El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC 8 ALRB No. 23

ERRATUM

The Order and Notice to Agricultural Employees in the above captioned case contain incorrect or inconsistent dates. Said Order and Notice are therefore deleted and the attached Order and Notice substituted in their place.

Dated: April 26, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

JOHN P. McCARTHY, Member

negotiations which Respondent had halted in February 1979. On the contrary, the totality of Respondent's conduct, including the summary rejection of the UFW's December 18, 1979, offer and its delay in submitting a counter-proposal until May 1980, indicates that from November 20, 1979, until, at least, May 1980, Respondent continued the bad-faith bargaining it began on February 21, 1979. In this context, the November 20 letter appears to have been the first step in a preconceived plan to justify a wage increase which Respondent intended to make, regardless of the UFW's position. We so find.

As no bona fide impasse existed when Respondent unilaterally increased its employees' wages, and as we find that Respondent engaged in surface bargaining with the union regarding a collective bargaining agreement, we conclude that Respondent has violated Labor Code section 1153 (e) and (a). We shall therefore order that Respondent make its employees whole for any economic losses they have suffered as a result of this violation during the period from November 20, 1979, until May 1980 and the period from May 1980 until Respondent commences good-faith bargaining which results in a contract or bona fide impasse.[1/]

ORDER

By authority of Labor Code section 1160.3, the

[1/] We note that the make-whole remedy ordered herein overlaps the remedial order in Admiral Packing Co. (Dec. 14, 1981) 7 ALRS No. 43, which also applies to Respondent. For practical purposes, the Respondent's liability in Admiral Packing now extends from February 21, 1979, until November 19, 1979, whereupon its liability in the instant case commences. We have bifurcated the make-whole period in the instant case to expedite compliance. John. Elmore Farms Mar. 10, 1982) 8 ALRB No. 20.

Agricultural Labor Relations Board hereby orders that Respondent Martori Brothers, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, suspending, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged in any activity protected by section 1152 of the Act.

(b) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) or its authorized representatives by unilaterally changing the wages or any other term or condition of employment of its employees.

(c) Failing to bargain in good faith with the UFW with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other, manner failing or refusing to so bargain with the UFW.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) 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) Make whole each employee employed since January 1979, for any loss of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation for

workers.

(b) Upon request, meet and bargain with the UFW as exclusive collective bargaining representative of its employees regarding a collective bargaining agreement and any unlawful unilateral changes in working conditions it has effected, and embody any understanding reached in a signed agreement.

(c) Upon request of the UFW, rescind the unilateral wage increase in the lettuce piece rate instituted during the 1979-80 lettuce harvest season and thereafter pay the piece rate in effect prior to its unilateral increase, unless and until a wage change is negotiated in good faith with the UFW as the employees' certified bargaining representative.

(d) Make whole all of its agricultural employees for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to bargain in good faith with the UFW regarding a collective bargaining agreement and the wage increases Respondent unlawfully granted to its employees in December 1979, plus interest computed at seven percent per annum. The period of said obligation shall extend from November 20, 1979, until the date in. May 1980 on which Respondent submitted to the UFW a full counter-proposal, and from that date in May 1980, until the date Respondent commences good-faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Make whole all agricultural employees employed in the Martinez crew on February 5, 1979, for any loss of pay and other economic losses they have suffered as a result of their

discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

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

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from January 1979 until the date on which the said Notice is mailed.

(i) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period and place (s) of posting to be determined, by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(j) Arrange for a representative of Respondent or Board agent to distribute and read the attached Notice, in all

appropriate languages, to its employees on company time and property at time(s) and place(s) 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 the employees may have concerning the Notice or employees' 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 23, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a com-plaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement, by changing the wage rates and bus service from Calexico without first negotiating with the UFW, and by discharging the Martinez crew on February 6, 1979. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all farm workers 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 to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

Because this-is true 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.

Particularly, WE WILL NOT make any changes in your -wages, hours or conditions of employment without negotiating with the UFW.

WE WILL pay those workers employed during the 1979-1980 and/or 1980-1981 lettuce harvest season (s) for any economic loss they suffered during said period(s) as a result of our unilateral discontinuance of bus service from Calexico.

WE WILL make whole all members of the Martinez crew who were discharged on or about February 6, 1979, for all losses of pay and other money losses they suffered as a result of their discharge.

WE WILL meet with your authorized representatives from the UFW, a their request, for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since November 20, 1979.

Dated: MARTORI BROTHERS

By: ______________________

(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice,, you -nay contact any office of the Agricultural Labor Relations 3oard. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130, This-is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-187-EC 80-CE-10-EC 80-CE-91-EC 8 ALRB No. 23

DECISION AND ORDER

On March 10, 1981, Administrative Law Officer CALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each timely filed exceptions and a supporting brief.

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

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

General Counsel excepts to the ALO's failure to recommend that Respondent's employees be made whole for their economic losses, despite his finding that Respondent engaged in surface bargaining after November 20, 1979. We find merit in this exception.

In Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, we found that Respondent, in concert with nine other employers,

bargained in bad faith with the United Farm Workers of America, AFL-CIO (UFW) by declaring a premature impasse on February 21,
1979. and refusing to participate in further negotiations. On November 20, 1979, Respondent, then bargaining alone, contacted the UFW regarding its desire to discuss certain changes in its wage rates and wage system. The UFW responded, stating that although it would not separately negotiate wage increases, the Union was interested in resuming negotiations for a full contract. The parties met on December 7, 1979, at which time the UFW offered either to immediately sign an agreement similar to an agreement between the UFW and Sun Harvest, Inc. or to begin full-scale negotiations from the point where the parties had discontinued negotiations on February 28, 1979.

Respondent, without explanation, selected the second alternative. On December 18, 1979, UFW submitted a proposal which contained modifications of its last proposal. By letter of December 31, 1979, Respondent rejected the UFW proposal in its entirety, without discussion of the proposed modifications, again declaring impasse, and unilaterally raised its wage rates for the harvest season. In March 1980, as the harvest was ending, Respondent decided that it would respond substantively to the Union's December 18, 1979, proposal; however a full counter-proposal was not submitted to the UFW until sometime in May 1980. The record does not indicate what bargaining, if any, took place after May 1980.

We agree-with the ALO that Respondent's letter of November 20, 1979, was not a good-faith effort to resume the

negotiations which Respondent had halted in February 1979. On the contrary, the totality of Respondent's conduct, including the summary rejection of the UFW's December 18, 1979, offer and its delay in submitting a counter-proposal until May 1980, indicates that from November 20, 1979, until, at least, May 1980, Respondent continued the bad-faith bargaining it began on February 21, 1979. In this context, the November 20 letter appears to have been the first step in a preconceived plan to justify a wage increase which Respondent intended to make, regardless of the UFW's position. We so find.

As no bona fide impasse existed when Respondent unilaterally increased its employees' wages, and as we find that Respondent engaged in surface bargaining with the union regarding a collective bargaining agreement, we conclude that Respondent has violated Labor Code section 1153(e) and (a). We shall therefore order that Respondent make its employees whole for any economic losses they have suffered as a result of this violation during the period from November 20, 1979, until May 1980 and the period from May 1980 until Respondent commences good-faith bargaining which results in a contract or bona fide impasse.[1/]

ORDER

By authority of Labor Code section 1160.3, the

[1/] We note that the make-whole remedy ordered herein overlaps the remedial order in Admiral Packing Co. (Dec. 14, 1981) 7 ALRB No. 43, which also applies to Respondent. For practical purposes, the Respondent's liability in Admiral Packing now extends from February 21, 1979, until November 19, 1979, whereupon its liability in the instant case commences. We have bifurcated the make-whole period in the instant case to expedite compliance. John Elmore Farms (Mar.10, 1982) 8 ALRB No. 20.

Agricultural Labor Relations Board hereby orders that Respondent Martori Brothers, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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(b) Failing or refusing to bargain collectively in good faith with the United Farm Workers of America, AFL-CIO (UFW) or its authorized representatives by unilaterally changing the wages or any other term or condition of employment of its employees.

(c) Failing to bargain in good faith with the UFW with respect to wages, hours, and other terms and conditions of employment of its employees, or the negotiation of an agreement covering such employees, or in any other manner failing or refusing to so bargain with the UFW.

(d) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) 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) Make whole each employee employed since January 1977, for any loss of pay and other economic losses resulting from Respondent's discontinuance of the Calexico bus transportation for

workers.

(b) Upon request, meet and bargain with the UFW as exclusive collective bargaining representative of its employees regarding a collective bargaining agreement and any unlawful unilateral changes in working conditions it has effected, and embody any understanding reached in a signed agreement.

(c) Upon request of the UFW, rescind the unilateral wage increase in the lettuce piece rate instituted during the 1979-80 lettuce harvest season and thereafter pay the piece rate in effect prior to its unilateral increase, unless and until a wage change is negotiated in good faith with the UFW as the employees' certified bargaining representative.

(d) Make whole all of its agricultural employees for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to bargain in good faith with the UFW regarding a collective bargaining agreement and the wage increases Respondent unlawfully granted to its employees in December 1979, plus interest computed at seven percent per annum. The period of said obligation shall extend from November 20, 1979, until the date in May 1980 on which Respondent submitted to the UFW a full counter-proposal, and from that date in May 1980, until the date Respondent commences good-faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Make whole all agricultural employees employed in the Martinez crew on December 5, 1979, for any loss of pay and other economic losses they have suffered as a result of their

discharge, reimbursement to be made according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per -annum.

(f) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

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appropriate languages, to its employees on company time and property at time(s) and place(s) 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 the employees may have concerning the Notice or employees' 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: March 23, 1982

HERBERT A. PERRY, Acting Chairman

JEROME R. WALDIE, Member

MEMBER McCARTHY, Concurring:

I am in basic agreement with the ALO's analysis and conclusions in this case, but I find it necessary to distinguish my approach to this case from that of the majority. First, it should be noted that I dissented to the majority's conclusion in Admiral Packing (Dec. 14, 1981) 7 ALRB No. 43, that Respondent and other employers were engaged in bad-faith bargaining as of February 21, 1979. Although I concluded in my dissent that a legitimate impasse began on that date, the impasse was at least temporarily broken in the instant case when Respondent's negotiator sent a letter to the Union on November 20, 1979, proposing a wage rate higher than that offered prior to impasse. See Hi-Way Billboards, Inc. (1973) 206 NLRB No. 1. I would find that no bona fide impasse occurred thereafter and that, on the state of the record in this case, Respondent was not free to unilaterally raise wages to a level higher than it had offered prior to impasse.

I wish to emphasize, however, that the failure to arrivi

at impasse prior to making unilateral changes does not automatically render such changes unlawful. Had Respondent been able to adequately demonstrate the existence of an extenuating circumstance such as business necessity[1/] or continuation of an established past practice (maintenance of the status quo), the unilateral changes in question could have been lawfully implemented irrespective of the existence of any impasse and without having afforded the Union an opportunity to bargain. (For business necessity, see Winn-Dixie Stores (1979) 243 NLRB 972 and Dilene Answering Service, Inc. (1981) 257 NLRB No. 24; for past practice, see NLRB v. Katz (1962) 369 U.S. 736, General Motors Acceptance Corporation (1972) 196 NLRB 137, enforced 476 F.2d 850 (1st Cir. 1973), and Ithaca Journal-News, Inc. (1981) 259 NLRB No. 60.

It does not appear that business necessity per se was raised as a defense by Respondent. As for the defense of established past practice, it must be shown that such practice is pursuant to normal company policy. Reed Seismic v. NLRB (1971) 440 F.2d 598. Here, the only evidence of past-practice concerns wage rates which were dictated by union contract over a relatively short period of time. It does not appear from the record that Respondent established and maintained over a significant period of time a policy of regular wage increases based on objective factors. I agree with the ALO that this makes Respondent's past-practice

[1/] This exception takes on added importance in the agricultural setting. Timing in cultivation and perishability of crops often create situations in which changes affecting otherwise mandatory subjects of bargaining must be made rapidly and unilaterally.

defense unavailing.

I am also in agreement with the ALO's position that once talks resumed, Respondent was obliged to bargain toward an entire contract rather than simply toward agreement or impasse on the one issue of wages. However, had Respondent resumed full-scale negotiations in good faith, it could lawfully have reached impasse on the wage issue and then proceeded to implement a unilateral change consistent with its last offer during negotiations. See Winn-Dixie Stores, Inc. v. NLRB, supra, 243 NLRB 972; Central Virginia Electric Cooperative (1981) 259 NLRB No. 46.

As Respondent has not demonstrated an adequate defense based on business necessity or continuation of the status quo, and as it failed or refused to bargain in good faith toward an entire contract once the talks had resumed, I concur in the result of the majority's decision.

Dated: March 23, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by bargaining in bad faith with the UFW regarding a collective bargaining agreement, by changing the wage rates and DUS service from Calexico without first negotiating with the UFW, and by discharging the Martinez crew on February 6, 1979. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all farm workers 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 to obtain a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

Because this is true 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.

Particularly, WE WILL NOT make any changes in your wages, hours or conditions of employment without negotiating with the UFW.

WILL pay those workers employed during the 1979-1980 and/or 1980-1981 lettuce harvest season (s~) for any economic loss they suffered during said period (s) as a result of our unilateral discontinuance of bus service from Calexico.

WE WILL make whole all members of the Martinez crew who were discharged on or about February 6, 1980, for all losses of pay and other money losses they suffered as a result of their discharge.

WE WILL meet with your authorized representatives from the UFW, at their request, for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since November 20, 1979.

Dated:

MARTORI BROTHERS

By: ______________________

(Representative)
(Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California, telephone number is (714) 353-2130. This is an official Notice of the Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Martori Brothers Distributors (UFW)

8 ARLB No. 23
Case Nos. 79-CE-187-EC
80-CE-10-EC
80-CE-91-EC

ALO DECISION

The ALO found three separate violations of the ALRA. First, he found that Respondent engaged in surface bargaining in violation of Labor Code section 1153 (e) by suggesting to the UFW that it would negotiate, then abruptly rejecting the Union proposal in its entirety/ declaring an impasse, and unilaterally raising wage rates. Second, the ALO found that Respondent discontinued bus service for its employees without bargaining with the UFW. Third, he found that Respondent discharged a lettuce harvest crew for engaging in a one-day strike, in violation of Labor Code section 1153 (a).

BOARD DECISION

The Board affirmed the ALO's findings, conclusions, and recommendations, with one exception. Although the ALO found that Respondent bargained in bad faith, he recommended no make-whole remedy. The Board order included a make-whole provision in its
remedial order.

* * *

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

MARTORI BROTHERS

Respondent

and

UNITED FARM WORKERS OF AMERICA, AFL-CIO

Charging Party

Case Nos. 79-CE-187-EC
80-CE-10-EC
80-CE-91-EC

APPEARANCES :

Sarah A. Wolfe
200 New Stine Road, Suite 228
Bakersfield, California 93309 For the Respondent

Jose Antonio Barbosa
319 Waterman
El Centro, California 92243; and

Barbara Dudley
1350 Front Street, Room 2056
San Diego, California 92101
For the General Counsel

Chris A. Schneider
P. O. Box 30
La Paz, Keene, California 93531
For the Charging Party

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was heard before me in El Centro, California, on September 22, 23, 24, 25 and 26. The charge in Case No. 79-CE-187-EC was filed December 8, 1979. The charge in Case No. 80-CE-10-EC was filed January 8, 1980. The charge in Case No. 80-CE-91-EC was filed February 6, 1980. Separate complaints, to which Respondent filed timely answers, were issued in 79-CE-187-EC and 80-CE-10-EC. A complaint issued June 30, 1980, consolidating the above-numbered cases for trial. The charge and the complaint were duly served upon Respondent.

The United Farm Workers of America (AFL-CIO) moved to intervene in the proceedings on the ground that it was Charging Party. The motion was granted.

Each party was given full opportunity to participate in the hearing and post-hearing briefs were filed by Respondent and by General Counsel.

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

FINDINGS OF FACT

I. Jurisdiction

Martori Brothers is a partnership engaged in agriculture in Imperial County, California, and is an agricultural employer within the meaning of Labor Code §1140.4(c).

The United Farm Workers of America (AFL-CIO) is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and

it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The OFW is a labor organization within the meaning of Labor Code S1140.4(b).

II The Unfair Labor Practices Alleged

Respondent is alleged to have violated §§1153(a), 1153(e) and 1155.2(a) of the Act by unilaterally effecting a change in wages and by unilaterally effecting a change in a condition of employment which was a mandatory subject of bargaining. Respondent is further alleged to have violated §1153(a) by terminating one of its lettuce harvest crews for engaging in protected concerted activity.

III, The Unilateral Wage Increase

The Facts.

Background: On January 27, 1978, the UFW was certified as bargaining representative for all agricultural employees of Respondent. Contract negotiations between Respondent and the DFW were carried on between April, 1978, and November, 1978, without agreement being reached.

In November, 1978, Respondent joined an industry bargaining group composed of approximately 28 vegetable growers operating in the Salinas and Imperial Valleys whose contracts, for the most part, were due to expire on January 1, 1979.[1/]

On February 21, 1979, the employer group submitted a proposal covering all contract provisions to which the group was prepared to agree and which contained a wage proposal for all

1/A few of the agreements were due to expire on December l7 1978. Respondent had no prior agreement with the UFW.

contract classifications. The wage proposal for a conventional ground pack lettuce piece rate was $.61 per carton the first year, $.65 the second year and $.70 the third year. The UFW submitted & counterproposal on February 28, 1979. It was rejected; the employer group declared the parties were at impasse; and no further proposals were exchanged.[2/] February 28 was the end of the 1978-1979 lettuce harvest season in the Imperial Valley.

In May, 1979, Sun Harvest withdrew from the multi-employer group and began meeting separately with the DFW. In June the Union also began meeting with that portion of the multiemployer group based in Salinas. The Imperial Valley growers thereupon withdrew from the multiemployer negotiations.

There was one meeting in August between the Imperial Valley growers, including Martori, and the UFW. No new proposals were exchanged.

On November 20, 1979, Respondent notified the UFW by letter from Nassif to Burciaga that it was contemplating changing its harvest operation from the conventional trio system to a quinteta system paying a rate of $.80 per carton.[3/] The letter also stated that if Respondent continued to use trios, it would pay $.75 per carton. Nassif's letter requested that the UFW advise him when it would be convenient to meet to negotiate regarding the

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2/As"a result of the employers' action, an unfair labor practice was filed. The matter has been heard by another Administrative Law Officer whose decision is currently pending before the Board [see Admiral Packing, et al, 79-CE-38-EC, et al]. The existence or nonexistence of an impasse as of February 28, 1979, is not at issue herein.

3/Nassif is an attorney. He also represented Colace Bros., Vessey & Company, and Maggio, Inc., the other Imperial Valley growers involved in the multiemployer bargaining. Burciage is an official of the UFW.

change to quintetos and the various rates proposed by Respondent, [4/]

By letter of November 26 Ann Smith, UFW negotiator, responded to Nassif's letter, stating that the UFW was willing to meet to discuss the quinteto and trio systems and the appropriate wage rates for the respective systems in the context of negotiating a collective bargaining agreement. Smith further stated that the Union would regard the unilateral implementation of a wage increase or the quinteto system as a violation of the ALRA. Various meeting dates were suggested in her response.

Respondent and the UFW met on December 7, 1979.[5/] Having received Martori's proposed change in the lettuce piece rate, the UFW suggested the following alternative approaches to the resumed negotiations: using the UFW's recently negotiated agreement with Sun Harvest as the basis for settlement with Respondent, since that settlement had been used to reach agreement with approximately 18 other employers; or if Respondent regarded that approach as unsatisfactory, the UFW would make those changes in its February 28, 1979, proposal which it felt were warranted by the change in Respondent's position on wages.

No answer regarding the proposed alternative approaches was elicited during the meeting. Later that day Nassif told Smith that Respondent was not interested in the Sun Harvest agreement and that the UFW should proceed with the bargaining by

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4/The proposed trio rate was the same as that in the Sun Harvest agreement.

5/Nassif and Martori were present for Respondent. Jerry Cohen, the General Counsel for the UFW, was present with Smith on behalf of the UFW.

submitting a proposal in response to Respondent's wage modification.[6/] Smith never received an explanation regarding why Martori found the Sun Harvest agreement unacceptable. There was no mention of an anticipated change to a quinteta system.[7/]

During the course of the meeting, Smith again advised Nassif that the UFW would not agree to any unilateral interim wage increase being implemented at the outset of the 1979-1980 season. Smith testified that Nassif stated that there had now been a break in the impasse. The meeting lasted approximately 20 minutes.

Having learned that Martori was not interested in adopting the Sun Harvest agreement, the Union, by letter of December 19, submitted proposed modifications of its February 28 proposal. Previously proposed changes in the Recognition Article found in the prior contract were withdrawn; proposed modification of the Hiring Hall and Union Label Articles were withdrawn; the Union now proposed no change in those articles as found in the prior agreement. The Union also modified its position regarding contributions into its medical plan and its pension plan, as well as reducing its wage proposal to $.80 per carton for trios. While the modifications reduced the Union's February 28 proposal, the cost impact was still greater than the cost of comparable provisions in the Sun Harvest agreement.

6/Smith's testimony as reported is ambiguous, the con struction set forth above seems the most reasonable reading. See Reporter's Transcript V. 1, p. 57, LL. 8-17.

7/According to Smith there was no discussion of the wage proposal made by Martori in Nassif’s November 20 letter. Nor were any substantive proposals discussed. Nassif testified the Union was unprepared to discuss wages or the quinteta system.

1 Nassif responded to the Union's December 19 modifica-
2 tions by letter of December 31. He asserted the parties were
3 again at impasse and would remain so until the UFW was prepared
4 to put forth a position which recognized the differences between
5 Martori and the other companies he represented on the one hand
6 and Sun Harvest on the other or until Martori was prepared to
7 sign the Sun Harvest agreement. His letter also asserted that
8 the DFW was not bargaining in good faith and had no desire to
9 reach agreement on any terms but the Sun Harvest agreement.

10 The Union responded on January 9, 1980, in a letter
11 from Smith to Nassif in which Smith contends that Nassif misstates
12 the Union position with respect to the Sun Harvest contract and in
13 which she asserts there is no impasse. The letter states that the
14 UFW is ready to meet at any time. There is no suggestion in her
15 letter that further modifications of the Union position might be
16 forthcoming at such a meeting.

17 By letter of January 21, 1980, directed to the ALRB
18 office in El Centro, Nassif conceded that Respondent increased the
19 wages of lettuce harvest employees to $.75 per carton for the con-
20 ventional ground pack. The letter further states the increase was
21 effective with the start of the Imperial Valley lettuce harvest
22 season. Nowhere does the record reveal the precise date on which
23 Martori started its 1979-1980 harvest. The 1978-1979 harvest
24 began on December 26, 1978. Ron Hall, manager of Imperial Valley
25 Vegetable Growers Association, testified the majority of the
26 Imperial Valley growers did not begin the 1979-1980 harvest before
27 December 15. Absent credible testimony to the contrary, I find
28 Martori began its lettuce harvest sometime between December 15

and December 31, 1979.

On January 28 Nassif wrote Smith acknowledging her letter of January 9. He asserted that Smith had stated in front of witnesses that the best Respondent and others represented by Nassif could hope to obtain was the Sun Harvest agreement? that if the companies opted to bargain from "bargaining proposals," something less desirable from the company's view would result. Nassif then stated: "We are happy to continue negotiations with the prospect of reaching a Collective Bargaining Agreement." He requested guidance regarding where the UFW would be willing to modify its position on "critical issues." Nassif then recited specific areas in the UFW proposal which were troublesome to Respondent and the other companies: union security, seniority, cost of living, union representatives and mechanization.

The letter closed with an inquiry regarding whether the UFW was prepared to negotiate separate contracts with each of the employers or whether the UFW was going to maintain its position that each must agree to the Sun Harvest contract as a "Master Agreement" and limit negotiations to local issues.[8/]

Smith responded to Nassif in a letter dated February 6 in which she states that Nassif mischaracterized the UFW's position and in which she denies ever stating that the Sun Harvest terms and conditions were the best which Respondent and the other three companies could obtain. She urged that if Respondent wanted to negotiate a contract for its Company that it proceed to do so by modifying the position it presently had on the

Respondent's letter also sought discussion about establishing a wage differential for non-lettuce, non-vegetable crops grown by some of the companies.

table. Additionally, Smith suggested that "the way to get negotiations off dead center was for Respondent to reply to the Union's modified position of December 19, 1979. She proposed that this be done in a meeting attended by principals from each of the four companies represented by Nassif.

In a letter dated February 12 Nassif requested that Smith advise him of available dates for a meeting. He cautioned that the chances for progress were slim if the Union adhered to a take-it-or-leave-it attitude with respect to the Sun Harvest agreement.

After an exchange of telephone calls initiated by Nassif, the parties met on March 4. Nassif stated he would submit a written response to the UFW's December 19, 1979, proposal. In April the Union received a written response with respect to all items but wages. A response on wages was received in May.

B. Conclusions.

In terms of the issue in the pendent hearing, it is irrelevant whether the parties were at impasse, during the period between February 28, 1979, and November 20, 1979. Admittedly, Martori wanted to increase the piece rate for trios to $.75 per hour at the outset of the 1979-1980 lettuce harvest. The proposed rate was in excess of his pre-impasse offer, assuming arguendo that such a state existed, and could not legally be effected without resumption of bargaining. Thus, we may start with the proposition that any pre-existing impasse was broken by Nassif's letter of November 20 to the UFW.

Since the UFW at no time agreed to the $.75 rate, at issue is whether its unilateral implementation by Martori violated

§1153(e). Generally speaking, unilateral changes in wages, hours or other conditions of employment in the face of a duty to bargain are permitted only when the parties have bargained to impasse or.. situations in which Respondent's failure to effectuate the change would be chargeable as failure to bargain in good faith, i.e., in circumstances where the Respondent's past practice with respect to the affected condition mandates the change. In the latter situation Respondent's unilateral act is more appropriately viewed as maintenance of a "dynamic" status quo. Here, Respondent makes both arguments in defense of its action.

The National Labor Relations Board has set forth its general criteria for determining impasse in the following terms:

> 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 exists. (Footnotes omitted).9/

More recently the National Labor Relations Board stated:

> A genuine impasse in negotiations is synonymous with deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. 10/

The ALRB has similarly defined a condition of

9/Taft Broadcasting Co., Inc., 163 NLRB 475, 478 (1967), aff'd sub nom, American Federation of Television & Radio Artists, AFL-CIO v. N.L.R.B., 395 F.2d 622 (D.C. Cir. 1968).

10/Hi-Way Billboards, Inc., 206 MLRB 22, 23 (1973).

1 impasse. "Impasse occurs when the parties are unable to reach
2 agreement despite their best good-faith efforts to do so."[11/]
3 An essential prerequisite to reaching that state of
4 deadlock which permits an employer to effect unilateral changes in
5 wages, hours or other conditions of employment is that the deadlock
6 is the culmination of good-faith bargaining by the employer and the
7 union. Certainly a common reason for rejecting a claim of impasse
8 is the failure of the party so claiming to. bargain in good
9 faith,[12/] Thus, it becomes necessary to review Respondent's con-
10 duct during the period between November 20 and December 31 to as-
11 certain whether it bargained in good faith. As in any situation in
12 which surface bargaining is at issue, the totality of the circum-
13 stances must be considered. After so doing, I conclude that during
14 the course of negotiations following November 20 at least until the
15 end of 1979, Respondent engaged in surface bargaining. This con-
16 elusion compels the further conclusion no genuine impasse existed
17 when Respondent unilaterally gave effect to the $.75 per carton
18 trio rate; it follows that the increase was violative of §1153(e)
19 and (a). We turn now to an elucidation of the path to this con-
20 clusion.
21 Initially, it is apparent Respondent had a limited
22 objective when it suggested a resumption of meetings. As is mani-
23 fested by Nassif's November 20 letter, Respondent sought to create
24 an environment in which it could with impunity grant a wage in-
25 crease. The November 20 letter does not suggest a willingness to
26
27 11/Masaii Eto, dba Eto Farms, et al, 6 ALRB No. 20, at
p. 11, Citing Bill CooK Buick, 224 NLRB 1094 (1976).
28 12/See 44 Tex Law Rev. 769.

bargain regarding any subject matter but wages.[13/] Since a party may not, consistent with its obligation to bargain in good faith, condition bargaining upon discussion of a single mandatory subject to the exclusion of other such subjects, the narrow scope of proposed bargaining set forth in Nassif's letter suggests Respondent was unprepared to discuss other mandatory subjects. At best the inference to be drawn from the letter is equivocal. When placed in the context of Respondent's course of conduct thereafter, a proper inference is that the letter was the opening shot of a preconceived plan to sanitize the rate increase Respondent had already determined to make, irrespective of the Union's response.

Upon receipt of Nassif's letter, it was incumbent upon the UFW to demand negotiations or risk waiving its right to object to the proposed rate increase.[14/] It did so, and the parties met on December 7.

The meeting was brief. It appears that the imminence of the 1979-1980 harvest season stirred some activity not only by Respondent but also by three other Imperial Valley growers represented by Nassif. The UFW, represented by Smith, held brief meetings that day with each of the growers.[15/] The Martori meeting was devoted to an attempt to get negotiations back on track after the extended hiatus in meetings between the parties.[16/] To

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13/The letter expressed a desire to discuss harvesting by use of quintetas rather than trios; but this subject matter is essentially a wage issue.

14/Globe-Union. Inc., 222 NLRB 1081 (1976); Lange Company, 222 NLRB 558 (1976).

15/Colace Bros., Vessey & Company, and Maggio, Inc.

16/Between February 28, 1979, and the December 7 meeting the parties met one time in August.

this end Smith suggested two approaches: that Martori accept the Union's newly negotiated agreement with Sun Harvest as the basic agreement and that the parties turn their attention to negotiating local issues. Since the Union had been successful in reaching agreement with 18 independent growers following this format, it cannot be said that such a proposal evidenced bad faith on the part of the UFW.[17/] As an alternative, the Union said it would prepare

those modifications of its last proposal to Martori which it thought warranted by Respondent's modified wage position. Nassif was unable to respond to the UFW position, and the. meeting recessed. Later that day, Nassif without explanation told Smith the Sun Harvest alternative was unacceptable and suggested she submit modifications of the UFW's February 28 proposal. While the absence of an explanation for rejection of a proffered proposal may in some instances evidence surface bargaining, such is not the case here. Respondent was given alternatives, it selected one and proposed that negotiation proceed in accordance therewith.

The Union responded by submitting modifications of its February proposal on December 18. It appears the modified proposal was not submitted on the date originally promised; however, the delay was not so significant as to manifest a failure to bargain.

Respondent ignored and failed to respond to the UFW's modified proposal until April, 1980, and then responded only

17/Its success with this format removes the proposal from the category of proposals manifesting bad faith because its proponent could be expected to know that no reasonable party across;
the table could find it acceptable. See

partially. It was May, 1980, before a complete response was forthcoming, a time well after the completion of the 1979-1980 season. This delay in response to the UFW's proposal, a proposal made pursuant to the bargaining approach for which Respondent opted, may properly be construed as a lack of interest in negotiating a contract and thus evidence that Respondent was engaged in surface bargaining during December, 1979.

A further indicia of Respondent's surface bargaining is Nassif's letter of December 31, his first communication with the Union following receipt of their most recent proposal. Negotiation had just resumed and there had been no meaningful discussion of the most recent UFW proposal which modified its previously presented position in significant ways both as to costs and conditions. Nassif's statement that the parties had again reached impasse was a self-serving statement artificially attempting to create impasse so as to insulate Respondent from liability for having already raised wages without notice to the Union. If indeed a deadlock existed on December 31, it was a deadlock resulting from Respondent's failure to bargain in good faith during the period subsequent to November 20, 1979,

Resisting this conclusion, Respondent argues that the UFW failed to bargain in good faith during the relevant period, pointing to the fact that the December 19 proposal though reducing wage, pension and medical insurance demands, still left those demands above the cost of the same items in the rejected Sun Harvest agreement and also to the fact that Smith allegedly stated the Sun Harvest agreement was the best contract Martori could hope to obtain.

Smith denies having made the Sun Harvest remark. Resolution of this conflict in the testimony is not crucial. Even, if made, the single comment juxtaposed to the UFW's course of conduct is entitled to no significance beyond that of a renewed attempt to get Respondent to opt for the Sun Harvest alternative, and it could not reasonably be construed as an ultimatum entitling Respondent to view further negotiations toward a separate contract as futile.[18/] Nor is the fact that the December 19 UFW proposals did not reduce its wage, pension and health insurance proposals to the Sun Harvest level a manifestation of a failure to bargain in good faith. After the hiatus, the December modification was essentially a first proposal and could not have reasonably been construed as an inflexible position on the part of the DFW. Rather, it more reasonably could be construed as a signal that, despite Respondent's rejection of the Sun Harvest option, the Union was prepared to move toward settlement on a single contract basis. Stated otherwise, the Union's conduct up to December 31 was not "necessarily inconsistent with a sincere desire to conclude an agreement . . ." and thus was not a failure to bargain in good faith.[19/] Therefore, UFW conduct did not excuse Respondent from its good faith bargaining obligation.

Having found Respondent engaged in surface bargaining, it follows that no genuine impasse existed when it unilaterally effected the $.75 per carton wage rate and that this action was a refusal to bargain violative of §1153(6).

It remains to discuss Respondent's other line of

18/See Dust-Tex Service, Inc., 214 NLRB 398, 405 (1974)

19/N.L.R.B. v. Katz, 369 U.S. 736, 747 (1962).

1 defense, i.e., the wage increase was maintenance of a dynamic
2 status quo and required by its past practice under pain of violat-
3 ing S1153(e) had the increase hot been granted.[20/] Respondent
4 correctly asserts that even during the course of negotiations an
5 employer is permitted to make wage increases in accord with a well
6 established policy and practice operative prior to any obligation to
7 bargain with the incumbent union. The General Counsel contends
8 the principle is inapplicable here, I agree.

9 The parties stipulated that from 1975 to 1978
10 Martori was covered by a master collective bargaining agreement
11 with the Teamsters and that pursuant to that agreement, there were
12 general wage increases during July of each contract year. There is
13 no evidence of Respondent's practice during the years prior to 141
14 1975.

15 The rationale for permitting unilateral wage in-
16 creases pursuant to an employer instituted historical practice is
17 inapposite when those increases were mandated under a collective
18 bargaining agreement. When wage increases have historically re-
19 suited from the bargaining process, employees can reasonably be
20 held to understand that a change in bargaining agent may result in
21 a change in the timing and amount of their increases. More signi-
22 ficantly, they can be held to understand that prior increases have
23 not been voluntarily granted by their employer as a freely adopted
24 policy. Having voted to change bargaining agents, they cannot be
25 heard to argue they are being punished by Respondent's failure to
26 adhere to practices negotiated by the bargaining representative
27
28 20/See German, Basic Text on Labor Law (1976), pp. 450-
454.

whom they rejected.[21/] Thus, Respondent's "dynamic status quo" argument misses the mark.

Respondent's defenses to effectuation of a unilateral wage increase having been found unavailing, it follows that said conduct violated §§1153(e), (a) and §1155.2(a) of the Act.

IV. The Discontinuance Of Bus Service

A. The Facts.

During the 1976-1977 and 1977-1978 lettuce harvest seasons, Respondent transported workers to and from work. Workers in the Martinez crew were picked up at a location in Calexico and bused to Respondent's fields near Brawley and Westmoreland. Workers in a second Martori crew were bused from a location in Brawley. At some point in the 1978-1979 lettuce harvest season, Respondent discontinued bus transportation from and to Calexico.[22/] Thereafter both harvest crews were transported from Brawley to and from the work site. Respondent did not reinstitute bus transportation from Calexico during the 1979-1980 harvest season.

The UFW was engaged in bargaining with Respondent when the Calexico pick-up was discontinued. It is undenied that Respondent failed to apprise the UFW it contemplated eliminating the Calexico daily worker pick-up in advance of so doing; nor was the Union thereafter notified Respondent had ceased this practice. The UFW's initial awareness of Respondent's action came in February, 1980, with the filing of the charge in 80-CE-10-EC.

21/Cf. N.L.R.B. v. Hendel Manufacturing Co., 523 F.2d 133 (2nd Cir. 1975).

22/There is a conflict as to whether the transportation was discontinued in January or February, 1979. It is unnecessary to resolve this conflict.

The Employer proposal on the table in January and February, 1978, contained an article dealing with worker transpor tation to and from a work site. Substantively, the Employers proposed no change in the travel allowance article found in their prior agreement with the UFW.[23/] The UFW counterproposal of February 28, 1979, also contained a provision on worker transportation.

Respondent witness Martori testified the Calexico bus was discontinued for economic reasons. After observing only eight to 10 people on the bus on January 5, 1979, he checked for about a week on the number of workers riding the Calexico bus. Thereafter, he concluded the low utilization made it uneconomical to continue sending a bus to Calexico, and he recommended to Steve Martori who was the decision maker that it be discontinued.

Historically, Respondent has provided bus transportation from Calexico for its thinning crew. It did so during September, October and November, 1979, during the lettuce thinning season. The foreman-bus driver for the thinning crew testified that 38 to 42 workers rode the bus on a daily basis.

B. Conclusions.

The following facts are undisputed: Respondent formerly provided transportation to and from work for Calexico based lettuce harvest workers. It ceased this practice, without notice to the UFW, at a time in January or February, 1979, when it had an obligation to bargain in good faith with the UFW and has never resumed it for lettuce harvest workers.

23/I.e., the multiemployer Imperial-Salinas bargaining unit.

Respondent does not dispute that providing transportation of workers to and from work is, in an agricultural setting, a mandatory subject of bargaining.[24/] Therefore, Respondent violated §1153(e) unless it was excused from bargaining to impasse on this subject matter. The National Labor Relations Board and the courts have long held that an employer's unilateral change in wages or conditions of employment is a violation of Section 8 (a)(5) [NLRA counterpart of §1153(e)] because such conduct circumvents the duty to negotiate, thereby frustrating the objectives of the NLRA as much as does a flat refusal to bargain.[25/] The rule is otherwise with respect to permissive subjects of bargaining.[26/]

Respondent defends on the ground of business justification and upon the ground that the underlying charge is barred by Labor Code §1160.2.[27/]

We turn to examine these defenses. Respondent's witnesses testified that bus transportation from Calexico was terminated because an insufficient number of workers utilized the service during the early part of the 1978-1979 harvest. There is credible testimony that approximately 10 people per day were using the service as contracted to field bus loads in prior years. The fall-off in utilization apparently derived from the workers' desire to

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24/In Phillips Broadcast Equipment Corp., 175 NLRB 939 (1969), respondent made a similar concession.

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

26/Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 137 (1971).

27/Respondent apparently concedes that transportation to and from work is a mandatory subject for bargaining. No argument is made otherwise. Also indicative of this posture is its argument that the UFW had a duty to seek out Respondent's employees and learn of their current working conditions.

avoid disturbances at the Calexico pick-up sites stemming from a UFW strike against other growers.- Assuming arguendo Respondent's explanation .for its cessation of Calexico bus transportation is accurate, it does not follow that the ALRA was not violated when the change was effected. While the presence of an overriding business reason may avoid the conclusion that animus toward the UFW motivated the change and thus a violation of S1153(c), or provide a sufficient balancing factor to avoid an independent §1153(a) violation, such business justification does not preclude finding a violation of §1153(e). A business justification for employer bargaining positions, particularly for proposed changes in wages, hours or other conditions of employment, is a sine quo, non of bargaining in good faith. The proposal or maintenance of positions not so grounded evidences surface bargaining and a resultant failure to bargain in good faith violative of §1153(e). But such is not the thrust of the instant action. Bargaining and bargaining in good faith imposes duties upon the employer beyond making reasonable proposals and modifications thereof.

One of the 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.[28/] It is this failure which is charged here, and it is this failure which compels the conclusion Respondent violated §1153(e) unless its conduct falls within one of the exceptions to the foregoing

28/N.L.R.B. v. Katz, supra; O. Murphy and Sons, 5 ALRB No, 617 Montebello Rose/Mount Albor Nurseries, 5 ALRB No. 64; As-H-Ne Farms, 6 ALRB No.9; Masaji Eto, et al, 6"ALRB No. 20.

principle.

Under the National Labor Relations Act there are three major exceptions to the principle that unilateral changes in wages, hours or other conditions of employment violate Section 8(a)(5): (1) when the employer has bargained to impasse on the subject; (2) when the modification is a maintenance of the status quo as conceived dynamically; and .(3) when the union has authorized the change, thereby waiving its right to demand bargaining on the subject matter.[29/] None of the exceptions exist in the present case. The change was effected at a time when the parties were still meeting and at a -time when both parties were tendering proposals on the subject matter. Thus, impasse had not been reached on this subject matter. No contention is made that elimination of Calexico transportation was maintenance of a dynamic status quo; nor on this record would such a contention find support. For the most part the "waiver" exception relates to changes effected during the term of a collective bargaining agreement; however, it is clear that the bargaining representative, upon being apprised of a proposed unilateral change during pendent negotiations, may lose its right to bargain regarding the change if no demand is made. However, it is uncontroverted the UFW received no notice that Respondent was about to or had eliminated Calexico busing. Thus, it cannot successfully be claimed the UFW waived its right to bargain to impasse on this subject matter.

As an affirmative defense to the allegation regarding, discontinued bus transportation, Respondent urges the subject is barred by the provisions of §1160.2 in that the charge was filed

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29/Gorman, Basic Text on Labor Law, p. 445,

more than six months after the date of the alleged violation. The charge was filed January 5, 1980, a period well beyond the §1160.2 period. Thus, unless the running of §1160.2 was tolled, the charge is outlawed.

The Board in Montebello Rose Co., Inc., 5 ALRB No. 64 (1979), following precedent of NLRB and federal court cases interpreting Section 10(b) of the NLRA, has stated: "... the limitation period begins to run only 'when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged [violation].'" [At p. 12.] Stated otherwise, the §1160.2 period does not begin to run until the charging party has actual or constructive notice of the unilateral change.

It is uncontroverted that the union had no actual notice of the change until January, 1980, when the charge was filed.

Respondent puts primary reliance on the doctrine of constructive notice. Its argument runs as follows: the discontinuance of bus service had an immediate and obvious effect upon its employee; there is no evidence the discontinuation was to be other than permanent; no employee made inquiry regarding whether bus transportation was temporarily or permanently discontinued; in view of the concurrent UFW strike against other growers the Union could have easily ascertained whether Respondent was providing transportation from Calexico; as the certified bargaining representative, the UFW had an affirmative duty to seek out Respondent's employees, learn their current working conditions and continue to remain informed regarding such conditions; and finally since the

only Employer proposal regarding transportation was renewal of the provision in the prior collective bargaining contract, there was no reason for the UFW to ". . . believe the employer was actively bargaining on the subject."

These arguments are not persuasive. Patently the bus riders had actual notice that bus transportation had ceased. However, no authority is cited for the proposition that such notice is to be equated with notice to the UFW, Charging Party herein. A labor organization is sui generis and has an existence separate from that of its members,[30/] Knowledge of a bargaining unit member, qua bargaining unit member, is not chargeable to the union any more than service of process upon a rank-and-file bargaining unit member constitutes service upon the union.

Nor does Respondent cite authority for the proposition that as the bargaining representative the UFW had an affirmative obligation to seek out Respondent's employees to ascertain whether Respondent had changed their conditions of employment during the course of negotiations. The bargaining representative is entitled to presume, absent a reason to be suspicious, that an employer bargains in good faith. It is not obligated to engage in active attempts to ferret out statutory violations. Such an obligation, and conduct pursuant thereto, would be disruptive of the bargaining process and make even more difficult its successful conclusion. The burden is not upon the union to find a statutory violation in timely fashion; the burden is upon an employer to unequivocally notify the union of proposed changes in wages, hours

30/Oil Workers International Union, CIO, v. Superior Court of Contra Costa County, 103 Cal.App.2a 512 (1951); Daniels v. Sanitarium Assn., Inc, 59 C.2d 602 (1963).

or other conditions of employment.

Finally, Respondent argues the UFW had constructive notice of its change because the Employer proposal was to renew the old contract language, thereby giving the Union no reason to believe it was actively bargaining on the subject matter. Such an assertion is mind-boggling. It would invite and require the Union to file §1153(e) charges with respect to any mandatory subject regarding which an employer proposed no change in an existing contractual condition or risk losing bargaining rights in the face of a unilateral change. Moreover, in the context of the present record, there is no reason to conclude the UFW should have divined impasse had been reached on busing. Respondent's position would produce a result clearly contrary to the statutory purpose of promoting stability in labor relations.

For the reasons outlined, Respondent violated §1153 (e) by unilaterally discontinuing bus transportation to job sites from Calexico in January or February, 1978, and the charge filed regarding this change is not barred by the provisions of §1160.2.[31]

General Counsel argues that Respondent violated §1153 (e)at the outset of the 1979-1980 harvest season. As noted, bus service for the thinning crew was not discontinued in the fall of 1979. General Counsel views Respondent's failure to provide transportation for the Martinez harvest crew after providing it for the thinning crew in the months preceding the 1979-1980 harvest as another unilateral change. This argument is unpersuasive. It is

31/At the ore trial hearing, Respondent moved to dismiss the busing allegations, citing M60-2. The Administrative Law Officer denied the motion. Respondent sought an interim appeal which was denied without prejudice. The motion was renewed during the trial. For the reasons enunciated, the motion is denied.

1 the unilateral change affecting the Martinez crew which is at issue.
2 The wages, hours and conditions of the thinning crew were never
3 changed. The discreteness of the two crews personnel-wise as well as
4 functionally makes inappropriate any attempt to require a carry over of the
5 conditions or wages of the thinning crew to the harvest crew. The unilateral
6 change effected during the 1978-1979 harvest left unaffected the wages and
7 other conditions of employ- ment of the thinning crew. Respondent's
8 failure to reinstitute Calexico bus transportation for the Martinez crew
during the 1979-
9 1980 season was merely a continuation of the unilateral change
10 made during the prior harvest. Had Respondent failed to maintain
11 bus transportation for thinning crew members in 1979, it would
12 have risked incurring a further violation of §1153(e). Continua-
13 tion of its practice of not providing bus transportation from
14 Calexico for the Martinez crew was not an independent violation of
15 §1153(e).

16 V. Martinez Crew Termination

17 A. The Facts.

18
19 During the 1978-1979 lettuce harvest Respondent cus-
20 tomarily utilized two harvest crews. On February 8, 1979, Martinez, the
crew foreman, notified his crew that it would be the
21 only crew working the next day because there were not many orders,
22 Martinez's crew was selected because Respondent regarded it as the
23 better crew. Work was restricted to one crew because Respondent
24 was going to "break a new field" about which it was uncertain,
25 On February 5 the crew left Respondent's Brawley
26 pick-up point in a Company bus sometime between 6:30 and 7:00 a.m.
27 Martinez who was driving the bus got lost in the Westmoreland area
28

for an hour and a half to two hours before finally locating the work site.

The lettuce was poor quality and the crew was shifted. to various portions of the field in attempts to find marketable product as contrasted to the customary practice of proceeding in lines from one edge of the field to the other. Much of the lettuce which was cut had to be discarded as it was harvested.[32/] The in-spector threw out an additional 10% of that harvested.

During the course of the day the workers verbalized complaints regarding the crew movements, being tired and not making enough money. After a discussion among themselves, they agreed they would stop working at 11:30 a.m. Mario Contreras, spokesman for the crew, met with Martinez at the lunch hour to re-port the crew's complaints and to advise him that the crew was going to stop around 1:00 p.m.[33/] Customarily the crew works six to eight hours a day. When there were large orders, the practice was to work until the order was completed. Contreras told Martinez the crew was stopping only for that day. Martinez told Contreras that he was not sure the crew would be finished by then because there was an order to finish.

Sometime between 1:30 and 2:00 p.m. the crew boarded the bus. Work on the order had not been completed. When Respon-dent's supervisors confronted them, the workers stated they dis-continued work because they were tired; because it was hot in the

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32/Contreras, a member of the crew, estimated the cutters discarded 40% of the lettuce cut. He later testified that 40% of the lettuce was good.

33/Contreras also testified he told Martinez the crew was going to work until 1:30 or 2:00 p.m.

field; because they were being shifted around; because the lettuce was bad; because Martinez got lost on the way to work; and because they were making less money.

Field Supervisor Tucker told them they got paid by the stitch count and the inspector's rejection of lettuce had no impact upon their earnings. He asked them to cut one more carload. Responding to worker complaints about not making enough money, Tucker said they were working while the other crew was not. Tucker said to the crew: "I can't guarantee you work tomorrow, if we don't get at least one more car today." Contreras testified the workers were told they would be fired if they failed to return to work. [34] No one returned to the field; so the bus returned the workers to Brawley. It is uncontroverted the workers were told there was still an order to be filled. Three trios remained at work and continued to work for approximately three hours.

On February 6 those workers who ceased work the previous day reported to the Brawley pick-up point. They were not permitted to board the bus. Each was given a voluntary quit notice and told to go to the field and speak 'with Steve Martori. When they reached the field, it was being harvested by a new crew.

The crew asked Martori why they had been fired, stating they told Tucker and Reyes that they were not quitting but were only refusing to work for that one day because they were tired and the inspector had been throwing away too much lettuce. When Martori assured them they were being paid for the lettuce

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34/Alronso Reyes, assistant foreman, told the crew that Steve Martori said they would be fired if they refused to continue work. Since this testimony came in without objection, it is admitted for all purposes and stands as an unrefuted admission of Respondent's position.

which the inspector discarded. Contreras expressed disbelief that such would be the case,[35] While the workers were at the field, Tucker told them there would be work for them the following day.[36]

The discussion ended, and Contreras repaired to the El Centro ALRB office to file the charge giving rise to the instant case. After discussions between an ALRB representative and counsel for Respondent, the workers were reinstated the following day.

B. Conclusions.

The complaint contains two allegations regarding the events of February 5 and 6 involving the Martinez crew; (1) Respondent attempted to force the Martinez crew to work overtime; and (2) 12 Respondent discharged crew members for protesting work conditions and for engaging in other protected concerted activity.

It is undisputed that a substantial majority of the Martinez crew engaged in a work stoppage on the afternoon of the 5th and that their action was triggered by dissatisfaction with their working conditions that particular day. The work stoppage was protected concerted activity. Neither the fact the walk-out was spontaneous nor the fact no union was involved renders the employees' conduct unprotected.[37] It was concerted action protesting working conditions„ Thus, those who walked out became economic strikers the afternoon of February 5; as such, they cannot be terminated absent some evidence of cause independent of leaving

35/A Respondent worker witness testified credibly that such had been the practice during the 10 years he had worked for Martori.

36/This testimony is uncontradicted,

37/N.L.R.B. v. Washington Aluminum Co., 370 U.S.9 (1962).

1 the job. The record is devoid of such evidence; therefore Respon-
2 dent violated §1153(a) if the evidence supports the conclusion the
3 strikers were discharged,
4 Respondent's Field Supervisor Tucker denied telling
5 crew members they would be fired if they failed to return to the
6 field. He conceded he told them he could not guarantee work the
7 next day if they did not remain long enough to complete one more
8 car. Tucker spoke in English and his statements were translated
9 into Spanish, No one corroborated Tucker's testimony; the person
10 who translated was not called. Even if Tucker was properly trans-
11 lated, it is not unreasonable that Contreras and the others under-
12 stood the remark to mean they were fired. Moreover, it is uncon-
13 troverted that Martori through Reyes told the workers they would
14 be fired if they failed to return to work. The inescapable con-
15 elusion is that the strikers were discharged for having engaged in
16 protected concerted activity. The appropriateness of this conclu-
17 sion is supported by the absence of any testimony or argument from
18 Respondent that the crew was permanently replaced as opposed to
19 discharged. Surely if that is what occurred, the argument would
20 have been made since hiring permanent replacements for economic
21 strikers is a permissible employer response to an economic strike,
22 Respondent's argument that no discharge occurred be-
23 cause the workers did not believe they were discharged as mani-
24 fested by the fact they all reported for duty on the 6th is with-
25 out merit. Discharge is not in any manner conditioned upon what
26 the employee believes. The strikers were not permitted to go to
27 work on February 6, There appears to be no reason to conclude
28 their offer to return to work as manifested by their presence was

other than unconditioned. The failure to reinstate them and displace the temporary replacements violates the Act.

Even if one were persuaded that the strikers were not fired, Respondent could not escape liability; the refusal to permit them to work on February 6 would certainly constitute a one-day suspension for engaging in protected concerted activity and be equally violative of §1153(a).[38/]

For the reasons set forth Respondent violated §1153 (a) by terminating striking members of the Martinez crew for engaging in protected concerted activities.[39/]

REMEDY

Having found that Respondent engaged in certain unfair labor practices within the meaning of Sections 1153(a) and (e) and Section 1155.2(a) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged members of the Martinez crew, I shall recommend that Respondent be

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38/Respondent moved to dismiss Paragraph 12 of the complaint which" alleges in substance that Respondent attempted to force Martinez's crew to work overtime. The motion is denied. It is clear that one of the areas of dispute was the length of the work day on February 5 and the fact it had extended beyond what the workers anticipated, irrespective of whether it be characterized as I overtime or regular time. Respondent's posture at this stage of the dispute was the threat of discharge if the workers persisted in their walk-out. Such conduct violates §1153(a).

39/At the outset of the hearing Charging Party and General Counsel moved for summary judgment regarding this charge and allegation on the ground Respondent failed to file a timely answers. The motion was denied. Upon reflection, I am convinced the ruling was erroneous, and had I found otherwise on the merits, I would have been constrained to reconsider and grant the motion. In view of the result reached herein, such action is unnecessary.

directed to make each whole for any losses suffered as a result of its unlawful action by payment to each of a sum of money equal to the wage he would have earned from the date of his discharge until his reinstatement together with interest thereon at the rate of 7% per annum. Back pay shall be computed in the manner set forth in Sunnyside Nurseries, Inc,, 3 ALRB No. 42 (1977).

Having found that Respondent violated Section 1153(e) by unilaterally discontinuing its practice of providing bus transportation for members of the Martinez crew, I shall recommend that Respondent be ordered to resume such service and to bargain upon demand with the United Farm Workers regarding discontinuance of said service; I shall further recommend that Respondent make whole each member of the Martinez crew for losses suffered as a result of its unlawful act.

I shall further recommend that Respondent be directed to cease and desist from effecting unilateral changes in wages or other conditions of employment unless such changes are effected subsequent to impasse and are consistent with Respondent's pre-impasse position.[40]

Having found 'that Respondent unilaterally effected a wage increase in violation of the Act, I shall recommend that Respendent be directed to cease and desist from effecting unilateral wage increases unless such changes are effected subsequent to impasse in collective bargaining and are consistent with wage increases previously proposed and rejected by the certified collective bargaining representative, I shall also recommend that if

40/Since it appears that all members of the Martinez crew discharged on February 6 were thereafter rehired, no order directing reinstatement is required.

requested by the DFW, Respondent shall rescind the unilateral wage increase in the lettuce piece rate instituted at the outset of the 1979-1980 lettuce harvest season and thereafter pay the piece rate in effect prior to its unilateral increase, unless and until a wage change is negotiated in good faith with the certified bargaining representative.

In order to more fully remedy Respondent's unlawful conduct, I shall recommend it make known to its current employees and to all persons employed during the 1979-1980 and 1980-1981 lettuce harvest seasons that it has been found in violation of the Agricultural Labor Relations Act, that it has been ordered to make certain employees whole for loss of pay resulting from its unlawful acts, and that it has been ordered to cease violating the Act by refusing to bargain with the UFW and not to engage in future violations.

To this end I shall recommend:

(1) That Respondent be ordered to mail a copy of the attached Notice to Employees to each person employed during the 1979-1980 and 1980-1981 lettuce harvest seasons at his or her last known address on file with Respondent or to any more current address furnished Respondent by the El Centro Regional Director or the Charging Party.

(2) That Respondent be ordered to distribute a copy of the Notice to each of its current employees,

(3) That Respondent be ordered to sign and to post the attached Notice for a period of not less than 60 days at appropriate locations on its premises as determined by the Regional Director as reasonably calculated to come to the employees' attention.

(4) That Respondent be directed -to distribute a copy of the Notice to each person hired during the 60-day period subsequent to this Decision.

I shall further recommend that the Notice as signed, posted and distributed be printed in English and any other language which the Regional Director finds to be the primary language of Respondent's workers.

Upon the basis of the entire record, the findings of fact, the conclusions of law and pursuant to Section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

The officers, agents, supervisors and representatives of Respondent Martori Brothers shall:

(1) Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of rights guaranteed employees by Section 1152 of the Act.

(b) Refusing to bargain collectively with the DFW or its authorized representatives by unilaterally changing wages and other terms and conditions of employment, or in any other manner refusing to bargain,

(c) Failing to bargain 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.

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Make each person employed during the 1979-1980

and 1980-1981 lettuce seasons whole for any losses resulting from Respondent's discontinuance of the Calexico bus transportation for workers.

(b) In the manner described in "The Remedy" section make each person terminated on February 6, 1980, for engaging in protected concerted activity, whole for any losses suffered as the result of his termination,

(c) Preserve and make available to the Regional Director or his representatives, upon request, for examination and copying all payroll records, social security payment records, time cards, personnel records and reports and other records necessary to '12 ascertain the back pay due.

(d) Mail to each employee employed during the 1979-1980 or 1980-1981 lettuce harvest seasons a copy of the Notice attached hereto and marked "Appendix." The Notice shall be mailed to the person's last known address on file with Respondent or the person's address as supplied by the El Centro Regional Director or the Charging Party.

(e) Give to each of its current employees a copy of the Notice attached hereto and marked "Appendix."

(f) Give to each employee hired during the 60-day period subsequent to the effective date of this Order a copy of the Notice attached hereto and marked "Appendix."

(g) Post the "Notice" attached hereto and marked "Appendix" in conspicuous places on the premises as determined by the Regional Director.

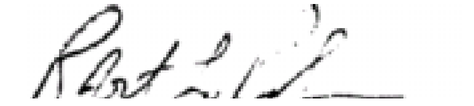
(h) Notify the Regional Director in the El Centro Regional Office within 20 days from receipt of a copy of this

Decision of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

Copies of the Notice attached hereto shall be furnished by the Regional Director for the El Centro Regional Office to Respondent for distribution.

Dated: March 10, 1981

AGRICULTURAL LABOR RELATIONS BOARD

By 

Robert LeProhn
Administrative Law Officer

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APPENDIX "A"

NOTICE TO EMPLOYEES

After a trial at which all sides had the opportunity to present their evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act, and has ordered us to send out and to post this notice. We will do what the Board has ordered.

The Act gives all agricultural employees the following rights:

To engage in self-organization;

To form, join or assist labor unions;

To bargain as a group and choose whom they want to speak for them;

To act together with other workers to try to get a contract or to help protect one another;

To decide not to do any of these things.

Because this is true 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.

Particularly,

WE WILL NOT refuse to meet with your authorized representatives from the UFW for the purpose of reaching a contract covering your wages, hours and conditions of employment.

WE WILL NOT make any changes in your wages, hours or conditions of employment without the approval of the UFW.

WE WILL pay those workers employed in the Martinez crew during the 1979-1980 or 1980-1981 lettuce harvest seasons for any loss they suffered during this period as a result of our unilateral discontinuance of bus service from Calexico.

WE WILL make whole for losses suffered those members of the Martinez crew discharged on February 6, 1980.

Dated: MARTORI BROTHERS

By ______________________________

THIS IS AN OFFICIAL NOTICE OF THE AGRICULTURAL LABOR RELATIONS BOARD, AN AGENCY OF THE STATE OF CALIFORNIA. DO NOT REMOVE OR MUTILATE.