; e.g. general labor down from $5.25 to $5.20; packing shed workers down $6.00 to $5.90; tractor driver (Class "A"), down from $7.50 to $6.85 etc.

Retroactivity

Retroactivity was moved up from November of 1978 to January of 1979.

Cost of Living

Semiannual payments were proposed instead of quarterly. (The advantage of this to Respondent would be that it would delay the time in which it had to contribute so it could invest said sun for a longer period).

Medical Plan

The Union moved from six and one-half percent (per hour) to six percent.

Pensions

Costs were reduced here, as well.

Martin Luther King Fund

Retroactivity was removed.

Leave of Absence for Funeral

The Union accepted three days of paid leave with benefits including grandparents' death and deleted its proposal (Sun Harvest) for a days leave if the travel was in excess of 300 miles one way.

January 21, 1980 Meeting [59/]

Respondent made a package proposal in writing to the effect that it would accept the Union's Union Security language (including good standing) if the UFW would accept Respondent's Hiring proposal. [60/] Hempel testified that although there was no logical connection between the two clauses, it was a good idea to put both in one package since there were such strong philosophical differences on the subject; i.e., the Union wanted good standing and Respondent wanted to continue its past hiring proposal.

Respondent also proposed packaging the Grievance and

59/Steeg testified that the previously arranged January 10 meeting was cancelled on January 9 by Hempel who explained he wasn't ready. Hempel testified that the January 4 meeting date was cancelled at the request of Steeg because both she and Hempel had some things to do on the Sakata negotiations.

60/This identical proposal had already been offered and was rejected at the December 5, 1979 meeting.

Arbitration section with the No Strike clause. Hempel testified that he had no problem with the Grievance and Arbitration language except that it was the only means of! redress and did not address itself to the problem of wildcat strikes. He testified he wanted the ability to go to court and request damages against the Union for violation of the No Strike clause.

A brand new written proposal (G.C. Ex. 68) was offered by Respondent which, for the first time in one year of bargaining, made offers on Injury on the Job, Pensions ($.05 per hour for each hour worked to the fund in the third year of the contract), Citizenship Participation Day (in the third year of the contract), and Mechanization, packaged with Management Rights. (If a worker is displaced by mechanization, he "shall be placed on a preferential hiring list which the company and the Union will use in conjunction with Article 3, Hiring").[61/]

There were also other proposals of interest.

Wages

Although Respondent continued to refuse to offer any retroactivity, Respondent verbally proposed[62/] an increase in all hourly wages from $3.40 to $3.60, a seven percent

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61/What Hempel meant by "preferential hiring" was net explained. This had been one of the main areas of disputes in the discussion over hiring and in particular, over the allegations of the discriminatory hiring practices of Jose Duran.

62/Hempel admitted on cross-examination that Steeg had asked than this proposal be reduced to writing but than he never did so.

increase in the second year and a five percent increase in the third year. Hempel testified he also thanked the Union Committee for exhibiting concern over Respondent's economic situation by reducing its wage proposal in its last offer (G.C. Ex. 62).

Vacation

Respondent scaled its proposal down to give credit to employees with 1-5 years service; but, it retained its hourly minimum concept by still requiring 1700 hours in the first year, trimming it to 1500 hours in the second year, and 1300 hours in the third year. This proposal, however, would not cover piece rate workers since none worked 1700 hours in a year. According to Steeg, when this was pointed out to Hempel, he admitted that it would not cover piece rate workers and that he would revamp the proposal.

Discipline and Discharge

Although Respondent removed its definition of just cause contained in G.C. Ex.62, Section B), it inserted a new clause (Section D) in which it limited the access of Union representatives in assisting discharged or disciplined employees to only those periods when the employees were not working; e.g. lunch, before work, after work.

In addition, Respondent proposed a five day probationary period in this section (Section A) while at the same time had proposed a ten day probationary' period in its Hiring proposal (Section I).

Medical Insurance

Although promised, the WGA expert who was going to compare the two plans was still not present.

February 27, 1980 Meeting [63/]

The Union made a new economic proposal (G.C. Ex. 68(a)),[64/] which reduced wage rates from the previous proposal of January 3, 1980 (G.C. Ex. 67). General labor was reduced from $5.20 to $5.15 per hour and higher classifications were also reduced.

Vacations

The Union, as a concession, offered to up the eligibility requirement for vacations from 350 to 500 hours.

Pensions

The pension plan was changed from the January proposal, as well. Retroactivity was eliminated; and the amount of contribution was reduced to $.20 (from $.24) in the first year, $.21 (from $.27) in the second year and $.22 (from $.30) in the third year.

Hiring

The Union continued to complain about discrimination in hiring and particularly that the labor contractor's employees were being given preference over Respondent's regular

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63/Hempel testified the next session had been tentatively set for February 12, 1930 but that he had been assigned by WGA to represent O. P. Murphy Co. in an unfair labor practice case, that it was scheduled to take one month, that he requested and received from the ALO in that case a break of a week in order to hold Bertuccio negotiations, and that February 27 was the date that was arranged for those negotiations.

64/Some of the proposals continued to state "pending information" because the Union was uncertain (for example, in the case of onions) whether the work belonged to the bargaining unit. The Union was desirous of finding out Respondent's definition of custom harvester and labor contractor. As Respondent refused to make proposals on onions, the Union could not be sure how workers were paid.

employees [65/] and that the season was almost ready to start and there still was no hiring system. Hempel testified that he explained to Steeg that it was impossible for Respondent to revamp its hiring "but in deference to the Union, we would look into their concerns, we would talk to Paul."[66/]

Steeg then proposed an interim hiring agreement in which 1979 workers would be given first preference, then 1978, etc. Hempel said he would get back to her with an answer.

Hempel testified that he told Steeg that Respondent was planting sugar beets but that this decision would have no effect upon the bargaining unit.

According to Steeg, Hempel also promised to let Steeg know about the cropping pattern for the current year—what was going to be planted in 1980 and what was not going to be planted that had been planted in the past—and its effect upon the bargaining unit.[67/]

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65/Hempel testified that he heard complaints about Duran's hiring practices at almost every session.

66/Tina Bertuccio was present at the bargaining session when this remark was made.

67/Hempel was not asked and therefore did not deny that he made such a representation. However, he did testify that he told Steeg it was economically unrealistic to expect a farmer to tell the Union what crops he was growing, especially when quick decisions often had to be made based upon market conditions.

March 24, 1980 Meeting [68/]

Interim Hiring

Although Hempel made it clear that Respondent intended to follow its hiring procedures of the past, Mrs. Bertuccio announced that she was taking down the names and phone numbers of workers as they reported in; and Respondent would call them to let them know when work would be available. She also stated that Duran was compiling seniority lists in the field.

The Union explained its previous Hiring proposal in more detail, particularly that part where a senior worker may bump a more junior one. Hempel testified that he had to explain again to Steeg Respondent's system that if a worker walks in and asks for work and if there is work available, he gets it. According to Steeg, however, Hempel did indicate he needed more time to consider the Union's proposal (although he had already had the proposal for some time) and that he now wanted a special meeting.[69/]

Seniority

Respondent appeared to be making movement in this area. The Union had previously (November 1979) proposed a seniority system (G.C. Ex. 65) which came to be know as the "yellow

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68/The meeting was originally scheduled for March 14 but was cancelled by Hempel.

69/A special meeting was never held, and Respondent never really answered the Union's proposal.

book."[70/] In January of 1980, Respondent presented its proposal (G.C. Ex. 68) which adopted much of the language of the Union. Then in March, Respondent made another seniority proposal. (G.C. Ex. 69)

The Union's objection to the proposal was that: 1) it constantly referred to job classifications and there was still no definition and 2) it was unclear how workers got assigned from general labor to shed or vice versa.

Health and Safety

Respondent made its first proposal on this subject since it had announced, on May 7, 1979, that it was off the table.

Housing

Here Respondent made its very first proposal (G.C. Ex. 69). Previously, Respondent's position had been to refuse to discuss it while requesting the UFW to delete it.

Medical Insurance

Once again there was no expert in attendance from WGA. Hempel indicated Respondent might be ready to accept the Union plan if eligibility were tighter and it was less costly. Still, there was no proposal on the table from Respondent.

Respondent continued to package Grievance and Arbitration

70/The "yellow bock" was not intended to be- a part of the contract but to supplement it. Whereas the contract language was to set down the basic principles of seniority the "yellow book was to apply those principles to specific situations; e.g. transfer, promotions, recall, etc. However, the Union later agreed to include the 'yellow book' in the contract". (G.C. Ex. 74)

with Kb Strike and Hiring with Union Security though both had been rejected.

April 2, 1980 Meeting

Steeg scheduled this meeting at the Labor Temple building in Salinas where a number of labor unions maintain offices. When Hempel heard where the meeting had been scheduled, he told Steeg in a phone conversation that he refused to meet in any hall that was associated with any labor organization and that he would prefer to cancel unless another meeting place could be arranged. Rather than cancel, Steeg was able to rearrange the meeting at the Bank of America.

Respondent had made a verbal wage offer at the previous meeting which it, per Steeg's request, now presented in writing (G.C. Ex. 70).

The Union also presented a proposal (G.C. Ex. 71) which consisted of two packages. The first combined Union Security, Hiring Halls, Discipline and Discharge, Subcontracting, and Grievance and Arbitration and accented the Sun Harvest language. In most cases, this was a concession to Respondent.[71/] In addition, the Union withdrew its proposal for On-the-Job Training provided that Respondent accepted the rest of its Seniority article.

In the second package, the Union changed its position on Mechanization, Medical Plan, Grower-Shipper, Successorship

71/For example, under Discipline and Discharge, the Union accepted for the first time a five day probationary period per Sun Harvest (See G.C. Ex. 79, p. 10). Under Grievance and Arbitration, the Union also agreed for the first time to a provision that grievance meetings should not be held during work time.

Supervisors,[72/] standby Time,[73/] vacations,[74/] and Union Representative more favorably to Respondent.

The Union also made a wage proposal[75/] (Appendix A of G.C. Ex. 71) in which many hourly rates were covered but piece check rate remained the same. Hempel testified that he informed Steeg that Respondent was at $3.65 per hour, had made substantial movement on fringes (medical and pension plans, Martin Luther King plan, holidays) and that he didn't know if there was much money left to offer.

Despite long discussions, there was still no agreement on seniority or hiring. Steeg continued to point out that too many people had been hired for available work and that Respondent was not following its own hiring procedure which it said it would follow. In addition, another complaint was that many workers had been laid off while Duran continued to give work preference to labor contractors. Hempel said he had no new proposals; Mrs. Bertuccio stated she would look into the problem.

72/Correa and Martinez were both allowed to perform bargaining unit work within certain limits.

73/Previously the Union had proposed pay for any travel between fields. Here it reduced its proposal to pay for travel only in excess of one-half hour.

74/Eligibility requirement was increased from 500 to 700 hours.

75/Once again, many categories were designated, "pending information."

April 18, 1980 Meeting [76/]

In the absence of Hempel, Howard Silver appeared for Respondent. Silver apologized for not having any new proposals, and explained that Hempel was tied up with the State Legislature on other business and could not attend.

This meeting was unproductive because Silver was unfamiliar with the history of negotiations. For example, Silver asked Steeg for her proposal on Jury and Witness pay. After Steeg explained that had already been agreed to, Silver stated that he had only been given a list of what to ask. At another point, Silver said Respondent would have to study the Union's Hiring proposal (G.C. Ex. 72) although Steeg pointed out that this was similar to the proposal made on February 27 which Hempel has supposedly been reviewing since then.

Steeg asked Silver why Respondent still wanted to delete the Martin Luther King Fund proposal after the Union had given it all the information it wanted. Silver replied it was because of philosophical reasons. Steeg then asked' if this were true, why did Respondent request the information in the first place?

76/The next meeting was not set up until April 11 (according to Hempel) or April 14 (according to Steeg) because that was the first time Hempel was available. Hempel admitted that he called Steeg to tell her he was unavailable to meet at the prearranged date so they agreed to meet on April IS. On April 17, Hempel called Steeg to report that he couldn't attend the session but that Howard Silver (who had previously attended two sessions March 24 and April 2, 1930) was going to be in the Salinas area and could attend the meeting. Hempel made it clear that there would be no new economic proposals but that Respondent would have a language proposal.

Finally Silver represented that Respondent might consider accepting the Union's Union Security proposal if the Union accepted Respondent's Hiring language, a package that had previously been twice offered by Hempel and twice rejected by Steeg.

May 2, 1980 Meeting

This meeting was held at the Grower Shipper office. Mrs. Bertuccio did not attend. It was at this meeting that real frustrations started to show. Steeg walked into the meeting with about twenty workers, and Hempel wanted to know if they were at war. Steeg replied that if their problems couldn't be solved, the Union might have to take steps to do so on their own. Hempel asked if there was any point in holding anymore meetings. Steeg asked Hempel for a proposal, and Hempel complained it was always Respondent that had to propose contract language and that the Union never did.

Respondent rejected out-of-hand the Union's packages of April 2, 1980 (G.C. Ex. 71) and offered its own proposal (G.C. Ex. 73).

Seniority

Despite the long discussion of differences on April 2, 1980, Respondent raproposed the sane seniority language as it had on March 24, 1980.

Medical Plan

Although Respondent indicated for the first tine' it

would accept the Union's plan,[77/] further probing by Steeg revealed that Respondent had added language affecting eligibility and the rate of contributions bringing it below Sun Harvest. Thus, there was really no acceptance because Respondent had not agreed to Sun Harvest, which is what the Union had been proposed on April 2, 1980 G.C.-Ex. 71),

Maintenance of Standards

While Hempel accepted Sun Harvest, he added the language: "Nothing herein shall preclude the company from exercising its management rights as provided in Article 16 hereof." This was unacceptable to the Union because since maintenance of standards was a limitation on management rights, placing in this this section language upholding management rights would confuse the issue.

Supervisors

Respondent rejected the Union's proposal of April 2, 1980 because, according to Hempel, it couldn't accept the Union's limitations on its supervisors' ability to do bargaining unit work. Hempel made no counterproposal.

77/The WGA. "expert" never did show up.

78/Sun Harvest did not have a 160 hour (one month) eligibility requirement and had an hour guarantee not a 6 hour one. Sun Harvest contributed $.34 per hour (G.C. Ex. 79, pp.25-261; under Respondent's plan the contribution was $.18.

Interim Hiring

Though it is now May, Hempel reported that further work was being done on Respondent's proposal.

Wages

Respondent offered a $.10 per hour raise across the board to $3.75 per hour, a six percent increase the second year and a six percent increase in the third year. Hempel, stated, however that he was offering no retroactivity and that it was never on the table. Steeg replied that the Union was willing to defer some costs to the third year but that the parties were still so far away on wages that this approach was not useful.

Respondent made some movement:

Vacation

Respondent did offer to reduce eligibility in the second year of the contract from 1500 hours to 1300 and in the third year to 1100 hours.

Martin Luther King Fund

Despite Howard Silver's remarks at the previous meeting that Respondent was opposed to this proposal on philosophical grounds, Respondent offered $.02 effective the third year of the contract. This was the first indication, since the bargaining commenced, that Respondent was willing to make any proposal on this article.

79/Under Sun Harvest, the employer was obligated to contribute $.06 effective the third year of the contract.

There was one article that was agreed to—Funeral Pay. The Union dropped its demand for an extra travel day, and Respondent accepted the days off for grandparents' death concept.

On May 13, 1930, the Union sent a new proposal (G.C. Ex. 74) to Hempel.

General labor was reduced $.05 to $5.10 and piece rate was reduced $.01 over the last wage proposal of April 2 (G.C. Ex. 71).

Medical Insurance

The Union agreed to cut back on the Sun Harvest contract. Respondent would have to contribute $.22 until July 14, 1980 and thereafter $.38.

Pension

The Union agreed to reduce the contribution to $.15 in the first year, $.1S in the second and $.20 in the third, below Sun Harvest.

Martin Luther King

Here again the Union reduced the contribution to $.05 in first and second year and $.06 in the third year, also below Sun Harvest.[81/]

The Onion changed its position on Resecting and Standby and accepted Sun Harvest on Records and Pay Periods When the Union accepted the Sun Harvest language, there was

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80/Under Sun Harvest the rate of contribution commencing on September 4, 1979 was $.13 per hour (G.C. Ex. 79).

81/Under Sun Harvest, the employer was obligated to pay $.06 per hour for all three years of the contract (G.C.Ex. 79).

an agreement.

Meeting of June 12, 1980 [82/]

As reflected in Respondent's summary presented at this session (G.C. Ex. 75, next to last page), Respondent made no changes from previous positions on many major items: Mechanization, Injury on the Job, Hours of Work and Overtime, Supervisors, Subcontracting and Successorship. Respondent again asked the UFW to delete Union Representative and Cost of Living. Hempel testified that at every session that Cost of Living came up, he told Steeg he believed that a wage rate that was so fair and reasonable over a three year period could be negotiated that there would be no need for such a provision.

As regards the Union representative question, Hempel testified Respondent was still unwilling to accept the concept of paying a worker wages for doing Union work.

No proposal was offered on housing and Respondent indicated it wanted to phase it out. Respondent reproposed the package of the UFW's Union Security proposal for Respondent's Hiring concept, and the Union's Grievance and Arbitration clause for Respondent's Management Rights and No Strike provisions, all of which had already been proposed and rejected on previous

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82/This was the first meeting in five weeks. Steeg took a one week vacation shortly after the May 2 session, and the dates of May 13 and 14 were tentatively agreed upon as the new dates. Hempel testified he was unavailable to meet and told Steeg to send him her proposal which she did on that same date (G.C. Ex. 74).

occasions.

Martin Luther King Fund

Respondent had proposed at the May 2 meeting for the first time $.02 per hour for each hour worked commencing in the third year. This proposal was placed in writing at the June meeting (G.C. Ex. 75); At that same meeting, Hempel said he was still waiting for information from Steeg as to whom the monies were remitted and the investment level of the Fund. Steeg replied that the Union had already given Respondent the information and that there had been no mention of the need- for any further information at the April 18 meeting when Silver announced Respondent was opposed to the proposal on philosophical grounds.

CPD

Hempel indicated he remained opposed to good standing, that an ALRB decision dealing with the matter confirmed this opposition, and that legislative hearings were also continuing. Hempel complained that he had still not received information from Steeg on the Fund, but Steeg testified that Hempel had never asked her for any information.

Medical Plan

Respondent increased its offer $.02 to a $.20 contribution per hour the first year, $.22 the second year and $.24 the third.

Pension Fund

Likewise, a raise of $.02 per hour in the second year was proposed going up to $.03 in the third.

Grower Shipper

Respondent accepted Sun Harvest including the limiting language offered by the Union on April 2 (G.C. Ex. 71).

Vacation

Respondent increased the number of those who would be eligible for percentage raises by lowering the number of years of service required from five to three years and from fifteen to ten years.

Union Representative

Hempel testified that the Union conditioned its acceptance of Respondent's Grievance and Arbitration clause with Respondent's acceptance of the Union Representative provision

Discipline and Discharge

Hempel testified that Steeg announced this section was tied to the Hiring proposal and that he became angry at this because Steeg had never mentioned it before.

Hempel testified that he thought there was an agreement at this meeting on Leave of Absence but that he later had some doubts about this and told Steeg at the next meeting on July 12 that he needed to check to make sure.

June 21, 1980 Meeting

This meeting lasted only 45 minutes, and no proposals were discussed. Instead, Hempel announced that he was no longer going to be the negotiator and that Howard Silver was taking over for him.

Hempel testified he told Steeg that Respondent had no plans to go out of business but that some of the

property was going to be sold to the Federal Aviation Administration for airport use, that it was poor soil anyway and only good for sugar beets which was, according to Hempel, not a bargaining unit crop. According to Steeg, Hempel stated that there were five ranches where there would be no agricultural operations in 1980 (no acreage in lettuce, chile peppers, gourds, ornamental corn) but that in his opinion it would not affect the bargaining unit.

Steeg further testified that she asked Hempel about Respondent's future plans and was told it had no immediate plans. Steeg's response was that because of the uncertainty about Respondent's plans for future years, she was withdrawing her Successorship proposals, reevaluating the Union's position, and that a new proposal would be submitted later.

July 12, 1980 Meeting [84/]

The discussions primarily focused on the Union's newest proposal (G.C. Ex. 76) which was presented at this session.

Modfications were made in vacation (eligibility increased to 800 hours in the first year over its last offer in April of 700 hours (G.C. Ex. 71), the pension fund was.

83/Steeg had read a newspaper article that Respondent was going out of the farming business, and on June 5 she called Hempel and asked him to verify this at the June 12 meeting. At that meeting Hempel denied the newspaper story.

84/Hempel testified that this meeting was originally scheduled for June 27 but was continued to this date because Steeg requested additional time to put together a proposal.

reduced from $.15 to $.10 per hour, and the Martin Luther King Fund was not made operative until January 1, 1981, a six month reduction in cost.

Wages were reduced in many categories; e.g., general laborer wages were reduced $.10 to $5.00, heavy equipment operator from $6.45 to $6.20, irrigators from $5.40 to $5.10, tractor subforeman $6.55 to $6.20.

Hempel asserted again that Respondent could not absorb the cost of high wages and high fund contributions all in the same year.

Seniority

An active discussion ensued over seniority. Steeg told Hempel that her proposal had accomplished what Respondent wanted—the combination into the agreement of Article IV with the "yellow book." However, during the discussions over this Article in which Steeg persistently pointed out the wage differences in various classifications, Hempel took the position that his May 2, 1980 "seniority classification and list" (G.C. Ex. 73, Appendix) was not a proposal at all but merely for discussion purposes that Respondent was not necessarily in agreement with it. The result of this was that Steeg was now uncertain as to what Respondent's position was on seniority and job classifications and had to request Hempel to clarify his stand.

Finally, the Union offered a new proposal on Successorship since it had removed its prior proposal from the table at the previous meeting.

Meetings of August 4 and 5, 1980 [85/]

Hieing

On the question of hiring, Hempel testified that he reiterated that Respondent was going to hire the same way as it had in the past/ although he told Steeg that Duran had instituted a "sign up" procedure which was what Respondent was proposing.

Wages

Hempel reproposed the $3.75 wage.[86/] When asked by Steeg if this was his final offer, Hempel testified that he replied "No", that Respondent would have to examine the total economic impact. According to Hempel, Steeg complained that the wage offer was predictably unacceptable.

Hempel testified that Steeg pointed out many errors in his wage proposal, including errors in anise, cardoni, and apricot piece rates (about which she testified in this hearing, infra). Hempel admitted the errors but stated they were clerical only and that they had never been brought to his attention before.

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[85/] Hempel had told Steeg that a prehearing conference in the present case was set for July 15 and that he would be unable to set up any dates for the next negotiation until afterwards.

86/Respondent raised wages $.25 per hour (and proportionately for piece rate) on July 1, 1980 (G.C. Ex. 73, Last pace). This matter is the subject of a separate unfair labor practice allegation infra.

Housing

Mrs. Bertuccio brought in statistics showing that the cost of upkeeping the houses was more expensive than the rents brought in.

According to Hempel, he tendered a partial proposal (Resp's Ex. 21) and, in addition, verbally reproposed Sun Harvest language on Successorship, Subcontracting, Grower/ Shipper, Leave of Absence and Maintenance of Standards.

Hempel testified that Steeg agreed to these proposals but only if packaged with other items.

Hempel testified that Grievance and Aribtration was settled because he "capitulated",[87/] and Supervisors,[88/] Injury on the Job and Management Rights were likewise settled.

September 2, 1980 Meeting

Respondent had mailed to the Union a new proposal on August 8 (Resp's Ex. 23).

During the meeting Hempel again argued against the good standing clause until Steeg pointed out that his most-recent proposal accepted the concept.[89/] According to Steeg,

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87/As it turned out, this article was not settled, and there was no "capitulation." The language the Respondent wanted—that members of the grievance committee not be paid for time spent on grievances during working hours—was simply removed from the Article to be later negotiated in a side letter. (See side letter language attached to Resp's Ex. 23, Article 5).

88/Again, there is no agreement here either. The issue of what work supervisors did and to what extent was simply removed from the article to be negotiated into a side letter at a later date. (Resp's Ex. 23)

89/Respondent's August 8, 1980 offer (Resp's Ex. 23) contained the following proposed language, in part, (39/ continued or pp. 70)

Hempel reviewed the document and declared the language was there by error. Hempel did not offer another proposal.

B. Analysis and Conclusion

The Agricultural Labor Relations Act defines bargaining in good faith in Section 1155.2, as follows:

> "1155.2(a) For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an '' . agreement, or any 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."

This language is the same as Section 8(d) of the National Labor Relations Act. · Thus, it is proper to refer to decisions of the National Labor Relations Board as a guide to deciding the present case. 90/

case. 90/

It has been held that the statutory duty to "bargain collectively in good faith" imposes the obligation to "meet... and confer in good faith" with a view towards the ultimate negotiation and execution of an agreement. To be sure, the Act "does not require either party to agree to a proposal or require the making of a concession. N.L.R.B. v. National Shoes, Inc., 208 F.2d 68S, 691 (2d Cir. 1953). On the other hand, an

(continuation of 89/) for Article 2, Union Security: "Each worker shall be required to become a member of the Union...; and to remain a member of the Union in good standing. Union shall be the sole judge of the good standing of its members. Any worker...who has been determined to be in bad standing by the union pursuant to the provisions of the Union's constitution shall be immediately discharged...."

90/See Labor Code Section 1143.

employer's failure to do little more than reject a union's demands is: "indicative of a failure to comply with the statutory requirement to bargain in good faith." N.L.R.B. v. Century Cement Mfg. Co., Inc., 208 F. 2d 84, 86 (1953). Thus, it is clear that "...the employer is obliged to make some reasonable effort in some direction to compose his differences with the union." N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131, 135, 32 LRRC-1 2225 (1st Cir. 1953), cert, den., 346 U.S. 887, cited in 0. P. Murphy Produce Co., Inc., 5 ALRB No. 63 (1979), review den. by Ct. App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980. In other . words, what is required is:

> "something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground.... Collective bargaining then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract...." (citations omitted). N.L.R.B. v. Insurance Agents' International, 361 U.S. 477, 4 L.Ed 2d 454, 462, 80 S.Ct. 419 (1960). See also Masaji Etc et al., v. Agricultural Labor Relations Board,5 Civ. No.5658, ___ Cal.App. ___ (1981).

And Mr. Justice Frankfurther, concurring in part and dissenting in part, in N.L.R.B. v. Truitt Mfg. Co., 331 U.S. 149, 100 L.Ed 1029, 1033, 38 LRRM 1014 (1956) stated:

> "These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to-budge from an initial position. But it is not necessarily -incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of rind The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination."

The fact is direct evidence of an intent to frustrate the bargaining process will rarely be found. As a result, a party's intent can only be discerned by reviewing the totality of its conduct. N.L.R.B. v. Reed & Prince Mfg. Co., supra; B.F. Diamond Construction Company, 163 NLRB 161, 64 LRRM 1333 (1967), enf'd, 410 F.2d 462 (5th Cir. 1969), cert, den., 396 U.S. 335 (1969); O. P. Murphy Produce Co., Inc., supra; As-H-Ne Farms, 6 ALRB No 9 (1980), review den, by Ct. App., 5th Dist., October 16, 1980, hg. den., November 12, 1980.

> "...the question is whether it is to be inferred from the totality of the employer's conduct that it went -through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in coed faith but was unable to arrive at an acceptable agreement with the union." N.L.R.B. v. Reed & Prince Mfg. Co., supra, 32 LRRM at p. 2227.

The totality of conduct may include specific acts away from the bargaining table such as unilateral changes in wages or a refusal to furnish information necessary to the fulfillment of the Union's duty to bargain. Such violations of the act raise a presumption of bad faith bargaining. Masaji Eto dba Eto Farms et al., 6 ALRB No. 20 (1930), enf'd in relevant part in Masaji Eto et al. v. ALRB; Montebello Rose Co., Inc., 5 ALRB No. 64 (1979), enf'd in relevant part in Kontebello Rose Co. v. N.L.R.B., 119 Cal.App. 3d 1 (Ct. App., 5th Dist., 1931).

Necessarily, the final determination must rest upon inferences drawn from circumstantial evidence; it involves reaching conclusions from conduct as to whether particular actions of a respondent were motivated by the desire to negotiate the best bargain possible for itself or were

motivated instead by a desire to frustrate negotiations. Columbia Tribune Publishing Co., 201 NLRB 538, 552 (1973); Queen Mary Restaurants v. N.L.R.B., 560 F.2d 403 (9th Cir. 1977). One conclusion results in the finding of a violation; the other that Respondent merely engaged in permissible hard '. bargaining. "Specific conduct which, standing alone, may not amount to a per se failure to bargain in good faith may, when considered with all the other evidence, support an inference of bad faith." Masaji Eto dba Etc Farms et al., supra, citing Continental Insurance Co. v. N.L.R.B., 495 F.2d 44, 86 LRRM 2003 (2nd Cir. 1974); Montebello Rose Co., Inc., supra. On the other hand, some action standing alone might clearly manifest an absence of good faith, but when taken in the total context of the parties' relationship does not support such an inference. Deblin Mfg. Corp., 208 NLRB 392, 399 (1974); Western Outdoor Advertising Company, 170 NLRB 1395, 1396-97 (1963).

This case raises the important question of how to separate tough negotiating from bad faith surface bargaining. The question is always hard to answer because "surface bargaining, by definition, may look like hard bargaining, and is therefore difficult to detect and harder to prove." K-Mart Corp, v. N.L.R.B., 626 F.2d 704, 105 LRRM 2431 (9th Cir.) 1980).

There is no simple formula to ascertain true motive. Each case must rest upon its own facts.

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> "At the outset we note that no case involving an allegation of surface bargaining presents an easy issue to decide. We fully recognize that such cases present problems of great complexity and ordinarily, as is the present case, are not solvable by pointing to one or two instances during bargaining as proving an allegation that one of the parties was not bargaining in good faith. In fact, no two cases are alike and none can be determinative precedent for another, as good faith 'can have meaning only in its application to the particular facts of a particular case.' N.L.R.B. v. American National Insurance Co., 343.' U.S. 395, 410. It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof recuired by law." (footnote omitted). Borg-Warner Controls, 198 NLRB 726 (1972)

With these rules in mind, it is appropriate to commence an analysis of the facts of the bargaining history between these two parties to determine their true intention towards each other judged from the totality of their conduct.

1. The Overview

In the early negotiating period, Schwartz and Andrade seemed to be making some progress, although over minor language items only. But after Hempel's entry as Respondent's negotiator, things started to bog down.

I credit Steeg[91/] when she testified that at the August 15, 1979 session, Hempel totally rejected without any reasonable explanation the Union's proposals on Mechanization, Cost of Living, Injury on the Job, Union Representative, and the Apprenticeship Fund and stated he would not offer any

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91/Steeg testified throughout in an honest and convincing manner. She evinced a remarkable memory, was articulate and thoughtful during all her testimony. She was a very impressive witness.

counterproposals on these items.[92/]

I also find that Hempel summarily rejected the proposal of October 12, 1979 to use the Sun Harvest contract as the basis for an agreement (although he finally got talked into at least presenting the proposal to the Bertuccios for their comment) and likewise rejected the West Coast contract when Steeg suggested it at the next meeting on November 1, 1979.

Such outright rejections without any real attempt to explain or minimize the differences is inconsistent with a bona fide desire to reach an agreement. As-H-Ne Farms, supra, citing Akron Novelty Mfg. Co., 224 NLRB 998, 93 LRRM 1106 (1976).

This same uncompromising spirit pervaded negotiations throughout. I attribute this to Respondent. As of November 1, 1979, Respondent's latest offer (G.C. Ex. 62) showed the parties to be far apart on the major items. The first three pages of Respondent's proposal indicated Respondent had made no changes in several significant areas; and in fact, rather than engaging in an honest effort to reach an agreement, continued instead to ask the UFW to delete certain proposals entirely such as Union Representative, Mechanization, Delinquencies, Cost of Living, and Travel Pay.

92/The duty to bargain may be violated without a general failure of subjective good faith if a party refuses to negotiate about any of the mandatory subjects. "...a refusal to negotiate in fact as to any subject which is within 8(d) and about which the union seeks to negotiate violates section 3(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly in all good faith bargains to that end." NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177, 2180 (1962).

Thereafter, the parties' remained far apart on all major items. Despite a lengthy and potentially fruitful discussion on hiring on April 2, 1980, Respondent was still incapable of offering anything except the continuation of its present practice. The parties were not close on wages. As to other articles, Respondent had finally made its first proposal on some and small movement on others, e.g., Pension, Medical, Seniority, Vacation, and Martin Luther King. But by the time Respondent finally got around to addressing some of these issues, much time had passed. For example, it wasn't until January 21, 1980, almost one year to the day since the commencement of negotiations, that Respondent offered counterproposals to Injury on the Job, Pension, and Mechanization (packaged with Management Rights). Housing was not countered until March 24, 1980, and it was also not until March 24, that Respondent agreed to reconsider Health and Safety, which the Union had maintained for some time had been agreed to by mistake. On May 2, 1980, Respondent made its first proposal on the Martin Luther King Fund.[93/] And even by June 12, 1980, Respondent's own summary of progress (G.C. Ex. 75) demonstrated the few changes from its previous position Respondent had actually made. I do not find this kind of intransigence to be true of the UFW.

Such unreasonable delays in submitting counterproposals and total rejection of other articles are indicative of surface bargaining. As-H-Ne Farms, supra, citing Lawrence

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93/Earlier Respondent had complained it had inadequate information upon which to formulate a proposal. But by November 1, 1979 Steeg had turned over sufficient information for Hempel to compliment her on her thoroughness; he did not tell her he needed anything additional.

Textile Shrinking Co., Inc., 235 NLRB No. 163, 98 LRRM 1129 (1978).

In any event, I find this late change of position on the part of Respondent to be slight and inconsequential. Given my discussions, infra, of the specifics of the bargaining history, the mandatory subjects, Respondent refused to make any proposals on, and the other unfair labor practices committed, I conclude that Respondent has engaged in surface bargaining.

2. The Infrequency of Negotiating Sessions Over a Twenty-One Month Period, The Several Delays and Cancellations Show a Lack of Seriousness about Bargaining.

> "Parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective bargaining negotiations as they display in other business affairs of importance." A. H. Belo Corporation (WFAA-TV), 170 NLRB 1553, 1565, 69 LRRM 1239 (1968), enf'd in relevant part in A. H. Belo Corp. v. N.L.R.B. 411 F.2d 959, 71 LRRM 2441, 2444 (5th Cir. cert, den., 396 U.S. 1007, cited in O. P. Murphy Produce Co., Inc., supra.

It is clear that Respondent had an affirmative duty to make prompt and expeditious arrangements to meet and confer. J. H. Rutter Rex Manufacturing Co., Inc., 86. NLRB 470 (1949). This duty was not met by delaying arrangements for meeting and by failing to advise soon thereafter when -another meeting could be arranged. O. P. Murphy Produce Co., Inc., supra, citing Exchange Parts Co., 139 NLRB 710, 51 LRRM 1366 (1962), enf'd, N.L.R.B. v. Exchange Parts Co., 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965), reh den., 431 F.2d 584.. (1965) and Coronet Casuals, Inc., 207 NLRB 304, 84 LRRM 1441 (1973). When an employer does not make itself available for negotiations at reasonable times, it may be inferred that it is attempting to delay agreement. O. P. Murphy Co., Inc.,

supra. This too is evidence of surface bargaining. Coronet Casuals, Inc., supra.

Prior to her first negotiating session with Hempel, Steeg suggested a more frequent meeting schedule. Hempel's attitude on this is reflected in his letter response of July 23, 1979 (G.C. Ex. 38): "I do not have the same luxury which you apparently enjoy of leaving days open. If you can provide the Company with an economic proposal at cur meeting, we may have something to discuss on August 2nd. There simply are not that many non-economic items which will consume more than one days time. Furthermore, the Company and Union have been unsuccessful with two day meetings—there has not been anything to discuss on the second day. Therefore, unless we have economics to discuss, and because of my schedule, I do not want to leave August 2, 1979 as an open day."

In fact, the parties did meet on August 2. (It was the August 1 meeting that was canceled.) At that meeting -- the first between Steeg and Hempel—Steeg again suggested more frequent meetings, possibly as many as several times a week, because the season was about to terminate. [94/] According to Steeg, Hempel testified that his schedule did not permit more frequent meetings than about once every fourteen days.

94/Steeg's understanding was that several of Respondent's crops would peak around early to mid-October.

At the next meeting, August 15, Steeg again suggested setting aside 2-3 days a week to meet before the end of the season. According to Steeg, Hempel stated that he could not meet more than once every 2-3 weeks. When Steeg then asked about the possibility of one solid week, Hempel got angry and stated that he would not be pushed into their meetings.

At the August 29, 1979 meeting, Steeg suggested they meet at nights or on Sunday. Hempel remarked he would have-to ask representatives of Respondent. It is not clear if he ever responded to this specific suggestion.

In fact, Steeg testified that at one point when she again requested more frequent meetings, Hempel replied that to meet more frequently, in view of the lack of progress being made, was not a good use of his time and that in any event, he couldn't afford to set aside more than one day at a time.

Respondent's reasons for rejecting the UFW's requests for more frequent meetings are totally unpersuasive. McFarland Rose Production, 6 ALRB No. 18 (1980). As the NLRB has said:

> "Nor do we consider it an adequate excuse that Kirle was busy with other matters and in no position to delegate his bargaining functions to some other attorney. It was incumbent upon the Respondent not Kirle, to provide a representative who could conduct negotiations with the degree of diligence expected and required of it by the statute." Insulating Fabricators, Inc., Southern Division, 144 NLRB 1325, 54 LRRM 1246 (1963), enf'd in 338 F.2d 1002, 57 LRRM 2406 (4th Cir. 1964).

And the Court of Appeal for the 5th Appellate District has recently held, ironically in a case concerning the same law firm as Hempel's:

> "The unavailability of the employers' negotiator cannot excuse their refusal to bargain particularly in light of the long delay which had occurred in this case and the fact that Stoll was a member of a law firm which had other attorneys who could have handled the negotiations. An attorney's busy schedule is no.' excuse for a party's failure to make some arrangements to be present at negotiating sessions N.L.R.B. v. Exchange Parts Company, (1965) 339 F.2d 829, 831-832)." Masaji Eto et al. v. ALRB, supra. See also, O. P. Murphy Produce Co., Inc., supra.

A quick review of the meeting schedule (Jt. Ex. 1)[95/] demonstrates the infrequency of meetings over the 21 months of negotiations. There were only thirty[96/] meetings or a little over one meeting per month. There were no meetings at all in June, July and September of 1979 and only one meeting in

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95/Jt. Ex. 1 does not include the last three sessions, August 4 and 5, 1980 and September 2, 1980.

96/This includes a meeting that should not have been held at all. Hempel did not show for the April 18 meeting and sent instead Howard Silver, who knew very little about the negotiations history on this property, having sat in as an observer with Hempel only once or twice. Silver offered no changes in Respondent's position and acted as if he was unaware of anything that had transpired before. He offered proposals that had been previously rejected by the Union and accepted Union proposals that had never been offered by the Union._ At one point he accepted a proposal that Respondent had previously offered. According to Steeg, during this meeting Silver apologized for not having any new proposals but explained it was because Hempel got tied up with the Legislature. I credit Steeg's explanation of the facts of the April 18, session. In any event, Silver did not testify and thus, did not deny her version.

January, May, October, and December of 1979 and February,[97/] March and May of 1980. In only April and August of 1979 were there more than two meetings in any one month. Some meetings lasted two hours or less (January 22, 1979, October 12, 1979, January 3, 1980, June 21, 1980). None lasted longer than' five and one-half hours (April 4, 1979). (See Jt. Ex. 2). . "The number of meetings and the amount of time between meetings are factors to be considered in determining whether an employer bargained in good faith or engaged in surface bargaining. McFarland Rose Production, supra, at p. 12, citing Radiator Specialty Co., 143 NLRB 350, 53 LRRM 1319 (1963), enf'd, in relevant part, 336 F.2d 495, 57 LRRM 2097 (4th Cir. 1964).

I have heretofore found Steeg to be a reliable and believable witness. I credit her testimony on the reasons for the various delay in negotiations herein. Although Respondent was not responsible for every delay (particularly during the time Schwartz was the UFW negotiator and became ill), the evidence seen in its totality convinces me that Respondent, especially through the words, attitude, and actions of Hempel, was responsible for the majority. Although it may be true that-some of the delays or cancellations may have been the fault of Schwartz or Steeg, these events were so few and infrequent as to have had no impact on the negotiations. See As-H-Ne Farms, supra.

97/In February of 1980 Hempel was assigned to be the WGA attorney in a major unfair labor practice case, O. P. Murphy & Co., and he advised Steeg he would be in trial at least one month. No explanation was offered why he would be assigned t a lengthy ULP case while he was in the middle of Bertuccio negotiations.

In any event, the number of meetings and length of time between them in the instant case do not indicate much seriousness about the business of collective bargaining on the part of Respondent; and they certainly would have had a deleterious effect upon the workers' perception of the labor organization chosen to represent them:

> "The Respondent's unreasonable delays in meeting with the Union, notwithstanding Murelli's prompt requests for negotiation meetings, irrespective of whether they amounted to deliberate procrastination, nevertheless had the effect of generating unrest and suspicion, obstructed and delayed the conclusion of a bargaining contract, and disparaged the Union's status as bargaining representative. Quality Motels of Colorado, Inc., 189 NLRB 332 (1971). See also, Little Rock Downtowners, Inc., 145 NLRB 1287, 1306; Miami Coca-Cola Bottling Co., 150 NLRB 392, 896."

Whether Hempel deliberately intended to drag these negotiations endlessly is an unknown. But one is tempted to observe that he seems to have kept pretty close to his expressed desire of not meeting much more than once every 2-3 weeks.

3. Paul Bertuccio Failed to Grant His Negotiator Sufficient Authority to Negotiate a Collective Bargaining Agreement.

Paul Bertuccio did not invest his negotiators with any real authority. This was partly because he never took the collective bargaining process very seriously or treated it with much respect. This is exemplified very well by his own testimony, as an adverse witness called by the General Counsel.

> "Q. Mr. Andrade was the first negotiator for your company—for your business?
>
> A. I don't think so. No.
>
> Q. But Mr. Richard or Rick Andrade was the first negotiator you had in connection with the collective bargaining.

A. I don't know if it was Richard Andrade or a Darrell something or other. I don't know. I don't know who was first. There have been several. I can't keep--....

* * * * *

Q. Do you have in your mind's eye—do you know that there was such a person who was your first negotiator?

A. Not the first negotiator, no. I don't know who the first negotiator was, no.

* * * * *

Q. Do you know Mr. Jaspar Hempel?

A. Yes, I do.

Q. He is your negotiator now, is he not?

A. I don't know if it is him, or if it's Howard Silver. I don't know. My wife could probably answer that. I don't know. ....

* * * * *

Q. Does Mr. Hempel have the authority to sign a collective bargaining contract on your behalf?

A. I don't know.

Q. Who would know?

A. I don't know. I presume he does. I don't know.

Q. Have you told Mr. Hempel that he can sign a collective bargaining contract on your behalf?

A. I don't think I've ever discussed that with him.

Q. So, you have not discussed with Mr. Hempel what his authority is?

A. Not to that degree, no.

Q. Have you discussed it to any degree?

A. I know that he's been the negotiator. That's all I know.

Q. Does Mr. Hempel have authority from you to agree to any proposal at all made by the United Farm.. Workers Union?

A. Not without my permission.

Q. So that he could not agree to, say, to a piece of the contract without your permission?

A. Not without my permission, no. ....

* * * * *

Q. But can your wife give Mr. Hempel authority to agree to any proposal that's part of the contract?

A. Not without my permission."[98/] (R.T. 2, pp. 105-108)

As for Tina Bertuccio, when asked on direct examination if there were any agreements on some articles even though not discussed with her husband, Paul, she testified, "Yes. There was a few things that we did." There was no follow up question from counsel for Respondent to establish precisely which contractual articles she was talking about.

However, when on cross-examination she was asked to describe which provisions were negotiated without Paul Bertuccio's consent, she replied, "Not right offhand I couldn't, maybe a holiday."

Upon further examination, however, Mrs. Bertuccio testified that all that had happened was that she and Eempel had caucussed regarding a holiday and had agreed to give it; but that she told Hempel, "I'll check with Paul about it." Mrs. Bertuccio did not even know if the UFW was ever informed of the holiday.

In any event, Mrs. Bertuccio admitted that this was the only time she had ever agreed to a contractual provision without Paul Bertuccio's knowledge.

Tina Bertuccio at one point in her testimony described

98/Almost one month later Paul Bertuccio testified again and stated that although he did not attend even one negotiating session, his wife and sometimes Hempel talked about it and he learned from them that they made concessions to Union proposals. He gave no examples. Even if this were true, it is clear that Mrs. Bertuccio and Hempel were acting without the authority of Paul Bertuccio as can be seen by the above-quoted testimony.

her own role in negotiations as a person who was to bring back information to her husband about language and wage proposals. She testified, "I was there on behalf of Paul...he would have to make the decision." At another point, she stated: "...I more or less did it for my husband because he's too busy to be sitting there listening to negotiations...."

For meaningful collective bargaining to ensue, the Union and the owner of a business, assuming he has chosen not to participate in actual table bargaining, must have informed their negotiator of the parameters that would be acceptable to them and imbued same with the authority to agree to various articles[99/] without the necessity of having "to check and report back" over every matter, small or large, that transpires at the bargaining table. [100/] Otherwise, the role of the negotiator becomes that of a "messenger boy," which means that negotiations are unnecessarily delayed. "The duty to bargain in good faith is not fulfilled by sending an uninformed messenger to the negotiations, while those with knowledge and decisional authority absent themselves from the discussions." Coronet

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99/The fact that the ultimate agreement would have to be signed by either Mr. Bertuccio or Mr. Chavez would not necessarily detract from this authority.

100/Of course, this does not mean that it is evidence of bad faith for a negotiator to have to check with officers of the union or top level management on certain proposals and counterproposals that quite naturally arise during the bargaining process. There are often unanticipated developments that come up which require further consultations and also advice in the formulation of counterproposals. But these situations are far different from the one here where Respondent's negotiator came to the bargaining table with apparently no authority to negotiate anything without the specific consent of the owner of the business who declined to attend any sessions.

Casuals, Inc., supra, 207 NLRB at p. 316. Whether giving a negotiator little or very limited authority is a strategy or is just plain reluctance to relinquish control is unimportant. In the end, so far as the other party is concerned, the results are the same.

4. Respondent Frequently Was Unable to Give the UFW Explanations Regarding Its Proposals; Its Negotiator Did Not Appear to be Familiar with the Business Operation.

It was incumbent upon Respondent to provide a bargaining representative sufficiently advised with respect to Respondent's operations to permit fruitful and informed discussions of working conditions and business practices. Coronet Casuals, Inc., supra.

a. The Hiring Practice

Although Hempel testified that he heard complaints of Duran's discriminatory hiring practices at almost every session, he consistently took the position that Respondent would not change its hiring practice. The NLRB has recognized that an employer is obliged to make some reasonable efforts to compose differences with the union if the Act is to be read as imposing any substantial obligation at all. N.L.R.B. v. Reed & Prince Mfg. Co., supra. But even besides the lack of compromise on Hempel's part, his understanding of Respondent's hiring practices was incomplete and confusing. When asked on cross-examination to explain the hiring practices of Respondent; I Hempel testified that he had explained to Steeg at the bargaining table that Respondent traditionally made no attempt to gather workers together on any certain date but that when

workers showed up—it was up to the worker to appear for work—, he/she was not hired on that day but was told when to next report for work. If workers showed up for work and work was available, they would be hired; it made difference if they had previously been employed for Respondent. This,according to Hempel, was the "system" Respondent wished to continue.

However, Hempel stated further on cross-examination that Respondent did give preference to families that had worked for Respondent for a long time in order to provide income to those families. But when asked how the preference worked (was a job set aside and reserved for certain family members?) or what family members were included (cousins, grandchildren?) or which among two competing families would get the work, Hempel admitted he did not know.[101/]

b. Walnut Harvesting Rate At the November 1, 1979 negotiating sessions, Steeg inquired as to why the harvesting rate for walnuts (G.C. Ex. 62, Article 50, Item 7) had no fixed rate but was between $3.35-33.60 (for the first year), $3.60-$3.85 (for the second year) and $3.85-$4.10 (for the third year). Hempel stated he couldn't explain it—just that some got more than others.

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101/Paul Bertuccio did not throw much more light on the subject either. He testified that there was an informal rule that those that worked last season should be hired back; but if there were insufficient jobs, the applicant's name, address and phone number would be taken down -and when a vacancy arose, the applicant would be contacted.

5. Respondent's Negotiator Frequently Failed to Inform Paul Bertuccio as to Significant Developments; Paul Bertuccio's True Position on Issues Was Not Always Accurately Represented at Negotiations

a. The 1980 Wage Increase

It was Paul Bertuccio's testimony that he instructed Hempel to inform the UFW of the proposed July 1980 wage increase, that the UFW was so informed but that to his knowledge the UFW never responded as to what its position was on the matter. Since Hempel never bothered to tell Bertuccio—the only person with the authority to make any negotiation decisions at Respondent's—that the UFW desired to bargain over the wage increase, negotiations over this subject never got off the ground.

b. The Interim Hiring Agreement

Obviously, an interim hiring agreement was an important objective to the Union especially since Respondent's work force increased during late May and early June. (G.C. Ex. 95)

Yet, Paul Bertuccio, when called as an adverse witness by the General Counsel, testified that he had never read the Union's Hiring proposal (G.C. Ex. 22 G.C. Ex. 72, first 2 pages) before, that Hempel never told him that the UFW had proposed a hiring procedure for 1980, and that Hempel had not discussed with him what proposal to make with respect to hiring employees that year. [102/] Further, he testified that.

102/Several weeks later, Paul Bertuccio was recalled as a witness by Respondent and on direct examination testified that his previous testimony was incorrect, that he had gone home, started to think about some of the things he had said and remembered that he had in fact read such a proposal. (102/ continued on pg. 89)

he had never discussed with Hempel the possibility of adopting a hiring procedure for 1980 as part of the collective bargaining agreement.[103/]

c. Cost of Living

Paul Bertuccio testified that he had no objection to a cost of living adjustment and believed that he had discussed this subject with Hempel. However, when asked whether he was aware of what Hempel had said about a cost of living adjustment during negotiations, Bertuccio stated, "I don't think we talked about the cost of living per se."

d. Wage Offers—Parity with Neighbors

Hempel consistently took the position that Respondent could not meet the wage demands of the UFW because it could only pay what its neighbors were paying. (See section 7, infra). This was not the position of Paul Bertuccio. Bertuccio testified that he could actually pay wages consistent with what he could live with:[104/]

(continuation of 102/)He gave as his explanation the fact that he was nervous, and that he had high blood pressure which made him lose his ability to concentrate. I do not credit his change of memory. The three or four questions propounded to him by General Counsel were clear and precise. Bertuccio appeared calm when he answered them, and he answered without hesitation or difficulty.

103/Not that it would have made any difference. Paul Bertuccio testified that he would be unable to sign a contract with the UFW which changed his hiring procedure. He testified: "If I had to change that, I wouldn't be able to live."

104/Bertuccio added that he could not live with what the UFW was proposing.

"Q. As I understand it, it's been your position during the course, or your business's (sic) position, through the course of collective bargaining, that your are willing to pay in the area of wages only what your neighbors pay. Is that correct?

A. I'd say what all the—we will pay whatever we can live with. That's all we can do.

Q. Have you instructed Mr. Hempel to take a position that you will only pay what your neighbors pay?

A. No, we have not taken that position. ....

Q. If he has taken that position, that's been without your authority?

A. That's right. ....

Q. So what your neighbors are paying is not really ' relevant to you?

A. ...it's not relevant, not really." (R.T. I, p. 110)

Thus, since parity with Respondent's neighbors was not, it turns out, a relevant factor, one can only infer an improper motive when Hempel repeatedly told Steeg that wage offers were being proposed at certain levels because Paul Bertuccio desired parity with his neighbors. Hempel was either not telling the truth or had again failed to communicate with his client. Whatever the reason, the result of Hempel's misrepresentation was to create a further barrier to productive negotiations.

6. Respondent's Negotiator Came to Negotiating Sessions Unprepared and Without Copies of His or the Union's Proposals

Hempel testified that in July of 1979 he gave copies of his written proposals to the ALRB, which had requested sane in connection with its investigation of alleged unfair labor practice charges in the present case. Hempel used this fact as an excuse to explain that he had no copies of either his

own or the Union's proposals at the August 2, August 15, and August 29 sessions. Hempel admitted that he prepared for and attended the August meetings without copies of either his own or the Union's proposals, and he had to obtain copies from Steeg. Hempel maintained that the ALRB had lost the proposals he gave them. Even if this were true, it would not explain his failure to retain extra copies. One might ask why Hempel didn't get copies of the proposals he gave to the ALRB from the Bertuccios; but Hempel testified he wasn't sure if they ever received copies of these proposals.

7. Respondent, in Giving Explanations for Its Low Wage Proposals, Created Confusion and Mistrust

a. Pleading Poverty

It is established that if an employer during contract negotiations over new wage rates gives as a reason for its resistance to certain wage demands of the Union the inability to pay ("pleading poverty"), then it must be prepared to allow said union the opportunity to review its records to determine the validity of the claim.

As the U. S. Supreme Court has said:

> "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched'- . for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.... We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith." ' N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 100 L.ed 1029, 1032, 38 LRRM 2024 (1956).

Thus, if indeed inability to pay really was the reason for Respondent's low pay proposals, then the UFW was entitled to know about it. That way, the Union, upon discovery of the validity of Respondent's claim, could have offered alternative suggestions; e.g. lowered its proposals accordingly, proposed fringe benefits with less of a cost impact, entertained the prospect of a longer contract, thereby giving Respondent the opportunity to regain its profitability, or offered a wage reopener clause. Obviously, however, under these circumstances, Respondent would have been required to open up its books to the Union in order to substantiate its claim.

Conversely, profit data will not be required where the employer's economic inability to pay is not asserted by it during bargaining and the information, though possibly helpful to the union, is really not relevant to the case. White Furniture Co., 161 NLRB 444 (1966), enf'd sub nom., United Furniture Markers v. N.L.R.B., 388 F.2d 380 (4th Cir. 1967). See also, 1981 Major League baseball strike.

In the present case, Hempel repeatedly told Steeg that it was "not pleading poverty", and made it clear to her that it would not allow the UFW to review its books.[105/]

For example, at both the February 27, 1980 and May 2, 1980 meetings Hempel testified he discussed with Steeg the business' fear for the future of the produce industry, but again

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105/Hempel knew what he was doing. He testified that he explained to Steeg at the Hay 2, 1980 session that "pleading poverty" was a term of "legal art" and that if a company plead poverty, its bocks would thereby be open to the union's scrutiny to determine whether or not the plea of inability to pay could be substantiated.

stressed he was not pleading poverty; and there was no discussion of any financial analysis Respondent night have done regarding costs.

However, in contrast to this, Tina Bertuccio, during her testimony, tried to suggest that the inability of Respondent to pay the wage demands of the UFW was indeed an issue at negotiations. Mrs. Bertuccio testified that the subject of Respondent's profitability was first discussed in February of 1930 when she told Steeg that what was being offered was all that was possible because Respondent had had some bad years. She further testified that at a subsequent negotiating session one month later, Hempel told Steeg that Respondent had had some bad years. Finally, on a third occasion, Bertuccio, in response to an alleged reference by Steeg to "rich farmers", stated that Respondent was not rich and that it was a question of the profit one makes and not how big the operation was. [106/] Yet, despite these vague references to an inability to pay at the bargaining table, Mrs. Bertuccio testified that she had not been pleading poverty. In truth, however, Bertuccio lacked a clear understanding of these two differing concepts. Her testimony was confusing and inconsistent. I note, for example, the following remarks in response to questions from the

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106/On this basis, I allowed Respondent to introduce into evidence copies of Respondent's 1977, 1978, and 1979 income tax returns, although I refused, Respondent not being a corporation or limited partnership, to limit the returns to farm income only, as Respondent desired. Respondent points out that the Bertuccio's farm operation suffered losses in 1978 and 1979 (Resp's post-hearing Brief at p. 101) but fails to mention large profits from non-farming sources such as ' partnership income, capital gains, sale of assets, rants, annuities, pensions, and income from interest. (Resp's Exs. 33 and 34). Also not mentioned is the large tax depreciation take: on Respondent's considerable land and equipment holdings during those years as well.

General Counsel:

"Q. Was it your position during negotiations that your financial ability prevented you from offering any higher wages than you were offering?

A. Yes. Yes and no.

Q. Yes and no?

A. Yes. Well, it did.

Q. Okay. Then s<hydid you and Mr. Hempel take the ' position of saying, 'We're not pleading poverty'?

A. I don't know why really. I just felt that if we're not pleading poverty and yet I knew that our financial status—as it was, that it was just...that's how we presented it to her (Steeg). ....

Q. He (Hempel) took the position that income wasn't the problem?

A. Income was no great problem but we had to foresee what was going to happen down the road another year from now.

Q. Well when he says, 'we're not pleading poverty', he's taking the position, isn't it that neither income nor wealth is a problem; isn't that correct?

A. Yes.

* * * * *

Q. So in other words, you can afford to pay higher-wages than you're offering now?

A. That's correct." (parenthesis added) (R.T. 23, pp. 89-90)

I find that Respondent's position on this question was not clear or consistent. If indeed Respondent's ability to pay was a real factor during negotiations, Steeg should have been so informed so that she could have further explored the question. If it was not, Respondent should have presented other rationale for its inflexibility on the wage issue.

2. Parity With Neighbors

Hempel claimed that Respondent was not pleading poverty but wanted to stay in line with what its neighbors were paying. But it was not always clear what neighbors Hempel was talking about. Originally, (at the August 15, 1979 meeting) Hempel told Steeg that he needed to see both the Harden Farms and Almaden contracts[107/] in order to assist him in ascertaining what his neighbors were paying.

On August 29, Hempel told Steeg he wanted to pay in line with his neighbors and that he wasn't just referring to Harden Farms[108/] and Almaden but to the area of Hollister and

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107/Both companies are based in Hollister; both are also under union contracts, probably the only two such companies in Hollister. Vinter Employers Association is an association of grape growers including Almaden, Paul Masson, Novitiate and others. On January 1, 1979 its general laborers were paid $3.50 per hour (G.C. Ex. 81). On January 1, 1980 a new agreement was executed in which the general labor classification rose to $5.10 per hour and was increased to $5.65 on January 1, 1981 (G.C. Ex. 82). Growers Exchange and West Coast Farms, two other companies under contract with the UFW, have fields in Hollister but do not have their principal place of business there. West Coast is a lettuce, celery, and cauliflower company centered in Watsonville, which entered into a labor agreement with the UFW on August 25, 1979 in which it agreed to pay its general laborers S5.00 per hour on August 25, 1979 and $5.40 per hour on July 15, 1980 (G.C. Ex. SO).

108/Hempel was very interested in separating himself from Harden Farms. Steeg testified that at the April 2, 1980 meeting, Hempel told her that he did not intend to offer more than the prevailing wages in the area but that did not include Harden because they were a "large lettuce company." Actually Harden had two lettuce crews, and a celery crew and also., farmed mixed vegetables, cauliflower, and asparagus. It maintained two sheds. There were 300-400 employees at' peak. When the Harden contract originally expired in December of 1978, it was paying its general field laborers between $3.55 and $3.70 per hour.

Gilroy, as well. Hempel added that he did not want Respondent compared to the rest of the vegetable industry but rather to what non-union companies were paving in Hollister[109/] and Gilroy. [110/]

On November 13, Hempel offered[111/] sort of a "favored nation clause" in which he said he would pay what the majority of non-union growers in Hollister were paying that next year. He again expanded the Hollister area to include Gilroy in a phone conversation with Steeg on November 29.

On cross-examination, however, Hempel admitted that Respondent's competitors were growers selling lettuce, onions, and sugar beets and that when Respondent sold lettuce, it was competitive with other growers from Salinas for the same market at the same time. Hempel also testified that he spent a good deal of time in Salinas during the industry negotiations and that it was fairly common knowledge that there were some non-

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109/For example, Herbert Ranch, a small tomato, bell pepper and onion non-union grower in Hollister was paying its employees $4.00 per hour in July of 1980.

110/The only company under a UFW contract in Gilroy was Mistral Vineyards, a grape grower.

111/Hempel's wage offer (G.C. Ex. 43) on that day of $3.35 for general labor, and S3.45 and $3.50 in subsequent years was based on what Hempel represented to be Paul Bertuccio's intentions to pay what the majority of non-union companies in Hollister were paying.

112/Although Hempel admitted that some of Respondent's employees came from Salinas, he was unwilling to consider the Salinas labor group as being a part of the labor market Respondent was seeking to attract. Hempel stated: "...if I did that my proposals generally would have been higher.

union lettuce companies like Merrill Farms, Royal Packing, Hansen Farms,[113/] and Let Us Pak,[114/] which either matched or in some cases offered greater wages than Sun Harvest.

I find that Hempel's explanation of his position on parity was, like pleading poverty, misleading. First, as was shown in a preceding section, it was not the position of Paul Bertuccio. And second, Hempel's limiting definition of parity, making exceptions when it suited him (Harden Farms, Salinas lettuce Companies, etc.), all made for confusion and uncertainty as to what Respondent's true position really was.

7. Respondent Made Proposals Which Were Predictably Unacceptable to the UFW

The NLRB has found surface bargaining when the employer proposed predictably unacceptable terms which it knew the union would reject, particularly where its wage offers merely maintained the status quo. Clear Pine Mouldings, Inc., 238 NLRB No. 13, 99 LRRM 1221 (1978), aff'd, 632 F.2d

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113/Wage rates at Hansen Farms were subpoenaed by the General Counsel for use in this hearing. A Petition to Revoke was filed and denied by me. I recommended to the Board that the subpoena be enforced, and the Board, with modification did so. Hansen Farms thereby complied with the Board's Order on October 28, 1980, after the close of the hearing herein by filing a "Response to Order Granting Enforcement of Subpoena Duces Tecum" with an accompanying Declaration of Mr. Tony Vasquez, Personnel Manager for Hansen Farms. Pursuant to section 20250 (f) of the ALRB. Regulations, said Response and Declaration is hereby received into evidence as General Counsel Exhibit 97. Said Declaration indicates inter alia, that as of June,1980 minimum hourly rates for field workers at Hansen Farms, a non-union company, Mere $5.05 per hour.

114/Let Us Pak said $5.10 per hour effective July 15,'1979. On March 10, 1980, the rate was raised to $5.50 per hour (G.C. Ex. 86A).

721, 105 LRRM 2132 (9th Cir. 1980). Accord, O. P. Murphy Produce Co., Inc., supra.

a. Wages

Respondent was aware in September, 1979 that Sun Harvest had agreed to pay its general laborers $5.00 per hour. And as the preceding section made clear, it was also aware that other area companies, including non-union ones, were likewise paying wages close to that amount, as well. Yet, on September 21, 1979, Respondent proposed $3.35 per hour (G.C. Ex. 62), up to $3.60 in 1980. On April 2, 1980, about five and one-half months later, Respondent had increased its offer to $3.63 per hour, up $.05 from its September, 1979 proposal. (G.C. Ex. 70)

In addition, retroactive pay was never offered by Respondent.[115/] Thus, as bargaining continued in 1980 without having reached any agreement, any proposed increases during 1979 were wiped out—only the 1980 wage proposals were relevant.

In my view, it is unreasonable to expect that employees who had voted for union representation and were bargaining for a new contract would accept a wage rate based only on non-union companies (and the lowest among them at that) working in Hollister and Gilroy coupled with the absence of any retroctivity whatsoever.

115/Since Respondent offered no retroactivity, the increases only took effect upon the execution of the contract. Thus, had the September 21, 1979 offer been accepted, $3.35 would have been paid between September 21, 1979 and September 20, 1930. On September 21, 1980, the anniversary date of the first year of the contract, wages would have keen raised to S3.60.

There can be no doubt that Respondent's wage offers must be considered meager. Making insubstantial wage proposals, especially when compared to what other growers were paying in the larger community, is a relevant factor to consider in determining whether surface bargaining occurred. As the 9th Circuit very recently pointed out:

> "We agree with the ALJ's characterization of the wage proposals as 'meager'. In an age of double digit inflation, an offer of little or no wage increase is an effort to decrease wages. The ALJ could infer that the company was not bargaining seriously.116/ K-Mart Corp. v. N.L.R.B., 626 F.2d 704 (9th Cir. 1980).117/

No reasonable explanation was put forward why Respondent's wage offers were so much below those of other growers in the same market. As has been shown, Respondent did not plead poverty and Paul Bertuccio was not relying on parity with his Hollister/Gilroy neighbors.

During the hearing, Respondent put forward a new

116/Respondent attempts to distinguish this case (Letter-to ALO of December 8, 1980) by, inter alia, arguing that the Bertuccio wage proposals were consistent with the prevailing wage rates paid by other area farmers. I have rejected this argument supra, and have found that Respondent inconsistently expanded or reduced the "area" to suit its convenience and in any event, had a much too narrow concept of "area." Putting that finding aside, however, I note that the K-Mart court found the wage proposals there "meager" not because they were far below the "prevailing wage rates" but because a maximum raise of $.15 per hour was, in fact, meager, and was perceived as "an effort to decrease wages."

117/The Court was quick to point out that its decision in' K-Mart was perfectly consistent with NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978), a case relied upon by Respondent in its post-hearing Brief, simply because the bargaining tactics used and substantive positions taken in Tomco did not support an inference of bad faith.

theory—that Respondent, because it was a sole proprietorship, was a priori less financially successful than other kinds of business operations such as corporations or partnerships. If Respondent's enterprise was less successful than others because it was an individual proprietorship, this point should have been thoroughly discussed during negotiations. It was not. Nor did Hempel mention it during his testimony. There was no evidence of any connection between the type of business enterprise and its ability to meet the wage demands of a labor organization.

Finally, there is testimony that Hempel informed Steeg that the unknown future of the produce market and Respondent's need to compete were both factors in its wage offers. As to the former, Hempel made only general non-specific claims and did not substantiate it with any documentation of actual costs. As to the latter factor, any such analysis could not fail to take into consideration the Salinas lettuce companies, which Hempel admitted were competitors of Respondent for the same market at the same time. [118/] Yet, those growers, competing in the same market as Respondent, were paying much higher wages. Respondent provided no credible evidence to suggest that its competition prevented it from making higher wage proposals.

There were other predictably unacceptable offers-made. It appears, for example, that on many occasions," just as it seemed that some progress was being made or that

118/It is to be recalled that Paul Bertuccio testified that of the 3000 acres farmed in 1930, 1400 of them were devoted to lettuce.

Respondent had made some concession, Respondent would propose new language that actually resulted in backward movement.

b. Maintenance of Standards

On May 2, 1980, Respondent agreed to accept the Sun Harvest language but only with the addition of the following language: "c. Nothing herein shall preclude the Company from exercising its management rights as provided in Article 16 hereof." (G.C. Ex. 73)

This proposal appears to offer some kind of a concession but in reality offers nothing because Respondent is free to do as it pleases under its Management Rights clause. It was wholly predictable that this additional language would have raised an insurmountable impediment to the successful conclusion of negotiations on this issue and would have been unacceptable to the Union.

c. Grievance and Arbitration

After having agreed to the concept of immediate processing of grievances, Respondent proposed on November 13, 1979 that "...all grievances shall be...processed...after working hours...." Thus, a worker fired or suspended at 7:00 a.m. or otherwise involved in a work dispute, instead of having his grievance possibly resolved on the spot with all participants there for discussion, as is often done successfully in the industrial setting, would have to wait until the end of the work day when many of the witnesses, including Respondent's own supervisors, would have gone home.

d. Discipline and Discharge

Respondent's proposal of September 21, 1979 (G.C. Ex. 62) deleted the warning system, which is what the Union wanted, but then added a new clause defining "good cause." It thereby deprived any arbitrator from ever finding any conduct outside that definition to be considered justified and which should not therefore result in discharge or suspension.

e. Grower Shipper

While it is true that on November 13, 1979 Respondent accepted the Sun Harvest language, the parties were far apart on what crops were custom harvested and which were not. Thus, matters that Respondent represented as being grower/ shipper arrangements were considered otherwise by the Union so it could hardly be said that Respondent's acceptance of the Sun Harvest language had any real meaning in the context of these negotiations,

f. Supervisors

By November 1, 1979, Respondent had agreed to eliminate Duran from its proposal of supervisors who could, do bargaining unit work, but it had added a new supervisor, Jose Martinez (G.C. Ex. 62).

There were many other examples of proposals that were predictably unacceptable to the Union: 1) Hours of Work and Overtime: Respondent's proposal for a normal work schedule before overtime would commence was ten hours, Monday-Friday, eight hours on Saturday, and four hours on Sunday (Resp's Ex.

21); 2)[119/] Health and Safety: On March 24, 1980 Respondent agreed that all vehicles should be maintained and operated in a safer condition and then it added in paragraph 2, that "All motorized equipment shall be attended to by the operator at all times when moving. If the operator leaves such motorized equipment when it is moving, the Company may discipline or discharge such operator and such discipline and discharge shall not be subject to the grievance and arbitration procedure contained in Article 5, hereof."; 3) Housing: Respondent made its very first proposal on housing on March 24, 1980 (G.C. Ex. 69) and agreed, inter alia, to operate and maintain the housing in the same manner as before the agreement; it then added in paragraph 6 that the "housing shall be reviewed by the Union and Company after one year to discuss and determine whether or not Company housing should be eliminated."

9. Respondent failed to make any proposals whatsoever over workers employed in the onion, garlic, and pea 120/ harvests, though these were mandatory subjects of bargaining.

From the outset, Hempel refused to make any proposals regarding the employees of Quintero because, based on his interpretation of the law, he believed Quintero to be a custom harvester and therefore, not part of the bargaining unit. Hempel

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119/This proposal, made on August 4, 1930, was no different from the much earlier proposal of November 13, 1979 (G.C.. Ex. 66).

120/Respondent never even informed the Union that 20 acres of peas had been planted in December of 1979 and that they were harvested by Quintero's workers at a wage rate agreed upon by Quintero and Paul Bertuccio.

testified that in his opinion, anyone who did more than provide labor for a fee; e.g., providing trucks, expensive equipment, etc. was a custom harvester; and even if an employer supplied small farm implements, like knives, then he/she would still be considered a labor contractor.

Hempel testified that he believed Quintero was a custom harvester for the following reasons: 1) he had been told this by his predecessor, Andrade; 2) Quintero supplied knives and trucks in gourds and all the equipment in onions and garlic including digging equipment, baskets/, knives and trucks to transport the product to the packing shed; 3) Paul and Tina Bertuccio had told him that trucks were supplied by Quintero and that convinced him that Quintero was a custom harvester because this fact fit squarely into an ALRB decision he had read (but could not name); and 4) Quintero was paid by the ton for the onion harvest.

Hempel admitted that at the time he conveyed his opinion to Steeg (August of 1979) that Quintero's onion and garlic workers were not part of the bargaining unit, he did not know that they had voted in the 1977 union election; and that he did not obtain this information until August of 1980 when Mrs. Bertuccio told-him in response to his questions. At that point, Hempel testified, he had a serious question as to whether Quintero was really a custom harvester, and he began to think that Quintero's workers may have been part of the bargaining unit.

No reason was given why Hempel could not or did not

obtain this information from the Bertuccios at an earlier point. In fact, Hempel admitted that in the spring of 1980, Steeg had told him that Quintero's workers voted in the election; but he failed to ask the Bertuccios about this matter at that time.

Tina Bertuccio testified that onion and garlic harvesters were on the 1979 and 1980 payrolls of Respondent and paid by Respondent's checks. [121/] And Respondent stipulated that on August 1, 1979 it raised its piece rate wages for onion harvesters from $.27 per bag to $.30 per bag. (Stipulation, R.T. 18, pp. 86-88).

Hope Beltran, Quintero's daughter and secretary treasurer of the business, testified that her father was paid by the ton for the tomato, peas and onion harvest but by a ten percent commission for the thinning and hoeing of onions, peppers and lettuce. She further testified that he and Paul Bertuccio had had an ongoing business relationship for around twenty years.

Beltran also testified about the harvesting operations. With respect to onions, she testified that her father gave, workers onion shears (which they later bought themselves) and a can for topping. After topping, the onions were then placed in sacks which Respondent provided. Beltran testified that her business provided trucks, bobtails, tractors, and forklifts but did not explain how they were used in the harvesting process.

121/The checks were prepared by Hope Beltran, and the payroll records were maintained by Quintero.

Beltran admitted that it was Respondent that really controlled the onion process, as it was Paul Bertuccio who decided when it was time to do the hauling and at which point Quintero would take his trucks into the field to load the onions onto the bins which sit on top of the truck. The, onions would then be transported to Respondent's packing shed where Respondent's forklift drivers unloaded them.

As regards, the garlic, Beltran testified that all her father did was to supply the workers to Respondent. The garlic, after topping, would be left in the field and later hauled away by Respondent. Shears had been provided by Quintero in the past (and later purchased by the workers), but in 1980 the garlic was topped by hand.

Finally, according to Beltran, the peas were also picked by hand whenever Paul Bertuccio called and said they were ready.

As mentioned, Hempel failed to make any contract proposals on onion, garlic or peas harvesting because he concluded that Quintero's workers were not part of the bargaining unit in that Quintero was a custom harvester; i.e., that Quintero assumed such complete control over the harvesting operation that it was he who became the primary employer instead of Respondent. If Hempel were correct or even if his belief were reasonably founded, then it could not be said that Respondent engaged in surface bargaining on this issue. On the other hand, if Hempel were incorrect or had no reasonable

belief that Quintero was a custom harvester, then Hempel's conduct was indicative of surface bargaining.

The Agricultural Labor Relations Board has, of course, issued several decisions on the distinctions between custom harvesters and labor contractors but has not looked to any single factor; instead, it reviews the whole activity of the business enterprise. Joe Maggie, Inc., 5 ALRB No. 26 (1979). But in all cases, the Board has said that there must be at least two elements present for the enterprise to be identified as a custom harvester: 1) the providing of specialized equipment and 2) the exercise of managerial judgment in the cultivation or harvesting of crops. Sutti Farms, 6 ALRB No. 11 (1980).

Applying this standard to Quintero's operation, it must be said initially that he supplied no specialized equipment. Quintero's trucks and simple equipment are not within the category of "specialized" as at least two ALRB decisions have made clear. The Garin Co., 5 ALRB No. 4 (1979). Tenneco West, Inc., 3 ALRB No. 92 (1977).

Second, it is also clear that Quintero did not exercise the managerial judgment required to qualify as a custom harvester. His main function was to supply workers. As in Sutti Farms, supra, the managerial decisions regarding the development and utilization of the crew were always made by Respondent. It was Respondent that decided when onions, were to be hauled from the fields to its packing shed; it was Respondent that decided when the peas were ready for harvest;

and Beltran freely admitted that in the case of garlic, her business merely provided the labor. Thus, Quintero did not have complete control over the harvest nor did he perform such functions beyond the supplying of labor that he "...assumes the primary employer relationship to the employees...." Gourmet Harvesting and Packing, 4 ALRB No. 14 (1978).

There is no ALRB authority for Hempel's view, and one is at a loss to discern what Board case Hempel felt, substantiated his position. Patently improbable justifications for a bargaining position will support an inference that the position is not being maintained in good faith. Queen Mary Restaurant Corp. v. N.L.R.B., 560 F.2d 403 (9th Cir. 1977).

I conclude that Hempel's belief that Quintero was a custom harvester was not reasonably based on either fact or law and illustrates again the casualness and lack of seriousness by which these negotiations were conducted. Hempel's consistent refusal to make proposals in onions, garlic or peas is further evidence of Respondent's surface bargaining.

10. Respondent Frequently Conveyed to the UFW Information Which Was Meaningless or Inaccurate or Lacking in Careful Analysis

a. Tomatoes

On October 12, 1979 Hempel verbally informed Steeg that certain canneries had notified Respondent that they were not interested in tomato contracts for 1979-1980 so that there was to be a reduction in tomato acreage of 250 acres.. However, Hempel further told Steeg that since tomatoes were custom harvested there would be no effect on the bargaining unit.

At the time he spoke to Steeg, Hempel knew that sugar beets were to be planted in those same 250 acres, but Hempel testified he was not sure if he told Steeg that. On a later occasion when it became known that sugar beets were replacing tomatoes, Hempel told Steeg that he didn't think this would affect the bargaining unit because sugar beets were also custom harvested. But he admitted on cross-examination that at the time he informed Steeg that there would be no effect on the bargaining unit, he had not thought of the pre-harvest work that would have been involved in the changeover.

Subsequently, on November 7, 1979 in a letter to Steeg (G.C. Ex. 41, p. 1) Hempel wrote: "...As you are aware, tomatoes have been custom harvested for the last three years because of the costly equipment involved. On the face of it therefore, it would seem that elimination of canning tomatoes would not have any impact on the bargaining unit. However as I indicated to you earlier, the fact that the Company will no longer grow tomatoes will have an impact on the overall cropping patterns, which may or may not have an effect on the bargaining unit."

Later, in a letter to Steeg dated December 5, 1979 (G.C. Ex. 43, p. 1), Hempel further elucidated his position: "First, I must remind you again that the Company is sincerely informing and advising the Union regarding future plans which may affect the bargaining unit. For instance, the fact that the Company has lost its cannery tomatoes may affect the entire cropping pattern of the Company, which may or may not enlarge

or decrease the bargaining unit. If the bargaining unit is affected, you will be notified by the Company."

Neither of these two letters could give Steeg any worthwhile information as to whether the loss of the cannery tomato contracts was going to result in less jobs'-for bargaining unit workers.

As a matter of fact, the essence of the information conveyed—that Respondent would no longer be growing tomatoes in 1980 was simply not true. Eighty-ninety acres of tomatoes (though down, of course from the 300 acres in 1979) were planted in 1980.

b. Anise and Cardoni

At the August 29, 1979 negotiating session, Hempel told Steeg that anise and cardoni workers were receiving $.60 per hour. [122/] This was an incorrect figure, as Hempel later discovered in August of 1980 after Steeg pointed out that the wage rates of some, of his earlier proposals were also -incorrect, including the piece rates. The correct rate was $.55 for cardoni and $.65 for anise. Hempel testified there had been a typographical error.

c. Labor Contractors/Custom Harvesting On August 29, 1979 in response to Steeg's inquiries, Hempel told Steeg that the only labor contractor utilized by Respondent was Quintero and that his workers performed only thinning and hoeing. He also represented that Manuel Salinas

122/Hempel testified he gained this information by observing Tina. Bertuccio going over the payroll records and coming up with the S.60 figure.

was not a labor contractor but merely a person who referred employees to Respondent. In addition, Hempel told Steeg that Quintero served as a custom harvester in onion and garlic and provided all the equipment.

On February 27, 1980, Steeg asked Hempel if he could explain what effect labor contractors were having on the work force. Hempel took a short caucus with Mrs. Bertuccio and returned to say that labor contractors caused no displacement of existing workers.

As the preceding section concerning Quintero's workers in the onion, garlic, and pea harvests made clear, this information was not accurate.

d. Hours of Work and Overtime

Respondent had proposed on November 13, 1979 (G.C. Ex. 66) that a normal work week would be ten hours Monday-Friday, eight hours on Saturday, and four hours on Sunday. When questioned by Steeg as to whether it was fair to consider these hours as part of the normal day and not overtime, Hempel made the following arguments:

1. Sun Harvest

Hempel contended his proposed hours were the same as Sun Harvest. This was incorrect information. Sun Harvest provided that hourly workers (except for tractor drivers and irrigators) and piece rate workers would receive overtime after eight hours Monday-Friday, and after five hours on Saturday for hourly and four hours for piece rate workers. All work on Sunday (except for irrigators) was paid at over-

time rates. (G.C. Ex. 79, p. 18)

2. Labor Code

Hempel stated that his proposed hours were in accord with the Industrial Welfare Commission's wage regulations (G.C. Ex, 93). This was also incorrect information. Hempel admitted on cross-examination that he had since learned that his proposal was not in fact consistent with state law because overtime rates applied to any work on Sunday. He also admitted that at the same time he was explaining his proposal to Steeg, he knew the Commission's orders and overtime provisions had been enjoined and were stayed pending a Supreme Court review as a result of a lawsuit brought by Hempel's employer, Western Growers Association.

3. Cost

Hempel next took the position that overtime was a very costly item for Respondent; but when asked by Steeg for monetary figures on this cost, Hempel reolied that he had no idea.[123/]

e. Bonuses

On August 15, 1979 Hempel told Steeg that Respondent gave no bonuses. Jesus Perez, a member of the Union Negotiating Committee, pulled out a check stub (G.C. Ex. 63) shewing a bonus, Hempel stated he would check with the Bertuccios.

On August 29, Hempel admitted that bonuses were given but only to a very select number of individuals—generally either long term employees or supervisors. Hempel also told

123/Hempel also asserted that his proposal was the current practice, and that Paul Bertuccio wanted it continued. In addition, Hempel pointed out that it would be simple from a bookkeeping standpoint.

Steeg that these bonuses were given in 1974, 1975, and 1977 and that none were given in 1978. This information was still not completely accurate. Perez produced his own pay stubs showing bonuses in 1974, 1975 and 1976 (G.C. Ex. 63). Perez testified there were no bonuses paid after 1976.

11. Respondent Frequently Made Proposals for Which No Calculation or Analysis as to Cost Had Been Made.

a. Vacation

Tina Bertuccio testified that the business made a proposal that any employee who had worked 1,800 hours in the previous year would be eligible for vacation pay even though no effort had been made to calculate how many employees would have been eligible. In fact, Mrs. Bertuccio admitted that Respondent, at the time it made its vacation proposal, had absolutely no idea how many of its 1979 workers would be affected by the vacation provision. Moreover, when Respondent reduced the eligibility during neogitations to 1,700 hours., it failed to again calculate how many of its employees this would affect.

b. Apricot Pruning Rates

On November 1, 1979 Steeg asked Hempel for information on the number of trees that were pruned per hour per worker so that she could develop a piece rate proposal. Hempel testified he checked with the Bertuccios and was told they didn't keep records on the number of trees pruned per hour. Hempel made no further inquiries of what other knowledge they might have, did not examine payroll records or time cards, and did not ask anyone from Respondent's operations to do likewise.

Nevertheless, Hempel on behalf of Respondent did make wage proposals for apricot pruning. He stated that he started with the base rate and that his proposals were based on percentage increases from that point.

However, on cross-examination, when asked how much his proposals amounted to per hour, he replied: "I have no idea."

c. Injury on the Job

Hempel consistently claimed that this was a major cost item. However, when asked by Steeg as to Respondent's cost figures showing how many persons injured, how much time lost, etc. Hempel could not come up with the information.

12.' Respondent's Wage Proposals in April 1980 Were Less Than Those Offered in November 1979, January and March 1980

Some of Respondent's wage proposals, none too high to start with, were even reduced more as the bargaining went forward. For example, in comparing Respondent's wage proposals (G.C. Ex. 43) of November 20, 1979, January 21, 1980, and March 24, 1980, with what Respondent offered in written form on April 2, 1980, (G.C. Ex. 70), Steeg was able to demonstrate through blackboard exhibits (G.C. Exs. 77 and 78) that for several categories Respondent's April 2, 1980 offer[124/] was actually lower. And this was the case irrespective of which method was employed to compute what the wages should have been.

124/On November 20, 1979, Respondent raised wages $.05 per hour to $3.40 (G.C. Ex. 43). On January 21, 1980, it made a verbal proposal to increase wages $.20 to $3.60, and on March 24, it verbally offered an increase of $.05 to $3.65, which Hempel stated was a twelve percent increase. Steeg understood this to mean twelve percent over the last wage proposal or over S3.60. However, upon further checking, Steeg discovered that the $3.60 wage rate was twelve percent above- the original wage offer of $3.25 made by Respondent on August 29, 1979. (G.C. Ex. $.0)

Thus, whether one were to utilize either the first or second approach, Respondent's April 2, 1930 wage offer (G.C. Ex. 70) was inconsistent with its previous verbal increases since November of 1979. As a result, workers in many classifications were shorted.

A recent NLRB case has held that when an employer withdraws its earlier proposal, presents new proposals containing regressive changes less favorable to the union, and fails to give an adequate explanation, the conclusion is that the employer sought to frustrate negotiations. Pittsburgh-Des Moines Steel Co., 253 NLRB No. 86, 106 LRRM 1001 (1980)

At the hearing, Respondent did not deny that these errors were made but instead argued that it was merely an inconsequential error since it was ludicrous to think that Respondent ever intended to lower its wage offers. In fact, Respondent now argues that Steeg's failure to bring the "miscalculation" to Respondent's attention earlier constituted bad faith bargaining on the part of the Union. (Resp's post-hearing Brief, p. 92) In short, Respondent argues that it was the Union's fault for not catching the error earlier and reporting it to Respondent.

I disagree. While I decline to decide whether Respondent intended actually to lower wages, I do find that its "miscalculations" created confusion making good faith' bargaining efforts difficult and is only more evidence of its casual and nonserious approach to negotiations. Nor can it

be assumed that Steeg knew the calculations to be in error. To her, it was only another grim reminder of the lack of progress in negotiations and how far apart the parties continued to be on wages.[125/]

13. Respondent's Intransigence on Union Security Did Not Reflect a Good Faith Attitude

Respondent objected to the UFW's good standing language because it didn't want to have to fire one of its workers for something outside its control. Yet, it had no qualms about firing a worker for non-payment of dues, also outside its control. Hempel admitted that Respondent did not object to the union shop concept and in fact, Respondent had included in one of its early proposals (April 4, 1979, G.C. Ex. 55) a provision that would require every worker to be a member of the union and that any such worker could be fired for failure to make payment of union dues and initiation fees.

Thus, Respondent's objection to union security was not one of principle but one of degree. It opposed good standing not because it permitted the discharge of an employee for the non-compliance of an obligation he/she had towards a union but rather because the degree of this obligation was broader than under the NLRA and broader than

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125/Amazingly, even while testifying, errors in Hempel's proposals were discovered and pointed out to him. He admitted that he had made a mistaken calculation in his April 1979 proposal (G.C. Ex. 70) and that he did not intend for assistant stitchers, anise, cardoni, and apricot workers to be offered less Money than they had in September, 1979 (G.C. Ex. 62),

Respondent apparently wanted.[126/] This is demonstrated by Hempel's answer to the following question during his cross-examination.

> "Q. ...but you did have an objection to firing a worker who failed to follow through on some other requirement (besides non-payment of dues) of the Union, correct?
>
> A. This is correct. We wanted to be consistent with the national act." (parenthesis added)

In short, Hempel's objection to union security was not Philosophical but was political—he[127/] was distressed that the ALRA allowed a good standing clause whereas the federal Act did not.

Hempel's objection does not evince a good faith negotiating attitude. Hempel took it upon himself to limit good standing to dues and ititiation fees because he wanted "to be consistent with the national act." But such a position has been specifically rejected by the ALRB in Montebello Rose Co., supra. There the Board stated:

> "Respondents' concern that the proposed good standing-provision would not be lawful under the National Labor Relations Act is patently improbable because it has little if any relevance to the negotiations between Respondents and the UFW; those negotiations are not

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126/This lack of strongly held principle creates an inference of bad faith. In Queen Mary Restaurants Corp, v. NLRB, supra, bad faith was shown where a company refused to consider any form of union security proposed by the union on grounds of moral principle; yet, the parent company had negotiated just such a clause with another union.

127/It will be recalled that one of Hempel's arguments against good standing at the August 29, 1979 session was that the Legislature had before it a bill to outlaw good standing; and therefore he urged Steeg to delete it from her proposal.

> controlled by the federal labor law. The lack of any logical relationship between the stated concern and the negotiations leads us to conclude that Respondents' justification was pretextual, i.e., a ploy to frustrate negotiations rather than an honestly-held concern." 5 ALRB No. 64 at p. 24.

In other words, there is no logical connection between what is illegal under the ALRA and is achievable in bargaining under the ALRA; and to rest a legal position on such a premise is bad faith bargaining. Adhering to an untenable legal position during negotiations is inconsistent with the obligation to bargain in good faith. Queen Mary Restaurant Corp. v. N.L.R.B., supra.

14. Respondent Offered Package Deals It Knew Would Be Rejected

Rather than working hard to minimize differences and attempting to arrive at compromises satisfactory to both parties, Respondent chose instead to offer package deals; e.g. the Union's Grievance and Arbitration provision for Respondent's Management Rights and No Strike; the Union's Mechanization for Respondent's Management Rights In some, cases the packages were not even logically connected. For. example, on December 5, 1979 Respondent indicated it would, accept the Union's Union Security proposal in exchange for the Union's accepting its status quo proposal on Hiring. This offer was made despite the fact that Respondent knew full well that the existing "system" of hiring and Duran’s alleged discriminatory practices was a major concern to the Union. Of course, the package was rejected; yet, Respondent continued to offer it (January 21, 1930 and April 18, 1980).

As was pointed out in Masaji Etc dba Etc Farms et al., supra, a respondents' "package proposals offered after a year of negotiations when Respondents were fully aware of the Union's position on these crucial articles, show that Respondents were not making reasonable efforts to compose differences with the Union." 6 ALRB No. 20 at p. 15. See also, Clear Pine Mouldings, Inc., supra.[128/]

I conclude that Respondent has engaged in surface bargaining and will make that recommendation to the Board.

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128/There is nothing, of course, inherently wrong with, a package proposal. But when the Union made such a proposal (G.C. Ex. 71, April 2, 1980 meeting), it showed much greater flexibility than did Respondent and its proposals were not repeatedly made when it became aware of Respondent's subsequent rejection (May 2, 1980).

VI. The UFW's Alleged Refusal to Bargain in Good Faith

A labor organization's bad faith bargaining may be an affirmative defense to a refusal to bargain allegation against an employer. Montebello Rose Co., supra, citing Continental Nat Co., 195 NLRB 841, 79 LRRM 1575 (1972) and Times Publishing Company, 72 NLRB 676, 19 LRRM 1199 (1947); McFarland Rose Production, 6 ALRB No. IS (1930).

A. The UFW's Alleged Delay in Presenting Economic. Proposals.

Hempel testified that at the April 23, 1979 meeting, he asked Schwartz for the Union's economic proposal but that Schwartz responded that it was difficult to prepare because of the lack of information in his (Schwartz') possession, especially on job classifications. But Hempel also testified that at another session, Schwartz indicated he was working on his proposal but said nothing about any lack of information. From this Respondent concludes that Schwartz had abandoned his supposed need for information and was merely dilatory in submitting an economic proposal. (Respondent's post-hearing Brief, p. 90). Further Respondent also argues that the Union's position was contradictory because when Steeg did submit the Union's first economic proposal, she asked for additional information whereas Schwartz had seemed perfectly satisfied with what he had been given.

I have found, infra, that any contention that. Schwartz abandoned his position on the Union's need for information is erroneous and that Respondent violated the Act by its refusal

and/or delay to furnish the material. Schwartz explained that the reason the UFW did not submit an economic proposal from the start of negotiations through the period when he became ill was because Respondent had not complied with the Union's "Requests for Information" (G.C. Ex. 2(a)) and that without such information, it was difficult to formulate a realistic wage proposal. According to Schwartz, he very much needed answers to the following questions: 1) What were the job classifications?; 2) What were the hours worked?; 3) Did labor contractors' employees or Respondent's employees work on certain crops?; 4) Which employees were paid piece rate and which hourly?; and 5) What were the seniority dates in order to determine, for example, the method by which vacations were allotted.

As of the time of Schwartz' departure, these informational requests had not been fulfilled. By representing to Hempel that he would try to make a proposal, Schwartz was merely indicating that he would do the best job he could in this direction with what information he had. He was not conceding that he needed no more or that what he had received was sufficient.

As to the issue of being dilatory in presenting an economic proposal, Respondent overlooks the fact that it was Andrade not Schwartz who testified that it was at his (Andrade's) suggestion at the February 5, 1979 meeting that the parties negotiate the language proposals first and then later move on to economic matters.

B. The UFW's Alleged Insistence on Discussing only Economic Issues.

Respondent next argues that often during negotiations Hempel wanted to discuss non-economic proposals, but Steeg

demanded that the economic items be discussed first. (Respondent's post-hearing Brief, p. 96). Thus Respondent argues both that the UFW did not present an economic proposal for some time and that when it did, it refused to discuss anything else.

I do not believe the facts support this conclusion. The negotiating history reveals that Steeg was eager to discuss and reach agreement on any subject and did not limit her negotiations to economic only. She did not insist the Union would not discuss non-economic issues. Nor did Steeg ever refuse to bargain over non-economic matters unless Respondent agreed to accept the Union's economic proposal, as was the case in Cal-Pacific Furniture Mfg. Co., 223 NLRB 1337 (1977), on which Respondent relies so heavily.[129/] Here there was no evidence that Steeg had presented any economic proposal as a final offer or that just because negotiations became stymied on economics, Steeg was unwilling to make further concessions either in the economic area or on other unresolved issues.

C. The UFW's Alleged Delay in Comming Forward with Economic Counterproposals.

Next Respondent argues that Respondent mailed Steeg an economic counterproposal on September 21, 1979 (G.C. Ex. 62) but that Steeg delayed in countering on the grounds that Respondent's offer was too low and that it amounted to a "declaration of war against the UFW." (Respondent's post-hearing

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129/ The ALJ in Cal-Pacific pointed cut that there was nothing to prevent the parties from attempting to reach agreement on economic matters first and then negotiating about non-economic issues later.

Brief, p. 91). In addition, Respondent charges that Steeg refused to present a counterproposal during the following month of November.

This contention is untrue. Respondent neglects to mention that at the very next meeting, October 12, 1979, Steeg offered the recently negotiated Sun Harvest agreement as a basis for a contract and that the parties negotiate only over those crops not grown by Sun Harvest, local issues and retroactivity. After Hempel's initial summary rejection of this offer, Steeg, at the very next meeting on November 1,offered both the West Coast agreement and then, that also having been rejected, a new economic and language proposal (G.C. Ex. 64). The Union's next proposal was shortly thereafter, January 3, 1980 (G.C. Ex. 67).

D. The UFW's Alleged Demand of Illegal or Non-Mandatory Subjects of Bargaining.

1. Union Representative

The Union proposed (Article 45) that an official representative of the Union be designated to adjust grievances and administer the contract on ranches of fifty workers or more and that he/she be compensated by Respondent while performing these duties.

Respondent argues that the Union's proposal of a paid Union representative was bad faith bargaining because such a proposal was "beyond any doubt"..."illegal on its face"; and if

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implemented by Respondent would cause it to violate Section 1155.4-[130/] and Section 1155.5[131/] of the Act. (Respondent's post-hearing Brief, pp. 94-95).

Respondent relies, in support of its position, mainly on the authority of United States v. Kave, 556 F.2d 855,'-95 LRRM 2668 (7th Cir. 1977), cert. den. 434 U.S. 921 (1978).

In the first place, this argument was not raised at anytime by Respondent during negotiations, and this fact reflects upon the validity of the position since Respondent is presenting it for the first time in its Brief. (Respondent's main reason for rejecting the provision outright during negotiations was that it was opposed to the concept of paying workers for not performing any actual farm work for Respondent).

130/ Section 1155.4 provides: "It shall be unlawful for any agricultural employer or association of agricultural employers, or any person who acts as labor relations expert, adviser, or consultant to an agricultural employer, or who acts in the interest of an agricultural employer, to pay, lend, or deliver, any money or other thing of value to any of the following: (a) Any representative or any of his agricultural employees. (b) Any agricultural labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the agricultural employees of such employer. (c) Any employee or group or committee of employees of such employer in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing. (d) Any officer or employee of an agricultural labor organization with intent to influence him in respect to any of his actions, decision or duties as a representative of agricultural employees or as. such officer or employee of such labor organization."

131/ Section 1155.5 provides: "It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan or delivery of any money or other thing of value prohibited by Section 1155.4."

Second, it is not "beyond any doubt" that the provision is illegal.[132/] Although there are very few cases interpreting Sections 1155.4 and 1155.5, the ALRB has pointed out that the federal statute from which it was derived (Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. Section 186(c)) was enacted in an effort to prevent corruption in labor organizations and is separate and apart from the unfair labor practices outlined in Section 1153 and 1154 of the Agricultural Labor Relations Act. United Farm Workers (Jesus Conchola), 6 ALRB No. 16 (1980). In United States v. Kaye, supra, the defendant, a labor union official, was charged with racketerring for accepting money from employers (service contractors) for services as a union steward when defendant never provided the services he was supposed to. In fact, at one point, the defendant placed himself on a service contractor's payroll for work in Chicago when defendant was in fact, absent from Chicago.

This kind of fraudulent criminal activity is a far cry from paying a worker regular wages for actually performing a service potentially of some benefit to Respondent; namely, helping to resolve disputes at the workplace and to assest in administering a first contract concerning a large number of workers.

Finally, it is uncertain whether a proposal for a union representative is a mandatory or permissive subject of

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132/ Even if it were illegal, no violation of the Act can be said to occur from the mere proposing it for negotiation. Morris, "The Developing Labor Law", Bureau of National Affairs, Inc., 1971, p. 438.

negotiations. Arguably, it was mandatory becuase it had a direct relationship to the employees'terms and conditions of employment adjustment of grievances and administration of the contract. If it was mandatory, Respondent's failure to ever discuss it at all represented a refusal to bargin on its part. NLRB v. Katz, supra.

On the other hand, a permissive subject may be proposed and negotiated by the consent of both parties at the bargaining table except that "the proponent may not insist on its position to the point of impasse or as a condition of reaching an agreement, and the other party may decline to discuss the issue altogether without violating the law." Gorman, "Basic Text on Labor Law", West Publishing Co., 1976, p. 523.

In the instant case, I need not decide whether the Union Representative proposal was mandatory or permissive because Respondent argues in its Brief only that the clause was illegal and not that the UFW insisted on it to the point of impasse. It did not. Respondent had really not gotten to the point in negotiating where it could be said it knew just how firm the UFW would stand on the issue. Nor had Respondent received-an ultimatum that a contract was impossible unless the Union Representative clause was included. McFarland Rose Production, supra.[133/]

133/ Steeg, as a rebuttal witness, denied telling Hempel that the Union would not sign a contract without this provision, and she denied that she maintained it was a mandatory subject of bargaining. She testified she only told Hempel that the Union was very serious about the proposal. I credit her testimony.

Thus, if arguendo the subject matter here was said to be a permissive area of bargaining, Respondent has failed to demonstrate that the Union bargained to impasse over this issued[134/]

2. Citizenship Participation Day Next, Respondent argues that the Union wanted Citizenship Participation Day (hereafter CPD) made a part of the ultimate agreement and "to force employees to authorize deductions (via application of the good standing requirement in the UFW's union security proposal)"[135/] although CPD "is nothing less than a fund utilized by the union for political purposes."[136/] (Respondent's post-hearing Brief, p. 95).

134/ Even if there were impasse over this one article, the fact that the parties may have reached an impasse on one article constitutes no defense to a refusal to bargain with respect to other matters which the union requested to be considered. Chambers Manufacturing Corporation, 124 NLRB 721, 44 LRRM 1447 (1959).

135/ Hempel had accepted the good standing concept in his August 5, 1980 proposal (Resp's Ex. 23), only to represent later (at the September 2, 1980 meeting) that it was another error.

136/ At one of the negotiating sessions, Hempel referred to CPD as a "slush fund" for the Union and implied that his position would be sustained by Conchola. United Farm Workers, supra, he also refused to negotiate over the subject matter on June 12, 1980, after Conchola had been issued, telling Steeg the decision helped him. It does not. In Conchola, the Board found no evidence of any threat by the UFW to affect Conchola's relationship with his employer and dismissed the complaint. Although the Board found problems with the method a dissenting union member would have to utilize in order to' recoup contributions that went to non-collective bargaining causes to which he was opposed, it did not find CPD to be unlawful.

The same analysis just given to the union Representative proposal would apply to this question. Even if CPD were a non-mandatory subject of bargaining, which Respondent maintains it is in its Brief, it has not demonstrated that the UFW brought the parties to the point of impasse over it. In fact, Respondent does not even suggest that -- it only maintains that the UFW's "insistence on negotiations is clearly strong evidence of bad faith." (Respondent's post-hearing Brief, p. 95).

E. The UFW's Alleged Utilization of Illegal Tactics Away From the Bargaining Table.

Respondent contends that through work stoppages and other activities away from the bargaining table, the UFW evidenced bad faith. The evidence is scanty, the connection between the activity and bad faith bargaining is not clear, and Respondent does not bother to argue it in its post-hearing Brief. There is evidence of a conversation between Hope Beltran and Marshall Ganz in which Beltran suggested that Ganz was attempting to frighten her into pressuring Paul Bertuccio into making concessions to the UFW at the bargaining table. There is also evidence of work stoppages that occured from time &o time. In any event, such activities may be perfectly legal, protected activities. But even if such activities were unprotected, they were not necessarily incompatible with the desire to bargain in good faith. The U.S. Supreme Court has held that a union does not violate its duty to bargain, even where it initiates intermittent work stoppages and disruptions that may be unprotected activity. N.L.R.B. v. Insurance Agents'

Union, 361 U.S. 477, 45 LRRM 2705 (1960). Good faith then is to be judged by the attitudes and conduct at the bargaining table; it is not for the ALRB to outlaw specific kinds of economic pressures. "...that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that...there is simply no inconsistency between the application of economic pressure and good faith collective bargaining." N.L.R.B. v. Insurance Agents' Union, Id. See also, Kaplan's Fruit and Produce Company, 6 ALRB No. 36 (1980).

F. Other Affirmative Defenses.

Respondent on August 20, 1980 also represented that the statute of limitations, laches, and estoppel were affirmative defenses. Except for arguing that one of the unilateral raises allegations was or should have been dismissed, I cannot recall any other objection to evidence being made utilizing these defenses. And since Respondent made no specific mention in its post-hearing Brief of these matters, it is not clear what Respondent's argument is, if there is one. At one point Respondent's counsel offered to point out specifically how these defenses applied to the instant case, but this apparently never occurred. I note that the NLRB has held that a statute .of limitations question is not jurisdictional and can be-waived. A. H. Belo Corp, v. N.L.R.B., 411 F.2d 959, 71 LRRM 2441 (5th Cir. 1969), cert, den., 396 U.S. 1007.

In addition, I do not agree that the UFW insisted on information it already had, as Respondent contended in its Amended Answer.[137/] I have found that the UFW made timely requests for relevant information but that the information was either delayed, refused, or presented only in part.

Respondent also claimed in its Amended Answer that the UFW did not represent all its members fairly.[138/] What business this is of Respondent's and how it relates to bad faith bargaining on the UFW's part, I know not. But if Respondent is referring to the labor contractor question, the facts are not that the UFW was out to displace Quintero's workers, who had voted in the union election, but rather to merge them all under one seniority system for all the crops grown by Respondent, including those presently farmed by labor contractors. What the UFW wanted to eliminate was the labor contractor, not the workers he employed.

I have considered Respondent's other affirmative defenses and reject them.

Respondent raises some defenses for the first time in its post-hearing Brief; e.g., part c (p. 92), part d (p. 9.2) and part g (p. 98). Since they were not specifically covered in the original Answer, the August 20 verbal Answer or the September 12, Amended Answer, I shall not consider them.

137/ Respondent did not address this issue in its post-hearing Brief.

138/ This issue is likewise not addressed in Respondent's Post-hearing Brief.

Viewed as a whole, the UFW's conduct does not constitute bad faith bargaining. It did not fail or refuse to bargain in good faith, and it was not the cause of the parties' inability to reach an agreement. The evidence as a whole shows that the UFW desired and worked towards a contract and that Respondent did not. There is no evidence that if the UFW .had acted as Respondent contends it should have, Respondent's bargaining strategy would have been any different. McFarland Rose Production, supra.

VII. Failure and Refusal of Respondent to Provide Accurate Information in a Timely Fashion

A. Respondent's Compliance with the Information Requests.

1. Facts

On December 13, 1978, Cesar Chavez wrote Paul Bertuccio requesting the commencement of negotiations. Enclosed with this communication was a "Request for Information" (G.C. Ex. 2(a)) which asked for production data, employees' names, dates of hire, wages paid, vacation taken, etc. that was said to be necessary before the Union could make a "reasonable and substantive negotiation proposal."

At the time Schwartz learned that Andrade was to be Respondent's negotiator, none of the information had been received so that in his very first letter to Andrade (January 10, 1979), Schwartz mentioned the need for this information and added that without it, the Union would have difficulty in submitting a proposal. (G.C. Ex. 5).

By the first meeting on January 22, 1979, Respondent had not yet provided the requested information. According to Schwartz, Andrade promised to have it by the very next negotiating session.

At that meeting (February 5, 1979), Andrade handed over to Schwartz a partial list of information sought (G.C. Exs.7 and 8, Rasp's Ex. 4)[139/] but same did not include some essential items, as follows: 1) there was no listing of the total hours employees worked (G.C. Ex. 7, p. 1). Andrade testified that he explained to Schwartz that these records were not kept, that there were "time cards" but that the list was incomplete because some of them had been turned over to the ALRB and not returned; 2) there was no breakdown of each employee's job category (G.C. Ex. 7, pp. 2-5); "3) there was no listing of the employees' dates of hire[140/] (G.C. Ex. 7, pp. 2-5); 4) there was an incomplete list of employees -- approximately seventy of the steadies only. [141/] (G.C. Ex. 7, pp. 2-5);5) it was unclear when Respondent replied to the inquiry regarding units per acre, which unit of production -- carton, box, bin, or bucket -- it had in mind. (G.C Ex. 7, p. 1); 6) there was no information of

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139/ Resp's Ex. 4 provided a list of pesticides used but not their "method of application", as had been requested. According to Schwartz, Andrade said this information would be forthcoming soon.

140/ Only the year the employee began work (not the month or day) was listed; some spaces were left blank. Mrs. Bertuccio testified she only guessed at this information and did not consult with Jose Duran or any other supervisor or foreman in order to obtain more accurate information.

141/ Mrs. Bertuccio also testified that she provided a list of only steadies because she cot the impression from Schwartz that this was all he wanted.

the tools, equipment, and protective garments provided to workers. (G.C. Ex. 29, p. 1).

At the next meeting, February 21, 1979, Respondent provided further information on pesticides, tools, and equipment, updated its total acreage/crop information (G.C. Ex.. 10), and presented Schwartz with a list of more than 600 seasonal workers along with their gross wages. However, their hours worked, hiring dates, and job classifications still were not given and Schwartz reiterated his request. According to Schwartz, Andrade represented that he would look into the possibility of obtaining more information but that Respondent did not keep hiring dates or job classifications.

At the March 8, 1979 meeting, Schwartz renewed the Union's request for the information on hours worked and hiring dates. Andrade replied that he thought he could get the information off weekly time cards[142/] and that they would provide the information to Schwartz that he wanted.

At this meeting, Schwartz also requested, for 1977 and 1973, the names of the employees working for all the labor contractors utilized by Respondent, their hours worked and, job classifications.

On March 20, 1979 Schwartz again requested information on hours worked and hiring dates and was again informed by Andrade that Respondent had weekly time cards but that these were the only records that Respondent possessed.

142/ Mrs. Bertuccio testified that the foremen handed cut these time card forms after she stamped the date on them, and that the employee would fill out his hours worked on the card the last day of the pay period. Wages were calculated by Mrs. Bertuccio on the basis of these cards according to whatever rate was in effect for that category of work.

According to Schwartz, neither Andrade nor Mrs. Bertuccio brought any time cards with them but that Tina Bertuccio represented to him that piece rate information was contained on the cards,[143/] although information on job classifications was not. During the meeting, Andrade offered Schwartz an opportunity to lock at whatever time cards he had.[144/]

Schwartz testified that he declined Andrade's offer at this session because Andrade indicated that any information from the time cards would be hard to gather since there were thousands of such cards, that they were not in any organized form, that they covered a large farming operation with many different crops and production units, and that Andrade made it clear that it was Schwartz who would have to compile the information himself. Schwartz conceded, however, that the time cards might have contained relevant information, even if they did not contain job classification information, because the hours worked (on a weekly basis) for at least some of the hourly workers would have been reported.[145/]

143/ The time cards did not indicate the piece rate workers hours worked--they only displayed the number of units completed by piece rate workers and the weekly hours worked by hourly employees.

144/ Andrade indicated he was not sure how many time cards Respondent actually had because, according to him, some of them were in the possession of the ALRB.

145/ On this basis and because Schwartz testified that he was desperate for some information in order to make contract proposals, he did later agree to review these records. However, this decision was made at what turned out to be his last negotiation session, May 7, 1979; Schwartz shortly thereafter became ill and never saw the cards. Hempel testified that he offered the cards at various times to Steeg, but she declined to review them.

Also on March 20, Schwartz asked Andrade for information as to any relationship Respondent might have with other growers for growing, harvesting and/or packing of any of Respondent's products. Andrade testified that he told Schwartz that most of Respondent's lettuce was harvested by Let Us Pak Company, that the Respondent had had a relationship with this company[146/] for five-six years, but that he (Andrade) was unable to say how much was harvested because it varied every year. Andrade indicated he would send this information to Schwartz shortly thereafter.[147/]

Schwartz inquired whether the 100 acres listed under "lettuce" (G.C. Ex. 7) included Let Us Pak production or any of Respondent's and, according to Schwartz, Mrs. Bertuccio replied that she was not sure.[148/]

The UFW had also previously requested information on what crops were produced per acre in order to determine how much work was available for Respondent's employees. On March 20, Andrade gave Schwartz 1978 acreage information on a number of crops (G.C. Ex. 13) and a list of piece rates per unit of production for different crops (G.C. Ex. 14).

146/ Paul Bertuccio testified that he was a limited partner in Let Us Pak.

147/ He did on April 4, 1979 (Resp's Ex. 1). This document only covers harvesting up to 1978. Paul Bertuccio testified that Let Us Pak harvested 70% of his crop in 1979 but only 50% in 1930. He also testified that Let Us Pak performed no pre-harvest work on any crop.

148/ This concluded the discussion on Let Us Pak. Andrade could not remember if he told Schwartz of an arrangement between Respondent and Let Us Pak in which if the latter declined to do a harvest, Respondent had first option to repurchase the acreage.

However, Schwartz contended that the information was still insufficient because: 1) it didn't include piece rates for the labor contractors; 2) it was net clear how much of the production was by Respondent and how much was by others; and 3) the document did not designate who was doing the harvesting.

Thereafter, on August 4, 1979, Andrade presented Schwartz with a list of Let Us Pak's acreage harvested between 1971-1973 (Resp's Ex. 1). But Schwartz believed that this information was likewise not helpful becuase it only contained acreage figures and no production information such as the number of cartons picked.

Marion Steeg took over as Union negotiator from Michael Schwartz sometime in July, 1979 following Schwartz illness. At her very first negotiating session, August 2, 1979 Steeg reiterated the Union's previous requests for hours worked, job classification, and production information, and made some new requests, as well; e.g., information on Let Us Pak, labor contractors and custom harvesters. Hempel confirmed that in early August Steeg asked him for a list of crops grown and acreage in 1979 and 1980 and what Quintero was then harvesting. Hempel testified that he told Steeg that she had been given that information before but that he would go back and check with the Bertuccios on it again anyway.

Hempel also testified that as to the requested information on the employees' dates of hire, he informed Steeg that the matter was being handled in that Duran had been directed to ask the employees to fill our employment

cards.[149/] According to Hempel, these cards were then placed in a large box which he presented to Steeg. Hempel testified that Steeg wanted to take the cards with her but that he told her she could not do this as they were originals, but that she could copy them. Hempel could not remember her response but recalls that Steeg did look at the records because she-was interested in seeing what information they contained. According to Hempel, these cards were the only dates of hire records Respondent ever possessed.

149/ Tina Bertuccio testified that a few days after receiving the Union's Hiring proposal, Duran was instructed to get a list of all people who worked for Respondent in 1978, 1979, and 1980, to keep records of the dates workers applied for work, and to note if the person ever worked for Respondent before. Mrs. Bertuccio further testified that these records were quite helpful and that if she needed someone immediately, for shed work, for example, all she would have to do would be to consult these lists. However, she also admitted that said lists were incomplete that not all had dates of hire and not all had information as to whether the worker had previously worked at Respondent's. When asked if the easiest way to have prepared the list was from the time cards, Mrs. Bertuccio responded that she was sure that was what Duran was doing. Duran, however, was not so sure. In fact, his testimony contradicted that of Mrs. Bertuccio directly. The General Counsel's subpoena duces tecum had requested "all documents, written applications and writings in any form which record the names of persons who have applied for or asked for employment as employees of Bertuccio during 1980". Duran testified, that he had no papers of that kind, that he used no written applications to hire workers, and that when workers came to him for jobs In 1980 and there was no job available, he did not take the applicant's name. Duran further testified that if there was no job available, he would tell the worker to keep checking with him.

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Steeg's position was that these cards were incomplete[150/] and that independent verification of the date of hire was still necessary. She continued to insist that in order to deal' with inaccuracies, Respondent obtain the information from the appropriate source, such as, for example, its own labor contractors (G.C. Ex. 47).

Subsequent to these August meetings, Respondent attempted to deal with the job classification informational request by preparing and turning over to the UFW additional categories on September 21, 1979 (G.C. Ex. 28). Mrs. Bertuccio testified she obtained this information from the time cards.

This new document included some new classifications such as "all around man", "general shed", "apricots", "stitcher man", "box folder", "sprayman", but contained no further information. According to Hempel, Steeg had now been provided with all materials she had requested on August 2, and he told her so at the August 29, 1979 meeting.[151/]

Hempel further testified that Steeg subsequently asked for additional information; e.g., the number of apricot trees pruned and the number of hours spent pruning and whether Respondent packed lettuce into boxes of thirty each, instead of the standard twenty-four. Hempel testified he told Steeg that Respondent did not pack thirty but that he would check; and that

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150/ Respondent did not require its employees to fill out there cards. As a result, only about one-half completed the forms.

151/ In addition, Hempel wrote to Steeg on December 5, 1979 (G.C. Ex. 45) stating that Respondent had provided the Onion with all the information requested by it.

he later found that he had been mistaken whereupon he reported this back to Steeg. As to the apricot pruning, Hempel testified he informed Steeg that Respondent did not keep those kinds of records.

2. General Summary of Actions Taken on UFW's Informational Requests

Hours Worked -- Respondent provided little information in this category, claiming that such records were not kept. It did represent that it possessed some time cards, though it was uncertain as to how many. In any event, it made it clear that the information would have to be gathered by Schwartz from incomplete files.

Job Classifications -- Respondent's position was that it did not keep this type of information either. When it did attempt to categorize the jobs, it often stated "field" worker without explaining in more detail the nature of the work. (G.C. Ex. 7). At times more than one job was listed; e.g., "field and shed", "field and misc.", "truck driver and misc. shed"; however, there was no breakdown as to how much of the work represented field and how much was for shed, etc. (G.C. Ex. 28). Nor was it clear from the catefories and pay listed if the work was paid hourly or piece rate.

Date of Hire – The UFW had requested the day, month and year for each employee, but Respondent provided only. the year for some of its workers and maintained it had no further information. Subsequently, according to Mrs. Bertuccio, Respondent handed cut cards to its employees asking to fill out

the requested information but only about one-half did so.

Grower/Shipper -- While the general description of the relationship between Let Us Pak and Respondent was clarified (Resp's Ex. 1), more specific matters remained unclear; e.g., though Respondent gave Let Us Pak acreage figures, what did the production statistics show?; were the 100 acres listed under lettuce in G.C. Ex. 7 Respondent's or Let Us Pak's?

Labor Contractors — Some information regarding Quintero's workers had been provided along with a list of 1977 workers and gross wages, but not all of the requested information was made available; e.g., names of all labor contractors, job classifications, hours worked, and work performed by workers provided by labor contractors.

Acreage/Crops Grown — The UFW did receive, generally speaking, this information.

Miscellaneous — Most of the other information requested; e.g., whether Respondent paid for witness and jury duty, pesticides, life insurance, medical, and pension etc. was made available. (Resp's Ex. 4).

3. Relevance of the Items Sought

There is little question but that the information sought by the UFW was timely and relevant to the subject matter of collective bargaining, and Respondent does not really contend otherwise.

a. Hours Worked

In order to formulate a meaningful economic proposal, it would be important for the UFW to know the number of hours

Respondent's employees worked during the year in order to compare these figures with the gross wages because such information might help to determine whether it would want to make a proposal for piece rate or hourly. O. P. Murphy Produce Co., supra. The number of hours worked would also affect vacation, medical, and pension proposals.

b. Job Classification

In addition to hours worked, it would also be important to the UFW to know the exact job classification of each employee because this would delineate the kind of jobs performed at Respondent's, the nature of the work, and again, whether the pay proposals should be piece rate or hourly.

Job classification information linked with the names of individual employees is relevant to collective bargaining. Boston Herald Traveler Corp. v. N.L.R.B., 223 F.2d 58, 36 LRRM 2220 (1st Cir. 1955), citing N.L.R.B. v. Whitin Machine Works, 217 F.2d 593, 35 LRRM 2215 (4th Cir. 1954), cert den., 35 LRRM 2730 (1955).

c. Names of Employees and Dates of Hire

The names and social security information might have helped to determine what the employees' wages were in the various job classifications. Date of hire information was relevant to the questions of vacation, pension, medical, bumping, layoff, and recall.

d. Acreage/Crops Grown

The Union sought production information per crop and acre to determine yield and thereby determine how much work was

available for Respondent's employees. This in turn would help determine what the wage proposal ought to be and whether it should be hourly or piece rate. For example, if there were a large yield per acre, the piece rate the Union would propose might be lower compared to a crop in which there was not as great a yield.

e. Labor Contractors/Custom Harvesters This information was likewise important to the Union. The Union, recognizing that it also represented the workers of the labor contractor who had voted in the union election, wanted to include the crops worked by them within the total bargaining picture. Thus, it was necessary for the Union to determine which crops were being worked by Respondent's own employees, which by a labor contractor, and which were custom harvested. [152/] Ultimately, the Union hoped to negotiate a contract that would include the labor contractors' employees within its hiring, seniority, layoff and recall provisions[153/]

152/ Even if Respondent had no duty to bargain regarding the alleged custom harvesters, it was not relieved from the duty to provide relevant information that could lead to the determination of the status of bargaining unit employees: "...Where, as here, the basic question is one of unit placement of a classification, the relevance of job descriptions of assertedly nonunit classifications is all the more pronounced." Brooklyn Union Gas Co., 220 NLRB 139, 192 (1973). See also, Curtiss-Wricht Corn, v. N.L.R.B., 347 ?.2d 61, 59 LRRM 2433 (3rd Cir. 1965).

153/ The final objective of the Union, of course, was to eliminate entirely Respondent's practice of utilizing the services of labor contractors.

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4. Analysis and Conclusions

The principles of law underlying this issue are well settled. The duty to bargain in good faith may be violated by an employer's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out the negotiation or administration of a collective bargaining agreement. Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 303, 99 S.Ct. 1123, 1125, 59 L.ed. 2d 333 (1979); N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 435-36, 87 S.Ct. 565, 567-68, 17 L.ed 2d 495 (1967); N.L.R.B. v. Truitt Manufacturing Co., 351 U.S. 149, 152, 76 S.Ct. 753, 755, 100 L.ed 1027 (1956); N.L.R.B. v. Associated General Contractors, 633 F.2d 766 (9th Cir. 1980), 105 LRRM 2912, cert den., ___ U.S. ___ (1981); Masajo Eto dba Eto Farms, et al., supra; Kawano, Inc., 7 ALRB No. 16 (1981).

Satisfaction of Respondent's obligation requires not only that the information be provided but that it be supplied with reasonable promptness. B. F. Diamond Construction Company, 163 NLRB 161 (1967), enf'd 410 F.2d 462 (5th Cir. 1968), cert den., 396 U.S. 835 (1969); Kawano, Inc., supra. Late, submission is not sufficient where diligent efforts to furnish it in a timely fashion have not been made. General Electric Company, 150 NLRB 192, 261, (1964).

Failure to furnish information on employee job classifications, dates of hire, social security numbers, wages, and fringe benefits of unit employees is a violation of Section 8(a)(5) and (1) of the NLRA. Fry Foods, Inc., 241 NLRB No. 42, 100 LRRM 1313 (1979); Calleer's Custom Kitchens, 243 NLRB No.

143, 102 LRRM 1009 (1979).

It is also a violation of the ALRA. In Kawano, Inc., supra, failure to state the classifications of employees in terms other than general workers and failure to explain the rate differential enjoyed by workers was said to be a violation of Sections 1153(e) and (a) of the Act. See also, Masaji Eto dba Etc Farms, et al., supra.

Even though an employer has not expressly refused to furnish the information, his failure to make a diligent effort to obtain the information may be violation of the obligation to bargain in good faith. N.L.R.B. v. John S. Swift Co., 277 F.2d 641, 46 LRRM 2090, 2093 (7th Cir. 1960). Even if some of the requested information is not available in the form requested, the employer must make a reasonable effort to secure the information or to explain or document the reason for its unavailability. Borden Inc., Eorden Chemical Division, 235 NLRB 982, 98 LRRM 1098 (1978).

Of course, the defense of unavailability is, at first glance, appealing, but not where there is a lack of good faith compliance with the request by not furnishing all of the information which was available. N.L.R.B. v. Rockwell-Standard Corp., 410 F.2d 953, 59 LRRM 2433 (6th Cir. 1967). Therefore, it is no excuse to claim that the information did not exist where other data was also obtainable by the respondent, but not made available to the union. Peyton Packing Co., Inc., 129-NLRB 1353, 1362 (1961).

Obviously, where unavailability is a legitimate defense, a respondent is not obliged to furnish the information 'requested

in the exact form called for. "But if the Company's strict construction of the Union's request was in truth the basis for its refusal, minimum standards of good faith require the Company at least to inform the Union as to the specific reason for unavailability, to disclose the alternate basis on which such information might be made available, and to inquire whether that alternative would be acceptable." General Electric Company, supra.

Respondent herein fell far short of fulfilling its duty to provide accurate, complete, and timely information, upon request, to the UFW. In some cases, it turned over no information at all. In others, incomplete information was made available only after long and unexplained delays. Generally, Respondent's full compliance with the Union's informational requests only occurred on relatively minor items; e.g., pesticides, tools, or items in which Respondent's answer was in the negative to the question of whether it offered any benefit to its employee such as jury duty pay, bereavement pay, a pension plan, etc. (See Resp's Ex. 4). However, on the major items, Respondent failed to comply with the Union's requests.

a. Hours Worked

Respondent vigorously defends its failure to provide certain types of information, such as hours worked data, by claiming that it possessed no such records; and that therefore, it was somehow relieved of any further obligation it may.

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have had.[154/]

It has been held that an employer who refused to provide the union with records of the estimated number of hours that employees would work on each job was in violation of the NLRA despite its contention that it did not keep written records of the number of hours, Garrett Railroad Car and Equipment, 244 NLRB No. 132, 102 LRRM 1357 (1979). But here the simple fact is that Respondent did possess some records on its employees', hours worked which, if turned over to the UFW, would have gone a long way towards fulfilling its legal obligation. However, none of the following sources of information was-ever mentioned or made available to the Union for its inspection:

1) Payroll Ledger Sheets

Paul Bertuccio testified that his business used payroll ledgers and that Mrs. Bertuccio was in charge of them. Some sample entries were introduced into evidence. The payroll journal, for example, for the week of May 25, 1979 (G.C. Ex. 31),

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154/ Respondent claims that it did not keep, inter alia, records of the hours worked of its employees per year, either for its hourly or piece rate employees, so that it was unable to provide this information to the UFW. It is worth noting that the Industrial Welfare Commission Order No. 14-80 (effective January 1, 1980) regulating wages, hours, and working conditions in the agricultural occupations (G.C. Ex. 93) under paragraph 7, "Records", states: "(A) Every employer shall keep accurate information with respect to each employee including the following: (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request. (6) When a piece rate or incentive plan is in operation, piece-rates, or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer." Not only was this regulation never followed by Respondent, but Hempel testified he never even informed the Bertuccios of its existence.

prepared by Mrs. Bertuccio,[155/] showed workers', including piece rate workers' hours worked per week.

2) Weekly Field Sheets

Paul Bertuccio testified that he could ascertain how long the weeding and thinning of lettuce would take through a review of the weekly field sheets (G.C. Ex. 26) covering consecutive days for which Duran had responsibility.[156/] In fact, Bertuccio testified that when he observed a slowdown in the sugar beet fields in March/April, 1980, he went back to his office and, using field sheets, was able to determine the number of acres in the field, the number of employees working, the time it was taking, and what it was costing per acre. In this way he discovered that sugar beets were taking twice as long in 1980 as they had taken in 1979.

Mrs. Bertuccio corroborated the testimony of her husband. She testified that the field sheets would reveal how long it was taking to produce any crop so that the farming operation would know how much it was costing per acre. According to Mrs. Bertuccio, by adding up the hours on the field sheets, a cost determination could easily be made.

155/ This payroll system was identical to the one established for labor contractor Quintero and prepared by his daughter, Hope Beltran (G.C. Exs. 29 and 30).

156/ Duran filled out the field sheets and brought them to Mrs. Bertuccio who retained them in the office. During 1930, Duran kept a running record for lettuce weeding and thinning. Duran also prepared field sheets covering the work of Quintero' s workers.

3) Other Sources of Information

a) Paul Bertuccio testified that he had done some analysis himself on the production costs for a carton of lettuce by computing it in his head and also utilized other sources such as talking with other growers. He admitted he himself had so calculated the cost per carton on onions in 1979 (but not 1980).

In Barney Manufacturing Co., Inc., 219 NLRB 41 (1975), a defense to a demand for information regarding the piece rate system was that no such records were in existence and that the piece rates were personally and mentally determined by the company's president. This defense was rejected by the NLRB. The Board explained that the president could have explained to the union the piece rate system. And in Ramona's Mexican Food Products, 203 NLRB 663, 676,684 (1973), aff'd, 531 F.2d 390 (9th Cir. 1974), the employer's claim that he kept the formula for drivers' bonuses in his head and did not have to give out that information was likewise rejected.

b) In January, 1980, Hempel discussed with Steeg tha rates paid for the cabbage harvest the preceding November/December. Hempel told Steeg that he had been informed by Tina Bertuccio that a computation of the piece rate revealed that it figured out to be greater than if the workers were to continue being paid at the hourly rate of $3.25 for general labor.

Respondent was somehow able to determine the number of hours employees worked in order to ascertain that they could have made

more on a piece rate basis than at the hourly rate. Hempel testified, however, that he failed to inquire of Mrs. Bertuccio how she had made the calculation.

c) In 1976, Respondent ceased harvesting potatoes because the business was losing money. Mrs. Bertuccio testified that this fact was determined by Paul Bertuccio by adding up the cost of seed, thinning, irrigation, and labor and then checking the time cards.

d) Jose Duran testified that starting in 1979, workers were required to turn in cards showing the number of hours worked per week. In addition, beginning in April/May, 1979, Duran kept a personal notebook listing every person who was under Duran's responsibility. The record does not clearly reflect that Duran or the documents he referred to were utilized by Respondent in gathering information to supply to the UFW pursuant to its request.

But Respondent contends it fulfilled its duty by-offering the information in a slightly different form as had been requested its time cards. While it is true that had the proffered time cards been able to supply the requested information in a complete and organized manner, they may well have been sufficient, even if they were not in the exact form requested by the UFW. Kawano, Inc., supra. See also, The Cincinnati Steel Castings Company, 86 NLRB 592 (1949); Lasko Metal Products, Inc., 148 NLRB 976, 979 (1964). But this argument is of no avail to Respondent here where the cards only partially

satisfied the UFW's demand and, as has been shown, Respondent had other more complete information which was not made available. Moreover, the UFW was under no obligation to utilize a burdensome procedure of wallowing through an incomplete and disorganized box of time cards "attended with considerable difficulty-and loss of time." The B. F. Goodrich Company, 85 NLRB 1151, 1153-54 (1950). "The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make." The Kroger Company, 226 NLRB 512, 513 (1976). And Kawano, Inc., supra, though relied upon by Respondent (letter of July 24, 1981 to me from counsel for Respondent), does not give it any aid. There the Board also held:

> "While Respondent may not be required to engage in burdensome work to satisfy a request for information, it does have an obligation to provide requested information when that information can be assembled and provided without great inconvenience or cost." Id, at p. 47 of A.L.O.D.

Finally, in O. P. Murphy Produce Co., Inc., supra, the Board found that respondent therein had violated Section 1153(e) by refusing to provide the UFW with the information it requested concerning the company's production and yield. "Respondent's yield and production figures are closely related to the income of the employees.... Respondent did not fulfill its duty by providing only gross numbers of employees and acreage, or by offering to allow the union to look through its general office records."

b. Job Classifications

Respondent repeatedly took the position that it did

not have this type of information either, that it had no duty to provide it, and that the UFW was attempting to force Respondent to create classifications that simply did not exist, citing N.L.R.B. v. United Brass, 287 F.2d 689, 696 (4th Cir. 1961). (Respondent's post-hearing Brief, pp. 72-73). I disagree. Unlike United Brass, the UFW's primary bargaining objective here was in trying to ascertain what work was performed by which workers and how much they were paid and not in establishing job classifications.[157/] Though Respondent maintained that it had only "general laborers", in truth it had distinct wage rates applicable to different job categories. It would not seem to have been a major undertaking for Respondent to have made a better effort to categorize the types of work performed by its employees. In Lock Joint Pipe Company, 141 NLRB 943 (1963), the NLRB held that a union was entitled to a breakdown of information regarding the "laborer" classification. "The failure of the Respondent to honor this request was not because of an honest belief that the Union was not requesting any further information pertaining to this classification, but was rather because of Resondent's adamant position that it had given the Union the information originally requested and it was

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157/ In United Brass, supra, the employer had no specific job classifications because it was shifting employees from job to job in pursuance of a training program, there were no specific wage rates for the different types of work, and each employee was hired at a standard starting wage rate.

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not legally obligated to break down such information any further."[158/]

When Respondent finally, on September 21, 1979 (G.C. Ex. 28), got around to better delineating its job categories in response to the UFW's request months earlier, the result was confusing and incomplete. Large numbers of workers were still classified as "general labor"; yet, there was no adequate explanation why the jobs performed at Respondent's could not have been broken down more accurately into specific categories. If, as Mrs. Bertuccio testified, general laborers could be irrigators, tractor drivers, shed workers, lettuce cutters, or weeders, what prevented Respondent from stating this and further clarifying in some fashion what work each performed and for approximately how long. In those cases where the said records reflect a division of labor; e.g. general labor and shed, general labor and irrigation, general labor and lettuce, there is no attempt by Respondent to explain which percentage of time or what amount of time was performed for each category. As discussed in the preceding section, it would appear that Respondent had data on its employees' hours worked to help ft determine this information.

The information contained in C.C. Ex. 23 was also misleading. On the first page of the exhibit, for example,

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158/ For example, Hempel stated in a December 5, 1979' letter to Steeg (G.C. Ex. 45, p. 3): "Finally, in response to your statement that the Company has not provided you certain outstanding information; I can only respond that the Company has, in fact, provided you with all the information that has been requested by the Union...."

there are several general labor workers listed, but their hourly pay rates vary between $3.00 and $3.25. Mrs. Bertuccio admitted she could not explain the difference. One employee (Antonio Aguilar) was even shown to have a wage of $3.35 per hour. Mrs. Bertuccio testified that this was an error.

Other unexplained differences in pay rates among the same job category abound. Some irrigators are listed at $3.25 per hour (Luis Arreola); others at $3.50 (Marin H. Arreola). Why the difference? At first Mrs. Bertuccio stated it was because Marin Arreola also did tractor work (though not listed on the exhibit); later she said it was just an error, Truck drivers are listed at $4.50 per hour (Mario Correa); others at $3.50 (Jose de la Rosa). One stitcher is earning $3.50 per hour (Clayton Alsberge, Sr.); another is getting $3.25 (John Alsberge). Mrs. Bertuccio explained that the higher paid employee was not a regular stitcher as he also drove a stitcher truck. Why wasn't this explained on the exhibit?[159/]

Balnk spaces supposedly also refer to "general labor", but it is unclear if this was ever explained to the UFW. Her is it clear whether fork lift drivers are in the same job classification as tractor drivers.

159/ Hempel also attempted to explain the reason for wage differentials at one of the negotiating sessions but could not. The UFW never really received complete information on why some workers received higher pay for doing the same work as other lower paid workers, how the decision was made, and who made it.

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Mrs. Bertuccio admitted the list' was incomplete because, according to her, the time cards might miss some of the employees from time to time. In addition, some employees were marked "not here", which was meant to signify that the employee was not on the payroll at the time the list was filled out. Thus, the information on these persons was compiled from old time cards.[160/]

It is interesting to note that when Respondent finally did set forth detailed job classification definitions in its proposal of May 2, 1980 (G.C. Ex. 73, Appendix, "Seniority Classifications and Lists"), information that Steeg had long been seeking, Hempel made it clear that it was "for discussion only". Thus at the July 12, 1980 negotiating session when Steeg attempted to address the job classification issue, Hempel informed her that Respondent was not really making a proposal since it was not necessarily in agreement with the language contained in its May 2 offer. This, of course, left Steeg confused as to just what was Respondent's proposal on job classifications.

Respondent also argues (Respondent's post-hearing. Brief at p. 73) that the UFW did not argue about the job " classification information until six months into the negotiations, the implication being that it was thereby waived. I do not

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160/ Mrs. Bertuccio had no idea what week's time cards she even had used to compile the G.C. Ex. 28 list. She conceded that the list might have been a few months old when prepared, possibly as early as April, 1979. She gave no explanation why she waited until September to prepare the list.

find this to be the case. Putting aside the lapse of time occasioned by the change of negotiators on both sides, I find that Schwartz early on objected to the lack of job classification information. Respondent presented a list of 600 employees on February 21, 1979, which was incomplete. Shortly thereafter, Schwartz became ill and left the employ of the UFW. When Steeg came on the scene in August, no further information had been provided; and she immediately asked for additional data.

Moreover, even if Schwartz had not asked for further information, the Union did not waive its right to it. As-H-Me Farms, Inc., supra. The Union requested the information, and that request was sufficient to preserve its right to the data. Id. As the Board held in Kawano, Inc., supra.

> "It is not necessary that the UFW repeatedly request relevant information or avail itself of other opportunities to acquire it before Respondent's failure to supply the information is a refusal to bargain. An employee's obligation to supply relevant information arises upon request and is not satisfied until the information is furnished or the union either actually or constructively withdraws, or otherwise waives, its request by reaching agreement on the subject matter covered by the request." (Footnote omitted).
>
> Nor is it necessary that the request be repeated:
>
> "We are unimpressed with Respondent's contention, that we should not find a violation because the request was not repeated. If the Union was entitled to the information at the time it made the request, then Respondent was obligated to furnish it and there is no obligation of the Union to repeat such a request any given number of times. Rather the obligation is on Respondent to furnish as promptly as practical any information properly requested by the exclusive bargaining agent." Aero-Motive Manufacturing Co., 195 NLRB 790, at 792, 79 LRRM 1996 (1972), enf'd, 475 F.2d 2, 82 LRRM 3052 (9th Cir. 1973_

c. Dates of Hire

Initially, Respondent made very little effort to assemble information to comply with this request because it maintained it did not have the actual dates of hire. The early information supplied contained the year of hire (and not the day and month as requested by the UFW) of a limited number of employees. (G.C. Ex. 7). Subsequent attempts by Respondent to comply with this request were lacking in enthusiasm and half-hearted at best. Although Mrs. Bertuccio testified that Respondent attempted to secure the requested information by requiring Duran to complete a list of 1978, 1979 and 1980 workers, to keep records of the dates workers applied for work, and to note if the person ever worked for Respondent before, Duran denied that he followed this procedure. In any event, Mrs. Bertuccio testified that workers were not required to sign the employment list and only about one-half, at most, did so. Of these, many failed to state their date of hire or when they had previously worked for Respondent. Even Mrs. Bertuccio acknowledge that these lists were incomplete.

d. Labor Contractors

The refusal to supply a union with information from which it could determine whether a respondent's employees were employees of it or of. a labor contractor is evidence of bad faith. Kawano, Inc., supra.

In August e-f 1979, Steeg requested information from Hempel regarding labor contractors. That information which

was supplied was either false or incomplete. For example, Hempel told Steeg that Quintero was the only labor contractor employed by Respondent, but Paul Bertuccio testified that he used at least one other labor contractor, Jose Martinez. [161/] Hempel also informed Steeg that Quintero's employees did only hoeing and thinning, and were used only for emergencies; but Paul Bertuccio testified that Quintero's workers did all kinds of field work including, in addition to hoeing and thinning, the harvesting of onions, garlic and bell peppers.

Hempel testified that he could not remember if he was able to answer Steeg's question about what crops Quintero was used for, and Hempel did not know what wage rates Quintero's employees were paid.

Some of the information requested was never provided. At the April 18, 1980 meeting, Steeg told Howard Silver and Tina Bertuccio that she had heard that Respondent was growing peas, and she wanted to know who would pick them and at what wage rate. According to Steeg, Silver and Mrs. Bertuccio said they didn't know anything about it but they would check into it. Steeg testified she never heard from them.

In fact, Quintero's employees harvested the small crop (20 acres), as they had done in previous years. A wage rate of $.06 per pound was agreed upon between Quintero and

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161/ Bertuccio also testified he used Manuel Salinas but did not consider him a labor contractor because he didn't have a license and was not paid a commission. However, he functions as a labor contractor in all other respects.

Paul Bertuccio. The Union was not consulted about the matter.[162/]

The Union, of course, had an interest in the labor contractor information because it was concerned with the possibility of uniform wage rates for employees in the various crops and also with the scope of the bargaining unit, which was fundamental to the Union's responsibility in knowing which employees it represented. As-H-Ne Farms, supra, citing Ohio Power Company, 216 NLRB 987, 88 LRRM 1646 (1975), enf'd, 531 F.2d 1381, 92 LRRM 3049 (6th Cir. 1967).

No credible explanation was put forward by Respondent as to why the above information was not supplied.

Finally, one further argument of Respondent's needs to be addressed. Respondent contends that it could not have been in violation of the Act because, after all, the UFW was still able to make a wage proposal from the information it did have. From this Respondent argues that the UFW was not harmed by its lack of information.

This argument misses the point because it overlooks the fact that Respondent's refusals and delays in providing information made it difficult for the UFW to submit a realistic full proposal. O. P. Murphy Produce Co., Inc., supra. In fact, for some categories where the UFW was uncertain about the job classifications or whether the work was paid hourly or piece rate or what the rate had been in the past, the Union proposal

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162/ It is to be recalled that the UFW never received any wage offer far the pea harvest during negotiations; e.g., Respondent's April 2, 1980 wage proposal. (G.C. Ex. 70).

stated "pending information", meaning a further proposal would he made ones receipt of the sought after information was received. (See, for example, Union's wage proposal of November 1, 1979, G. C. Ex. 64).

A union which submits wage proposals does not thereby establish a clear and unmistakable waiver of its right to information. As-H-Ne Farms, Inc., supra, citing Sun Oil Company of Pennsylvania, 232 NLRB 7, 96 LRRM 1484 (1977).. . See also, N.L.R.B. y. Fitzgerald Mills Corporation, 313 F.2d 260, 52 LRRM 2174 (2d Cir. 1963), enforcing 133 NLRB 877, 48 LRRM 1745 (1961), cert den., 375 U.S. 834, 54 LRRM 2312 (1963).

Here the Union did the only thing it could -- it made a proposal based on the information it had on hand at the time. But, of course, this placed it at a terrible disadvantage because it was forced to make proposals and to review counterproposals in a state of ignorance on some crucial items, not really knowing whether movement on its part would result in bringing the parties closer to an agreement. Thus, as a practical matter, when Respondent rejected a proposal, the UFW would not always know whether new proposals would come, any closer to resolving the problem so it had to guess rather than be in a position to predict the probable outcome. For example, when Hempel asserted that Respondent couldn't afford Sun Harvest rates, its production data might have revealed that in fact, its employees were actually earning more based upon their production. Had the Union known this, its positions might well have been modified and alternate proposals made.

As a final note, I should point out that in assessing Respondent's defense that it did not maintain certain information that was requested, I am not unmindful that Respondent has previously been found to be in violation of the Act for improper record keeping. In Paul W. Bertuccio, 5 ALRB No. 5 (1979), the Board found that Resondent had failed to maintain and make available to the Board upon request accurate and current payroll lists, as defined in Section 20310(a)(2)[163/] containing the names and street address of workers directly employed or supplied by a labor contractor.

In summary, I shall recommend to the Board that the Respondent be found in violation of the Act for refusing to or failing to provide in a timely fashion relevant information, pursuant to the Union's request, and in particular, on hours worked, job classifications, dates of hire, and labor contractors. In some cases, the requested data had not been supplied even at the time of the end of the hearing.

Respondent's consistent refusal to provide information on the grounds of unavailability, its providing information

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163/ Section 20310(a) and 20310(a)(2) state, in part: "...Upon service and filing of a petition...the employer so served shall provide to the regional director...the following information...: ...A complete and accurate list of the complete and full names, current street addresses and job classifications of all agricultural employees, inducing employees hired through a labor contractor, in the bargaining unit sought by the petitioner in the payroll period immediately preceding the filing of the petition...." (Emphasis added).

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which was incomplete and organizationally in disarray, and its disinclination to offer alternative information from other sources which was available and could have been provided to the Union without any great effort leads me to conclude that Respondent's real reason for withholding said materials was not unavailability but either an unwillingness to disclose, the information in any form, General Electric Company, supra, or was a bargaining device designed to interfere with the UFW's ability to make a sensible proposal. Kawano, Inc., supra.

These acts are all circumstantial evidence of Respondent's desire to confuse and drag out negotiations and support the inference that Respondent was not negotiating in good faith.

VIII. The Unilateral Changes

A. The July 1979 Wage Increase

1. Procedural Issue

Respondent raises a procedural argument at the outset. Its position is that this allegation (Case No. 79-CE-196-SAL) was dismissed in a previous proceeding and may not be retried again.

Hempel testified that he was counsel foe Bertuccio on October 9, 1979 at a prehearing conference before ALO Matthew Goldberg in which allegations against Respondent were pending, that he made a motion to either consolidate or dismiss all outstanding charges then in existence[164/] and that ALO Goldberg

164/ This motion specifically excluded the surface bargaining allegations in the present case.

advised the attorney for the General Counsel, Norman Sato, to expeditiously conduct his investigation and determine whether or not pending charges should be consolidated into the then existing complaint. A few days later at the actual hearing, the allegation (79-CE-196-SAL), according to Hempel, was discussed with Sato and dismissed. Hempel testified that he thought that ALO Clayton Rest, who had been assigned to hear the case on its merits, was present at the time of the dismissal but later testified that it could have been dismissed by ALO Goldberg at the prehearing conference.

Norman Sato, Regional Attorney in the Salinas ALRB office, testified that in October of 1979 he was the 'General Counsel attorney responsible for a previous Bertuccio case and that he attended a prehearing conference before ALO Goldberg and the actual hearing before ALO Rost. Sato denied that he at any time stated that charge 79-CE-196-SAL would be dismissed or that it was in fact dismissed either in front of Goldberg, or Rost. In fact, Sato could not recall that any allegations at all were dismissed. Sato did recall that there was some discussion, probably before Goldberg, to review all pending charges against Respondent with a view towards either consolidating same in the then existing complaint or dismissing them.

2. Ruling

Respondent argues that the charge on which this allegation is based (79-CE-196-SAL) is improperly before me, same having been previously dismissed by the General Counsel. Its theory is

that ALO Matthew Goldberg "ordered" the General Counsel to investigate all outstanding unfair labor practice charges against Respondent and either concolidate them into the then existing complaint or to dismiss the charges. Pursuant to that "order", Respondent argues that Case No. 79-CE-196-SAL was dismissed by the General Counsel.

A transcript of the prehearing conference was subpoenaed by Respondent. However, Respondent, upon reviewing same, did not introduce any portion into evidence. Thus, apparently, the transcript itself did not corroborate Hempel's claim that this charge was dismissed or promised to be dismissed at the prehearing conference or, for that matter, even the claim that Goldberg had issued an order to consolidate all allegations against Respondent or dismiss them.

When a charge is dismissed, the charging party and the respondent are notified by mail pursuant to Section 20218 of the ALRB Regulations. Section 20219 provides for an appeal to the General Counsel by the charging party.

In the present case, there is no evidence, other than Hempel's uncorroborated assertion, that the matter was dismissed, that dismissal was mailed from the Regional Director to the charging party, or to Respondent, as required by the Regulations, or that the charging party, pursuant to said Regulations, filed an appeal. In short, there is no credible evidence that Charge No. 79-CE-196-SAL was dismissed. Respondent's Motion is denied.

3. Facts

Tina Bertuccio testified that she attended a negotiating session in April at the Salinas Bank of America along with Andrade and Hempel. During a short five minute break, and at a time when she and Schwartz were left alone in the room, Bertuccio testified (on direct examination) that she informed Schwartz that Respondent would raise wages $.25 in the middle of July, that Schwartz asked if Respondent had raised wages in July in the past, that she replied, "yes", and that Schwartz remarked there would be no problem. At the end of her testimony and in answer to a question from the ALO, Mrs. Bertuccio added for the first time that she told Schwartz specifically that previous raises had been given in 1976, 1977 and 1978.

According to Mrs. Bertuccio, this was the only time in the four-five months that Schwartz served as Union negotiator that she ever gave him any information outside the presence of her own negotiators.

Mrs. Bertuccio further testified that sometime in May she had a telephone conversation with Schwartz (regarding his desire to see the packing sheds) in which she reminded him that Respondent was going to raise wages in July, and that he replied that there would be no problem so long as it had been done in the past. When asked why it was necessary to bring it up a second time, Bertuccio replied, "cause I figured that they can turn around and say that I didn't tell him anything."

Finally, Mrs. Bertuccio testified that at the end

of the meeting at the Bank of America, she did not tell Andrade that she had informed Schwartz of the raise but that she did tell Hempel, who was observing negotiations.[165/]

Hempel testified that although he took over negotiations in mid-April, he never mentioned the wage increase of July 1 to Schwartz and never told Steeg either that there was to be a July raise. Hempel testified that the subject matter of the raise was not brought up by Steeg until August 2 or August 15 at which time he informed her that indeed the raise had been granted. He further testified that he did not tell Steeg that Schwartz had previously been told about the raise and waived any objection.[166/]

On rebuttal, Schwartz denied ever having a conversation either in person or by phone with Tina Bertuccio concerning Respondent's plans to raise wages in July, 1979.

165/ The March 20, 1979 negotiating session was at the Bank of America in Salinas, only Hempel was not there. The April 23, 1979 session at the Bank of America was attended by Hempel but Andrade was not present (Jt. Ex. 2).

166/ It is worth noting that Steeg wrote to Hempel on July 117 1979 (G.C. Ex. 36) complaining that she had been -informed by workers that there had been a wage increase in July but that it was done without negotiations or agreement with the Union. Steeg repeated this complaint at the August 2, 1979 meeting adding that at no time since she became the UFW negotiator—June 23,— 1979 did Respondent mention its intention to raise wages.

B. The July, 1980 Wage Increase

Facts

Steeg testified that at the June 12, 1980 meeting,[167/] Hempel told her that Respondent wanted to put into effect a $.25 hourly increase on July 1. Steeg testified that she told Hempel, following a short caucus, that the parties should bargain over the interim raise, that a raise to $3.50 was not sufficient, and that the Union proposed a raise to $4.50 per hour.

According to Steeg, Hempel responded that he would have to consult with Paul Bertuccio and that he would shortly respond in writing with a counterproposal.[168/]

At the next meeting, July 12, Steeg testified she told Hempel she was still waiting for his response, but that she had heard the increase had already been put into effect. Hempel indicated this information was correct.

C. Analysis and Conclusion

1. The General Rule

167/ Hempel had notified Steeg by letter on June 11,.1980 that Respondent anticipated raising wages $.25 per hour effective July 1, 1980 (Resp's Ex. 20; G.C. Ex. 75, last page) The letter did not refer to Respondent's intent to raise the piece rate.

168/ Hempel basically confirmed Steeg's version except that he testified he told Steeg at the June 12 meeting that her proposed raise to $4.50 was too high as historically Respondent had only raised wages in July $.20 - $.25.

169/ The parties stipulated that on or about July 10, 1980, the Respondent raised the wages of its general field laborers from $3.25 per hour to $3.50 per hour and piece rate wages of its lettuce cutters and packers was raised from $.47 per box to $.50 1/2 per box. (Stimulation of parties, R.T. XVIII, p. S3).

It has long been established under federal labor law that an employer commits a violation of Section 8(a)(5) of the National Labor Relations Act (NLRA counterpart of Section 1153(e)) by making unilateral changes in wages or working conditions. This is because such conduct circumvents the duty to negotiate, thereby frustrating the objectives of labor policy just as much as a flat refusal to bargain would. N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 3 L.ed 2d 230, 50 LRRM 2177 (1962). In fact a unilateral grant of a wage increase is so inimical to the collective bargaining process that it constitutes an independent violation of the National Labor Relations Act, regardless of whether any showing of subjective bad faith is made. Id; N.L.R.B. v. Consolidated Rendering Co., 386 F.2d 699 (2d Cir. 1967). Such conduct clearly tends to by-pass, undermine and discredit the union as the exclusive bargaining representative of the employer's employees. Continental Insurance Co. v. N.L.R.B., 495 F.2d 44 (2d Cir. 1974).

It is a violation of the Agricultural Labor Relations Act, as well. Such unilateral change is a per se violation and violates the duty to bargain because it eliminates even the possibility of meaningful union input of ideas and alternative suggestions. Kaplan's Fruit and Produce Co., 6 ALRB No. 36 (1980). Subjective bad faith need not be established to prove such a violation. O. P. Murphy Produce Co., Inc., supra.

However, there are limited exceptions to the general rule which permit unilateral changes despite the existence of

a duty to bargain where: 1) the parties have bargained to impasse; 2) the union has consented to the change and thereby waived its right to demand bargaining over the subject; or 3) where the employer's change is consistent with a longstanding past practice to the extent that the failure to effectuate same-would result in a charge that respondent failed to bargain in good faith. This latter situation is known as maintaining the "dynamic status quo." N.L.R.B. v. Katz, supra; N.L.R.B. v. Landis Tool Co., 193 F.2d 279, 29 LRRM 2255 (3rd Cir. "1952. In Katz, the Court indicated that unilateral wage changes that in effect were merely a continuation of the status quo would not be an unfair labor practice. However, the wage increase must be an automatic one and not involve any measure of discretion. Thus, there must be credible evidence of such a past practice or other proper businss purpose, If the employer grants regular wage increases or other benefits, it "carries a heavy burden of proving that such adjustments of wages...are purely automatic and pursuant to definite guidelines." N.L.R.B. v. Allis Chalmers Corp., 601 F.2d 870, 875, 102 LRRM 2194 (Sth Cir. 1979).

2. Respondent's Defenses to the Allegations of Unilateral Raises

a. Union Waiver -- 1979 Raise

Tina Bertuccio testified that at an April, 1979 negotiating session (the precise date was never specified) at the Bank of America, at which Andrade and Hempel were also present, she informed Schwartz of a forthcoming July raise of

$.25 per hour and that he consented to it. According to Mrs. Bertuccio, this conversation took place during a break when only Schwartz and she were left in the room alone together.

The initial problem in weighing this testimony is that it is unclear what meeting Mrs. Bertuccio could be referring to. There were three meetings in April of 1979. The April 4 meeting was not held at the Bank of America but at a school in Hollester, California, and Hempel was not present. (Jt. Ex. 2). The April 12, 1979 meeting was again held in Hollester, and again Hempel was not present (Jt. Ex. 2). The April 23, 1979 meeting was indeed held at the Salinas Bank of America, but Andarde was not present (Jt. Ex. 2).

Besides this confusion, there are other reasons for not crediting this testimony of Tina Bertuccio. When she testified as an adverse witness, she specifically denied having any separate conversations with Schwartz or making any proposals to Schwartz outside of Andrade's presence and further testified that if there were questions to be asked or proposals to be made, it would be Andrade who would do it.

Mrs. Bertuccio often emphasized in her testimony that she was not all that familiar with the negotiating process and would often rely either upon her negotiators for advice or upon her husband for final decisions. Thus, it seems to me unlikely that Tina Bertuccio would have casually announced at a break a decision of this importance when her two negotiators were absent. Likewise, it seems improbable

that she would have planned to announce it deliberately when her negotiators had left the room. If Mrs. Bertuccio had intended to notify the Union of the raise, it would appear to have been much more in keeping with her character for her to have made such an announcement through her negotiators rather than for her to have done it on her own. However, even assuming arguendo that she did in fact plan to announce the raise herself, she most certainly would have told her own negotiator of her intent. Yet, she testified that she never mentioned it to Andrade.

On the other hand, if one assumes that the announcement of the raise was an unplanned occurrence; i.e., that it spontaneously arose during a break in the negotiations, it would, of course, be helpful to determine what-conversation preceded the break that would have led Mrs. Bertuccio into such a discussion. But she was unable to explain what the parties had been negotiationg before the break or even what they discussed afterwards.

Even more surprising is Bertuccio's testimony that she never told her own negotiator, Andrade, at the end of the session that she had informed Schwartz of the raise, although she did tell Hempel.[170/] Why would she have told only Hempel

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170/ Hempel testified that the reason he never raised- the issue of the July wage increase with Steeg was because in the spring of 1979 at a meeting at the Bank of America, he and Mrs. Bertuccio were walking cut and the latter told him she had mentioned the wage increase to Schwartz and that Schwartz had responded that is was O.K. Quaere why Hempel did not give this explanation when he received complaints on July 11 (G.C. Ex. 36) and at the August 2 meeting from Steeg that there had been a unilateral increase without consultation with the Union.,

when Andrade was her chief spokesperson.[171/]

As regards the second time Mrs. Bertuccio allegedly told Schwartz about the raise (the phone conversation in May of 1979), her purported reason for doing so was to remind him of the raise so that he couldn't "turn around and say that I didn't tell him anything." Yet, if whe were so concerned that Schwartz would claim he had no knowledge of the raise, would she have chosen originally to inform him during a short break —— the only time she had ever given him any information outside the presence of her own negotiator——of this significant event, reconfirm it only by means of telephone, not tell her own negotiator what she had done, and not put it in writing?

It is also worth mentioning that although Mrs. Bertuccio testified she told Schwartz about the increase in the hourly rate planned for July, she said nothing about the piece rate, which also was raised in July, as well.

I do not credit the testimony of Tina Bertuccio,[172/]

171/ Andrade did not tell the UFW that he would be leaving and that Hempel would replace him until the April 12 meeting, a meeting which Hempel did not attend. An April 17 scheduled meeting was cancelled by Hempel on April 16 because he claimed he had just learned that he was to become the new negotiator. Hempel's first meeting as chief negotiator was April 23, 1979 at the Bank of America, only Andrade did not attend (Jt. Ex. 2)

172/ Another factor that casts doubt on Mrs. Bertuccio's testimony is her denial during the hearing that the UFW offered a $4.50 interim wage as a counteroffer to Respondent's announcement of its intent to raise wages in July of 1980, a fact. Hempel readily agreed with and which is not in dispute.

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and I find that the Union was not informed of and did not consent to the 1979 unilateral raise. Schwartz denied that these conversations with Tina Bertuccio occurred, and I believe him. Even assuming arguendo that Mrs. Bertuccio did notify Schwartz of the raise, I question whether an experienced union negotiator such as he would have so readily accepted at face value Mrs. Bertuccio's claim that the raises had been given in July in previous years without demanding to see records or even inquiring whether the amount of the raise had been the same as in past years.[173/]

b. Past Practice

Respondent next argues that both its 1979 and 1980 raises of $.25 were consistent with a well established past business policy of regularly increasing wages in this amount, thus placing its actions within the N.L.R.B. v. Katz, supra, exception. However, this contention will not withstand careful scrutiny. Although raises of $.25 per hour were in fact given in July 1979 and 1930 (and in 1977 and 1978), the amount of raises varied in other years; e.g., $.20 in 1976, $.30 in 1974, and in 1975, there was no raise at all (G.C. Ex. 94) v Nor is there credible evidence that Respondent's piece rates

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173/ As a matter of fact, the evidence demonstrates that one year Respondent gave no raise at all and one year it gave $.30. See discussion, infra.

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were increased in an automatic manner prior to 1979.[174/] Respondent's policy of wage increases left wide open to its own discretion if wages were to be raised and how much.

As stated by the Board in Kaplan's Fruit and Produce Company, supra, at P. 17:

> "Respondent's exceptions contend that the increases are legal because they follow a well established' company policy of granting certain increases at specific times.' The increases, it is argued, represent the maintenance of a 'dynamic status quo', not a change in conditions... While this is an exception to the general rule, the Katz case specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary...." (Citations omitted).

Moreover, Respondent presented no evidence suggesting that its allegedly well established wage policy had ever been made known to its employees so that it was committed to raising wages in the amount of $.25 every July.

I do not believe Respondent's wage hikes were automatic. They were not always given? and when they were, their amounts differed, showing a wide latitude of discretion on the part of Respondent. Consideration of the increases here, coupled with the manner of their implementation compels the conclusion that Respondent unilaterally instituted wage increases.

C. Impasse -- 1981 Raise

Finally, Respondent argues that it bargained with the Union over its 1980 raise, reached impasse, and thereby "implemented its offer." (Respondent's post-hearing Brief, p. 107]

174/ The Stipulation entered into between the parties (R.T. XVIII, pp. 36-39) does not mention piece rate wage hikes except for an August 1, 1979 raise for onion harvesters and a July 10, 1930 raise for lettuce cutters and packers.

It is true that once impasse occurs, an employer is allowed to effectuate unilateral changes in wages, hours, or other conditions of employment consistent with offers the union has rejected in the prior course of bargaining. Almeida Bus Lines, Inc., 333 F.2d 729, 56 LRRM 2548 (1st Cir. 1964), cited with approval in McFarland Rose Production, supra. Of course, the impasse must be genuine; i.e., the deadlock was the result of good faith bargaining of the employer and the union. A common reason for not accepting a claim of impasse is the failure of the party so claiming to have in fact bargained in good faith. The difficulty, of course, as always, is in determining whether good faith bargaining has occurred.

The National Labor Relations Board has established the general framework:

> "Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." Taft Broadcasting Co., Inc., 163 NLRB 475, 478 (1967), aff'd sub nom, American Federation of Television and Radio Artists, AFL-CIO v. N.L.R.B., 395 ?.2d 622 (D.C. Cir. 1968).

The NLRB has also held that a genuine impasse in-negotiations is synonymous with deadlock and exists where, despite the parties' best efforts to achieve an agreement, they are unable to do so. Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973); Dust-Tex Service Inc., 214 NLRB 398, 88 LRRM 292 (1974); Bill Cock Buick, 224 NLRB 1094, 92 LRRM 1532 (1976)

This standard has been adopted by the ALRB, as well:

> "Impasse occurs when the parties are unable to reach agreement despite their best good faith efforts to do so." Masaji Etc, dba Etc Farms, et al., supra.

In the instant case, the facts are simple, undisputed, and belie the theory of impasse. The Union was notified in writing on June 11, 1980 by Hempel that effective July 1, 1980 it was anticipated that wages would be raised $.25 per hour to $3.50 (Rasp's Ex. 20; G.C. Ex. 75 (last page)). Hempel also told Steeg about the intended raise at the negotiating session of June 12, 1980.

Steeg indicated that in her opinion what Hempel was proposing as an interim wage was clearly not enough, and she suggested a figure of $4.50 per hour. Hempel replied that Steeg's proposal was too high as historically Respondent had only raised wages $.20 - $.25 in July but that he would consult with Paul Bertuccio and respond with a counterproposal. He did not. There was no further proposal forthcoming from Respondent. Instead, in the interim between this June 12, 1980 negotiating session and the next one of July 12, 1980, Responder went ahead and on July 10, 1980 put into effect its intended $.25 raise. (Stipulation of parties, R.T. XVIII, p. 88).

These facts hardly suggest that Respondent came to impasse despite its best efforts to achieve agreement. On the contrary, Respondent had agreed to raise wages $.25 in July and set cut to do so regardless of the Union's presence on the property. The fact that Hempel told Steeg that her offer of $4.50 was too high because historically Respondent

had only raised raises $.20 - $.25 indicates he had already closed his mind on the subject and was to be bound by an alleged past practice. The fact that conditions had changed and that there was now a labor union to contend with seemed to be irrelevant to Hempel. By his summary rejection of Steeg's offer and failure to make a new one, he acted as if the Union did not exist.

Carrying this attitude one step further, Hempel apparently did not even relay the Union's $4.50 per hour offer to Paul Bertuccio, the only person at Respondent's place of business who had the authority to accept, modify or reject it. Bertuccio testified he instructed Hempel to inform the UFW of the intended increase but was not even aware the Union had made a counterproposal. To his knowledge, the Union had not bothered to respond.

> "A deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct." Northland Camps, Inc., 179 NLRB 36, 72 LRRM 1280 (1969), cited in McFarland Rose Production, supra. See also, Industrial Union of Marine and Shipbuilding Workers (Bethelem Steel Co., Shiobuildina Division) v. N.L.R.B., 320 F.2d 615 (3rd Cir.).

As in any situation in which surface bargaining is alleged, the totality of the circumstances must be considered. After such consideration, I have found that Respondent has engaged in surface bargaining and this conclusion supports my finding here that no genuine impasse existed when Respondent made its unilateral changes in wage rates. Respondent's conduct, in terms of both the 1979 and 198C pay raises, when viewed, as well, in the context of its overall behavior at the

bargaining table, supports the inference that Respondent intended to institute the pay raise regardless of the Union's response and that Respondent's declaration of impasse was a device for raising wages. The effect of implementing the unilateral pay raise would necessarily undermine at a critical time the Union's bargaining position.

The supposed impasse and Respondent's subsequent wage increase were not based on a good faith belief that impasse had in fact been reached and is therefore, evidence of Respondent's overall bad faith bargaining. McFarland Rose Production, supra. See also, As-H-Ne Farms Inc., supra; Montebello Rose Co., Inc., supra.

One of the legal duties required of an employer who would bargain in good faith is that it effect no change in wages, hours, or other conditions without notice to the bargaining agent and without providing the bargaining agent with an opportunity to bargain regarding the proposed change prior to its implementation. N.L.R.B. v. Katz, supra; Kawano Inc., supra; O. P. Murphy Co., Inc., supra; Montebello Rose Co., Inc., supra; As-H-Ne Farms, Inc., supra; Masaji Etc dba Eto Farms, et al., supra. It is the violation of this duty that is alleged here; and in that none of the exceptions to unilateral action apply, I am impelled to the conclusion that Respondent indeed did violate its duty.

I find that Respondent was under a duty to bargain regarding its unilateral increase in wages in July of 1979 and 1980 and shall recommend to the Board that it be found

in violation of Section 1153 (e) and derivatively Section 1152 (a) of the Act.

D. Change in Method of Harvesting

1. Facts

The Second Amended Complaint alleges that during- the fall of 1979 Respondent changed its method of harvesting lettuce and cabbage by the use of large bins rather than small cartons, thus reducing the amount of work available to ... employees represented by the UFW. (paragraph 9c).

Paul Bertuccio testified that during 1979 a large amount of the late lettuce and cabbage was too small and not suitable for packaging and marketing in the regular boxes; and that in order to avoid having to plough under the crops, he contracted with Sun Harvest to purchase it. (Sun Harvest was interested in shredding the crop for use in ready-mix salads. Respondent used its own crews (members of weeding crews as opposed to lettuce harvesters) to harvest the crops and load it into bins which were supplied by Sun Harvest. Ordinarily, boxes or cartons were usually used for lettuce and cabbage.

Javier Ceja, as a witness for the General Counsel, testified that a crew of 13-14 workers loaded cabbage into bins in November, 1979 but only for 4-5 days; and that lettuce was placed in bins by a crew of around 13 foe three weeks in November/December 1979.

2. Analysis and Conclusions The General Counsel did not meet his burden of proving

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the elements of this allegation.[175/] First, there is some question whether a temporary, emergency measure to save the crop, such as occurred here, is the type of change which triggers the application of the Act. Second, there was no evidence that such a change actually affected working conditions adversely or that there was any loss of pay to the workers or that placing the product in bins instead of cartons was more arduous. Actually the only evidence on this point is that Respondent used its own workers on the bins——work that ordinarily would have gone outside the bargaining unit; e.g., to Let Us pak.

If any change in working conditions did occur, it seems to me that it would have had a deminimus effect upon Respondent's employees so that it could not be said to rise to the level of a violation of the Act.

In any event, since I cannot find on this record that Respondent's utilizing bins instead of boxes for a short time in November/December 1979 was a change in working conditions, I conclude that Respondent had no obligation to notify and. bargain with the certified bargaining representative over it.

I recommend the dismissal of this allegation.

E. Change by Increased Use of Labor Contractors 1.

Facts

The Second Amended Complaint alleges that in the spring of 1980, the Respondent increased the use of employees

175/ The General Counsel did not discuss this allegation in his post-hearing Brief.

provided by labor contractors and decreased the use of Respondent's own employees without negotiating any of these changes or their effects with the UFW.

Paul Bertuccio testified that work slowdowns started in March of 1980 and that he personally saw 2/3 of a weeding crew in sugar beets refusing to perform any work; he also testified he observed from time to time members of lettuce weeding crews of Inez Villegas and Eduardo Villegas slowing down,. ' as well.

Bertuccio further testitifed that he and Jose Duran compared work progress reports from 1979 with 1980 and discovered that the slowdowns were causing work schedules to fall way behind, particularly in the weeding, and costs to double. Because the weeds were getting higher with the resultant reduction in the quality of the soil coupled with the higher cost in removing the weeds, Bertuccio testified he decided to bring in Quintero earlier than normal for around 3-4 days. Initially, 25 workers came to work, increasing to 40 or 45. Ho regular employees were laid off.

Duran conceded that the Villegas crews had less work in 1980 than in 1979, and Quintero more,[176/] but testified it was only because it became necessary to hire Quintero when Respondent's employees began participating in a series of slowdowns, work stoppages, leaving work early, and refusing to work on Saturdays. The dates Duran could identify when this activity took place

176/ The parties stipulated that Manuel Salinas referred fewer workers to Respondent in 1980 than in 1979 (R.T. '23, p. 148).

were May 2, late July, and August.

Eduardo Villegas testified that there had been eleven work stoppages in his crew beginning on July 24, 1980. Hope Beltran testified she observed union activity on July 25. Inez Villegas, testified there had been slowdowns in his crew in June and work stoppages in July.

As a rebuttal witness, Ramiro Perez testified that work stoppages to protest the lack of progress in negotiations started in the fall of 1979; but he denied that there were any work stoppages or slowdowns in Inez Villegas' crew the first six months of 1980, although he acknowledged that he had been accused by Duran in May and Hempel and Mrs. Bertuccio during June negotiating sessions or organizing slowdowns during that period.

2. Analysis and Conclusions

There can be no doubt that Quintero did more work for Respondent in 1930 than in 1979. Both Beltran and Duran so testified with Duran adding that Quintero's workers actually did work in 1980 that had been done in 1979 by the Villegas crews. But according to both Bertuccio and Duran, this fact came to pass only because of the series of slowdowns, work stoppages and other activity that occurred.

Although the specific dates of this 1980 activity are not certain, what did occur was considered enough of a problem that Quintero was called upon to perform services in excess of what he normally did. The specific problem, however, is to resolve the conflict in the testimony over whether the

first slowdowns in 1980 occurred in the spring. Paul Bertuccio testified he observed it in March in the sugar beets, thereby necessitating the hiring of Quintero. Duran placed this occurrence later— in May. But Ramiro Perez testified, as a rebuttal witness, that he worked in the Inez Villegas crew during the first six months of 1980 and that there were no slowdowns or work stoppages during that time.

I credit Respondent's version. Both Paul Bertuccio and Jose Duran testified convincingly that the slowdowns and other labor problems took place in the spring and continued on through the summer. Both were in a position to know whether this occurred and to act accordingly. Further, Perez acknowledged that he had been accused in May by Duran and then by Hempel and Mrs. Bertuccio of organizing slowdowns and work stoppages. This does not, of course, prove that Perez was so engaged, but only that there was apparently some kind of labor activity occurring in the spring of 1980 that necessitated, at least in the employer's mind, the bringing in of Quintero. In addition, Perez testified only as to his experiences in Inez Villegas[177/] crew while it is possible that slowdowns occurred either in another crew or at another sugar beet field that Perez was not aware of.

I assume the General Counsel would argue[178/] that the

177/ Paul Bertuccio was not sure but thought the slowdown was in the Inez Villegas crew.

178/ The General Counsel did not address this allegation in his post-hearing Brief.

Respondent should have notified the Union about its decision in the spring of 1980 to utilize the services of Quintero earlier than usual. Thus, the question really is whether, in response to slowdowns or other labor disruptions, an employer, such as Respondent, may make unilateral changes without consultation with the union. I think it can. In Times Publishing Co., 72 NLRB 676 (1947) it was established that the employer had no duty to bargain with the union as to its decision permanently to replace strikers and the manner in which that replacement would be effected. See also, Colace Brothers, Inc., 6 ALRB No. 56 (1980).

As to subcontracting out work during a strike, the NLRB appears to require bargaining only when the arrangement is intended to be permanent and thus has impaired the scope of the bargaining unit and the status of the union. If, however, the subcontracting is intended as a temporary measure to aid the employer to keep its operations intact during the strike, there is no duty to bargain about the decision. German, "Basic Text of Labor Law", West Publishing Company, St. Paul, Minnesota, 1976, at p. 436. See, Empire Terminal Warehouse Co., 151 NLRB 1359 (1965), 58 LRRM 1589 (1965), enf'd sub nom, General Drivers Local 745 v. N.L.R.B., 355 ?.2d 342 (D.C. Cir. 1966); Southern Calif. Stationers, 162 NLRB 1517 (1967).

I view the hiring of Quintero in the spring of 1980 as being equivalent to a subcontracting to meet the needs of the business occasioned by the slowdown and other activity. Although the cases cited above concern strike activity, I see

no difference, except in degree, so far as disruptions to the employer's business, between a strike and a slowdown. The legal principle is the same.

For all the foregoing reasons, I recommend the dismissal of this allegation.[179/]

E. Changes in Planted Acreage

The Second Amended Complaint alleges that during 1980 Respondent reduced its planted acreage of tomatoes, cabbage and onions and increased its planted acreage of sugar beets, all with the net effect of reducing the amount of work available to be done by employees represented by the UFW.

1. Onions

a) Facts

Onions are planted anywhere from December 15 through May 1, depending on weather and marketing conditions. In December, 1979, Paul Bertuccio planted forty acres for the 1980 harvest. In January and February, he planted another forty acres in each month, and in March, 20-30 acres.

b) Analysis and Conclusion The

allegation in the Complaint charges that

179/ For the same reasons stated above, I recommend the dismissal of paragraph 10(c) of the Second Amended Complaint which alleges that Respondent gave more work to Quintero in order to discriminate against its own employees to discourage union support in violation of Sections 1153 (c) and (a) of the Act. I have found that Respondent's conduct was justified 'by business necessity. I do not find that the greater utilization of Quintero in 1980 was done for the purpose of discrimination.

Respondent reduced its planted acreage of onions. But I can find nothing in the record to sustain this portion of this allegation.

2. Cabbage

a) Facts

Paul Bertuccio testified that he increased his cabbage acreage in 1979 from 5-10 acres to 100 because he had purchased a stitcher truck that made cartons. However, because of bad market conditions, he was forced to plough under some of the acreage and never harvested others.

As to 1980, he testified that he had planted 40 acres in October, 1979 for the January-March harvest, that he had planted another 20 acres in August, 1980, and that it looked as if he might have 100 acres again by the end of the year, the same as 1979.[180/]

b) Analysis and Conclusion The allegation in the Complaint is presumably based on

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180/ Bertuccio had initially, as an adverse witness on July 12, 1980, testified that no cabbage had been planted in 1980. Later on direct as part of Respondent's case on August 20, 1980, he pointed out that he had planted 40 acres in October of 1979 for the January - March, 1980 harvest. He also testified, as shown above, that he would probably have 100 acres in 1980. Bertuccio's explanation of this apparent inconsistency was that in July, the General Counsel had asked him how much cabbage he had planted in 1980, and that he had answered "none" because in fact, his 1930 cabbage was planted in 1979 and that he had not planted any in 1980 up to that time. He also stated the General Counsel did not: ask him when the cabbage was harvested. A review of the record supports Bertuccio.

Bertuccio's early testimony as an adverse witness that he planted no cabbage in 1980. As this would have been a decrease over 1979 when 100 acres were planted, General Counsel would argue[181/] that this change should have been negotiated with the Union. However, I have concluded that Bertuccio should be credited when he testified he would probably plant 100 acres by the end of 1980. This being the case, his 1980 acreage would have been the same as 1979; and there is no change that would require bargaining, assuming arguendo there was such an obligation in the first place. In any event, it is impossible to determine in a hearing that ended in September 1980 whether Respondent's cabbage acreage in 1980 would be less than or more than what it planted in 1979. I therefore, have insufficient information on which to base a finding.

3. Sugar Beets and Tomatoes

a) Facts

During 1979 only 200 acres of sugar beets were planted, but in 1980 this figure rose dramatically to 650 acres. Paul Bertuccio testified there were two reasons for this: 1) because he had lost as purchasers two canneries that had bought his tomato crop in 1979, he had additional land for farming he had not previously counted on; 2) governmental reports indicated to him that sugar supplies were down, thus suggesting a ready market. As a result, according to Bertuccio, he entered into a number of planting contracts with

181/ General Counsel did not discuss this allegation in his post-hearing Brief.

Union Sugar Co., the first such agreement being signed in December of 1979, and the last one in April, 1980. Bertuccio planted 100 acres in December of 1979, 200 acres in January, 1980, 200 acres in February, 1980, and 30-40 acres in March of 1980.

Bertuccio admitted that he did not notify the UFW. of his decision to increase his acreage in sugar beets, and there was no bargaining over it.

Bertuccio also testified that generally sugar beets fit into the middle range of labor intensive crops but that in 1980, because of extensive weeding that was required, they were highly labor intensive. For the past 10-11 years sugar beets had been custom harvested, and Bertuccio testified that he saw no reason to change this pattern in 1980. However, he testified that no final decision on this had been made.

As to tomatoes, Paul Bertuccio testified that he used to own his own tomato picking machine but sold it around 1977 because he needed the personnel used to operate the machine on other crops. Since 1976, Tony Lcmano, a custom harvester, has provided the machine and labor to harvest Respondent's tomatoes. In 1979 Respondent grew 300 acres of tomatoes but only 80-90 acres in 1980. Paul Bertuccio attributed this decline to the fact that two cannery companies did not renew their tomato contracts for 1980. First, N.W. Packing Company on September 24, 1979 informed Bertuccio that it could make no advance commitment for 1980 (Rasp's Ex. 7). Second, the Del Monte Corporation advised him on October 26, 1979 that it would not purchase his

tomatoes for the 1980 season (Resp's Ex. 6).

This information was passed on to the UFW. On October 12, 1979 Hempel verbally informed Steeg that there was to be a reduction in tomato acreage of around 250 acres because of the possible loss of the cannery contracts. Subsequently, on November 7, 1979 Hempel wrote Steeg (G.C. Ex. 41) that Respondent would not grow tomatoes any longer and that this decision "may or may not have an effect on ' the bargaining unit." Again on December 5, 1979, Hempel wrote Steeg to reiterate that Respondent had lost its cannery tomato contracts. (G.C. Ex. 45).

b) Analysis and Conclusion

As the Second Amended Complaint alleges it to be an unfair labor practice for Respondent to have unilaterally decreased its tomato production, I again have to assume[182/] that General Counsel would argue that Respondent had a duty to notify the Union of its decision to decrease its 1930 tomato acreage, owing to the loss of the cannery contracts', and to bargain with the UFW with respect to that decision and its effects on the bargaining unit.

Of course, the Union was notified about Respondent's plans to discontinue its 1980 tomatoes. I have, however, concluded that Respondent's conduct with respect to this notice

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182/ The General Counsel failed to address this allegation in his post-hearing Brief.

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was a further example of Respondent's surface bargaining.[183/] But to say that Hempel gave confusing and misleading information is not to say that the Union had a right to decision bargain over the subject matter. The threshold question then is whether such a duty existed in the case of tomatoes.

I think not. This crop has been custom harvested-by Lomano since 1976. It seems to me that since tomato work was traditionally non-unit work,[184/] Respondent had no duty to bargain with the Union over its decision to drastically reduce it. As this work never belonged to the bargaining unit in the first place, a Fibreboard analysis, infra, is not necessary.

Steeg also virtually conceded that the elimination of the tomato crop would probably not affect the bargaining unit employees. Her interest was in learning what Respondent intended to grow on the land thereby freed up by the discontinuance of tomatoes and negotiating over same. As she

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183/ I found (in Section V B(10), supra) that the information submitted to the Union by Hempel regarding Respondent's plans was confusing and somewhat inaccurate.

184/ There is, of course, the possibility that pre-harvest work in tomatoes was performed by Respondent's own employees. But the evidence is insufficient for me to make a finding as to what work was performed and who did it. Further, I do not recall any evidence of anyone being laid off as a result of the reduction in tomato acreage. See, District 50, UMW v. N.L.R.B. (Allied Chem. Corp.), 358 F.2d 234 (4th Cir. 1966).

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stated in her November 12, 1979 letter to Hempel (G.C. Ex. 41):

> "...I remind you that the Union's position is that any change which affects the wages, hours, and/or working conditions of the bargaining unit workers should be bargained with the Union. The Union sees no reason why the discontinuation of the cannery tomato harvest/ which was not performed by bargaining unit workers according to you, should in any way curtail or cutback bargaining unit work, but in fact opens up land which could be farmed in such a way as to increase bargaining unit work."

This brings us to the question of whether a duty existed on the part of Respondent to bargain with the Union over its decision to increase its planted acreage in sugar beets from 200 acres to 650 acres.

Initially, it should be mentioned that it appears clear that the decision to terminate tomato production because of the loss of the cannery contract had reprecussions for bargaining unit employees because the loss resulted in the planting of at least 200 more acres[185/] in sugar beets than in 1979. In view of the weeding and thinning requirements, it is obvious that the decision for more sugar beet acreage, irrespective of whether they were custom harvested, would have had an impact on the bargaining unit employees, at least in the sense that additional pre-harvest work[186/] would have been made available to them.

However, I am unaware of any ALRB decision extending the right of a labor organization to negotiate over a management's

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185/ As the preceding discussion indicated, Respondent grew of tomatoes in 1979; 80-90 in 1980.

186/ I find here that the record reflects that pre-harvest work in sugar beets was performed by Respondent's employees.

decision of what to produce – in this case its decision to increase its acreage in a certain crop. The issue is novel because generally the question arises in the context of whether an employer who tends to close, terminate, or transfer a portion of work from a bargaining unit should submit that intention to the negotiating process inasmuch as said decision affects the employees terms and conditions of employment by decreasing or eliminating entirely bargaining unit job opportunities. Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964); Brockway Motor Trucks v. N.L.R.B., 582 F.2d 720 (3rd Cir. 1978); Ozark Trailers, Incorporated, 161 NLRB 561 (1966).

Here the General Counsel would presumably argue[187/] 1) that the Union should be notified about Respondent's decision to increase sugar beet production; and 2) the Union should have been consulted about whether Respondent was going to have the crop custom harvested again so it could have had the opportunity to negotiate over the work being performed by bargaining unit employees

I agree with Respondent that the decision to increase sugar beet production lies at the core of managerial discretion and is not subject to the bargaining proces. (Respondent's post-hearing Brief, pp. 111-114). In Fibreboard, supra, the employer subcontracted out work that had previously been done by bargaining unit employees and terminated said employees, as

187/ The General Counsel did not discuss this issue in his post-hearing Brief,

well. It refused to bargain with the union over the issue. The U.S. Supreme Court held that the employer had refused to bargain over a mandatory subject matter and was guilty of a violation of Section 8(a)(5) of the NLRA.

Mr. Justice Stewart in a concurring opinion which is often cited for the legal principle involved here limited the "condition of employment" over which an employer would have to bargain by excluding those decisions which "are fundamental to the basic direction of a corporate enterprise or...infringe only indirectly upon employment security,"

> "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such mangerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment," 379 U.S. at 223.

The decision as to what is to be grown goes to the very heart of the farming business. I do not see how requiring a farmer to negotiate with the union over a basic management decision such as-an increase in the number of acres devoted, to sugar beet production would, accomplish the purpose of bringing to peaceful resolution problems vital to the interests of both management and labor. To require such bargaining would significantly abridge the farmer's freedom to manage his own business.

If the General Counsel were to contend that the Union had the right to negotiate over the decision to employ custom harvesters to harvest the increased sugar beet acreage, this

argument must likewise fail. In the first place, any such duty to decision bargain on this issue arose only at the point that Respondent made its decision as to who was to do the sugar beet harvest for it. The requirement of decision bargaining does not mean that an employer must defer making a decision concerning terms and conditions of employment until it has first conferred with the union. The requirement is that once the decision is made, it may not be implemented without first giving said union a chance to discuss it and offer alternative ideas. Lange Company, 222 NLRB 558, 563 (1976). See also, Ozark Trailers, Incorporated, supra.

In this particular case, there is evidence that the decision had been made to plant significantly larger numbers of sugar beet acres in December, 1979, January, February, and March of 1980 but that the decision as to whether same were to be custom harvested had not yet been made. Paul Bertuccio testified that for the past 10-11 years his sugar beets had been custom harvested, and that he saw no reason to change that in 1980; but he also testified that at the time of the hearing no final decision had yet been made.

I find that there was no duty to decision bargain over who was to harvest the sugar beet crop because the legal obligation, assuming arguendo it existed, had not yet arisen.

Second, in that Respondent had a past practice of-custom harvesting its sugar beet crop, that practice should be treated as the status quo so that the employer's decision could continue to be mace "unilaterally" with bargaining necessary

only if there were a departure from that past practice. German, "Basic Text on Labor Law" West Publishing Company, St. Paul, Minnesota, 1976, at p. 522. See also, Westinchouse Elec. Corp., (Mansfield Plant), 150 NLRB 1574, 58 LRRM 1287 (1965).

I recommend the dismissal of this allegation".

F. Sale of Respondent's Garlic Crop

1. Facts

The Second Amended Complaint alleges that in the fall of 1979 Respondent assigned to another employer the harvest of garlic plants, thus reducing the amount of work available to employees represented by the UFW.

Between 1975-1978 inclusive, Respondent harvested its own garlic crop using labor contractor Quintero.[188/] In 1979 Respondent planted and maintained its own garlic, but Paul Bertuccio testified that Jon Vessey[189/] in June of 1979 bought Respondent's early garlic crop of 40 acres [190/] for seed (as opposed for marketing) purposes. Vessey, using his own crews,

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188/ 90% of this crop during this time period was sold to Vessey Foods.

189/ There was some confusion on Paul Bertuccio's part as to whom he sold his garlic. At one point he testified he sold it to Jen Vessey. Later, however, he testified he sold it to Vessey Foods which sold it to Jon Vessey.

190/ There was also a second crop of garlic of around. 20 acres which was harvested in late 1979 by Quintero's employees.

harvested the garlic bought from Respondent in July and early August, 1979. According to Bertuccio, this arrangement was worked out between him and Vessey in November, 1978[191/] around planting time.

Garlic is generally a very labor intensive crop, especially if harvested for market because of the requirement of topping.[192/] In this case, however, topping was not required as the garlic was harvested strictly for seed.

2. Analysis and Conclusion

The General Counsel argues that Respondent "sold out from under the union the work of harvesting two-thirds of the garlic crop", work that had customarily been done by Quintero's employees, whom the UFW represents; and that there was no economic emergency requiring such a sale that would prevent bargaining. (General Counsel's post-hearing Brief, pp. 22-24). General Counsel further argues that Respondent's failure to notify the Union before completion of the garlic sale to Vessey was a violation of its duty to bargain over the decision to partially close a part of the business and over the effects thereof.

191/ The UFW was certified on November 17, 1978 (Certification No. 77-RC-13-H) (G.C. Ex. 2).

192/ Garlic prepared for market requires picking up each individual bunch and cutting off the roots and top.

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An issue of this nature usually involves two questions:[193/] does the duty to bargain in good faith require that Respondent bargain with the UFW regarding its decision to sell its early 1979 garlic crop to Jon Vessey?; 2) does the duty to bargain in good faith require only that Respondent bargain with the UFW over the impact or effect of its decision to sell its said garlic crop to Vessey?[194/]

193/ Though not discussed in the briefs, there is possibly a third question. Was there any duty at all on the part of the Respondent to bargain over the garlic sale in view of the fact that the UFW was not certified until November 17, 1978, and the decision to sell was possibly made before that date. (Paul Bertuccio testified his decision was made sometime in November, and it is not clear if this occurred before or after the certification). I find such a duty to bargain existed even where the decision predated the November 17, 1978 certification. The California Supreme Court just recently upheld the ALRB in deciding that an employer may not decide to unilaterally change the terms or conditions of employment during the pendency of election objections and prior to certification. Highland Ranch, No. LA. 31359, __ Cal 3rd, ___ September 10, 1981. See also, Sunnyside Nurseries, 6 ALRB No. 52 (1980).

194/ In this case, however, counsel for Respondent in his letter to me of July 30, 1981 acknowledges that an employer is obligated to bargain over the effects caused by implementing his decisions. The question of effect bargaining does not appear to be at issue in this case.

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The initial question is how Respondent's sale to Vessey of the spring garlic crop and Vessey's harvest of same is to be characterized. Is it a partial closure, a partial business discontinuance, a sale of a part of a business, or a subcontracting? Here is where it is difficult to apply traditional industrial business concepts to the agricultural setting. While in a sense an agricultural product may be sold or a product discontinued or certain crops relocated on different fields and others left dormant, it is also true that the essence of the business — the land-remains, of course, intact. Respondent sold its crop but retained the ownership of its land to be harvested another day. Thus, Respondent did not sell the business in the sense that it withdrew from or took itself out of the business of growing garlic (or any other crop) on that parcel of land nor did Respondent partially shutdown in the sense that it remained in the same business in other locations but closed out its farm here.

It seems to me that subcontracting would best describe the business relationship between Respondent and Vessey in that Respondent used the employees of another company to perform work or services that previously were performed by employees of the bargaining unit. The only difference is that the service being performed by Vessey is not for Respondent — it is for Vessey, he being the purchaser of the crop. But I'm not 'sure the difference is all that meaningful in terms of the potential impact on the employees.

In any event, I regard the sale of the garlic crop

to Vessey to be analagous to the act of subcontracting and will treat the matter as such. [195/]

The major legal precedent for determining whether "terms and conditions of employment" can be read to restrict Respondent's decision to sell his garlic crop to Vessey is Fibreboard Paper Products Corp.v. N.L.R.B., supra, a subcontracting case, discussed in part E of this Section. It seems to me that Fibreboard and many of the cases following it require, as a test for decision bargaining, that a significant adverse impact on the bargaining unit be shown as a result of the'-subcontracting decision. District 50, UMW v. N.L.R.B. (Allied Chem. Corp.), 358 F.2d 234 (4th Cir. 1966); Westinghouse Elec. Corp. (Mansfield Plant), supra, ISO NLRB 1574, 58 LRRM 1257 (1965). It has, in fact been held that there is no duty to bargain if no bargaining unit employee is laid off or has his working hours reduced because of the subcontracting. UAW, Local 133 v. Fafnir Bearing Co., 382 U.S. 205 (1965).

In the present case, the General Counsel failed to show any adverse impact from the sale of the 40 acres. There was no evidence of layoff, reduced hours, or reduced pay. This is because in all likelihood there was little or no impact. The 40 acres comprise a miniscule part of Respondent's operation — it grows 1400 acres in lettuce alone. And since this particular garlic was harvested strictly for seed, the evidence suggests there was less labor involved than had it been harvested for market.

195/ It is worth noting that the Court in Fibreboard, supra, pointed out that the terminology of "subcontracting" or contracting out has no precise meaning and is used to describe a variety of business arrangements.

Moreover, in Fibreboard, Mr. Justice Stewart, in his concurring opinion, emphasized that one of the important factors that made the subcontracting a mandatory subject there was the fact that the employer had acted in an effort to cut costs by reducing the workforce. Here, there is no such evidence. Respondent acted because he had an opportunity to earn capital off the early sale of his crop, a traditional management prerogative. Under these circumstances, its actions were lawful, particularly in view of the fact that there was no demonstrable adverse impact on the employer.

Although not directly on point, since it involved a partial closure, a recent decision of the U.S. Supreme Court is worth noting. In First National Maintenance Corporation v. N.L.R.B., ___U.S.___, 49 U.S.L.W. 4769, June 22, 1981, the Court, concerned that management have a freer hand to operate a profitable business, directed that a balancing test be employed.

> "...in view of an employer's need for unencumbered decision making, 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." 49 USLW at 4772.

The Court then went on to say that under the balancing test, a decision to partially close a part of a business for economic reasons outweighed any right of the union to participate in decision bargaining:

"We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of Section 8(d)'s 'terms and conditions'." (footnotes omitted) 49 USLW at p. 4774.

I recommend the dismissal of this allegation.

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IX. The Discharges

A. Discharge of Ruben Guajardo

1. Facts

Ruben Guajardo was hired by Duran in 1979 as a lettuce cutter. According to Guajardo, at the time of his hiring Duran, without specifically mentioning the UFW, told him that he would hire him but that he didn't want him to cause trouble because others had placed union banners in the fields and on Respondent's stitcher truck.[196/] Guajardo testified that he was wearing a buckle with the UFW insignia at the time of his hiring.

Guajardo also testified that he was fired by his foreman, Eduardo Villegas,[197/] who informed him it was on Duran's orders, and that Villegas told him that same day to come to the ranch at 10:30 a.m. the following morning to pick up his paycheck. In this same conversation, according to Guajardo, Villegas specifically asked him to tell his co-worker, Juan Mojica, that he (Mojica) was not fired and could continue to work at Respondent's. [198/]Guajardo testified that he informed

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196/Jose Cortez, a union leader in Eduardo Villegas' crew during 1979, testified that in May of 1979, prior to Guajardo and Mojica being hired, more than one-half of the members of the crew had placed UFW flags on their cars and parked them alongside the fields.

197/Villegas is sometimes referred to as "Lalo".

198/On cross-examination, however, Guajardo testified that it wasn't until two weeks after his last day of work that he learned he was terminated; and it was at that time that he was informed that he should tell Mojica to report for work the next day.

Villegas that he would not be used in this way and that Villegas should inform Mojica himself.

Guajardo testified that he was initially told by Villegas he was being laid off for lack of work; then later was told he was fired.

Guajardo acknowledged that his work had been criticized by Villegas but testified that he never found out the reason for his discharge.

B. Discharge of Juan Mojica[199/]

1. Facts

Juan Mojica was hired around April/May, 1979 with the help of his friend Ruben Guajardo, who introduced him to Eduardo Villegas. Both he and Guajardo traveled together to work from Salinas.

Mojica testified that Duran became aware that he (and Guajardo) were union supporters approximately one and one-half months after he started working at Respondent's. First, Mojica related an incident in June or July of 1979 in which Duran said to him and Guajardo, "Chavista, come and have a beer."[200/]

199/During the course of the hearing but before Mojica had been called as part of General Counsel's direct case, the General Counsel orally moved to amend Paragraph 10(b) of the First Amended Complaint to include an allegation that Juan Mojica, like Ruben Guajardo, was discharged because of his support for the UFW. Mojica had been part of the original-charge, Case No. 79-CE-330-SAL (G.C. Ex. Kb)), and there was no objection from Respondent (R.T. XII, p. 10). The amendment was allowed.

200/Jose Cortez, also testified that on one or two occasions Duran called workers "Chavistas" but that "he was laughing, but he wasn't saving it as discrimination, or anything, he was saying it jokingly." (R.T. XV, p. 12)

According to Mojica, both he and Guajardo joined Duran, both drank beer with him for an hour and that during their conversation Duran offered him (Mojica) the job of foreman, which he turned down, saying there were more benefits being a UFW member. Mojica also testified that during this conversation Guajardo expressed sympathy for the UFW.[201/]

And second, Mojica testified that he spoke to some of the workers, including Gilberto Gamboa, infra, about unionization[202/] and that Duran saw him and learned what he was doing.

On the day of Guajardo's discharge, September 19, 1979. Mojica testified that he was working in a cabbage trio with Guajardo and Gamboa, and that after 5:00 p.m. (later changed to between 3:00-5:00 p.m.) Guajardo's work was criticized[203/] in front of the entire crew because the cabbage heads that were being boxed were too small.[204/] Mojica also testified that Villegas

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201/There is no corroboration for this conversation. Although Guajardo testified after Mojica, the General Counsel chose not to ask Guajardo about Duran's alleged reference to "Chavistas" or about the alleged subsequent conversation.

202/Mojica's first mention of this union activity came only on cross-examination by Respondent. It was not mentioned during the direct case.

203/Mojica testified that he had worked in the same trio for the previous 1-2 weeks and Guajardo had not been criticized during that time frame. However, he admitted that he didn't know if Guajardo's work had been criticized before then because Respondent had been regularly changing the composition of the trios. Villegas testified he had criticized Guajardo's work 2-3 weeks before September 19.

204/Mojica testified he couldn't remember who the packer was. It was Guajardo.

took two heads of cabbage out of the box and placed them on the ground. Although he didn't think Guajardo placed these cabbages back in the box, or that Villegas returned to talk to Guajardo, as Villegas had testified, infra, Mojica admitted that he wasn't watching Guajardo the whole time.

At the end of the day, according to Mojica, Villegas told him work had been slowing down and that on the following day he would be called to be informed where the work was going to be.[205/] Mojica testified that the following day he received no phone call so he went to the home of Jose Cortez at 6:00 a.m. to see if he knew where the crew was working because Cortez was the one to be called if work was available. At that time he asked Cortez to notify Villegas that he was at Cortez' house so he could be called there if there was work. According to Mojica, he, Cortez and Guajardo spent from 6:00 a.m. to noon outside of Cortez' house talking and waiting for a call. Mojica testified that around noon Cortez received a call, and then related to Mojica that he (Cortez) was given work but that Mojica and Guajardo were not. Cortaz left to go to work,[206/] and Mojica testified he remained at Cortez' house until later when he finally decided to go to the ranch anyway because he stated he really was not sure if there was work or not.

205/Ordinarily, the foreman would tell the worker at the end of the day which field to report to the next day.

206/Neither Cortez nor Guajardo corroborated these events.

Mojica testified he arrived at the ranch at 3:00 p.m.,[207] observed the entire crew, including Cortez, working as usual, and went to speak to Paul Bertuccio. Finding him, Mojica testified he asked Bertuccio if he had been laid off and was told, "no". According to Mojica, he then asked Bertuccio for his pay check (it was payday), was informed that Duran had it, and thereafter went to find Duran and to also inquire why he wasn't working. Mojica testified that when he encountered Duran, the latter cursed him and told him to go to hell. According to Mojica, both Cortez and Guajardo were present during this conversation.[208]

After this alleged conversation with Duran, Mojica testified he went to see Villegas and told him that it would have been a lot simpler if he (Villegas) had told him the day before that there was no longer any work for him.[209] According to Mojica, Villegas said it was a result of Duran's order.[210]

207/The 3:00 time was in response to a question from me. Earlier, in his direct examination, Mojica testified he spoke to Bertuccio at 2:00 p.m. At another point, he testified Cortez had left his house around noon and that he (Mojica) also left within 10-15 minutes thereafter to go to Respondent's offices.

208/Neither Cortez, Guajardo, nor Duran were asked about this alleged conversation nor did they corroborate its occurrence in any other way.

209/On direct examination, Mojica did not testify Villegas told him he was actually fired. Much later in his testimony, in answer to a question from me, he testified that he was told he was fired.

210/Mojica testified that Cortez was present during this conversation and that Duran was only 20 feet away. Neither Cortez nor Duran corroborated the alleged conversation.

Gilberto Gamboa, the third member of the trio, testified that he had been working with Guajardo and Mojica 3-4 weeks when Villegas criticized Guajardo for the size of the cabbages he was putting into the boxes. 211/ According to Gamboa, Guajardo tried to find larger cabbages but was unsuccessful because they were all pretty much the same size. Gamboa did not recall seeing Guajardo deliberately trying to put ' smaller cabbages back into the box.

Gamboa testified that the entire crew, including Guajardo and Mojica, were UFW supporters but that Mojica did not do anything different to assist the UFW or organize the crew from any other worker.

Jose Cortez was also called as a witness by the General Counsel. He testified that he was the UFW representative in Eduardo Villegas' crew in May of 1979 when Guajardo and Mojica joined the crew. Cortez further testified that the workers in his crew had not worked under UFW contracts but that word got around that both Guajardo and Mojica had so from time to time during lunch or breaks workers would ask Guajardo and Mojica about what benefits the UFW could give. Cortez also testified that Villegas was present during conversations in which workers discussed the union, but Cortez was not specifically

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211/On direct examination, Gamboa testified that only Guajardo was criticized. Later in his testimony, however, in answer to a question from me, he added that Mojica was also criticized Mojica did not testify that he was criticized.

212/Duran readily acknowledged that he was aware that Cortez was a UFW leader but denied that he knew Mojica or Guajardo were also. See infra.

asked if Villegas was present during any of the times Guajardo or Villegas were speaking to the workers about the Union. According to Cortez a vast majority of workers in his crew were union supporters.

The foreman, Eduardo Villegas, testified that it was his job, among other things, to see to it that small cabbage heads were not cut; but that if they were cut, that they should not be packed in the box.[213/] According to Villegas, this had been a problem in the past with Guajardo; and 2-3 weeks prior to his discharge on September 19, he had discussed the matter with him, sometimes as often as 2-3 times a day. Villegas testified that this criticism helped for a time as Guajardo would improve his job performance, only to lapse back into old habits again.

On September 19, 1979 Villegas again criticized [214/] Guajardo's packing having discovered six or seven small cabbages in the box. Villegas testified that he then personally removed these small cabbages from the box, left Guajardo, moved up the field, looked back, and observed Guajardo picking up the same small cabbages and putting them back into the box.

According to Villegas, he then returned to where Guajardo was, told him not to do that again, at which point

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[213/] Villegas testified that the normal box should contain 24 cabbage heads and weigh 45 pounds.

[214/] Villegas testified he called only Guajardo's attention to this problem because, as the packer, he was primarily responsible for what ultimately went into the box.

Guajardo angrily told him that others were doing it worse than he and that Villegas should look to them.

Villegas further testified that he then discussed the matter with Duran and that both of them decided to terminate Guajardo at the end of the day. However, instead of waiting, as he usually did, to hear of work assignments for the next day, Guajardo (along with Mojica) [215]/had left early so that Villegas had no opportunity to speak to him that day.

Villegas further testified that he later reached Guajardo by phone that evening and told him that he was terminated and to come in the next day to pick up his check.

According to Villegas, he had no further conversation with Guajardo but that on the following day he did see Mojica, and that Mcjica told him he had come to pick up his paycheck and asked if there was work available for him. Villegas testified that he replied that Mojica could come to work whenever he wanted, whereupon Mojica responded that it was difficult for him to come by himself from Salinas because of the gas expense.

Villegas denied that he ever told Mojica that he would call him later to inform him where the work would be the next day. Villegas testified that Mojica was a good worker and that he did not fire him. He acknowledged that he never called Mojica to find cut why he was no longer showing up for work.

215/Villegas testified that he knew that Guajardo and Mojica traveled to work together from Salinas.

As to the Union activities of Guajardo and Mojica, Villegas testified that Guajardo was not a union leader so far as he knew but that he didn't know about Mojica; and further, that during the spring/summer 1979, Guajardo and Mojica did not make speeches on behalf of the UFW to the crew to his knowledge.

Jose Duran testified that he hired both Guajardo and Mojica around May,1979. At the time Guajardo was hired, Duran testified that he observed him to be wearing a belt with a UFW insignia.

According to Duran, foreman Eduardo Villegas complained to him that Guajardo was not doing a good job and that Duran himself had personally warned Guajardo about three times in August to be more careful.

On the day of Guajardo's discharge, Duran testified that Villegas was especially irritated with Guajardo's work performance, showed Duran a cabbage box that weighed less than 32 pounds and contained very small cabbage, and complained that he couldn't put up with Guajardo any longer. Duran testified that he advised Villegas to allow Guajardo to finish the day and then terminate him, but Villegas reported back that he was unable to do this in that Guajardo had left early. At that point Duran testified he instructed Villegas to call Guajardo at home and notify him of his discharge.

As to Mojica, Duran testified that he was not discharged because he was a good worker and that, "I think he quit."

According to Duran, he saw both Guajardo and Mojica in the field the next day around 9:30-10:00 a.m. Guajardo asked for his check; but since Duran didn't have it, he sent Guajardo to the office for it. As to Mojica, he too asked for his check and told Duran he would be absent for a few days because he didn't have a ride to work. Duran testified he told Mojica he could return whenever he wanted to because he wasn't involved with the problem Guajardo had; however, he never did.

Finally, Duran denied that either Guajardo or Mojica were known to him to be UFW leaders.

C. Analysis and Conclusions

1. The Prima Facie Case

> "To establish a prima facie case of discriminatory discharge in violation of Sections 1153 (c) and (a) of the Act, the General Counsel is obliged to prove by a preponderance of the evidence that the<entployee was engaged in union activity, that Respondent had knowledge of the employee's union activity, and there was some connection or causal relationship between the activity and the discharge." Jackson & Perkins Rose Co., 5 ALRB No. 20 (1979); See also, John Van Wingerden, et al., 3 ALRB No. 80 (1977).

It is also true that where the Board could as reasonably infer a proper motive as an unlawful one, the act of management cannot be found to be unlawful discrimination. N.L.R.B. v. Huber & Huber Motor Express, 223 F.2d 743 (5th Cir. 1955). Thus, seemingly arbitrary discharges, even if harsh and unreasonable, are not unlawful unless motivated by a desire to discourage protected union activity. N.L.R.B. v. Federal Pacific Electric Co., 441 F.2d 765 (5th Cir. 1971). The Act does not insulate a pro-union employee from discharge or layoff. It is only when an employee's union activity or concerted activity is the basis for the discharge that the Act

is violated. Florida Steel Corp. v.N.L.R.B., 587 ?.2d 735 (5th Cir. 1979). "In 'the absence of a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." Borin Packing Co., Inc., 208 NLRB 280 (1974); Lu-Ette Farms, Inc., 2 ALRB No. 38 (1977); Hansen Farms, 3 ALRB No. 43 (1977).

A conclusion or an inference that the discharge of an employee would not have occured but for his union activity or protected concerted activity must be based upon evidence, direct or circumstantial, not upon mere suspicion. N.L.R.B. v. South Rambler Co., 324 F.2d 447 (8th Cir. 1963). Evidence which does no more than create suspicion or give rise to inconsistent inferences is not sufficient. Schwob Mfg. Co. v. N.L.R.B., 297, F.2d 864 (5th Cir. 1962); Rod McLellan, 3 ALRB Nc. 71 (1977). Mere suspicion of unlawful motive is not substantial evidence; an unlawful or discriminatory discharge purpose is not to be lightly inferred. Florida Steel Corp. v. N.L.R.B, supra. Lu-Ette Farms, Inc., supra.

2. Union Activities of Guajardo

The General Counsel was unable to prove through the testimony of Guajardo that he was engaged in any protected concerted or union activity. Guajardo was not even asked by the General Counsel if he was engaged in such activity. The only testimony of Guajardo remotely connected with the UFW was his claim that he was wearing a UFW insignia on his belt buckle at the time he was hired in May, which Duran confirmed, and his claim that Duran warned him not to cause

trouble by putting up banners which Duran was not questioned about. But even if Duran made such a statement, this would hardly prove that Guajardo was engaged in union activities at the time of his discharge in September or that he was discharged for his support of the UFW.

The only testimony at all that would support an inference that Guajardo had been engaged in Union activities[216/] was the testimony of crew leader Cortez that Guajardo and Mojica were familiar with UFW contracts and often gave advise to other workers about UFW benefits.[217/] There is no need to resolve the conflict among General Counsel's own witnesses over the degree of involvement in protected union activities of Guajardo (or Mojica) because whatever this activity may have consisted of, General Counsel has failed to establish that Respondent had any knowledge of it.

Under Section 1153(c) and (a) of the ALRA an essential element in finding a discriminatory discharge is that the employer knew or believed that the employee in question was a union supporter. Howard Rose Co., 3 ALRB No. 86 (1977), See also, N.L.R.B. v. Whitin Machine Workers, 204 F.2d 833, 32 LRRM 2201 (1st Cir. 1953). Such knowledge bears heavily

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216/Althcugh Mojica was also (like Guajardo) not specifically asked any questions about Guajardo's union activities, he did testify that on the day that he, Guajardo, and Duran drank beer together, Guajardo expressed sympathy for the UFW. Of course, Duran already knew that when he hired him.

217/Neither Guajardo nor Mojica were asked about this by the General Counsel when they testified.

218/It is to be recalled that Cortez' testimony was directly contradicted by Gamboa, the third member of the trio, who testified that although both Guajardo and (218/ continued en pg. 21.

on the issue of whether the discharge reasonably tended to discourage union activity, or constituted unlawful interference, restraint or coercion of employees.

Although Cortez testified that Villegas was present at instances when unionization was discussed among the workers (although no dates or times were given), the General Counsel failed to link up Villegas' alleged presence to be at the same time Guajardo and Mojica were allegedly answering questions about union benefits.

Guajardo also suggested shifting reasons for his discharge in his testimony and claimed that Villegas initially told him he was being laid off and then later told him he was being fired per Quran's order. I do not credit this testimony, as I credit little of what Guajardo said. He testified in a confused, rambling, unresponsive and angry manner. At one point he testified he was fired in a telephone conversation on September 19; then later, in his testimony he claimed that event didn't take place until two weeks later. I do not believe him when he says he never found out why he was dismissed from Respondent's employ.

I find that the General Counsel has failed to make out a prima facie case of discriminatory discharge of Ruben Guajardo.

3. The Union Activities of Mojica

The General Counsel has also failed to make a prima

(continuation) Mojica were union supporters, Mojica did not do anything different to assist the UFW or organize the crew from any other worker. Gamboa was not asked specifically about Guajardo.

facie showing of discharge in the case of Juan Mojica. There is, to begin with, the same problem encountered with Guajardo as to the extent of union activity he was involved in. Mojica testified for the first time on cross-examination that he spoke to other workers about the union, including Gamboa, but there is no evidence of what the discussion was about, when they occurred, and who led them. Putting aside the conflict between Cortez' testimony and Gamboa's testimony over Mojica's participation in these discussions (see preceding footnote), the General Counsel has still failed to put forth credible evidence of Respondent's knowledge of this activity, even if true. There is, however, (unlike Guajardo) evidence on the subject. First is Mojica's testimony that Duran became aware that he was a union supporter because Duran saw him talking to co-workers regarding the union. There is no foundation for this statement, and it is insufficient to support an inference that Respondent had knowledge of Mojica's union activities. There is no evidence of when these events took place, who was present, and at what distance Duran was to the participants in the conversation. I give no weight to Mojica's naked assertion.

And second, there is Mojica's testimony that Duran called him a Chavista (and then offered him a job as a foreman). Again, this alleged statement is uncorroborated even though Mojica testified that Guajardo was present when the remark; was made. Moreover, the designation "Chavista" was in the singular. (R.T. XII, p. 17). Thus, it is unclear if Duran were speaking to Mojica or Guajardo. I do not credit

the alleged statement. For reasons stated, infra, I find that the testimony of Mojica to be generally unreliable. At any rate, even if Duran had called Mojica a "Chavista", the significance of the remark is somehow lost on me since in the conversation immediately following (in which they sat around and drank beer together for about an hour) Duran offered Mojica the job of foreman. In any event the UFW representative, Cortez, made a point of stating that the use of this term was, in the context of this work situation, Duran's way of joking with the workers and that no harm was meant by it.

I conclude that all General Counsel has shown here is that Mojica (and Guajardo) were union supporters, but so were the vast majority in Villegas' crew. There is no credible explanation as to why they were singled out for special treatment. Even assuming arguendo that Mojica's and Guajardo's activity was known to Respondent (which I do not find), I still conclude that the General Counsel has not carried his burden of establishing the elements of a discriminatory discharge. To constitute a violation of Section 1153(c), the discrimination in regard to tenure of employment must have a reasonable tendency to encourage or discourage union activity or membership. An employer may discharge an employee for any activity or reason, or for no reason, without violating that section so long as its action does not have such a tendency. N.L.R.B. v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955); N.L.R.B. v. South Rambler Co., supra.

I cannot find where it has been established that there

was any causal relationship between Mojica's and Guajardo's activity and their discharge/ either real or "constructive", infra. Jackson & Parkins Rose Co., supra. There is simply no evidence that Respondent's action at the time was in any way related to such considerations. C. Mondavi & Sons. dba Charles' Krug Winery, 5 ALRB No. 53 (1979), rev. den. by Ct. App., 1st Dist., Div. 2, June IS, 1980; hg. den. July '16, 1980. The General Counsel has not carried his burden of establishing the elements of a discriminatory discharge. Lu-Ette Farms, Inc., supra.

Both the California Supreme Court and the ALRB have recently approved the Wright Line standard and applied same to ALRB proceedings. Kartori Brothers Distributors v. A.L.R.B., No. L.A.31310, __Cal.3rd__, July 27, 1981; Nishi Greenhouse, 7 ALRB No. IS (1981). See also, Verde Produce Company, 7 ALRB No. 27 (1981). In Wright Line, 251 NLRB 150, 105 LRRM 1169 (1980), the NLRB set forth standards to be used in "dual-motive" cases; i.e., where a discharge was effectuated for both legitimate business reasons and because of protected concerted or union activities on the part of the discharged employee. [219/] Here, as I have found that the General Counsel

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219/In Wright Line, the NLRB stated: "Thus,...we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(l) turning on employer motivation. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." 105 LRRM at pp. 1174-1175. The NLRB also said that if the employer failed to carry his burden in' this regard, he could not really complain because his conduct would have been found to have been motivated (in whole or in pact) by an unlawful consideration in that the employee's protected activity was causally related to the employer's action.

failed to establish a prima facie case of discriminatory discharge, it becomes unnecessary to consider Respondent's preferred business justification. Ruline Nursery Co, 7 ALRB No. 21 (1931).

However, even if the General Counsel had made a' prima facie case, Respondent would have sustained its burden of demonstrating that "the same action would have taken place even in the absence of the protected conduct." I credit Villegas' testimony because he testified in a lucid and truthful manner. I find that Guajardo was discharged for cause. Not even Guajardo denied that he was packing cabbages that were far below the minimum weight for the cartons. His defense seemed to be that others were doing it too so why pick on me? I find that Guajardo performed his job improperly despite prior warnings from Villegas, whose testimony on this point I credit.

As to Mojica, I find that his testimony was inherently implausible. A few illustrations will demonstrate the point: 1) Mojica's claim of uncertainty about his job status following Guajardo's discharge is not to be believed. Guajardo admitted that Villegas had told him to inform Mojica that he (Mojica) had not been discharged and could work. But Mojica would have us believe that he was never so informed by Guajardo, with whom he spent most of the following day beginning at -6:00 a.m. at Cortez' house; 2) If Mojica were interested in going to work, why did he go to Cortez' house expecting to get a call for work when he knew Villagas had his phone

number; and, of course, he had Villegas' number, as well, and could have called him, as he had in the past; 3) If Cortez had received a call around noon to go to work and Mojica' was interested to know where the work was, why didn't Mojica go with him instead of showing up at the ranch 2-3 hours. later, as he testified he did? What did he do during that time anyway?; 4) When Cortez' work assignment came through and there was none for Mojica, why didn't Mojica call Respondent's place of business to make inquiries as to where work was supposed to be; 5) I find it curious that despite Kojica's long description of the events that transpired at Cortez' house the morning following Guajardo's discharge, neither Cortez nor Guajardo were asked any questions about them by General Counsel 6) Mojica testified that Villegas told him that there was no longer any work for him on Duran's orders; yet Cortez, who according to Mojica was there, was asked no questions about this alleged conversation and therefore, could not corroborate it; 7) In any event, Mojica testified that Paul Bertuccio himself had, earlier that day, specifically told him that he had not been laid off, so how could he have been confused about this; and 8) In the conversation with Duran in which Mojica was allegedly told to go to hell, neither Guajardo nor Cortez, both of whom were present according to Mojica, corroborated it.

I credit Villegas that Mojica was not terminated and that Mojica told him that it would be difficult for him (Mojica) to drive to work from Salinas because of the gas

expense. I find that Mojica voluntarily quit his employment with Respondent.

There remains one further issue. It is possible that General Counsel is claiming[220/] that by discharging Guajardo, Respondent was constructively discharging Mojica since it was clear that both workers traveled to work together in the same car. But constructive discharges are reserved for situations where the affected worker is subjected to abuse such as harassment, surveillance, threats, or where a work assignment is so difficult or unpleasant that it manifests an employer's intention to cause an employee to quit. George Arakelian Farms, Inc., 5 ALRB No. 10. See also, J. P. Stevens & Co., Inc. v. N.L.R.B., 461 F.2d 490 (4th Cir. 1972).

There is no constructive discharge here. First, as can be seen, the facts do not fit within the standard kind of situations for which constructive discharges have been made applicable. And second, there is no evidence on this record that Respondent knew (let alone intended) that

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220/ General Counsel chose not to address the Guajardo or Mojica discharges in his post-hearing Brief.

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Mojica would be unable to obtain other transportation, assuming this to be the case, when it fired Guajardo.

I conclude that Respondent did not-violate Section 1153(c) by its conduct with respect to Ruben Guajardo or Juan Mojica. I shall, therefore, recommend dismissal of these allegations.

Finally, in determining whether the discharge may have violated only Section 1153(a) of the Act, a similar conclusion is reached. It cannot be said that Guajardo's discharge or Mojica's "constructive discharge" would reasonably tend to interfere with, restrain, or coerce other employees in the exercise of their Section 1152 right.

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X. The Evictions

A. Rodrigo Navarette

1. Facts

Rodrigo Navarette has worked for Respondent for over 15 years; for most of these years he has worked as an irrigator. For all that time Respondent has provided housing for him: Navarette has lived in his present house in 910 Hunder Lane for the past five years.

Tina Bertuccio testified that a few years ago a house on the Bertuccio property in which Navarette had been living burned down. Initial attempts to find alternate housing proved difficult but a solution was found in the fact that the Hudner family, from whom the Bertuccios were already leasing land, had a vacant house which could be used by the Navarette family. Thereafter, an arrangement was worked out and has been in effect for the past 5-6 years whereby Navarette would pay $50.00 per month rent to the Bertuccios, and the Bertuccios would pay for Navarette's utilities and water bills. According to Mrs. Bertuccio, the rental fee of $50.00 was supposed to defray the cost of the utilities and water that the Bertuccios obligated-themselves to pay and did not go to the Hudners.

Mrs. Bertuccio testified that in October of 1979 Mrs. Hudner called her and indicated she wanted Navarette cut of the house because he was keeping it too dirty. Subsequently, on October 29, 1979, Paul Bertuccio received a letter from Philip Hudner requesting the termination of Navarette's

occupancy of the house under the terms of the lease[221/] (Rasp's Ex. 13). By so doing, the Hudners were revoking their prior verbal permission to allow the Navarette family to occupy a house on the leased premises.

The Bertuccios then wrote Navarette on November 9, 1979 (G.C. Ex. 91) informing him that the Bertuccios did not own the property, that the owners wanted the premises vacated within thirty days and that he would have to leave.

Navarette testified that around this time Mrs. Hudner, the widow of the owner of the property, came to the house where he was residing and told him that he had to leave because she didn't want him to live there anymore.

After his receipt of Bertuccio's letter, Navarette had a conversation with Mrs. Bertuccio. Mrs. Bertuccio testified she again emphasized that it was Mrs. Hudner and not she who had made the decision regarding the house, and that she (Mrs. Bertuccio) had no choice in the matter as she was bound by the terms of the lease agreement. According to Bertuccio, Navarette indicated to her that he was looking for a different place to live, but he continued to remain in the house.

On January 17, 1980 the Bertuccios again wrote Navarette (G.C. Ex. 90) asking him to vacate the premises by

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221/That agreement had leased to Paul Bertuccio 279 acres of the Hudner Ranch for one year (which had begun in 1975) at $50,000.00 per year. Section 3 of said document stated: "Lessee shall have the right to use the barn but shall have no right to use any other buildings, which may be demolished by Lessors at any time. Lessee shall comply with such reasonable conditions affecting the appearance of the house, buildings, and grounds on which they are located as Lessors may from time to time establish by instruction to Lessee."

February 17, 1980. Mrs. Bertuccio testified that Mrs. Hudner had again complained to her.

Around this same time, the subject came up during negotiations and Steeg accused Respondent of unlawfully evicting Navarette.

Navarette was a witness in an ALRB hearing in 1978 at which time he testified that Respondent had discriminated against him. He was also scheduled to be a witness in another case (Case No. 79-CE-309-SAL et al, G.C. Ex. 84) in which it was alleged in the complaint, based on charges filed in August and September 1979, that Respondent had refused to give Navarette irrigation work because of his union activities.

2. Analysis and Conclusion

I assume the General Counsel is arguing that [222/] Navarette was threatened with eviction as punishment for his participation in ALRB proceedings on October 10, 1979 in Case No. 79-CE-309-SAL, et al. However, his first such participation was in 1978; yet, no such "threat" took place until the Bertuccio letter of November, 1979 (G.C. Ex. 91). This leaves the possibility that the "threat" only occurred after the 1979 ALRB activity. But this argument overlooks the fact that it was the Hudner Estate that made the decision to require Navarette to leave the premises and not the Bertuccios. [223/] The Bertuccios had no choice in the matter,

222/The General Counsel does not argue this allegation in his post-hearing Brief.

223/There is no evidence on this record of any conspiracy between the Hudner Estate and the Bertuccios to rid themselves of the presence of Navarette.

as lessees, having received notice of the lessor's intent to eliminate the occupancy of the premises. To do otherwise would have been to place Respondent in violation of its own lease agreement.

I see the timing of the letter Bertuccio wrote to Navarette terminating the latter's tenancy, coming as it did during a time he was involved in an ALRB proceeding, as being purely coincidental. What precipitated the Bertuccio November, 1979 letter was not Navarette's ALRB activity but was Philip Hudner's October 29 letter to the Bertuccios, received just prior to the termination date of Respondent's lease, requesting that Paul Bertuccio take whatever steps were required to remove the Navarettes from occupying the house on the Hudner property. There is no evidence that Philip Hudner, trustee of the estate and an attorney, was anything but serious about this request. The fact that the Bertuccios followed through on the request was only in fulfillment of a legal obligation; there is no evidence of unlawful motivation on their part. [224/] I recommend the dismissal of this allegation.

B. Ramiro Perez

1. Facts

In June of 197$ Alfredo Canella and his brother rented from the Bertuccios a small trailer on McCloskey Road. The Canellas had to go to Mexico for a couple of weeks; but they

224/There is no evidence that Navarette was engaged in union activity as alleged in the Second Amended Complaint (paragraph 10(a))—only that he filed a charge with the ALRB alleging that he was discristinated because of union activity and that he testified in an ALRB hearing that he had been discriminated against. Respondent is not charged with having violated Section 1152(d) of the Act.

didn't want to leave their personal property unguarded so they asked Mrs. Bertuccio if they could allow Ramiro Perez to stay in the trailer while they were gone. Tina Bertuccio testified that she told the Canellas that the arrangement was all right so long as Perez left when they returned. According to Mrs. Bertuccio, the trailer was only suitable for two persons at most, and this was how she wanted it rented.

About two weeks after the Canellas had returned from Mexico, Mrs. Bertuccio discovered that Perez had still not left the trailer and personally spoke to him about it. She explained that the trailer was rented only for two persons and that he would have to move back to where he had previously, been. Mrs. Bertuccio further testified that Perez indicated to her that he understood the problem and would act accordingly; however, he still did not move. Bertuccio testified that when she discovered this, she instructed Alfredo Canella to inform Perez that he would have to move out; but no action was ever initiated to lawfully evict Perez. As for Perez, he admitted that he told Mrs. Bertuccio he would only be in the trailer until the Canella brothers returned from Mexico, and that she said that arrangement was satisfactory. But after the Canellas returned, (after two months) they, according to Perez, asked him to remain which he did; and it wasn't until six months later that Mrs. Bertuccio said anything about it. He testified that at that time she asked him to move, giving as a reason that the trailer was only fit for habitation by two people.

This problem had been raised by Steeg at one of the

negotiating sessions. After Mrs. Bertuccio stated her position, Steeg replied that Perez claimed that he had permission to remain there.

2. Analysis and Conclusion

Again, this allegation was not briefed by the General Counsel. I assume he maintains that Perez' position on the Union's negotiating team motivated Respondent to ask him to leave the Canella's trailer when they returned from Mexico. I disagree. The General Counsel has failed to prove any such unlawful motivation. Perez and Mrs. Bertuccio both understood that when the Canella's returned, Perez would be required to locate other housing. This was a reasonable request on the part of Mrs. Bertuccio who wanted only to restrict the use of her trailer to two persons, which was her right.

I recommend that this allegation be dismissed.

C. Maria Jimenez

1. Facts

Ms. Jimenez, a member of the Negotiating Committee, has worked at Respondent's since 1975. Other members of her family work there as well, and they live together in a house owned by Respondent. Ms. Jimenez testified that in July of 1979, Mrs. Bertuccio told her that she was thinking of closing down the company housing because of the many problems (plugged washrooms, bathrooms, other complaints) and that "this, were cur first rewards for being in the Union." (sic) (R.T. 11, p. 32) Jimenez further testified that no one had spoken to her since this alleged conversation about closing down the house, and that she had, in fact, continued to live there six

General Counsel argues this was a threat to make it clear that support for the Union would lead to financial loss for the Jimenez family.

2. Analysis and Conclusion

I credit Jimenez that the statement was made by Mrs. Bertuccio. [225/] Jimenez testified in a very honest, direct manner. I regard the statement as a threat. The assertion that because of unionization the possibility existed of Respondent's housing being closed down, was a threat that continued support of the union Mould have exactly that effect. Paul W. Bertuccio and Bertuccio Farms, 5 ALRB No. 5 (1979). As such, the statement reasonably tended to interfere with or restrain employees in the exercise of their rights guaranteed by the Act. Id.

I find that Respondent's conduct constituted a violation of Section 1153(a) of the Act.

XI. Prior Unfair Labor Practice

Finally, I am not unmindful of the fact that in 5 ALRB No. 5 (1979), the Board found Respondent had violated the Act by interrogating employees as well as threatening them with discharge, layoff, eviction and deportation because of their union activities. The Board also found that Respondent had anti-union animus although there was insufficient evidence (in the layoff of a crew) to overcome Respondent's affirmative

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225/Mrs. Bertuccio was not questioned about the statement.

defense of insufficient work and poor work performance by the crew. I have considered this fact because it is established that "...earlier events may be utilized to shed light on the character of (current) events," including use of a "history of anti-union animus...to impute an improper motive for (an employer's actions)." ALRB v. Ruline Nursery Company, 115 Cal.App.3d 1005, 1013.

XII. Conclusion

The evidence supports the finding that Respondent was engaged in surface bargaining with no bona fide intent to -reach an agreement.

> "...to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." N.L.R.B. v. Herman Sausage Company, Inc., 275 F.2d 229,232 (5th Cir. 1960). See also, B. F. Diamond Construction Company, supra.

The record as a whole, including Respondent's delay in providing and refusing to provide relevant information, its instituting unilateral changes, its illegal and improbable justifications for its refusals to compromise, its inability to explain its own positions, its rejection without explanation of the Union's proposals, and the background evidence of prior anti-union animus clearly establishes a finding that the Respondent did not negotiate with a view towards reaching an agreement. Here was a business that did not want a contract, and it succeeded in obtaining that goal.

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XIII. The Remedy

Having found that Respondent, Paul W. Bertuccio, failed and refused to bargain in good faith in violation of Section 1155.2(a) and Sections 1153(a) and (e) of the Act, I shall, pursuant to the provisions of Section 1160.3, recommend that Respondent be ordered to meet with the UFW, upon request; to bargain in good faith; and in particular to refrain from unilaterally changing employees' wages or working conditions and from failing and refusing to furnish information relevant to collective bargaining as requested by the UFW to make whole its agricultural employees for the loss of wages and other economic benefits they incurred as a result of Respondent's unlawful conduct, plus interest thereon computed at seven percent per annum. Adam Dairy, 4 ALRB No. 24 (1978).

Because Respondent manifested a continuing pattern of illicit conduct, I shall recommend that the make-whole remedy commence on January 22, 1979, the date upon which. Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful failure and refusal to bargain in good faith, 'O. PS. Murphy, 5 ALRB No. 63 (1979), and continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or impasse.

I shall recommend dismissal of the complaint with respect to all allegations thereof in which the Respondent has been found not to have violated the Act.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

Pursuant to Labor Code Section 1160.3, Respondent, Paul W. Bertuccio, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and in particular by unilaterally changing employees' wages or working conditions and failing to bargain over the effects of those changes and by failing and refusing to furnish information relevant to collective bargaining at the UFW's request;

(b) Threatening employees with loss of housing or any change in the terms and conditions of their employment because of their union activities;

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees: and if an understanding is reached, embody such

understanding in a signed agreement.

(b) Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time between January 22, 1979 to the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by them as the result of Respondent's refusal to bargain, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios, 4 ALRB No. 24 (1978), plus interest computed at seven percent per annum.

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

(d) 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.

(e) Post copies of the attached Notice in conspicuous places on its property for a sixty-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.

(f) Provide a copy of the attached Notice to each employee hired curing the twelve-month period following

the date of issuance of this Order.

(g) Mail copies of the attached Notice in all appropriate languages, within thirty days after issuance of this Order, to all agricultural employees referred to in Paragraph 2(b) above.

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

(i) Notify the Regional Director in writing, within thirty 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.

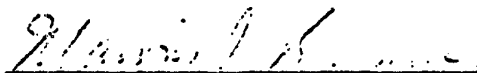
IT IS FURTHER ORDERED that the certification of the UFW, as the exclusive bargaining representative for Respondent's agricultural employees, be extended for a period of one year

from the date on which Respondent commences to bargain in good faith with the UFW.

IT IS FURTHER ORDERED that the allegations of the Second Amended Complaint with respect to which no violation of the Act was proved are dismissed.

DATED: October 16, 1931

AGRICULTURAL LABOR RELATIONS BOARD

By: 

MARVIN J. BRENNER
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all 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 try to get a contract or to help or protect one another; and

6. To decide not to do any of the above things.

Because it is true that you have these rights, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT refused to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT-make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed change's.

WE WILL NOT threaten employees with loss of housing or any change in the terms and conditions of their employment because of their union activities.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if

possible. In addition, we will reimburse all workers who were employed at any time during the period from January 22, 1979 to the date we begin to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW.

DATED:

PAUL W. BERTUCCIO

By: _____

Representative Title

If you have any questions about your rights as farm workers or this Notice, you nay contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161.

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

DO NOT REMOVE OR MUTILATE.