Blythe, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GEORGE ARAKELIAN FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 79-CE-168-EC 79-CE-169-EC 8 ALRB No. 36

DECISION AND ORDER

On May 13, 1981, the Executive Secretary ordered transferred to the Board the attached Decision and recommended Order, which was previously issued by Administrative Law Officer (ALO) Beverly Axelrod in this proceeding. Thereafter, Respondent timely filed exceptions and a supporting brief, and the Charging Party and General Counsel each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] 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, and conclusions of the ALO and to adopt her recommended Order, as modified herein.

In George Arakelian Farms, Inc. (Feb. 2, 1978) J. ALRB. No. S, we dismissed Respondent's election objections and certified

[1/] All code citations herein will be to the Labor Code unless otherwise specified.

the United Farm Workers of America, AFL-CIO (UFW) as the exclusive collective bargaining representative of Respondent's agricultural employees. On February 6, 1978, the UFW requested that Respondent commence bargaining, but Respondent, in order to obtain judicial review of the Board's certification, thereafter refused to meet and negotiate with the Union. We subsequently concluded, in George Arakelian Farms, Inc. (July 28, 1978) 4 ALRB No. 53, that Respondent violated section 1153 (e) and (a) of the Act by failing and refusing to meet and bargain with the UFW, and ordered Respondent to bargain and to make its employees whole for the economic losses they suffered because of its refusal to bargain. Respondent appealed the Board's decision pursuant to section 1160.8.

While Respondent's appeal was pending, the California Supreme Court issued its decision in J. R. Norton Co. v. Agricultural Labor Relations Bd. (1980) 26 Cal.3d 1. The Board then requested that the Court remand the Arakelian case (4 ALRB No. 53) so that the Board could reconsider its make-whole order therein in light of the standards set forth in the court's Norton decision. After reviewing Respondent's litigation posture in refusing to bargain, we issued a supplemental decision and revised order in which we reaffirmed our earlier imposition of the make-whole remedy based on our finding that Respondent's litigation posture in challenging our certification of the UFW was not reasonable at the time of the refusal to bargain. George Arakelian Farms, Inc. (May0, 1980) 6 ALRB No. 28. We concluded that Respondent, rather than testing the certification in order to insure that the UFW had been elected to be the employees' exclusive

bargaining representative in a free and fair election, was engaging in a dilatory tactic designed to avoid its duty to bargain with the union. We reached this conclusion because each of Respondent's election objections was dismissed either for lack of supporting evidence or because it clashed with an established principle of labor law. Respondent's appeal is still pending before the Court of Appeal.

The Unfair Labor Practices

The complaint in the instant case alleges that, on or about November 25, 1979, Respondent violated section 1153 (e) and (a) of the Act by unilaterally changing its wage rates and discontinuing its practice of paying employees a transportation allowance for gasoline, without giving the UFW prior notice or an opportunity to bargain about those changes. At the hearing, the parties stipulated that, subsequent to the issuance of the Board's certification on February 2, 1978, Respondent increased the wages of its lettuce crews (trios) several times, and that Respondent did not notify the UFW, or negotiate with the UFW, about those, changes.[2/]

In its exceptions, Respondent contends that the ALO's conclusions and recommended remedial order in this case are premature, since the validity of the Board's certification, the Board's unfair-labor-practice findings, and its imposition of the make-whole remedy are currently before the Court of Appeal for review. Respondent suggests that the ALO should have made her

---

[2/] The stipulation was received into evidence at the hearing as Joint Exhibit 1.

findings, conclusions, and recommendations after issuance of, and in consideration of the outcome of, the forthcoming Court of Appeal decision. We disagree.

The National Labor Relations Board has held that the duty to bargain is not tolled during the period in which an employer seeks judicial review of the national Board's certification. NLRB v. Winn-Dixie Stores, Inc. (5th Cir. 1966) 361 F.2d 512 [62 LRRM 2218]. In Lucas County Farm Bureau Co-Operative Association (1960) 128 NLRB 458 [46 LRRM 1327], the NLRB found that the employer violated section 8(a)(5) and (1) of the National Labor Relations Act (the NLRA's counterparts to section 1153(e) and (a) of our Act), by unilaterally changing the terms and conditions of its workers' employment while the employer was seeking judicial review of the board's original certification. The NLRB ordered the employer to cease and desist: from making such unilateral changes and, upon request, to bargain with the union concerning any changes in its employees' wages and working conditions. We follow this applicable NLRA precedent in concluding that Respondent's effort to seek judicial review of the Board's certification did not, and does not, toll its duty to bargain with the UFW. Accordingly, we affirm the ALO's conclusion that Respondent violated section 1153 (e) and (a) of the Act by failing and refusing to meet its bargaining obligation.

Respondent excepts to the ALO's conclusion that it violated the Act by instituting the several unilateral wage changes referred to in the parties' aforementioned stipulation. Respondent argued that the increases in the lettuce trio wage rates ware a

continuation of Respondent's past practice and an attempt to remain competitive in the lettuce industry. We find no merit in this exception. Similar arguments were advanced in Kaplan's Fruit and Produce Company (July 1, 1980) 6 ALRB No. 36 and N. A. Pricola Produce (Dec. 31, 1981) 7 ALRB No. 49, in which we found that unilateral wage increases, almost identical to those in the present case, violated the Act.

The wage increases granted in this case were not part of an automatic increase, but were discretionary changes, the amount and timing of which were determined by Respondent's general manager Dan Arakelian and, before him, by general manager George Arakelian. Although the increases were usually granted at the beginning of a harvest, labor contractor Gomez testified that in one year the increase was delayed for about a week, and the stipulation entered into by the parties at the hearing indicates that increases were granted at different times during different years and sometimes twice in one season. Dan Arakelian testified that, when the labor contractor requested a wage increase for the workers, he did not automatically grant the request, but first made inquiries about the wages other growers were paying. On such occasions, Arakelian did not always contact the same number of area growers in order to determine the prevailing wage rates. Arakelian testified that, after making his survey of area wage rates, he established his rate at a point between the highest and lowest wage rates in the area; i.e., an amount which he believed was necessary in order to continue to attract qualified workers. Even though Respondent's unilateral wage increases were based to some extent on objective factors, such

as the wages other area employers were paying, Arakelian's own testimony reveals that he exercised considerable discretion in determining the amount and timing of the increases. In such circumstances, the matter of wage increases is a proper and mandatory subject of collective bargaining. N. A. Pricola Produce, supra, 7 ALRB No. 49.

Our dissenting colleague would find that these wage increases did not violate the Act. However, the cases cited by Member McCarthy do not in fact support his position. In Southern Coach & Body Co. (5th Cir. 1964) 336 F.2d 214 [57 LRRM 2102], wage increases were granted automatically at three and six month intervals. In NLRB v. Ralph Printing & Lithographing Co. (8th Cir. 1970) 433 F.2d 1058 [75 LRRM 2267], a Special Master found three categories of wage increases granted by the employer to be violations of the NLRA, even though the employer argued that the increases were justified because they were granted pursuant to the company's long-standing practice of utilizing individual hiring agreements, they were necessary in order to maintain the proper differential between skilled and unskilled workers after the federal minimum wage was increased, or they were granted because workers moved to more complex equipment. These defenses were rejected because there was no specific time interval between hiring and the guaranteed raise, the increases were not sufficient to maintain the alleged wage differential, and the increases were not granted automatically when workers changed jobs.

Member McCarthy would find that Respondent's wage increases did not violate section 1153 (e) and (a) of the Act

because they were made pursuant to Respondent's customary practice of adjusting wages at the commencement of each harvest season. Respondent's general manager testified that Respondent has two lettuce seasons each year, a spring season from late February to early April, and a fall season from November to mid-December. However, two of the wage increases were granted either during a season (April 2, 1979) or at the end of a season (December 15, 1980). The fact that a third of the increases listed in the parties' stipulation were granted outside the scope of Respondent's "customary practice" casts serious doubt on the validity of Respondent's claim that it actually had a customary practice, and certainly undercuts Member McCarthy's assertion that Respondent's wage increases were made pursuant to a "well established company policy of granting certain increases at specific times."[3/]

Grants of wage increases, such as those instituted by Respondent in this case, often benefit the employees in the sense that their wages are brought up to the prevailing rate in the area. However, NLRB precedent is clear that, once the union is certified as the exclusive bargaining representative of the employees in the bargaining unit, the employer may not implement any wage changes which are discretionary as to timing or amount without giving the union notice and an opportunity to bargain, since such unilateral changes ignore the employees' expressed choice to have all changes

---

[3/] We note that, even if a wage increase is so automatic that the withholding of the increase would be an unfair labor practice, the employer must negotiate with the bargaining agent to the extent that any discretion exists in determining the timing or amounts of the increase. Oneita Knitting Mills, Inc. (1973) 205 NLRB 500 [83 LRRM 1670].

in their wages and working conditions made in the context of collective bargaining between their union and their employer. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

In his dissent, Member McCarthy states that he also would find that any violations based on discontinuance of the fuel allowance or on wage increases granted before May 28, 1979 (i.e., six months or more before the charges in this matter were filed), are barred by the six-month limitation in section 1160.2 of the Act.[4/] Three of the wage changes listed in the parties' stipulation occurred more than six months before the filing of the charge on November 30, 1979. However, Respondent did not raise the statutory six-month limitation as a defense either when the stipulation was received into evidence at the hearing or in its exceptions to the ALO's decision. The NLRB has held that the statutory limitation is not jurisdictional, but must be the subject of an affirmative defense, Chicago Roll Forming Corp. (1967) 167 NLRB 961 [66 LRRM 1228], and we have followed this precedent in our decisions. AS-H-NE Farms, Inc. (Feb. 8, 1980) 6 ALRB No. 9, fn. 1 at p. 16.

In AS-H-NE Farms, Inc., supra, 6 ALRB No. 9, we rejected the employer's challenge to one of the ALO's findings based on the procedural ground that the event was not included in a charge filed within the six-month limitation of section 1160.2 of the Act. As the Board noted:

[4/] Section 1160.2 provides in part that, "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made...." The analagous section of the National Labor Relations Act is section 10 (b).

> The law is clear ... that the statutory limitation is not jurisdictional, but must be the subject of an affirmative defense. See, e.g., Chicago Roll Forming, Co., 167 NLRB 961, 971, 66 LRRM 1228 (1967), enf'd. 418 F.2d 346, 72 LRRM 2683 (7th Cir. 1969). Respondent failed to raise the defense at the hearing, or in its post-hearing brief. Respondent's failure to raise the statutory limitation constituted a waiver of the defense. Shumate v. NLRB, 452 F.2d 717, 78 LRRM 2905, 2908 (4th Cir. 1971), accord, Vitronic Division of Penn Corporation, 239 NLRB 9 [239 NLRB 45], 99 LRRM 1661 (1978). AS-H-NE Farms, Inc., supra, 6 ALRB No. 9 at p. 16.

In Chicago Roll Forming Corp., supra, 167 NLRB 961, the NLRB affirmed the administrative law judge's finding that:

> ... the proviso to Section 10(b) of the Act is a statute of limitations, and is not jurisdictional. [Fn. omitted.] It is an affirmative defense, and if not timely raised, is waived. The Respondent Employer had adequate opportunity to raise it, but has declined to do so. It has waived this procedural defense, and has elected to defend on the merits....

In Vitronic Division of Penn Corporation, supra, 239 NLRB 45, the national Board, in a footnote, rejected the respondent's argument that the complaint was barred by section 10(b). The respondent did not raise the defense in its answer, at the hearing, or before the administrative law judge, but raised the 10(b) issue before the board for the first time in its exceptions and brief in support thereof to the decision of the administrative law judge. The NLRB noted that it "has long held that the 10(b) proviso is a statute of limitations, and is not jurisdictional. It is an affirmative defense and,, if not timely raised, is waived .... Thus, Respondent's belated attempt to raise a 10 (b) defense in this proceeding is clearly untimely." Vitronic Division of Penn

////////////////

////////////////

Corporation, supra, 239 NLRB at p. 45.[5/]

In his dissent, Member McCarthy questions our adherence to our prior ruling in AS-H-NE, arguing that AS-H-NE is not an accurate reflection of the current state of the law on this point because of the NLRB's "unequivocal rejection" of the Chicago Roll Forming and Shumate cases.

Although there is some confusion in the NLRB's treatment of section 10(b),[6/] Member McCarthy's discussion of the six-month limitation suffers from overstatement of what he perceives to be the "clear weight of NLRB authority." A close scrutiny of the cases he cites, and a review of current NLRB cases, reveals the error in his analysis.[7/] In a recent NLRB decision, which issued after all the cases cited in the dissent, the national Board

---

[5/] A panel of three Eighth Circuit justices specifically approved the board's treatment of the section 10 (b) issue in Vitronic Division of Penn Corporation, but, shortly thereafter, the Court, en bane, denied enforcement of the board's order, without explanation, by an evenly divided court. NLRB v. Vitronic Division of Penn Corp. (8th Cir. 1979) 630 F.2d 561 [102 LRRM 2753, 103 LRRM 3105].

[6/] For example, in Evans Products Co. (1975) 220 NLRB 1325 [90 LRRM 1447], the NLRB adopted, without comment, an administrative law judge's decision in which the ALJ asserted that section 10(b) of the NLRA imposes a restriction on the board's power and is a jurisdictional requirement rather than an affirmative defense. Compare with Chicago Roll Forming Corp., supra, 167 NLRB 961 [66 LRRM 1228]":

[7/] For instance, although Member McCarthy asserts that the NLRB's "willingness to dismiss complaints or allegations on its own motion is evident in several decisions," the cases he cites do not support that proposition. Except for the Evans case, noted above, the cases either do not indicate whether or when a party raised the 10 (b) defense, or, as in Patterson Menhaden Corp. (1966) 161 NLRB 1310 [63 LRRM 1434], clearly indicate that the respondent had in fact raised section 10 (b) as a defense to certain allegations. What the board did "on its own motion" in Patterson Menhaden Corp. was reexamine its decision and order.

reaffirmed the position" it adopted in Chicago Roll Forming and cited, in support, Vitronic Division of Penn Corporation. McKesson Drug Company (1981) 257 NLRB No. 54 [107 LRRM 1509]. In McKesson Drug Company, the NLRB found no merit in the Respondent's contention that the complaint was barred by section 10(b):

> Sec. 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense and, if not timely raised, is waived. Vitronic Division of Penn Corporation, 239 NLRB 45 (1978); Systems Council T-6, International Brotherhood of Electrical Workers, et al. (New York Telephone and Telegraph Company), 236 NLRB 1209, 1217 (1978), enfd. 599 F.2d 5 (1st Cir. 1979). The record establishes that Respondents first raised the defense of sec. 10 (b) in their briefs to the Administrative Law Judge and did not plead or litigate the issue at the hearing. Therefore, we agree with the Administrative Law Judge that Respondents did not raise the affirmative defense of Sec. 10(b) in a timely manner and that this defense must be considered waived.

See also K & E Bus Lines, Inc. (1981) 255 NLRB No. 137 [107 LRRM 1239].

We find that Respondent's failure to raise the statutory limitation embodied in section 1160.2 constituted a waiver of the defense. In so finding, we follow what we believe to be the clear weight of NLRB precedent.[8/]

Respondent did raise the six-month limitation at the hearing as a defense to the allegation that it violated section 1153 (e) and (a) of the Act by discontinuing its transportation allowance. Although Respondent discontinued the fuel allowance in

---

[8/] We also note that our finding that Respondent waived the statutory limitation of section 1160.2 by not raising it in a timely fashion is consistent with the treatment California courts have given statutes of limitations in administrative hearings. See Witkin, California Procedure (2nd ed. 1970) page 1080; Bohn v. Watson (1954) 130 Cal.App, 2d 24, 36.

February of 1979, the charge was not filed until November 30, 1979, more than six months later. In her decision, the ALO noted that the six-month period does not begin to run until the aggrieved party knows or reasonably should have known of the illegal act that is the basis for the charge. The ALO further noted that, as Respondent agreed in its post-hearing brief, the burden was on Respondent to show that the aggrieved party had actual or constructive notice of the unilateral change more than six months before the charge was filed. Amcar Division, ACF Industries, Inc. (1978) 234 NLRB 1063 [98 LRRM 1287]; Amcar Division v. NLRB (8th Cir. 1979) 596 F.2d 1344 [100 LRRM 3074]; see also, Strick Corporation (1979) 241 NLRB 210 [100 LRRM 1491]; Crown Cork & Seal Company, Inc. (1981) 255 NLRB No. 4 [107 LRRM 1195]. The ALO found that Respondent failed to meet its burden of showing that the union had actual or constructive notice of the termination of the fuel allowance more than six months prior to the filing of the charge. Respondent did not take exception to the ALO's finding, and instead chose to assert that the discontinuance of the fuel allowance was justified because Respondent started to rent a labor camp for its employees. Having failed to raise a section 1160.2 argument in its exceptions concerning the fuel allowance, Respondent waived the defense as to that allegation as well. Barton Brands Ltd, v. NLRB (7th Cir. 1976) 529 F.2d 793, 801 [91 LRRM 2241].

Since Respondent has waived its opportunity to assert section 1160.2 as a defense to the alleged violations of the Act before us in this case, we are not compelled to address such an argument. However, even if we were to examine the applicability

of section 1160.2 to the present case, we would still uphold the ALO's findings. The action complained of in this case--Respondent's failure and refusal to bargain concerning the institution of unilateral changes in the wages and working conditions of its employees--was in the nature of a continuing violation of the Act. In Julius Goldman's Egg City (Dec. 1, 1980) 6 ALRB No. 61, the Board found that the employer violated the Act by rehiring returning economic strikers as new employees, thereby denying them full reinstatement rights, including seniority. The Board held that, although the decision to institute the rehire policy occurred before the start of the six-month limitation period, the employer's conduct in maintaining that policy and giving effect to it constituted an unfair labor practice within the limitations period. Similarly, in this case, Respondent instituted some wage increases and discontinued its fuel allowance more than six-months before the charges were filed. However, those changes remained in effect during the six months prior to the filing of the charges, and Respondent failed to notify the union or to give it an opportunity to bargain about those matters throughout that period and until the hearing. The parties stipulated that, since February 2, 1978, Respondent has never given notice to or negotiated with the UFW over any changes in the wages, hours, or working conditions of its agricultural employees.

Even more compelling is this Board's decision in Ron Nunn Farms (July 23, 1980) 6 ALRB No. 41, in which the employer refused to bargain with the union in order to obtain judicial review of the union's certification, and the union did not file a refusal-to-

bargain charge alleging a violation of section 1153 (e) of the Act until almost eight months after the employer first informed the union that it was refusing to bargain. Respondent argued that the charge was time-barred by section 1160.2, but the Board disagreed, finding that the employer's refusal to bargain occurred not only when it notified the UFW of its intention to test the certification, but continued up to and beyond the date the union filed the charge, and therefore occurred throughout the six months preceding the filing and service of the charge. Respondent in this case violated section 1153(e) and (a) of the Act throughout and after the six-month limitation period, by continuing in effect the unilateral wage increases and the unilateral discontinuance of the fuel allowance while continuing to fail and refuse to bargain with the union over such changes.

In Ron Nunn, the union had notice of the employer's refusal to bargain more than six months prior to the filing of the charge, and the Board therefore limited the make-whole portion of its remedy to the six-month period preceding the filing of the charge. In the instant matter, there is no comparable evidence that the UFW had actual or constructive notice of any of the wage changes or the discontinuance of the transportation allowance, and therefore no reduction in the make-whole period is appropriate.

In this case, Respondent has failed and refused to meet and bargain with the UFW at all times since the Board issued its certification. We have already found that Respondent pursued judicial review as a dilatory tactic in an attempt to avoid its bargaining obligation. Respondent's unilateral implementation of

the wage increases and its unilateral discontinuance of its practice of paying a fuel allowance to its employees constitute further evidence of Respondent's continuing attempt to reject its employees' chosen bargaining representative and its own obligation to bargain with the UFW.

The Remedy

Having concluded that Respondent violated the Act by unilaterally changing its employees' wages and working conditions, the ALO recommended that Respondent be ordered to make its employees whole for the economic losses they suffered as a result of that refusal to bargain.

Respondent excepts to the ALO's make-whole award, arguing that imposition of the make-whole remedy is inappropriate in this case for the same reasons that the Board declined to impose the make-whole remedy in Kaplan's Fruit and Produce Company, supra, 6 ALRB No. 36; i.e., Respondent contends that the motivation behind the various wage increases was to bring its lettuce trio workers up to the "approximate and prevailing wage rate in the Blythe area." We also recently declined to award make-whole to remedy a unilateral wage change in N. A. Pricola Produce, supra, 7 ALRB No. 49. However, in both Kaplan's and Pricola we found that the union was partly responsible for frustrating the bargaining process. In Kaplan's, the Board found, on the basis of the totality of the bargaining conduct of the employer and the union (including 37 meetings over a three-year period), that the employer did not engage in bad-faith bargaining or surface bargaining. We also found that the union "... consciously refused to discuss the wage issue both

before and after the increases," Kaplan's Fruit and Produce Company, supra, 6 ALRB No. 36 at p. 19. In Pricola, we declined to impose the make-whole remedy partly because the union was primarily responsible for delays in bargaining and there was no evidence that the employer was ever unwilling to bargain about wages or other working conditions.

The facts in the present case are clearly distinguishable from those in Kaplan's and Pricola. Here, Respondent engaged in a per se refusal to bargain by instituting the unilateral changes. From the date of its original refusal to bargain, Respondent never recognized or met or dealt with the union as the certified collective bargaining representative of its employees. There is no evidence that the union was in any manner or degree responsible for Respondent's failure to negotiate with the UFW about the unilateral changes. We therefore find that it is appropriate to impose the make-whole remedy in order to compensate Respondent's employees for all economic losses they have incurred as a result of Respondent's refusal to bargain. See Pacific Mushroom Farm (Sept. 22, 1981 7 ALRB No. 28.

In compensating the employees for losses caused by Respondent's refusal to bargain over changes in their wages and fuel allowances, we note that the union's bargaining strength does not remain frozen at the time of an employer's refusal to bargain in order to test a certification. Undeniably, an erosion of employee support results when an employer, by its refusal to bargain, forces a certified union into the background for an extended period of time, during which the union is unable to

negotiate on behalf of the employees or to represent them in their daily workplace grievances. In the instant case, in view of our finding that Respondent's pursuit of judicial review of the certification was an attempt to avoid its bargaining obligation, even the make-whole remedy we are ordering may not fully remedy the non-economic losses suffered by the employees as a result of Respondent's actions. See Pacific Mushroom Farms, supra, 7 ALRB No. 28.

Respondent argues that, even if the Board concludes that its discontinuance of the employees' fuel allowance violated the Act, there is no evidence that a significant number of drivers remained on its payroll for the remainder of the fall 1978 season or continued working during the 1979 spring harvest and thereafter. In support of its argument, Respondent relies on the Court of Appeal's decision in George Arakelian Farms, Inc. v. ALRB (1981) 111 Cal.App.3d 258, in which the court upheld the Board's finding that an employer discriminatorily discharged members of a cantaloupe-harvesting crew because of their concerted activity, but limited the Board's backpay award to the end of the cantaloupe harvest. Respondent argues that any make-whole remedy ordered in this case because of the discontinuance of the transportaion allowance should therefore be limited to the remaining weeks in the fall 1979 harvest.

Respondent's argument misperceives the purpose of awarding employees make-whole payments to remedy an employer's refusal to bargain. Once a labor oragnization has been certified to represent the unit employees in collective bargaining, that labor organization

has the right, and the obligation, to negotiate with the employer over the wages, hours, and conditions of employment of all the agricultural employees of the employer, and remains the certified bargaining representative until it is decertified or replaced by a different representative in a Board-conducted election. Respondent's unilateral discontinuance of the employees' fuel allowance occurred at the beginning of the spring 1979 season, but its failure and refusal thereafter to negotiate with the UFW concerning that change is deemed to be a continuing refusal to bargain, extending from the date of that change until such date as Respondent meets and bargains in good faith with the union about the matter. Economic losses resulting from Respondent's unilateral discontinuance of the fuel allowance are incurred by any employee(s) who would have received such allowances during the aforesaid period had Respondent not instituted the unlawful unilateral change. Accordingly, we affirm the ALO's award of make-whole with respect to fuel allowances, like her make-whole award as to wage rates, as proper.

ORDER

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

1. Cease and desist from:

(a) Instituting or implementing any change in any of its agricultural employees' wages, work hours, or any other term or condition of their employment without first notifying and affording

the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with Respondent concerning such change(s).

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

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

(a) Upon request, meet and bargain collectively with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, concerning the unilateral changes Respondent has made in its employees' wage rates and fuel allowances since December 1978,

(b) If the UFW so requests, rescind the unilateral changes heretofore made in its employees' wage rates and/or their fuel allowances,

(c) Make whole its employees for all economic losses they have suffered as a result of Respondent's refusal to bargain with the UFW, and the unilateral changes Respondent made in their wages and fuel allowances, since December 1978.

(d) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all records relevant and necessary to a determination by the Regional Director of the make-whole amounts due to its employees under the terms of this Order.

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

for the purposes set forth hereinafter.

(f) Post copies of the attached Notice in conspicuous places on its property for a 60-day period, the period and places 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.

(g) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of this Order to all agricultural employees employed by Respondent at any time during the period from December 1, 1978 through December 30, 1980.

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

(i) 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 with its terms. If the Regional

Director determines that Respondent has not fully complied with the Order within a reasonable time after its issuance, then upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

Dated: May 20, 1982

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

MEMBER McCARTHY, Dissenting:

I would dismiss that portion of the complaint which alleges that, by virtue of unilaterally increasing employees' wages on November 19, 1979, Respondent refused to bargain with the Union in violation of section 1153(e). I would also find that the ALO erred in concluding that the changes in employees' wages and fuel-allowance subsidies which Respondent instituted more than six months prior to the filing of related unfair labor practice charges constituted independent violations of the Act.

It is well settled that an employer may violate the Act when it makes changes in conditions of employment without notice to, and consultation with, the union which represents the employer's employees. NLRB v. Benne Katz, Etc., d/b/a Williamsburg Steel Products Co. (1962) 369 U.S. 736 [50 LRRM 2177]. However, where unilateral increases in wages are necessary to maintain the status quo, i.e., to continue a past practice, they are not violative of the Act. In such circumstances, the employer is not

required to notify and bargain with the union because the mere continuation of a pre-existing practice or condition of employment during the bargaining period is not an actual change in working conditions within the meaning of Katz, supra; NLRB v. Southern Coach & Body Co. (8th Cir. 1964) 336 F.2d 214 [57 LRRM 2102].

As explained by the court in NLRB v. Ralph Printing & Lithographing Co. (8th Cir. 1970) 433 F.2d 1058 [75 LRRM 2267], cert. den. (1971) 401 U.S. 925 [75 LRRM 2102].

> Generally speaking, a unilateral change in wages without first contacting the Union and granting it an opportunity to negotiate amounts to a refusal to bargain and constitutes a violation of 29 U.S.C. section 8(a)(5) [correspondingly, ALRA section 1153(e)]. [Citations omitted.] ... An exception to this rule is where increases in wages are merely aimed at maintaining the status quo. Where there is a well established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases. [Citations omitted.]

Respondent admitted that it changed the wage rate of its lettuce harvest crew at the beginning of the 1979 fall season, without prior notice to, or consultation with the Union, but it denied that this conduct violated the Act. Respondent asserts as a defense to its action that it has customarily adjusted wages at the commencement of each harvest season, in accordance with the dictates of the prevailing rate for similar work, in order to remain competitive. It is the position of Respondent that the practice began prior to the advent of the Union and thus the implementation of wage increases in accordance with established policy would not tend to undermine the Union.

I would find that the raise which forms the basis for the complaint was granted according to a formula that was consistent with Respondent's long-standing practice of seasonally adjusting wages in order to raise them to the average of the rate levels being paid by other lettuce growers who compete in the same labor market. N. A. Pricola Produce Co., Dissenting Opinion (Dec. 31, 1981) 7 ALRB No. 49. The amounts as well as the timing of the increases were governed by objective external factors: the start-of-season prevailing rate in the area for lettuce-harvest workers as determined by Respondent's survey of neighboring growers. Respondent did not exceed the prevailing rate, but rather adopted a rate midway between the high and the low range of the rates paid by competitive employers.

Consistent with Katz, supra, 369 U.S. 736, NLRB v. Ralph Printing & Lithographing Co., supra, 401 U.S. 925, warns that increases in pay, even if grounded in past practice, are not permissible if based upon management's subjective assessment of the performance of individual employees. Certainly no one could legitimately conclude that Respondent herein exercised discretion as to any individual employee(s) when it instituted a single across-the-board rate applicable to all employees within each category of work. Moreover, Respondent was not apprised of the identities of the crew members at the time it negotiated a wage-rate package with its labor contractor for the coming season.

The ALO concluded that the unilateral wage increases, which Respondent granted more than six months before the unfair-labor-practice charges were filed, were violations of section 1153(e)

and (a) of the Act. It is elementary that section 1160.2 prohibits the board from finding a violation based on any conduct that occurred more than six months prior to the date on which a charge is filed. Montgomery Ward & Co. (1974) 217 NLRB 232 [89 LRRM 1127],

Section 1160.2, the equivalent of NLRA section 10(b), provides in part that, "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made ...." As interpreted by the U. S. Supreme Court, "This limitation extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge." NLRB v. Fant Milling Co. (1959) 360 U.S. 301 fn. 9, 79 S.Ct. 1179 [44 LRRM 2236].

For the same reason, I would reject the ALO's conclusion that Respondent's unilateral discontinuance of a fuel-cost subsidy to employees eight months prior to the filing of the charges herein was a violation of section 1153 (e) and (a) of the Act.[1/] Production Molded Plastics, Inc. (1977) 227 NLRB 776, 782 [95 LRRM 1048]; Hunter Saw Division of Asko, Inc. (.1973) 202 NLRB 330, fn. 1

[1/] But for the express statutory limitation on the Board's authority to adjudicate untimely-filed claims, I would reach a different conclusion with respect to the failure of Respondent to notify the Union and bargain over its decision to discontinue fuel allowances. Whether employees were to be compensated for transportation costs was not governed by any set policy but by the particular circumstances and at the discretion of Respondent's labor contractor. Unlike the seasonal wage adjustments, the change in policy as to fuel costs was not compelled or justified by past practice and for that reason would have constituted a unilateral change and a per se violation of section 1153 (e) and (a) of the Act had a charge with respect to that conduct been timely filed.

[82 LRRM 1498]; Bastian-Blessing, Division of Golconda Corp. (1971) 194 NLRB 609 [79 LRRM 1010].

NLRB v. Pinion Coil Co., Inc. (2d Cir. 1952) 201 F.2d 484, 492 [31 LRRM 2223] sets forth the prevailing standard. The court declared:

> (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six months.
>
> (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint [or amended complaint], although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) [they] occurred within six months before the filing of the charge. (Emphasis added.)

These qualifications were not met here, either with regard to the wage increases which Respondent granted between February 1978, and April 1979, or its discontinuance of fuel allowances in March 1979. The initial unfair-labor-practice charges were filed on November 30, 1979. They alleged certain unilateral changes in employees' working conditions effected by Respondent during the statutory six-month period preceding the filing of the charges herein. Specifically, the charges allege that Respondent unilaterally instituted changes in wage rates on or about November 25, 1979, and "a change in working conditions" at

the same time.[2/]

Although unilateral increases granted by Respondent prior to May 28, 1979,[3/] the pertinent cut-off date for purposes of section 1160.2, cannot, as a substantive matter, be found to be unfair labor practices or the subject of a remedial order, evidence of such past events is admissible, but only for the limited purpose of shedding light on the true character of matters occurring within the six-month limitations period. Local Lodge 1424 (Bryan Manufacturing Co.) v. NLRB (1960) 362 U.S. 411, 431, 80 Supreme Court 822 [45 LRRM 3212]; Providence Medical Center (1979) 243 NLRB 714 [102 LRRM 1099]; Axelson Manufacturing Co. (1950) 88 NLRB 761 [25 LRRM 1388]. The record shows that Respondent introduced evidence showing that the wage increases it had granted simply followed a well-established past pattern in that regard. Thus, Respondent's stipulation, covering wage increases between

---

[2/] It appears that the General Counsel's subsequent investigation of the charges did not reveal any related conduct which may have occurred during the statutory six-month period predating the filing of the charges. With regard to the fuel-allowance matter, the original complaint alleged only a "discontinuance of Respondent's past practice of paying employees $10 per carload." Thereafter, at the pre-hearing conference on February 23, 1981, General Counsel issued a First Amended Complaint in which it was alleged that Respondent had discontinued the fuel allowance on or about November 25, 1979. Upon commencement of the hearing on March 3, 1981, Respondent moved to dismiss this allegation on the basis of the time-bar limitation of section 1160.2. The ALO denied the motion although she found that the change actually occurred in early March of 1979, more than eight months before the initial charge herein was filed.

[3/] Unlike my colleagues, I would find these changes to constitute independent acts rather than a continuing violation of the duty to bargain. See, e.g., General Motors Acceptance Corp. (1972) 196 NLRB 137 [79 LRRM 1662]; Continental Oil Co. (1971) 194 NLRB 126 [78 LRRM 1626].

February 1978 and April 1979, is relevant to this proceeding only insofar as it serves as support for its contention that the unilateral increases granted during the statutory six-month period were consistent with the standard increases regularly granted prior to that period.

Apparently relying on the evidence of Respondent's unilateral changes effected prior to the statutory six-month period, the ALO tacitly concluded that those time-barred changes constituted violations of the Act, as her recommended Order includes remedial provisions relating to those changes. The charges and the complaint are devoid of any allegation which would put Respondent on notice that either the wage increases or any other changes in working conditions effected prior to November of 1979 would be prosecuted, or have to be defended, as unfair labor practices. "Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice." NLRB v. Threads, Inc. (4th Cir. 1962) 208 F.2d 1, 9 [51 LRRM 2074], Consequently, Respondent had every legitimate reason to believe that neither the wage increases nor any other unilateral changes prior to May 1979 were at issue in the case. In short, Respondent

> ...had the right under the statute to be assured that it would not be held liable for activities occurring more than six months [before the filing of the charges]. A contrary result would amount to a circumvention of the proviso to section [1160.2] of the Act."
>
> Koppers Company, Inc. (1967) 163 NLRB 517 [64 LRRM 1376].

The precedents discussed above do not entirely dispose of the issue of matters not alleged in a timely-filed unfair labor practice charge, given this Board's ruling that the section 1160.2

proviso does not set up a jurisdictional limitation on the Board's power to adjudicate claims. In AS-H-NE Farms, Inc. (Feb. 8, 1980) 6 ALPB No. 9, the Board held that the statute provides an affirmative defense to an aggrieved party which, if not timely raised, is waived. However, AS-H-NE Farms, supra, begs the question, as the issue herein is whether the Board can even find a violation, let alone issue a remedial order, based on conduct which occurred prior to the six-months limitations period. I submit that it cannot and that the clear weight of authority empowers the Board, on its own motion, to dismiss any complaint, or allegations in a complaint, based on such time-barred charges.

The U. S. Supreme Court is of the view that Congress's imposition of a statute of limitations in labor relations matters was not based on the same considerations as apply to similar statutes affecting the private rights of individual litigants and that, "...a finding of a violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the 10 (b) proviso." Local Lodge 1424 (Bryan Manufacturing Co.), supra, 80 Supreme Court 822, 834 [45 LRRM 3212]. The court declared:

> As expositor of the national interest, Congress, in the judgment that a six-month limitations period did 'not seem unreasonable [citations omitted], barred the Board from dealing with the past conduct after that period had run, even at the expense of the vindication of statutory rights. 'It is not necessary for us to justify the policy of Congress. That policy cannot be defeated by the Board's policy [citations omitted].'

The national Board's willingness to dismiss time-barred, complaints or allegations on its own motion is evident in several

decisions. See, e.g., Patterson Mehaden Corp. (1966) 161 NLRB 1310 [63 LRRM 1434];[4/] Hunter Saw Division of Asko, Inc. (1973) 202 NLRB 330 [82 LRRM 1498]. In Evans Products Co. (1975) 220 NLRB 1325 [90 LRRM 1447], the national Board affirmed an Administrative Law Judge who carefully reviewed NLRB and federal court decisions construing section 10(b) and concluded as follows:

> From the foregoing, I understand the Board's basic position to be that section 10(b) imposes a restriction on the Board's power and is thus a jurisdictional requirement rather than an affirmative defense which can be waived. If that is a correct reading of Board decisions, the burden of proof was on the General Counsel to establish that the [conduct complained of] took place less than 6 months before the charge was filed....

A contrary ruling of the national Board appeared, eight years before Evans, in Chicago Roll Forming Corp. (1967) 168 NLRB 961 [66 LRRM 1228], wherein the NLRB summarily adopted an ALJ's ruling that "the proviso to section 10(b) of the Act is a statute of limitations, and is not jurisdictional. It is an affirmative defense, and, if not timely raised, is waived." Nevertheless, three years later, on its own motion, the board dismissed a complaint that was based on alleged unfair labor practices which occurred more than six months prior to the filing of the charge. International Association of Machinists (Union Carbide Corp.) (1970) 180 NLRB 875 [73 LRRM 1143]. Ten months later, the same

---

[4/] The board's actions in that case are particularly instructive. In its first decision, the board "failed to note that the charge initiating this proceeding was filed...more than six months after the [conduct in] issue occurred." Thereafter, acting on its own motion, the board recalled the decision and deleted therefrom its earlier, inadvertent finding that a time-barred allegation constituted a violation of the Act.

panel of the board agreed to reconsider its decision in Union Carbide upon the charging party's motion that it rescind its dismissal of the complaint and decide the underlying issues of law and fact presented in the complaint. In issuing a supplemental decision, the board adhered to its initial position that the issuance of the complaint was time-barred by section 10 (b). International Association of Machinists (Union Carbide Corp.) (1970) 186 NLRB 890 [75 LRRM 1456].

The Court of Appeals reversed the board on that issue, finding that it had committed procedural error by relying on section 10(b) since the aggrieved party had not pleaded the statute of limitations but submitted its case on the merits. Citing Chicago Roll Forming Corp., supra, 168 NLRB 961 [66 LRRM 1228], the court suggested to the board that its "dismissal of the charges on its own initiative is inconsistent with its earlier ruling that section 10(b) 'is a statute of limitations and is not jurisdictional.'" Shumate v. NLRB (4th Cir. 1971) 452 F.2d 717, 721 [78 LRRM 2905]. However, the board, upon remand, stated that while it was bound by the court's directive to adjudicate the allegations which it had dismissed on its own initiative, "for the purposes of this decision only," it would "respectfully reserve for future cases its position that the complaint was time-barred." International Association of Machinists (Union Carbide Corp.) (1972) 196 NLRE 785 [80 LRRM 1079]. The NLRB has subsequently "made clear that it did not acquiesce in the [Fourth Circuit's] view of the law." International Union of Operating Engineers (1975) 220 NLRB 530, fn. 11 [90 LRRM 1615].

The focus of the present inquiry has evolved into a question of statutory interpretation, with the majority asserting that the section 1160.2 language ("No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board ....") is neither more nor less than a procedural device available only to parties, and I, on the other hand, maintaining that such language clearly and unambiguously expresses the legislative intent to prohibit this Board not only from finding a violation or ordering a remedy based on time-barred claims but from even issuing a complaint or litigating in such cases.

In affirming the ALO's findings based on conduct which predated the relevant six-months limitations period, my colleagues read AS-H-NE' Farms, Inc., supra, 6 ALRB No. 9, for the proposition that the pertinent provision of section 1160.2 is available only to a respondent, as an affirmative defense, and that as it was not timely raised by Respondent,[5/] the Board is somehow precluded from dismissing on its own motion those allegations of the complaint which are based on conduct which this statute clearly prohibits us from finding to be a violation.

AS-H-NE, however, is based principally on Chicago Roll Forming Corp. (1967) 168 NLRB 961 [66 LRRM 1228], and

---

[5/] Moreover, even if it be considered that section 1160.2 is waived as a defense if not so raised during the course of the hearing, I would find that as Respondent clearly raised that defense at the hearing with respect to the unilateral changes as to fuel allowances, its section 1160.2 defense thereto should be held to apply also to its unilateral wage changes and that there was therefore no waiver of the statutory defense in this matter.

Shumate v. NLRB (4th Cir. 1971) 452 F.2d 717, 721 [78 LRRM 2905], two cases whose principles the NLRB unequivocally rejected in International Association of Machinists (Union Carbide Corp.) supra, 196 NLRB 785. Significantly, the Union Carbide case also represents the NLRB's clearest recognition of its obligation to dismiss time-barred claims irrespective of whether the limitation defense has been asserted by the respondent.[7/]

In analyzing the factual patterns which emerge from the three most recent cases cited by the majority in support of its view that the section 1160.2 proviso is solely procedural, I note that in each of those cases, unlike the instant matter, there is a question of fact as to whether the conduct alleged as violative of the Act occurred before or during the six-months statutory period. It is of some importance in the consideration of each of those cases to recognize that the parties raised their limitation

[6/] AS-H-NE also relies on the somewhat dubious authority of Vitronic Division of Penn Corporation (1978) 239 NLRB 45 [99 LRRM 1166 j enforcement denied (8th Cir. T5"79) 630 F.2d 561 [103 LRRM 3105], which itself is premised on Chicago Roll Forming, as well as Shumate.

[7/] Section 1160.2 reflects a clear and unambiguous directive of the California Legislature prohibiting this Board from issuing a complaint (and, derivatively, from litigating, finding violations, or issuing remedial orders) b`Åased on conduct which occurred more than six months before the filing of the charge. "If the legislature creates a right or liability unknown at common law, and, in the same statute, fixes a limitation [as it has clearly done in section 1160.2], the time provision is usually considered sub-stantive." 2 Witkin, Cal. Procedure (2d Ed. 1972), Actions, section 232 at page 1089. Where a substantive time limit is involved, the plaintiff, here the General Counsel, must allege facts which show that the right has not expired. See Witkin, sua, Actions section 230 at page 1088. See also discussion in Regents of U.C. v. Hartford, Etc., Co. (1978) 21 Cal.3d 624, 640. In the instant case. General Counsel has neither alleged nor proved such facts.

defenses for the first time after the close of the evidentiary hearings when the factual questions asserted therein could not be litigated. What is conspicuously clear in each of those cases is that the national Board, notwithstanding the untimeliness of the statutory defenses, nevertheless examined the basis for those defenses before finding that they were lacking in merit. Unlike the situation in Hunter Saw Division of Asko, Inc. (1973) 202 NLRB 330, fn. 1 [82 LRRM 1498], the board found in each of the three cases that the allegations were not based on conduct which occurred prior to the limitations period and thus dismissal of the complaint was not warranted.

In Vitronic Division of Penn. Corp. (1978) 239 NLRB 45 [99 LRRM 1166], enforcement denied (9th Cir. 1979) 630 F.2d 561 [103 LRRM 3105], the 10(b) question was whether, as respondent argued, the violation occurred in September 1976, when striking employees were required to sign requests for reinstatement or, as alleged in the complaint, seven months later when they were terminated for failing to renew those requests. The charge was filed four months following the terminations, well within the six months statutory period as to the terminations, but five months after the expiration of the six-months period following the initial requirement to sign requests for reinstatement. Respondent argued for the first time, in its brief in support of exceptions to the ALJ's adverse ruling, that only its action of September 1976 could support a violation. The board rejected the 10(b) defense as untimely but ruled nevertheless that respondent's contention, even if timely raised, would not have altered the board's view that the

terminations were the operative events from which the limitations period commenced to run.

Similarly, in McKesson Drug Co. (1981) 257 HLRB No. 54 [107 LRRM 1509], respondent failed to raise or litigate the limitations defense at the hearing, raising that defense for the first time in post-hearing arguments to the ALJ, who found that although the challenge was properly asserted as a statute of limitations defense, it was not timely raised. The basis of respondent's defense at that stage was that the operative event was the date on which it agreed to extend an existing bargaining agreement to a yet-inoperative facility, thus becoming party to an unlawful prehire contract more than six months prior to the filing of the charge. The board affirmed the ALJ's finding that, in any event, it was respondent's conduct in giving effect to the prehire agreement within the limitations period that violated the Act.

The third case of these three cases relied on by the majority is K&E Bus Lines. Inc. (1981) 255 NLRB No. 137 [107 LRRM 1239], wherein the ALJ faulted respondent for having adequate notice of a potential 10 (b) issue upon receipt of the complaint yet failing to raise the question either in its answer to the complaint or at the hearing. But the ALJ nonetheless evaluated the arguments asserted by respondent in support of its post-hearing exception on the basis of section 10 (b) and found them lacking in merit.

The sole question is whether this Board, in the instant case, should sanction the ALO's findings of violations based on conduct which occurred outside the limitations period. Thus, it is immaterial for present purposes whether the limitation be

characterized as procedural or jurisdictional or, if the former, whether it was timely raised by Respondent. There is no factual dispute here as to when the alleged unlawful conduct occurred and the Board is not dependent upon Respondent to plead and prove that it occurred prior to the filing of the underlying charges, for the evidence clearly establishes that it did. Even if it be believed that the limitation is unavailing to Respondent in its procedural posture, the fact remains that NLRA section 10 (b) (the equivalent of our section 1160.2), "...extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge." Fant Milling Co. (1959) 360 U.S. 301, fn. 9 [44 LRRM 2236]; accord, Koppers Company, Inc. (1967) 163, 517 [64 LRRM 1376].

We are thus clearly prohibited from issuing a complaint based on charges filed more than six months after the alleged unlawful conduct or issuing a remedial order concerning conduct as to which liability has been extinguished by such belated timing. Yet, the majority, by its action,

> ...in these circumstances, to allow the amendment to the complaint and consider the issues raised by it would be tantamount to treating the amendment as if it were a new charge. As such charge would be predicated upon alleged conduct which occurred more than 6 months prior to the filing thereof, it would be barred by Sec. 10 (b) of the Act.
> R. J. Causey Construction Co. (1979) 241 NLRB 1096 [101 LRRM 1045], citing Hunter Saw Division of Asko, Inc. (1973) 202 NLRB 330, fn. 1 [82 LRRM 1498].[8/]

[8/] Although in that case the amendment was not sufficiently related to the conduct alleged in the underlying charge, unlike the situation here, I believe that the principle is equally applicable. See NLRB v. Pinion Coil Co., Inc. (2d Cir. 1952) 201 F.2d 484 [34 LRRM 2223].

In the final analysis, I do not believe we should interpret a respondent's inadvertent failure to plead or argue section 1160.2 as an affirmative defense so as to entitle us to find violations and issue remedial orders as to conduct which the statute clearly prohibits us from even alleging as violations in a complaint.

Dated: May 20, 1982

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro 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 an opportunity to present evidence, the Board found that we unlawfully changed the wage rates and fuel allowances of our employees without notice to or bargaining with the United Farm Workers of America, AFL-CIO (UFW) about those changes.

The Board has told us to send out and post this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives you and all California 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 about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

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

WE WILL, if the UFW asks us to do so, rescind either or both of the changes we previously made in the wages and fuel allowances of our employees and we will make each of our employees whole for any economic losses he or she has suffered as a result of those changes.

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

Dated: GEORGE ARAKELIAN FARMS

By: _____
Representative Title

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

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

George Arakelian Farms (UFW)

8 ALRB No. 36
Case Nos. 79-CE-168-EC
79-CE-169-EC

ALO DECISION

The ALO concluded that Respondent committed per se violations of Labor Code section 1153 (e) and (a) by granting discretionary unilateral wage increases and discontinuing its practice of paying employees a transportation allowance, without giving the union notice or an opportunity to bargain. The unilateral changes occurred while Respondent was engaged in a technical refusal to bargain in order to test the validity of the Board's certification. The ALO also found that the allegation concerning Respondent's unilateral discontinuance of its transportation allowance was not barred by the six-month limitation of section 1160.2, as Respondent failed to show that the union had actual or constructive notice of that unilateral change more than six months before the charge was filed. The ALO recommended that Respondent be ordered to cease and desist from making unilateral changes, to meet upon request and bargain with the UFW concerning the unilateral change and other terms and conditions of employment, and to make its employees whole for economic losses they suffered as a result of Respondent's unilateral changes.

BOARD DECISION

The Board affirmed the ALO's conclusions as to Respondent's per se violations of section 1153 (e) and (a), noting that Respondent's bargaining obligation continues during the course of a technical refusal to bargain in order to seek judicial review of the certification. The Board found that the wage increases were not part of an automatic system, but were discretionary changes, the amount and timing of which were determined by Respondent's general manager. The Board also found that the allegations based on unilateral wage increases which occurred more than six months before the charge was filed were not barred by section 1160.2, since Respondent did not raise that defense at the hearing or in its exceptions brief. The Board followed NLRB precedent which holds that section 1160.2 is an affirmative defense which is waived if not raised in a timely fashion. The Board noted that, even if Respondent had raised the 1160.2 defense in a timely manner, its refusal to bargain concerning the unilateral institution of changes in the wages and working conditions of its employees was in the nature of a continuing violation of the Act. The Board affirmed the ALO's make-whole order, since Respondent had refused, from the date of the certification, to meet and bargain with the union, and there was no evidence that the union was in any manner or degree responsible for Respondent's failure to negotiate with the union about the unilateral changes.

DISSENT

Member McCarthy would find that the unilateral wage increases were consistent with Respondent's past practice of surveying its neighboring growers at the commencement of each harvest season in order

to ascertain their current prevailing rate and then adjusting its wages according to that objective basis. On this basis, he concluded that Respondent had maintained the status quo and thus did not effectuate a subjective or discretionary change in terms and conditions of employment which would require notice to, and consultation with, the certified bargaining representative. In addition, he would dismiss the ALO's findings of violations based on wage and fuel allowance changes effected more than six months prior to the filing of the unfair labor practice charges in this proceeding, finding them to constitute independent allegations of conduct time-barred by section 1160.2 of the Act. Moreover, Member McCarthy reads section 1160.2 as prohibiting the Board from issuing a complaint, litigating a cause, or finding a violation based on conduct which occurred prior to the six-months statutory period. It is his position that the Board should dismiss such allegations on its own motion irrespective of whether any party has pleaded section 1160.2 as an affirmative defense.

* * *

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:	
GEORGE ARAKELIAN FARMS,	
Respondent,	
and	Case Nos. 79-CE-168-EC 79-CE-169-EC
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.	

Sylvia Lopez, Esq. of Oxnard, Calif., for the General Counsel

Dressier, Quesenbery. Laws & Barsamian, by Lewis P. Janowsky, Esq., of Newport Beach, Calif., for the Respondent

DECISION

BEVERLY AXELROD, Administrative Law Officer: These cases were heard before me on March 3 and 4, 1981 in El Centro, California. The order consolidating cases was issued on December 8, 1980. The first amended consolidated complaint was issued on February 23, 1981. The complaint alleges violations of Sections 1153(a) and (e) of the Agricultural Labor Relations Act, herein called the Act, by George

Arakelian Farms, herein called Respondent. The complaint is based on charges filed on November 29, 1979 by United Farm Workers of America, AFL-CIO, herein called the Union. Copies of charges were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing, and after the close thereof the General Counsel and Respondent each filed a brief in support of its respective position.

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

Findings of Fact

I. Jurisdiction

Respondent is engaged in agriculture in Imperial County, California, and is an agricultural employer within the meaning of Section 1140(c) of the Act. The Union is a labor organization representing agricultural employees within the meaning of Section 1140(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Sections 1153(a) and (e) of the Act by unilaterally instituting wage rates for its employees without giving notice to or bargaining with the Union, the certified bargaining representative of

Respondent's employees, and by unilaterally eliminating its practice of paying a fuel allowance to drivers who transported employees, also without notice to or negotiations with the Union.

Respondent denies that its actions violated the Act. Respondent further moves that the allegation concerning the fuel allowance be dismissed on the ground that the charge relating to that allegation was filed beyond the statutory limitation specified in Section 1160.2 of the Act.

A. The Operation of the Farm

Respondent has been in the business of growing lettuce for approximately twenty-five years. There are two lettuce harvest seasons per year, one in the spring and one in the fall. The spring harvest usually begins in late February and runs for about four or five weeks, until early April. The fall harvest usually begins in November and runs through December.

Respondent's business was managed by George Arakelian until his death in April, 1979. Following that his son, Daniel Arakelian, took over supervision of the lettuce harvests.

The harvesting is usually done by groups of three workers, the basic wage rate being a "lettuce trio rate". The trio is comprised of a cutter/packer, a loader, and a closer. The rate also applies to additional workers who

sometimes assist in the operation. Approximately fifty (50) employees work in the harvest each day, although the number of workers needed varies depending on the weather and the stage of the season; fewer workers are needed at the beginning of the season. The individual workers vary on a day-to-day basis, with a turnover as some stop working at the Respondent's business and go to work somewhere else.

Respondent obtains its employees through a labor contractor. Until February, 1979, Respondent used Mr. Leandro Gomez as its labor contractor; beginning approximately March, 1979 Respondent has used Mr. Willie Morales as its contractor. Respondent pays the labor contractor a price for each carton of lettuce harvested; the contractor then pays a trio rate per carton to the employees.

On February 2, 1978 the Union was certified by the Agricultural Labor Relations Board, herein called the Board, as the exclusive bargaining representative for Respondent's agricultural employees. Respondent has challenged this certification in the Court of Appeals. It is stipulated that review of the Board's certification of the Union is pending in the Court of Appeals. It is also stipulated that on February 6, 1978 the Union requested Respondent to commence bargaining and that since February 28, 1978 Respondent has refused to meet and bargain collectively with the Union. It is further stipulated that since February 2, 1978 Respondent has never given notice to, nor negotiated with, the Union over any changes in wages, hours or working conditions.

B. The Wage Rates

It is stipulated that new lettuce trio rates have been instituted a number of times since the Union was certified in February, 1978. Specifically, the trio rate was increased from 560 per carton in the spring, 1978 season to 60(2 for fall, 1978, decreased to 57«s and then increased to 630 for spring, 1979, and 740 for fall, 1979 when the charge in this case was filed.[1/] It is further stipulated that Respondent did not give the Union notice of these wage rates, and did not negotiate with the. Union about them.

The testimony concerning wage rates showed the following: For approximately fifteen years, through February, 1979, Mr. Leandro Gomez-supplied lettuce harvest workers to Respondent. Before each harvest season Mr. Gomez would meet with Mr. George Arakelian and they would make an oral agreement as to a contract price per carton of lettuce harvested. The price would be paid to Mr. Gomez, who then paid his workers their trio rate out of the overall rate paid to Mr. Gomez by Respondent. The trio rate to be paid to the employees was factored into the total price agreed to between Respondent and Mr. Gomez. There were no written agreements. Mr. Gomez paid his employees on a cash basis at the end of each day. On one occasion, in the spring, 1978 season, Mr. Gomez and

[1/] The rate was increased to 79<s for spring, 1980, and then decreased to 75¢ for the fall, 1980 season.

Mr. Arakelian reached an agreement on a wage increase approximately one week after the harvest season began.[2/]

Mr. Gomez testified that at these pre-season discussions he would bring Mr. Arakelian check-stubs from two other lettuce growers in the area, showing what their current wage rates were. Mr. Arakelian would then check with the other companies. Following this, Mr. Arakelian and Mr. Gomez would agree on the contract price. Mr. Gomez testified that Mr. Arakelian always agreed to Mr. Gomez' requested contract price.

Ms. Louise Smoot, Respondent's office manager, testified that at Mr. George Arakelian[1] s request she would call other lettuce growers each season to confirm what their current lettuce wage rates were. She testified that she was sometimes asked to call specific companies, and sometimes she would use her own judgement as to which companies to call. In the spring, 1978 season she called three growers (Respondent's Exhibit (RX) No. 5), and in the fall, 1978 season she called one grower (RX:4)

There are approximately twelve lettuce growers in the immediate area around Blythe, Claifornia, where Respondent's premises are located.

In February, 1979 Mr. Gomez' association with Respondent was ended, and Mr. Willie Morales became the labor contractor used by Respondent. For about a week at the end of the fall, 1978 harvest season (in February, 1979) Mr. Morales and Mr. Gomez worked together; following that Mr. Morales became the

---

[2/] Mr. Gomes' testimony on this point was vague ("see Tr. I, 38-39), but I find that the wage increase for the spring, 1973 season was agreed to approximately a week after the season began,

sole contractor used by Respondent.

Beginning with the spring, 1979 harvest season, Mr. Morales negotiated the contract price with Mr. Daniel Arakelian. Mr. Arakelian continued his father's method of meeting with the contractor prior to the season to negotiate an oral agreement for a contract price. He also directed Ms. Smoot to call some other growers in the area, as she had previously, to confirm their wage rates. After this Mr. Arakelian would make an oral agreement with Mr. Morales. Mr. Arakelian testified that he tried to agree to a price sufficient to keep him competitive in the area. There were no written agreements. The stipulation in this case (Joint Exhibit No. 1) shows that an initial rate was agreed to between Mr. Arakelian and Mr. Morales on March 5, 1979 for the spring, 1979 season, involving a. decrease in the trio rate from fall, 1978, and that later in the spring, 1979 season (April 2, 1979) a second, increased rate was agreed to. The rate was increased again for the fall, 1979 season.

As noted, it is stipulated that none of the wage rates instituted by Respondent after February, 1978 were bargained about with the Union, and no notice of them was given to the Union.

C. The Fuel Allowance

The employees supplied to Respondent by labor contractor Leandro Gomez lived in several different border cities and

towns in the area around Respondent's premises. Respondent would notify Mr. Gomez how many workers were needed, and Mr. Gomez would tell the workers. They would drive in cars to the border crossing, where Mr. Gomez would meet them and tell them the location of the fields to be harvested.

Mr. Gomez paid the driver of each car a sum of money, from five to ten dollars a day depending on the size of the car, for transportation fuel expenses. Mr. Gomez paid his workers their harvest rate on a cash basis at the end of each day; the transportation fuel allowance was also paid in cash at the end of the day, and was in addition to the harvest trio rate. In late February, 1979 Mr. Morales took over as labor contractor. The testimony was not clear as to how many of the employees who had previously worked at Respondent's business were used by Mr. Morales. Mr. Morales testified that he did not discharge any previous employees, and that he used the workers who showed up at his office in El Centro on a first-come basis. Mr. Morales testified that he did not know if any of these workers had been supplied to Respondent previously by Mr. Gomez. The workers used by Mr. Morales, as was the case with those supplied by Mr. Gomez, drove to Respondent's premises from various border towns and cities.

Mr. Morales paid his workers by check. When he took over as labor contractor he discontinued giving any transportaion allowances. No such allowances have been given since that time.

Mr. Filar Lizarraga testified that he worked as a waterer at Respondent's premises for Mr. Gomez, and then continued on when Mr. Morales took over. He testified that he drove to work and received a fuel allowance under Mr. Gomez, and that he no longer received an allowance after Mr. Morales took over in March, 1979.

Mr. Gomez had discussions with Mr. George Arakelian in which Mr. Gomez asked Mr. Arakelian to rent a labor camp for the lettuce workers. Mr. Gomez testified that in one season Mr. Arakelian did rent a labor camp. However, the lettuce workers did not want to stay at the camp, preferring to commute from their homes. They continued to drive to work, the drivers receiving the transportation allowance.

In 1979 Mr. Morales asked Mr. Daniel Arakelian to rent a labor camp for the lettuce workers. Mr. Arakelian did rent a camp, paying $5,100 for rent in 1979. However, Mr. Morales testified that the workers did not want to stay at the camp. They continued, to drive to work, and Mr. Morales continued his practice of not paying any transportation fuel allowance.

As noted, it is stipulated that the Union was not given any notice of the discontinuance of the transportation fuel allowance, and no negotiations were held with the Union concerning the matter.

III. Discussion of the Issues and Conclusions

A. The Wage Increases

The principles of law governing the area of unilateral

increases in wages are well established: "(An) employer may not unilaterally alter the wages ... of its employees, but must, instead, notify and bargain with the certified collective bargaining representative prior to instituting the change." Montebello Rose Co., Inc., 5 ALRB No. 64, p. 11. The Board has held in a line of cases that unilateral wage increases are "per se refusals to bargain" in violation of Section 1153(e) of the Act. Kaplan's Fruit and Produce Company, 6 ALRB 36, p. 16; Hemet Wholesale Company, 4 ALRB No. 75; O.P. Murphy and Sons. 5 ALRB.No. 63; Montebello Rose Co., supra; Signal Produce Co., 6 ALRB No. 47.

It is stipulated in this case both that the Union was the certified bargaining representative of Respondent's employees as of February, 1978, and that several wage increases were instituted by Respondent after that time without giving notice to or bargaining with the Union. Thus, Respondent's actions are a violation of the duty to bargain under Section 1153(e) unless they fall within some exception to the general requirement.

The only exception within which Respondent seeks to fit this case is the suggestion in the leading case of NLRB v Katz, 369 U.S. 736, 50-LRRM 2177, 2181-82 (1962), that unilateral wage increases are permissible if they are "in line with the company's long-standing practice," and thus are a mere continuation of the status quo."

However, the Board's opinion in Kaplan's Fruit and Produce Company, 6 ALRB 36, shows that Respondent's actions here do not fit within this exception. In Kaplan the Board held that the employer's unilateral wage increase-violated the Act:

> "In May 1977 and June 1978, Respondent granted hourly wage increases to its grape workers without giving the UFV advance notice or an opportunity to negotiate prior to implementation. As such unilateral wage increases are per se refusals to bargain, we affirm the ALO's conclusion that Respondent violated Sections 1153(e) and (a) of the Act thereby.
>
> Respondent had a pattern of granting such wage increases after a request by the workers, every year during the pruning season. After a conference among Respondent's managers and a quick survey of the prevailing area wage rate, Respondent had raised wages in this manner every year since 1973. In 1977 and 1978, the pattern was repeated, despite the ongoing negotiations between Respondent and the UFW. In both years the Respondent notified the UFW of the wage increase by letter, but only after the increase was in effect. Unilateral action of this sort, in and of itself, violated the duty to bargain since the possibility of meaningful union input is foreclosed.
>
> 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. The increases here occurred only after an employee request, subject to refusal by Respondent, and in an amount fixed by Respondent's sense of the prevailing rate. We therefore conclude that the increases were discretionary and subject to collective bargaining." 6 ALRB No. 36, pp. 15-17 (citations omitted).

I find the reasoning of the Kaplan case appropriate here

as well. The main difference is that in Kaplan the wage rates were instituted after request by the employees.[3/] However, this is not a controlling factor, for the basis of the Kaplan holding is that discretionary increases, as opposed to automatic ones, must be bargained about. I find and conclude on the facts of this case that the wage increases here clearly were discretionary.

First, as in Kaplan, the increases were wholly within the control of Respondent, "subject to Respondent's refusal," Kaplan, supra, p. 17. Second, here as in Kaplan the wage increases were "determined by Respondent's sense of the prevailing area wage rates." Ibid. Mr. Arakelian testified that Respondent checked with a few of the local growers and then tried to agree on a price that was competitive with their rates. Third, although Respondent argues that the increase was legal because it was granted every season, the same was true in the Kaplan case. The point is not the regularity of the increase, but whether it is discretionary with the employer, even where the employer has generally exercised its discretion in a regular way.

In addition to the above factors, the testimony and stipulations in this case reveal that the wage increases were not in fact invariably granted in a regular, automatic way. Although Respondent's argument is based on the premise that there was a fixed pattern of meeting with the contractor

---

3/tn Kaplan the parties were engaged in bargaining. It is stipulated in this case that the Union requested Respondent to commence bargaining, and that Respondent has refused to bargain.

prior to each season and setting a new wage rate based on the rates at neighboring growers, the evidence shows that this was not always the case. Mr. Gomez' testimony shows that in the spring 1978 harvest season, the wage increase apparently was not settled until after the first week of the season. Further, the stipulation (Joint Exhibit;1) shows that in the first season in which Mr. Morales was the contractor, spring 1979, there were two wage rates instituted, the first being a decrease in the trio rate over the previous season. Thus it is apparent that the decisions whether to grant a wage increase, when to grant a wage increase, how many wage increases to grant in a season, and how much the wage increase should be, were all within the discretion of Respondent. These clearly were not "automatic increases Which are fixed in amount and timing," Kapian, supra, p. 17.

On the facts of this case, therefore, I find and conclude that Respondent unilaterally instituted discretionary wage rates without giving notice to or bargaining with the employees' certified bargaining representative, and that this constituted a violation of Sections 1153(a) and (e) of the Act.

B. The Fuel Allowance

It is undisputed that until March, 1979 the employees who drove themselves and others to work received an allowance each day of between five and ten dollars for transportation fuel expenses. It is also undisputed that this practice was ended in that February 1979. It is stipulated that Respondent

did not notify the Union about this change and did not bargain with the Union about it.

As discussed in the previous section, the law is clear that "(A)n employer may not unilaterally alter the wages or working conditions of its employees, but must, instead, notify and bargain with the certified collective bargaining representative prior to instituting the change." Montebello Rose Co., Inc., 5 ALRB No. 64, p. 11. Such unilateral changes constitute a violation of Sections 1153(e) ...and La) of the Act. Montebello Rose Co., Inc., supra; Adam Dairy, 4 ALRB No. 24; Hemet Wholesale Company, 4 ALRB No. 75; AS-H-NE Farms, 6 ALRB No. 9.

The undisputed testimony and stipulations show that the termination of the transportation fuel allowance was a unilateral change, and this change was therefore a violation of the Act unless it comes within an exception to the general rule requiring such changes to be bargained about. Respondent asserts that there are two exceptions or defenses to this alleged violation: (1) Respondent timely filed a motion to dismiss the allegations concerning the transportation fuel allowance on the ground that the charge relating to it was filed after the statute of limitations had run out; and (2) Respondent asserts that the unilateral termination of the fuel allowance was justified by the business practice of renting a labor camp for the employees. I will deal with each of these defenses in turn.

1. The Statute of Limitations

Section 1160.2 of the Act specifies that:

> "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made,..."

The parties are in agreement as to the applicable standards for interpreting this statutory limitation. Specifically, the Board in Sruce Church. Inc., 5 ALRB No.45, p. 7, held that "the six month period does not begin to run until the aggrieved party knows, or reasonably should have known, of the illegal activity which is the basis for the charge." Thus, the period does not begin to run "until the charging party has actual or constructive notice of the unlawful conduct in refusal to bargain cases dealing with unlawful unilateral changes." Montebello Rose Co., Inc., 5 ALRB No. 64, pp. 12-13. Further, as Respondent agrees in its Brief, the burden is on Respondent to show that the aggrieved party had such actual or constructive notice of the unilateral change. Bruce Church, Inc., supra; Montebello Rose Co., Inc., supra; Amcar Division v NLRB. 596 F. 2d 1344, 100 LRRM 3074 (8th Cir., 1979); ACF Industries, Inc., 234 NLRB Mo. 158, 98 LRRM 1287 (1978).

It is undisputed that the transportation allowance was discontinued by the beginning of March, 1979, and that the charge relating to it, No. 79-CE-169-EC, was filed on

November 29, 1979, some nine months later. However, it is also undisputed that Respondent never notified the Union about the change. Thus the question here is whether Respondent has met its burden of showing that the Union had actual or constructive notice of the termination of the allowance more than six months prior to filing the charge. I find that Respondent has not met this burden.

The testimony shows that when Mr. Morales took over as sole labor contractor he ended the transportation fuel allowance. Mr. Morales could not state whether any of the workers he provided to Respondent were holdovers from the workers supplied by the previous contractor, Mr. Gomez. There was no testimony that any workers informed the union of the change. All that Respondent has shown is that one employee, Mr. Pilar Lizarraga, received the allowance prior to March, 1979 and continued working after the allowance was terminated. Significantly, however, there was no testimony from Mr. Pilar[4/] that he, or anyone else, ever notified the Union.

The key issue here is the requirement, set out in Montebello Rose Co.. Inc., supra at p. 13, that the "charging party has actual or constructive notice." (Emphasis added). The charging party in this case is the Union. I find "hat Respondent's showing that one employee had actual knowledge of the change, but did not notify the Union, is not sufficient to meet Respondent's burden of proving that the Union had

[4/]The witness preferred being addressed as Mr. Pilar.

actual or constructive notice. Accordingly, I conclude that the statutory limitation in Section 1160.2 of the Act does not require dismissal of the allegations relating to the termination of the transportation fuel allowance.

2. The Business Justification

Respondent in its Brief argues that the unilateral termination of the transportation fuel allowance in March, 1979 was legal because it was justified by the expense incurred by Respondent in renting a labor camp for its employees and the lessening of the need for employees to commute because of the availability of the labor camp. Respondent relies on a general statement in NLRB v Katz, 369 U.S. 736, 50 LRRM 2177, 2182 (1962), that "we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action . . . ."

Whatever the contours of this potential exception, I do not agree that it would exist here. The reason is that in the context of this case I find the justification offered by Respondent to be pretextual. The testimony of Mr. Gomez shows that prior to 1979 Respondent had rented a labor camp, but when the employees preferred not to stay there they continued to receive the transportation fuel allowance when they commuted. Respondent again rented a labor camp in 1979, and the employees again preferred to commute. This time,

however, the transportation allowance was not paid. There was no evidence introduced to indicate any special necessity or hardship present in the latter year that was not present in the former. Accordingly, I find that there was no special justification for Respondent's unilateral termination of the transportation fuel allowance.

On all the facts, I therefore find and conclude that Respondent unilaterally terminated the transportation fuel allowance without notifying or bargaining with the certified bargaining representative of Respondent's employees, in violation of Sections 1153(e) and (a) of tire Act.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices in violation of Sections 1153(e) and (a) of the Act, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent, in its Brief, argues that the make-whole remedy often applied in a refusal to bargain case should not be recommended here, and that instead the limited remedy applied in Kaplan's Fruit and Produce Company, 6 ALRB Mo. 36, should be applied. In Kaplan the Board found that since the employer's unilateral wage increases .had been instituted according to its usual practice and had simply kept its employees at the prevailing rates, there was no need to apply

a make-whole remedy.

However, I find that this case does not present the same circumstances concerning the remedy as does Kaplan. First, here the stipulated evidence casts come doubt as to whether Respondent's workers were in fact always given the prevailing rates. Although Mr. Arakelian testified that this was his general practice, Joint Exhibit No. 1 reveals that when Mr. Morales began as labor contractor in the spring, 1979 season, the wage he paid to the employees was less than they had received at Respondent's premises the previous harvesting season. This was so despite the fact that Respondent paid Mr. Morales a higher rate in the spring, 1979 season than it paid Mr. Gomez in the fall, 1978 season. Further, Joint Exhibit No. 1 shows that there subsequently has been at least one other season in which the wages paid by Mr. Morales to the employees remained virtually the same as the previous season while Respondent increased the price paid to Mr. Morales. Finally, it is undisputed that when Mr. Morales came to Respondent's premises the transportation fuel allowance was terminated. Thus, overall, Respondent's employees suffered a diminution of their benefits compared to other growers.[5/]

[5/] This is true whether or not other growers paid a fuel allowance. If the other growers did, and the allowance was removed at Respondent's business, then Respondent's workers fell behind the others. If the other growers did not pay an allowance, then Respondent's employees suffered a loss of the relative advantage they had over the other growers. In either case the situation is not the same as the Kaplan case. The only situation in which Respondent's employees would be in the same boat as the employees at the other growers would be if at the same time all the other growers had been paying a transportation allowance and then, all discontinued it. There is no evidence whatsoever in the case to support this conjecture.

Accordingly, I do not find the same circumstances present here concerning the appropriate remedy as were present in the Kaplan case.

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

ORDER

Pursuant to Labor Code Section 1160.3, Respondent George Arakelian Farms, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Unilaterally changing employees' wages or working conditions without first notifying and bargaining with the United Farm Workers of America, AFL-C10;

(b) In any other 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 in good faith with the Union concerning the unilateral wage increases instituted since February, 1978, and the termination of the transportation allowance in March, 1979;

(b) Make whole those employees employed by Respondent since February 2, 1978 for any losses they may have suffered as a result of the termination of the trans-

portation allowance in March, 1979, or the unilateral institution of wage changes since February, 1978 without bargaining with the Union about those changes, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios. 4 ALRB No. 24 (1978).

(c) Post copies of the attached Notice, in English and Spanish, in conspicuous places on its property, and provide a copy of the attached Notice to each employee hired during the 12-month period following the date of issuance of this Order;

(d) Mail a copy of the attached Notice to, or otherwise attempt to contact, employees who worked from the period beginning March, 1979 and who had been receiving the transportation fuel allowance previous to that date;

(e) 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 employees under section (b) above;

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

Dated:

BEVERLY AKELROD
Administrative Law Officer

Appendix A

NOTICE TO EMPLOYEES

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

1. We will bargain with the United Farm Workers of America, AFL-CIO, if requested, about the termination of the transportation fuel allowance we used to pay to those people who drove their cars to work, and about the pay changes we have instituted for our employees since February, 1978.

2. We will make whole to employees who have worked for us any time since February, 1978 any economic losses they may have suffered as a result of the termination of the transportation fuel allowance, or the institution of wage changes without first bargaining with the Farmworkers union.

3. All our employees have the right to engage in protected union activities, and we will not make changes in your wages or working conditions without first bargaining with the Farmworkers union about them.

Signed: GEORGE ARAKELIAN FARMS

By: _____
(Title)