El Centro, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOE MAGGIO, INC., VESSEY & COMPANY, INC., & COLACE BROTHERS, INC.,	)	Case Nos . 79-CE-186-EC
	)	79-CE-188-EC
Respondents,	)	79-CE-191-EC
	)	79-CE-200-EC
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	8 ALRB No. 72

DECISION AND ORDER

On September 23, 1980, Administrative Law Officer (ALO) Ron Greenberg issued the attached Decision in this proceeding. Thereafter, Respondent, the General Counsel and the Charging Party, the United Farm Workers of America, AFL-CIO, (UFW) each timely filed exceptions and a supporting brief. Respondent filed a brief in response to the UFW's exceptions and the General Counsel filed a brief in response to Respondent's exceptions. Respondent also filed a supplemental brief wherein a potentially relevant case,[1] which issued subsequent to the briefing schedule, was discussed. Briefs in opposition to Respondent's Supplemental Brief were filed by the General Counsel and the UFW. General Counsel's motion to consolidate this case with two others was denied.

The Board has considered the record and the ALO's Decision in light of the exceptions and briefs and has decided to

[1] O. P. Murphy & Sons (Nov. 3, 1981) 7 ALRB No. 37.

affirm the rulings, findings, and conclusions of the Administrative Law Officer (ALO) as modified herein, and to adopt his recommended remedial Order as modified herein.

Wage Increases in March, April, and June 1979

At the close of the hearing on February 15, 1980, General Counsel moved to amend the complaint to add allegations: that Respondent Joe Maggio, Inc. (Maggio) unilaterally raised the wages of its carrot-harvest employees in March 1979; and that Respondent Colace Brothers, Inc. (Colace) unilaterally raised the wages of its non-lettuce harvest employees in June 1979. Respondents opposed General Counsel's motion on the ground that each alleged wage increase had occurred more than six months prior to the filing of the charges on December 8, 1979, and was therefore barred by Labor Code section 1160.2. General Counsel countered Respondents' argument by contending that the six-month period was tolled because Respondents had not given the Union notice of the changes, prior to the hearing in this matter.

The ALO ordered the parties to brief the statute of limitations issue, indicating that he would rule on the motion and, if necessary, reopen the record to take additional evidence on the question of notice. On March 3, 1980, the ALO granted General Counsel's motion to amend, rejecting Respondent's arguments and finding that the "General Counsel" did not receive notice of

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wage increases within the six-month limitation period.[2/] We find that the ALO should have reopened the hearing to allow Respondents an opportunity to present evidence regarding the UFW's knowledge of the wage increases. The failure to allow such an opportunity prevented that issue from being fully litigated and in that regard denied Respondents a fair hearing. We therefore dismiss the allegations regarding unilateral wage increases in March, April, and June 1979. (See D'Arrigo Brothers Co. (June 22, 1982) 8 ALRB No. 45 at p. 3.)

Bargaining History

Although the consolidated complaint herein alleges, as violative of the Agricultural Labor Relations Act (Act), Respondents' unilateral increases in its harvest wages for 1979, those increases did not occur in isolation, but rather in the context of its overall collective-bargaining conduct.

In November 1978, Respondents joined a multi-employer bargaining group (the group), comprising 26 growers from the Salinas area and the Imperial Valley. Many of the growers in the bargaining group, including Respondents, had had contracts with the UFW which were to expire at the end of 1978.

Collective bargaining between the group and the UFW proceeded without much progress for several months and on January 19, 1979, the UFW initiated strikes against certain members of the group. On February 21, the group submitted a "final" offer

[2/] We note that the ALO apparently inadvertently referred to the General Counsel in his ruling since the issue is whether the Union, rather than the General Counsel, received notice of the wage increases within the statutory period.

to the Union. On receiving a counteroffer from the UFW on February 28, the group declared that an impasse had been reached on all issues and cut off further negotiations.

The UFW filed charges that the group, including Respondents, had failed and refused to bargain in good faith. Thereafter, the Regional Director issued a complaint based on those charges and a hearing was held beginning on September 25, 1979. On March 4, 1980, ALO Jennie Rhine issued her Decision, in which she concluded that Respondents, and other members of the group,[3/] had violated Labor Code section 1153(e) by, inter alia, refusing to provide the UFW with requested information relevant to collective bargaining, by conducting a public relations campaign designed to communicate directly with t he employees in combination with a take-it-or-leave-it contract proposal, by taking a disingenuous position with regard to the binding effect of federal wage guidelines, and by declaring an impasse when significant issues had not yet been discussed.[4/] In Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, the Board reviewed and generally adopted ALO Rhine's findings[5/]

[3/] In September 1979, 15 of the growers in the group reached agreements with the UFW and, consequently, the unfair labor practice charges against those growers were settled.

[4/] Respondents have excepted to the reliance of ALO Greenberg in the instant case on the findings and conclusions of ALO Rhine, arguing that an ALO Decision which is under appeal is tentative and without authority. However, since the Board adopted the basic findings and conclusions of ALO Rhine in Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, that exception is now moot.

[5/] The Board did not adopt the ALO's findings that the growers were unreasonable in their efforts to provide information, unlawfully failed to submit a complete counteroffer, or made predictably unacceptable offers.

and conclusions regarding the alleged unlawful bargaining tactics and ordered the growers who had not reached settlement with the UFW, including Respondents, to make their employees whole for any economic losses resulting from their employers' refusals to bargain.

The instant matter concerns the bargaining history between the UFW and Respondents following the point where the Admiral case leaves off. After the declaration of impasse by Respondents on February 21, 1979, bargaining did not resume until August 1979.[6/] At that time the parties met at Respondents' request, because they desired to respond to the Union's contention that they had refused to discuss certain proposals. Neither side had any new proposals to offer at that time and no significant discussion took place.[7/]

The next contacts with the UFW were by separate letters, dated November 20, 1979, written by Respondents' attorney, Tom Nassif, for each Respondent. These letters indicated that as

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[6/] After the February 1979 declaration of impasse, the multi-employer bargaining group disbanded. Each of the Respondents herein thereafter bargained on its own. However, the conduct and positions of the Respondents herein continued much the same as before.

[7/] Respondents' witnesses testified that UFW negotiator David Burciaga agreed at the August meeting that the parties were at impasse. Although Burciaga did not testify in these proceedings, UFW negotiator Ann Smith, who was primarily responsible for the negotiations, testified that the August meeting produced no chance in Respondents' February 28 position. We therefore affirm the ALO's finding that, although the parties were deadlocked in August 1979, the impasse was not bona fide, but rather was the product of Respondents' bad-faith bargaining conduct. (Montebello Rose Co., Inc. (Oct. 29, 1979) 5 ALRB No. 64, enforced (1981) 119 Cal.Apc.3d 1.)

Respondents were approaching the harvest season they were interested in implementing wage-rate increases and certain changes in the method of harvesting. UFW negotiator Ann Smith wrote back to Nassif, rejecting the idea of negotiating wages or harvesting methods apart from a full contract. Smith did, however, agree to meet to discuss the possibilities for progress toward a full contract, and the parties thereafter met on December 7, 1979.

At that point in the negotiations, the intentions of the parties apparently diverged. Respondents, still maintaining that a bona fide impasse existed, intended to negotiate only over the changes proposed in their November 20 letters. The Union refused to negotiate on that basis and suggested, with regard to full contract negotiations, that Respondents either sign a contract similar to that signed by Sun Harvest in September 1979[8/] or the Union would go back to its February 28 offer and resume bargaining item by item.[9/] Respondents rejected the Sun Harvest approach without explanation and selected the Union's second alternative. Smith then agreed to submit a new Union proposal and the meeting ended with no substantive discussion of the changes proposed in

[8/]The Sun Harvest agreement had become a vegetable industry "master agreement," which 18 growers signed in September 1979. Respondents' arguments regarding the historical practice of paying prevailing wage rates are based on the Sun Harvest contract rate of $.75 per carton of harvested lettuce.

[9/]The UFW considered the November 20 letters a modification of Respondents' offer of February 21 and was willing to respond with a counteroffer in that context. Respondents' subsequent conduct and their legal arguments in this case make it clear that Respondents did not share the Union's view and believed, rather, that they could negotiate wages and other changes separate from full-contract negotiations.

Nassif's November 20 letters.

Although there was no discussion of wage increases or harvesting methods at the December 7 meeting, the parties apparently understood that the changes would be implemented without further negotiation. On December 8 the UFW filed refusal-to-bargain charges against each Respondent, alleging that Respondent had made unlawful unilateral changes on or about December 7. On December 10 and 14, Respondents' respective harvest operations began with the increased wage rates and new harvesting methods in effect.

Despite Respondents' unilateral changes and the Union's unfair-labor-practice charges, the UFW submitted a revised contract proposal to Respondents on December 19. Although the revised proposal showed movement from the Union's February 28 proposal, Respondents, by letter of December 31, rejected the December 19 offer without substantive discussion and declared another impasse. Respondents and their negotiator/attorney Nassif testified that they rejected the December 19 proposal because they expected an offer of better terms than contained in the Sun Harvest contract and received instead a Union proposal much less favorable than the Sun Harvest contract. It is not clear how Respondents developed such expectations, however, since the testimony indicates that Respondents understood what the Union had agreed to do on December 7.[10/]

[10/] Respondents also testified that they believed it was futile to respond to the UFW's December 19 offer, since Smith had stated on December 7 that, even using the item-by-item approach, the union would never sign a contract which, from the Union's perspective,

(fn. 10 cont. on p. 8.)

Bad-Faith Bargaining

The ALO went beyond the allegations in the amended complaint and found that Respondents' declaration of impasse on December 31, 1979, was a continuation of the bad-faith bargaining found in Admiral Packing Co., supra, 7 ALRB No. 43. He therefore concluded that Respondents thereby violated Labor Code section 1153 (e) and (a) and recommended that Respondents' employees be made whole for all economic losses suffered as a result of their employers' failure or refusal to bargain in good faith.

Respondents except to the ALO's finding and conclusion on the basis that bad-faith bargaining was neither alleged in the complaint nor litigated at the hearing. We find no merit in this exception. As described above, the December wage increases and changes in harvesting methods made by Respondents were the subject of testimony by both General Counsel's and Respondents' witnesses in the context of the full contract negotiations. The record presents the entire bargaining history of the contract negotiations from February 21 to December 31, 1979. Moreover, Respondents have not claimed that they were denied an opportunity to present any evidence or that they have any additional evidence that they could, or desire to, introduce in their defense. (NLRB v. Bradley Washfountain Co. (7th Cir. 1951) 192 F.2d 144 [29 LRRM 2064.)

(fn. 10 cont.)

was less favorable than the Sun Harvest contract. Smith denied giving such an ultimatum. We find it unnecessary to resolve this testimonial conflict as we find that the Union's actual bargaining conduct on December 7 and December 19 indicates a desire to bargain in good faith and that Respondents could not reasonably conclude that further responses would be futile. (See Martori Brothers (Mar. 23, 1982) 8 ALRB No. 23, ALO Decision at p. 15.)

As the bad-faith bargaining issue is closely related to the refusal-to-bargain allegations in the complaint, and as the issue was fully litigated at the hearing, we find that the ALO's findings and conclusions as to bad-faith bargaining did not deny Respondents due process of law. (Prohoroff Poultry Farms v. Agricultural Labor Relations Board (1980) 107 Cal.App.3d 622, 628; Martori Brothers (Mar. 23, 1982) 8 ALRB No. 23; N. C. Coastal Motor Lines, Inc. (1975) 219 NLRB 1009 [90 LRRM 1114].)

We affirm the ALO's finding that Respondents' conduct between February 21 and December 31, 1979, did not "represent a substantial break with its past unlawful conduct or the adoption of a course of good-faith bargaining." (McFarland Rose Production (Apr. 8, 1980) 6 ALRB No. 18, Rev. den. by Ct.App., 5th Dist., April 26, 1982.) Respondents had no new proposals to offer from February 21 until November 20, 1979. On the latter date, within weeks of the 1979-80 harvest, Respondents did offer new proposals, but attempted to limit the negotiations to those proposals. That: belated and limited effort on Respondents' part belies any intention to bargain in good faith and indicates instead a desire to increase employees' wages without following the customary procedures of good-faith bargaining. Respondents' summary rejection of the UFW's December 19 proposal confirms Respondents' lack of genuine desire to resolve differences and reach an agreement.

Respondents argue in their exceptions that the unilateral changes made in December 1979 were lawful because a bona fide impasse may be reached as to a single mandatory subject of bargaining during full contract negotiations, without reaching a

bona fide impasse as to the overall negotiations.

The general rule stated by the National Labor Relations Board (NLRB) in Winn-Dixie Stores, Inc. (1979) 243 NLRB 972 [101 LRRM 1534] is that an employer may not declare an impasse as to one issue where the union's opportunity to bargain over that issue is merely ritualistic or pro forma. In Winn-Dixie, the employer gave the union very short notice of its intention to raise wages, ignored the union's desire to meet and continue negotiations on all open matters, and therefore failed to fulfill its duty to bargain in good faith. The NLRB has adhered to its Winn-Dixie analysis, despite the opinion of the Fifth Circuit Court of Appeals that any prior notice and opportunity to bargain over a proposed change in employees' working conditions fulfills the employer's duty to bargain. (Cf. M. A. Harrison Mfg. Co., Inc. (1980) 253 NLRB 675 [106 LRRM 1021] and Dilene Answering Service, Inc. (1981) 257 NLRB No. 24 [107 LRRM 1490] with Winn-Dixie Stores, Inc. v. NLRB (5th Cir. 1978) 567 F.2d 1343 [97 LRRM 2866].)

We believe the NLRB ' s Winn-Dixie Stores, Inc., supra, 243 NLRB 972 analysis reflects a more reasonable approach to the collective bargaining process than that of the Fifth Circuit. The duty to bargain in good faith would lose much of its meaning if, after certification of an exclusive bargaining representative, an employer would maintain unilateral control of all terms and conditions of employment by singling out one issue at a time, engaging in pro forma bargaining as to it, and

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then unilaterally implementing the change it had proposed.[11]

In the instant case, the Union was attempting to maintain a strike against Respondents over several harvest seasons. Although Respondents did not intend to engage in genuine negotiations towards a full agreement, they certainly desired to grant a wage increase, an increase which would facilitate the hiring of striker replacements and help Respondents to escape the full impact of the strike. Respondents therefore set out to "bargain" over wages alone in the last few weeks before the harvest began, despite their failure to make a wage proposal during the nine preceding months and despite the willingness of the UFW to resume negotiations on all issues, including wages. In that context, we find that Respondents' participation in the December 7 meeting was no more than a specious attempt to give plausibility to their preconceived plan to implement wage increases, either with or without the Union's acquiescence. (See Martori Brothers, supra, 8 ALRB No. 23.)

Unilateral Wage Increases

We affirm the ALO's conclusion that Respondents Maggie, Vessey and Colace violated Labor Code sections 1153 (e) and (a) of the Act by instituting wage increases without bargaining with the UFW, and his findings that Respondents Vessey and Colace raised

[11] We are not suggesting that impasse can never be reached cr. a single issue, absent impasse as to the entire negotiations. Where negotiations over an issue have continued without progress for a substantial period of time, the issue is of major importance, and the party seeking the change can show some genuine business necessity for making the change at that time, unilateral implementation may not violate the duty to bargain. (Southern Wipers, Inc. (1971) 192 NLRB 816 [78 LRRM 1070].)

wages to the new rates proposed in their November 20 letters to the Union, while, after November 20, Respondent Maggio raised its wages to the rates that had been proposed on February 21, shortly before the growers declared an impasse in the group bargaining.[12]

Respondent Maggio argued that the wage increases it instituted did not violate Labor Code sections 1153 (e) and (a) of the Act because the parties were at impasse, and it implemented its pre-impasse wage-rate proposals. In Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, we found that there was no bona fide impasse. Maggio therefore violated the Act by instituting its wage proposal.

Respondents Vessey and Colace similarly argued that their wage increases were proper because the parties were at impasse. We reject that argument also because of our finding that there was no bona fide impasse. Vessey and Colace, however, also argued that the wage increases they implemented were based on past practice or were caused by business necessity. Although we have discussed those defenses in previous unilateral-wage-increase cases (George Arakelian Farms (May 20, 1982) 8 ALRB No. 36; N. A. Pricola Produce (Dec. 31, 1981) 7 ALRB No. 49; Kaplan's Fruit and Produce Company (July 1, 1980) 6 ALRB No. 36; Pacific Mushroom Farms (Sept. 22, 1981) 7 ALRB No. 28), we believe that a thorough discussion of the case law concerning such defenses is appropriate

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[12] The ALO stated that in March 1979 Maggio raised wage rates in all job classifications to the levels offered prior to the declared impasse. The record, however, indicates that only the carrot-piece rate was changed in March, and wages in other classifications were raised in the fall and winter of 1979.

and will provide the parties a fuller understanding of the majority's position. For the reasons set forth below, we find that neither defense is applicable in the instant matter, and we affirm the ALO's conclusion that Vessey and Colace violated Labor Code sections 1153 (e) and (a) of the Act by instituting the wage increases proposed in their November 20 letters to the UFW. The UFW rejected Vessey and Colace's proposal for interim wage increases, and Vessey and Colace implemented the increases without reaching a bona fide impasse. (NLRB v. Katz (1962) 396 U.S. 736 [50 LRRM 2177].)

Respondents' Past Practice Defense

In their exceptions, Respondents Vessey and Colace argued that the ALO erred in rejecting their defense that the wage increases they instituted were a continuation of past practices and therefore did not represent unilateral changes in the terms and conditions of their workers' employment.

Any review of precedent concerning unilateral changes in wages and working conditions must begin with NLRB v. Katz, supra, 396 U. S. 736. In that case, the U. S. Supreme Court held that an employer's unilateral change in its employees' terms or conditions of employment is a per se violation of the National Labor Relations Act (NLRA) section 8 (a)(5), without any showing of subjective bad faith on the part of the employer, because such unilateral change is a circumvention of the duty to bargain and tantamount to a flat refusal to bargain. In Katz, the Supreme Court found that the employer violated NLRA section 8(a)(5) by granting merit increases to its employees without prior notice to the union. The

court held that the granting of such increases amounts to a refusal to negotiate, except where granting the raises constitutes continuation of a pre-existing past practice. However, the court found that, unlike an automatic increase to which an employer has already committed itself, the wage increases in question "were in no sense automatic, but were informed by a large measure of discretion," and therefore violated NLRA section 8(a)(5).

Since the Supreme Court issued its Katz decision, NLRB and federal court cases have continued to develop the precedent established in Katz. In NLRB v. Allis-Chalmers Corp. (5th Cir. 1979) 601 F.2d 870 [102 LRRM 2194], the employer argued that its wage increases were granted pursuant to a periodic survey of prevailing wages and benefits and were, therefore, not subject to bargaining. The court, however, disagreed, noting that "[t]he employer carries a heavy burden of proving that such adjustments of wages and benefits are purely automatic and pursuant to definite guidelines." (NLRB v. Allis-Chalmers, supra, 601 F.2d at p. 875.) The court found that the increases violated the NLRA as they were not automatic and as the employer exercised considerable discretion in determining their timing and amount.

The NLRB and courts have on occasion considered cases in which employers met the Allis-Chalmers burden of proving that a wage increase was automatic, and therefore, pursuant to the Supreme Court's Katz decision, not a change in the employees' working conditions. For example, in State Farm Mutual Auto Insurance Co. (1972) 195 NLRB 871 [79 LRRM 1621], it was held that the employer did not violate the NLRA by granting cost-of-living increases,

which were automatically applied to the employees' base salaries during negotiations. However, the NLRB concluded that the employer violated the NLRA by granting merit increases during the same period, finding that the merit increases were discretionary, ever, though they were made pursuant to a regular review which occurred 6 and 12 months after an employee was hired, and annually thereafter. In NLRB v. Southern Coach & Body Company (5th Cir. 1964) 336 F.2d 214 [57 LRRM 2102], the court held that the employer did not violate the NLRA when it granted wage increases pursuant to its long-standing practice of granting automatic wage increases to new employees 3 and 6 months after they began work, and paying employees according to the type of operation they were performing. See also Reid Seismic Company v. NLRB (5th Cir. 1971) 440 F.2d 598 [76 LRRM 2998], where the court held that the employer did net violate the NLRA by granting raises pursuant to a well-established policy of reviewing each employee's wages at 30- and 60-day intervals, where the increases were granted before the union had been certified and the union had made no request to bargain about that practice.

However, where a unilateral change is not a mere continuation of a pre-existing working condition, the NLRB and courts will find that the change violates section 8(a)(5) of the NLRA. (Queen Mary Restaurants Corp. v. NLRB (9th Cir. 1977) 560 F.2d 403 [94 LRRM 3067]; NLRB v. John Zink Co. (10th Cir. 1977) 551 F.2d 799

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[107 LRRM 3121]; McGraw-Edison Company v. NLRB (8th Cir. 1969) 419 F.2d 67 [72 LRRM 2918].)[13/]

In cases where a past practice of granting wage increases is clearly established, employers have argued that the failure to give such increases would expose them to liability for an unfair labor practice for changing the terms and conditions of their workers' employment. In Southeastern Michigan Gas Company (1972) 198 NLRB 1221 [81 LRRM 1350], the employer had, for the preceding 20 years, reviewed the work performance of each employee every six months and thereafter granted a five percent wage increase to employees who it found had been performing satisfactorily. The NLRB found that the employer's discontinuance of its periodic review procedure during negotiations, without notice to or consultation with the union, violated NLRA section 8(a)(5) of the Act, since the wage chances resulting from the review were not discretionary. The NLRB noted that it is the unilateral change in the status quo ante which is prohibited, and which forms the basis of the unfair-labor-practice charge.

However, a similar argument failed in Armstrong Cork Co. v. NLRB (5th Cir. 1954) 211 F.2d 843 [33 LRRM 2789], where the employer contended that it was required to continue its past

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[13/] In NLRB v. Patent Trader, Inc. (2d Cir. 1969) 415 F.2d 190 [71 LRRM 3086], the court reversed the NLRB's conclusion that the employer violated the NLRA by granting salary increases to employees at intervals of approximately six months, finding that the employer was merely continuing its past practice. To the extent that the unilateral wage increase were discretionary in timing or amount, this Second Circuit Decision seems inconsistent with NLRB v, Katz, supra, 396 U.S. 736, and other federal circuit court decisions cited herein.

practice of granting individual merit and promotional increases after the union's certification since to discontinue that practice would constitute an unlawful change in its employees' working conditions. The court upheld the NLRB's finding that the employer's grant of merit increases, without consultation with the union, naturally tended to undermine the authority of the certified bargaining representative and violated the Act, noting that the employer's

> ... suggestion that any other course than that taken by it would have subjected it to unfair labor practice charges is more fanciful than real, for the Board properly concedes that no violations of the Act can normally result where an employer in good faith consults the bargaining representative before taking action on such matters, even though a bona fide impasse in negotiations subsequently renders unilateral action essential. (Armstrong Cork Co. v. NLRB, supra, at p. 848.)

In Oneita Knitting Mills, Inc. (1973) 205 NLRB SCO [83 LRRM 1670], the NLRB concluded that the employer violated NLRA section 8(a)(5) by unilaterally granting merit increases. The increases were granted pursuant to a fixed policy of granting increases annually at approximately the same time of year, but the amount of the increase depended on the discretion of a management representative. The administrative law judge noted that:

> The gravamen of the offense with which Respondent is charged is not that it continued, as was its past practice, to review each employee's record for the purpose of determining the amount of the annual increase to be awarded him; rather, it was Respondent's act of putting into effect those increases in the various amounts it had determined without first notifying the employee's bargaining representative and giving it an opportunity to confer about the proposed increases before they became effective. (Id., at p. 502-503.)

The NLRB affirmed the law judge's finding in Oneita. In response to the employer's argument that it would have violated the NLRA by refusing to grant the merit increases, the NLRB held that:

> ... An employer with a past history of a merit increase program neither may discontinue that program (as we found in Southeastern Michigan) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. N.L.R.B. v. Katz, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted. (Oneita Knitting Mills, Inc., supra, 205 NLRB 500.)

Turning to the facts of the instant matter, we must determine whether Respondents Vessey and Colace have sustained their burden of showing that the wage increases granted were not discretionary, but were implemented automatically pursuant to a past practice. We must first determine whether Respondents Vessey and Colace granted wage increases with such regularity that they may be considered automatic. Then, if we determine that the wage increases were in fact automatic, we must determine the degree, if any, of discretion involved as to the timing or amount of the increases, and whether Respondent bargained over any such discretionary aspects. (Oneita Knitting Mills, supra, 205 NLRB 500.)

Jon Vessey testified that, from 1972 to 1978, Respondent Vessey granted periodic Wage increases in January and July to its agricultural employees in all job classifications pursuant to its contract with the Teamsters Union. In April of 1977, Vessey signed a contract with the UFW which provided for a wage increase in July

in all job classifications. John Vessey testified that, in 1976, Respondent Vessey granted a wage increase not provided for in the Teamster contract, in order to maintain its wages at the "industry-rate." However, that wage increase was negotiated pursuant to a wage reopener clause in its contract with the Teamsters Union.

Jon Vessey further testified that, historically, when employees began harvesting lettuce in the Imperial Valley, they were paid the same wage they had previously received in the Salinas harvest. Vessey said that he based the industry standard on the rate paid by the largest growers in the industry—Bud Antle, Bruce Church, and Sun Harvest. However, Vessey testified that, in 1979, he did not ask Bruce Church what it was paying.[14/] Vessey learned of the Sun Harvest contract, and its 75 cents piece rate, as soon as that contract was signed on August 31, 1979. In September of 1979, Jon Vessey knew that the majority of the Salinas growers were paying 75 cents or more, depending on the job classification and method of harvesting, and he knew that he intended to pay at least 75 cents to his lettuce-harvest workers when his harvest started in December. However, he did not make a 75 cent wage offer to the UFW until November 20, 1979, a few weeks before the Imperial Valley lettuce harvest started. Vessey was not aware of any growers paying less than 75 cents.

[14/] The Dissent accuses us of seriously misconstruing the facts involved in this case, and of demanding an "unrealistic degree of exactitude" concerning the concept of prevailing rate. We find Jon Vessey's testimony concerning whether he did or did net consider the wages paid by Bud Antle and Bruce Church to be inconsistent and contrary to Respondents' and the Dissent's assertion that Vessey and Colace exercised little or no discretion in determining what wage rate they would pay their employees.

Vessey testified that in order to determine what Salinas growers were paying, he talked to people, referred to surveys, and had conversations with other Imperial Valley growers. He first testified that he did not contact the Salinas growers to verify the rate they paid, but later testified that he sometimes called Salinas growers, and finally testified that he contacted other companies to verify their piece rates. Vessey said the workers who came from 15 to 20 Salinas companies set the "prevailing rate" and would not work for less than that rate. Vessey listed several companies that had signed contracts with the Union, and several that he thought might have been paying more than the 75 cents rate provided in the Sun Harvest contract rate.

In addition to lettuce harvesters, Respondent Vessey employs irrigators, tractor drivers, and thinners, all of whom are paid an hourly rate. While Respondent Vessey was under contract with the Teamsters and the UFW, those and all other job classifications received yearly increases. However, in 1979, classifications other than the lettuce harvesters, i.e., the hourly-rate workers, did not receive an increase when Respondent Vessey increased the lettuce piece rare to 75 cents. Jon Vessey explained that the hourly rate for the other classifications was determined based on what local Imperial Valley growers were paying, and not on what Salinas growers were paying. Vessey testified that Imperial Valley-rates for the hourly rate classifications have traditionally been below the Salinas area rates.

Joe Colace testified that his workers have been covered by a collective bargaining agreement since 1972. From 1973 to

1976. Respondent Colace was a party to contracts with the Teamsters, pursuant to which Colace's employees were granted periodic wage increases in July of each year. Respondent Colace first signed a contract with the UFW in 1976, and pursuant to that contract, its employees' wages were increased in June of 1976. The lettuce piece rate was changed by oral agreement in December 1977 along with the hourly rate, after negotiations with the UFW. Colace testified that he did not know what other employers in the Imperial Valley and Salinas were paying in 1977. Colace did not testify concerning his wage practices before 1972, when he first signed a contract with the Teamsters.

Like Jon Vessey, Colace learned of the Sun Harvest contract when it was signed in the summer of 1979, and in September of that year he talked with family members about increasing the wage rates. Colace was not certain as to when he learned that a majority of the Salinas employers were paying 75 cents. He discussed the rate in a grower assocation meeting in October, and talked about whether other employers had signed contracts and were paying 75 cents. In November, Colace decided that, based en what he had heard was the "prevailing rate" in Salinas, he would have to pay 75 cents to get his lettuce harvested. He could not testify with certainty as to the source of his information regarding the "prevailing rate." Colace testified that he was not certain whether he had decided to pay 75 cents before his foremen recruited new workers, and that his foremen may have recruited without knowing what wage would be paid. Colace was not certain whether employees had said they would not work for less than 75 cents.

Like Respondent Vessey, Respondent Colace did not raise the hourly rate for its irrigators, tractor drivers and thinners in 1979, even though in all prior years Colace granted a wage increase in all other job classifications when it increased the lettuce piece rate. Colace noted that he had trouble getting weeding and thinning crews in the 1979-80 harvest, but that the workers did not demand a higher wage. Colace testified that he pays the "prevailing rate" or higher, because he receives a "quality pack."

Tom Dalzell, a representative of the UFW, testified that at the end of the 1979 Salinas season, employers without union contracts (including Hansen Farms, Merrill Farms, Garin Brothers, Mission Packing Company, and Nunez Brothers) were paying a piece rate ranging from 75 cents to 78 cents, and that Bruce Church was paying 72 3/4 cents.

Ron Hull, manager of the Imperial Valley Vegetable Growers Association, testified concerning ten grower-shippers that had operations in both Salinas and the Imperial Valley. Of those, Bud Antle was paying the highest rate because of its different harvesting system, Bruce Church was paying less than 75 cents, Hansen Farms was paying above 75 cents, Ralph Samsel was paying 76 1/4 cents, and Let-Us-Pak and Salinas Lettuce Farmers Co-op were paying above 75 cents. The remaining five companies (Jack T. Bailie, Sun Harvest, D'Arrigo, J. R. Norton and Hubbard) were paying 75 cents.

On the basis of the record evidence in this matter, we find that Respondents Vessey and Colace have failed to establish that the increase they granted in the lettuce piece rate in

December of 1979 was automatic or merely the continuation of the pre-existing practice.

It is clear that Respondent Vessey granted increases in its lettuce piece rate each year for the years 1969 through 1979, and Respondent Colace made similar increases during the years 1974-1979. However, almost all such wage increases were granted pursuant to the terms of a collective bargaining agreement, or after negotiations with the UFW. The wage changes were granted in July of each of those years and made effective the following December. When the lettuce piece rate was increased, increases were also granted in all other job classifications, including irrigator, tractor driver, and thinner.

In 1979, Respondents Vessey and Colace changed their past practice. Instead of granting a wage increase pursuant to the terms of a union contract, or after reaching agreement with the Union concerning an interim wage increase, Respondents Vessey and Colace unilaterally instituted increases in the lettuce piece rate. Instead of granting the increases in July, the increases were first proposed in late November, and instituted shortly thereafter when the harvest began in December. Contrary to previous years, only the lettuce rate was increased; the employees in other job classifications did not receive an increase.

Respondents cannot rely on their prior collective bargaining agreements to legitimate the granting of unilateral wage increases in 1979. The NLRB cases discussed above all involve the past practices followed by employers before there was a union certification or a collective bargaining agreement. The only

evidence presented at the hearing in this matter as to a past practice not covered by the terms of a union contract concerned the wage increases granted by Respondent Vessey during the years 1969 to 1972,[15/] and the evidence in that regard is insufficient to establish the kind of automatic increases described in State Mutual Auto Insurance Co. (1972) 195 NLRB 871 [79 LRRM 1621], and NLRB v. Southern Coach & Body Company (5th Cir. 1971) 336 F.2d 214 [57 LRRM 2102]. All the evidence concerning Respondent Colace involved years during which its employees' wage increases were determined by the terms of a union contract.

It is clear from the testimony of Jon Vessey and Joe Colace that the timing and the amount of the wage increases they implemented in prior years were determined by contract terms rather than a consideration of the "prevailing rate" paid by other employers. Although Vessey and Colace testified that they simply determined each year what the "prevailing rate" in Salinas was and then raised their workers' wages to that rate, their testimony was vague and inconsistent concerning how they determined what the "prevailing rate" was. For example, even though Jon Vessey testified that he based the industry standard on the rates paid by the three largest lettuce growers, he actually considered the rate of only one of those growers. Vessey's testimony about the source of his information, was inconsistent. Colace simply testified that he was not sure where his information concerning the "prevailing rate" came from.

[15/]Jon Vessey's declaration, which was amended at the hearing, indicates that no wage increase was granted in 1972.

Based on the record, we find there is insufficient evidence to establish that Respondents Vessey and Colace had a past practice of granting wage increases that was so automatic that they could lawfully institute unilateral wage increases in 1979 without bargaining with the Union and absent an impasse in the negotiations.[16/]

Respondents' Business Necessity Defense

Respondents Vessey and Colace contend that their implementation of the 75-cents-per-trio piece rate for the lettuce harvest ground crew was justified by business necessity. They argue that the perishability of the crop created exigent circumstances which excused or justified their unilateral action.

The U. S. Supreme Court in NLRB v. Katz, supra, 369 U.S. 736, acknowledged that "there might be circumstances which the

[16/]The Hanes case (Hanes Corporation and Amalgamated Clothing and Textile Workers Union (1982) 260 NLRB No. 77 [109 LRRM 1185]), cited by the dissent, does not compel a different conclusion. In that case, the employer implemented a unilateral wage increase shortly after a representation election was held, but before the national Board certified the union. The board held that the employer lawfully effectuated the increase, which was an "established or nondiscriminatory" term and condition of employment, based on a practice of implementing such increases annually. However, the employer violated section 8(a)(5) of the National Labor Relations Act by failing to bargain over certain discretionary aspects of the increase, such as its size and timing. We find the facts in Hanes are distinguishable from the present case. In Hanes, the employer's wage policy was established in the years preceding the certification, and there was no evidence that, as in the present case, wages were set pursuant to the terms of a collective bargaining agreement. Furthermore, the administrative law judge in Hanes specifically noted that, as in previous years, the wage increase was granted to all job classifications. In the present case, only the lettuce harvest rate was increased, and other job classification rates, which had received yearly increases under the collective bargaining agreements, were not raised with the lettuce rate.

Board could or should accept as excusing or justifying unilateral action." The NLRB has recognized the existence of a compelling business justification that would excuse or justify the unilateral implementation of a change in wages or working conditions. (Winn-Dixie Stores, Inc. (1979) 243 NLRB 972 [101 LRRM 1534]; Dilene Answering Service, Inc., supra, 257 NLRB No. 24.) However, economic considerations alone will not justify a unilateral change. (Airport Limousine Service, Inc. (1977) 231 NLRB 932 [96 LRRM 1177].) Moreover, neither exigent circumstances nor a business necessity relieves an employer of its duty to notify and bargain with the union. This defense requires bargaining to the extent that the situation permits; an impasse is not necessarily required. (See Local 777, Democratic Union Organizing Committee v. NLRB (1978) 603 F.2d 862, 890 [101 LRRM 2628].) To the extent that bargaining is required, the bargaining by both the employer and union must be in good faith. The NLRB has no specific rule for determining whether the business-necessity defense applies. Whether or not exigent circumstances or business necessity exist is determined on a case-by-case basis.

In Dilene Answering Service, Inc., supra, 257 NLRB No. 24 at page 6, footnote 6, the NLRB affirmed the conclusion of its Administrative Law Judge (ALJ) that the employer's implementation of a change in the holiday work schedule after notifying the union of its proposed change and giving the union reasonable opportunity to respond did not violate NLRA section 8(a)(5) and (1). The NLRB affirmed the ALJ's conclusion solely on the basis that the unilateral implementation of the schedule was justified

by business necessity. The employer's business operated 24 hours a day, 7 days a week, and the scheduling of employees for work, especially for holidays, created difficult problems. Three operators had quit near Christmas because of the employer's method of scheduling holiday work, and, in an effort to prevent a similar problem at Easter time, the employer proposed some changes on March 27 at a regular bargaining session. It told the union it wished to implement the new schedule for the Easter weekend. The union did not respond to the employer's proposed changes, although it had told the employer it would do so. The employer thereafter implemented the new schedule in order to assure adequate coverage for Easter weekend, April 14 and 15. In those circumstances, the NLRB found that the implementation of the scheduling chance was justified by business necessity.

In Airport Limousine Service, Inc., supra, 231 NLRB 932, respondent Receiver in Bankruptcy refused to guarantee overtime to employees and to pay a 20 cents per hour wage increase required under the contract. The Receiver argued that his actions were taken only to alleviate the dire financial position of the employer. The NLRB rejected the Receiver's contention based on economic necessity and concluded that his actions were in violation of section 8 (a)(5) of the NLRA. In reaching that conclusion, the NLRB relied on its decision in Oak Cliff-Golman Baking Company (1973) 207 NLRB 1063 [84 LRRM 1035].

In Oak Cliff-Golman, the employer revoked a wage increase previously granted to its employees pursuant to a union contract in order to reduce its costs to keep from having to close its

business. The NLRB acknowledged the employer's financial plight but nevertheless concluded that financial necessity is not a defense to such unilateral action because such considerations are irrelevant. The NLRB found that:

> ... [N]owhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to be a desirable economic objective. (Id., at p. 1064.)

In Glazer Wholesale Drug Company, Inc. (1974) 211 NLRB 1063 [87 LRRM 1249], the union engaged in an economic strike. Before the strike, the wages paid by the employer ranged from $1.76 to $2.00 an hour. During the strike, the employer hired a number of replacements at $1.85 or more per hour, but not exceeding $2.00 per hour. A substantial number of the replacement workers were paid as much as 9 cents an hour more than the strikers they replaced. The employer did not notify or consult with the union in regard to the wage rates it paid replacements. In the course of negotiations preceding the strike, the employer had offered the union only a 4-cents-an-hour across-the-board increase in the first year of a three-year contract. When the union asked the employer why it paid replacements more than it had paid or offered the strikers, the employer replied that it was necessary to do so in order to "get people to cross the picket line." The ALJ found, and the NLRB affirmed, that

> Assuming, ..., that it was 'necessary' to pay replacements a higher wage than regular employees had received or had been offered in collective bargaining before the strike in order to get them to accept employment, ... such recruiting problems

> did not rise to the level of economic necessity excusing Respondent from notifying and consulting with the employees' bargaining representative about its intentions before it took action. (Id., at p. 1066.)

In Winn-Dixie, Inc., supra, 243 NLRB 972, the employer submitted a wage proposal to the union in a letter dated April 8, 1974. Although the union responded to the letter and requested a meeting date for the purpose of collective bargaining, no meetings took place until June 24, 1974. In the interim, the employer proposed that its wage increase proposal of April 8 "be put into effect immediately without prejudice to further bargaining on the subject."

At the June 24 meeting, the employer told the union that it was eager to implement the proposed wage increase immediately because the unit employees had not received a wage increase in 18 months and the increase would keep the employer's wage rates competitive with the rates paid by other employers in the area. The union declined to agree to the implementation as it wanted to reach an agreement on other mandatory subjects of bargaining before agreeing to any increase in wages.

The parties met again on July 1 and 2. At the July 2 meeting, the employer advised the union that it intended to implement its previously-proposed wage increase effective July 6, and suggested that it and the union jointly issue' and post a notice advising employees that the July 7 raise was an interim wage increase and that wages and all other items in the contract were still subject to current negotiations. The union rejected that proposal. Respondent implemented the wage increase effective

July 7.

The NLRB concluded that Respondent violated its duty to bargain by implementing the interim increase. In a footnote, the NLRB found there was inadequate record evidence to support the employer's defense that a compelling business justification existed which excused its unilateral action.

As the NLRB has not established any general or specific rules as to what constitutes exigent circumstances or a business necessity sufficient to justify a unilateral change in employees' wages or working conditions, without violating the employer's duty to bargain in good faith, we shall not attempt to fashion any such rule. We agree with the NLRB that economic necessity alone is not sufficient to justify a unilateral change without prior notice to, and bargaining with, the union. Whether any particular exigencies or circumstances will be found to justify an employer's unilateral changes in wages or working conditions will be decided on a case-by-case basis.

Turning to the facts in the instant matter, we must determine whether Respondents Colace and Vessey have sustained their burden of proving that sufficient business necessity or exigent circumstances existed that would excuse or justify their implementation of unilateral wage increases.

The UFW initiated a strike against Respondents Vessey and Colace in January or February 1979. On December 4, 1979, the strikers made unconditional offers to return to work, but both employers refused to reinstate the strikers. (Vessey & Company, Inc. (Dec. 15, 1981) 7 ALRB No. 44 and

Colace Brothers, Inc. (Jan. 7, 1982) 8 ALRB No. 1.)

Jon Vessey and Joe Colace knew in early September that Sun Harvest had signed a contract with the UFW. They also knew that the Sun Harvest contract would be the "master contract" for the vegetable industry and its 75 cents per carton lettuce harvest rate would most likely be the "prevailing rate," since subsequent UFW contracts signed by growers in the industry would provide for no less than that amount. Despite that knowledge, Vessey and Colace waited until November 20, almost two months after they learned the Sun Harvest contract was signed and just a few weeks before the harvest was to begin, before notifying the union of their intent to raise the lettuce harvest rate to 75 cents.

The UFW responded in a November 27, 1979, letter suggesting that the parties meet December 6 or 7, noting that Respondents had indicated they were unavailable to meet prior to the week of December 3. The parties met on December 7, but there was no discussion of the proposed wage increases, which were implemented on December 10 and 14 when Respondents began their harvest operations.

Respondents' alleged exigent circumstances were not unforeseeable given the fact that they knew the harvest would begin in early or mid-December but waited two to three months after learning of the signing of the Sun Harvest contract in September, before notifying and meeting with the UFW. Circumstances which may become exigent because of Respondents' own delaying of the bargaining process cannot excuse or justify its

implementation of unilateral wage increases.

We find that Respondents have failed to establish the existence of exigent circumstances or economic necessity sufficient to excuse them from their statutory obligation to bargain in good faith with the Union prior to implementing any increase in employees' wages. Although we acknowledge the perishability of the lettuce crop, the lettuce harvest lasts two to three months, rather than two to three days. Striking lettuce harvesters were available to return to work and there is no evidence that their expressed willingness to return was conditioned on receiving 75 cents per carton. Thus, replacement workers may not have been necessary but for Respondents' refusal to reinstate the strikers. Respondents have failed to establish that there was sufficient difficulty in recruiting workers to harvest the lettuce to warrant our finding that the unilateral change in wages was justified. (Glazer Wholesale Drug Company, Inc., supra, 211 NLRB 1063.)

Lettuce Wrap Machines

The complaint alleged that Respondent Vessey violated Labor Code section 1153 (e) and (a) by instituting a lettuce wrap operation without notice to, or bargaining with, the Union about that change. Respondent's counsel's letter to the Union dated November 20, 1979, stated: "This year the Company is considering a wrapped lettuce operation in addition to the conventional ground pack for lettuce. We would like to discuss the matter with you as well as the appropriate wages for all lettuce harvest operations." Vessey then made a wage proposal for the lettuce wrap operation. The Union responded in a letter dated

November 27, 1979, stating that it was "prepared ... to discuss the introduction of a wrap lettuce operation ...." However, neither the Union nor Respondent Vessey raised the issue of the wrap lettuce operation at the December 7 meeting. Respondent Vessey began using the lettuce wrap machines on December 10, 1979

The first issue we must address is whether Vessey's decision to use lettuce wrap machines is a mandatory subject of bargaining. In O. P. Murphy Produce Co., Inc. (Nov. 3, 1981) 7 ALRB No. 37, we adopted and applied the standard developed by the U. S. Supreme Court for determining whether an employer is required to bargain with its employees' representative about management decisions affecting the employees' working conditions. In First National Maintenance Corp. v. NLRB (1981) 101 S.Ct. 2573 [107 LRRM 2705], the court stated that:

> ... [I]n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

The record herein fails to indicate that the introduction of the lettuce wrap machines had a substantial impact on the continued availability of work in the bargaining unit. Although the lettuce wrap machines changed the harvest operation substantially, they apparently did not displace workers or reduce the amount of work to be performed. We conclude therefore that Respondent Vessey was not required to bargain with the UFW over its decision to introduce a lettuce wrap operation.

The introduction of the lettuce wrap operation did have

some impact on the wages, hours, and working conditions of the bargaining unit. The second issue, therefore, is whether Vessey satisfied its statutory duty to bargain in good faith with the UFW over the effects of its decision to introduce lettuce wrap machines. Vessey notified the UFW that it was considering the use of lettuce wrap machines approximately two weeks before the start of the harvest,[17/] and also made a wage proposal covering the workers on the wrap lettuce operation. The Union indicated that it was prepared to discusss Respondent Vessey's proposed change, but did not raise the issue at the December 7 meeting or at any time prior to Respondent Vessey's actual introduction and implementation of the wrap lettuce operation and proposed wages.

Preliminarily, we find that Respondent Vessey's lettuce wrap proposal was of a different character than the unilateral harvest wage increases discussed and found unlawful above. Since the lettuce wrap change was local and operational in nature, it was not a matter that would be a major issue in collective bargaining negotiations. We view the introduction of lettuce wrap machines as an issue that Respondent Vessey could reasonably expect to resolve prior to the harvest, apart from general contract negotiations, since an interim change in operations of this type has a relatively insignificant effect on the status of the Union or the bargaining positions of the parties.

The testimony of Ann Smith indicates that the Union did

[17/] It appears, however, that Respondent had already leased the lettuce wrap machines for use during the 1979-80 harvest season at least a month before the Union was notified.

not believe Respondent intended to negotiate in good faith over any of the proposed changes on December 7. The Union appears to have assumed that Respondent Vessey would unilaterally implement the use of the lettuce wrap machines regardless of the Union's position and therefore believed it was futile to pursue the issue. While Respondent Vessey's bargaining conduct prior to December 7 lends some support to the UFW's belief, such subjective reactions have no probative value and do not excuse or justify the Union's failure to seek bargaining and/or to offer a counterproposal about the lettuce wrap machines at the December 7 meeting. As the Union did not raise that issue or offer any counterproposal thereto at the December 7 meeting, Respondent Vessey cannot be found to have engaged in bad-faith bargaining regarding the lettuce wrap machines. (Admiral Packing Company, supra, 7 ALRB No. 43 p. 12.) Accordingly, the allegation to that effect in the complaint is hereby dismissed.

Remedy

As we have found that Respondents' declarations of impasse on December 31, 1979, were a continuation of the bad-faith bargaining found in Admiral Packing Co., supra, 7 ALRB No. 43, we shall order Respondents to make whole their employees for the economic losses they suffered as a result of Respondents' bad-faith bargaining. (Montebello Rose Co., supra, 5 ALRB No. 64, enforced (1981) 119 Cal.App.3d 1; O. P. Murphy Produce Co., Inc. (Oct. 26, 1979) 5 ALRB No. 63.) The record in the instant matter presents the parties' bargaining history from February 21, 1979, the date the growers declared an impasse in the group bargaining, to

December 31, 1979, when Respondents again declared that an impasse had been reached. We found in Admiral Packing Co., supra, that the employers' unlawful refusal to bargain commenced on February 21, 1979, and we ordered them to make their employees whole for the period commencing on that date and continuing until the date on which the employers commence good-faith bargaining which leads to a contract or a valid impasse. In our remedial Order in this case, we shall order Respondents to make whole their employees for losses they suffered from February 21, 1979, to December 31, 1979, when Respondents declared an impasse where there was none, and from January 1, 1980, until the date on which each Respondent commences good-faith bargaining with the UFW which leads either to a contract or to a bona fide impasse. (John Elmore Farms (Mar. 10, 1982) 8 ALRB No. 20.) We note that the makewhole period covered in our Order in this case will to some extent overlap the makewhole period included in our Order in Admiral Packing Company, supra. Respondents' employees will, of course, be made whole only once for the losses they incurred as a result of Respondents' bad-faith bargaining.[18/]

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that

[18/]Our makewhole Order in Admiral Packing did not include amounts by which Respondents' contributions to the UFW Robert F. Kennedy Medical Fund and Martin Luther King Farmworkers Fund would have increased if Respondents had bargained in good faith to contract, since we found that the UFW violated Labor Code section 1154 (c) of the Act by failing or refusing to provide information which Respondents had requested concerning these funds.

Respondent Joe Maggio, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) as exclusive collective bargaining representative of its agricultural employees.

(b) Changing its agricultural employees' wage rates or other terms or conditions of their employment without first giving the UFW notice thereof and an opportunity to bargain over the proposed change.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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 UFW as the certified exclusive collective bargaining representative of its agricultural employees and embody any understanding reached in a signed agreement.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses suffered by them as a result of its failure and refusal to bargain in coed faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision in Lu-Ette Farms, Inc. (Aug. 16, 1982)

8 ALRB No. 55, the period of said obligation to extend from February 21, 1979, until December 31, 1979, and from January 1, 1980, until the date on which Respondent commences good-faith bargaining with the UFW which results in either a contract or a bona fide impasse.

(c) Upon the UFW's request, rescind the unilateral wage increases it instituted in the fall of 1979 and thereafter meet and bargain collectively in good faith with the UFW over any proposed wage increases.

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

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

(f) 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 November 20, 1979, until the date on which the said Notice is mailed.

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for

60 days, the time(s) and place (s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

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

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place (s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for the time lost at this reading and during the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the LIW as the exclusive collective bargaining representative of the agricultural employees of Respondent be, and it hereby is,

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extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 7, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, 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 (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 did violate the law by bargaining in bad faith with the United Farm Workers of America, AFL-CIO, (UFW) regarding a collective bargaining agreement and by changing our employees' wage rates without first negotiating with the UFW. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California these rights:

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

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

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since February 21, 1979.

Dated: JOE MAGGIO, INC.

By: ______________________________

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 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

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Vessey & Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW), as exclusive collective bargaining representative of its agricultural employees.

(b) Changing its agricultural employees' wage rates, or other terms or conditions of their employment, without first giving the UFW notice thereof and an opportunity to bargain over the proposed change.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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 UFW as the certified exclusive collective bargaining representative of its agricultural employees and embody any understanding reached in a signed agreement.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses suffered by them as a result of its failure and refusal to

bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, the period of said obligation to extend from February 21, 1979, until December 31, 1979, and from January 1, 1980, until the date on which Respondent commences good-faith bargaining with the UFW which results in either a contract or a bona fide impasse.

(c) Upon the UFW's request, rescind its unilateral wage increase of December 1979 and thereafter meet and bargain collectively in good faith with the UFW over any proposed wage increases.

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

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

(f) 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 November 20, 1979, until the

date on which the said Notice is mailed.

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

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

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the "JFV;

as the exclusive collective bargaining representative of the agricultural employees of Respondent be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 7, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, 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 (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 did violate the law by bargaining in bad faith with the United Farm Workers of America, AFL-CIO, (UFW) regarding a collective bargaining agreement and by changing our employees' wage rates without first negotiating with the UFW. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California these rights:

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

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

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

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since February 21, 1979,

Dated: VESSEY & COMPANY, INC.

BY: ______________________________

Representative Title

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

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

DO NOT REMOVE OR MUTILATE

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Colace Brothers, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) as exclusive collective bargaining representative of its agricultural employees.

(b) Changing its agricultural employees' wage rates, or any other term or condition of their employment, without first giving the UFW notice thereof and an opportunity to bargain ever the proposed change.

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

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 UFW as the certified exclusive collective bargaining representative of its employees and embody any understanding reached in a signed agreement.

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses suffered by them as a result of its failure and refusal to bargain in good

faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, the period of said obligation to extend from February 21, 1979, until December 31, 1979, and from January 1, 1980, until the date on which Respondent commences good-faith bargaining with the UFW which results in either a contract or a bona fide impasse.

(c) Upon the UFW's request rescind its unilateral wage increase of December 1979 and thereafter meet and bargain collectively in good faith with the UFW over any proposed wage increases.

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

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

(f) 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 November 20, 1979, until the

date on which the said Notice is mailed.

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

(h) Provide a copy of the attached Notice to all agricultural employees hired during the 12-month period following the date of issuance of this Order.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in. all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Beard agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

IT IS FURTHER ORDERED that the certification of the UFW

as the exclusive collective bargaining representative of the agricultural employees of Respondent be, and it hereby is, extended for a period of one year from the date on which Respondent commences to bargain in good faith with the UFW.

Dated: October 7, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, 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 (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 did violate the law by bargaining in bad faith with the United Farm Workers of America, AFL-CIO, (UFW) regarding a collective bargaining agreement and by changing our employees' wage rates without first negotiating with the UFW. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act (Act) is a law that gives you and all other farm workers in California these rights:

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

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

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

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

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

WE WILL make whole all of our employees who suffered any economic losses as a result of our failure and refusal to bargain in good faith with the UFW since February 21, 1979.

Dated: COLACE BROTHERS, INC.

By: ______________________________

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California 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

MEMBER McCARTHY, Dissenting in part:

Contrary to the holding of my colleagues, I would find that Respondents Vessey and Colace raised a valid defense to the allegation of unlawful unilateral wage changes. The Respondents have demonstrated that the wage changes were lawful on the basis of either historic past practice or business necessity.

While the majority's statement of the law pertaining to the historic past-practice defense is not incorrect, it requires some further elaboration. The historic past-practice defense is based on recognition of the fact that the employer's action must alter the status quo in order to give rise to the obligation to bargain. (NLRB v. Ralph Printing & Lithographing Co (1970) 433 F.2d 1058 [75 LRRM 2267].) Thus, when an employer has a well-established policy of making wage adjustments at a certain time each year and such adjustments are "a part and parcel of the existing wage structure," the employer's action in that regard simply serves to maintain the status quo and does not change an

existing condition of employment. (NLRB v. Ralph Printing & Lithographing Co., supra; Reed Seismic Co. v. NLRB (1971) 440 F.2d 598, 601.) To the extent that employer discretion is a factor in the timing or amount of the wage adjustment, a change in the status quo is apt to be inferred. However, a certain amount of discretion may be exercised by the employer without taking the wage adjustment outside the protection of the historic past-practice defense. In Eastern Maine Medical Center v. NLRB (1981) 658 F.2d 1 [108 LRRM 2234], the First Circuit Court of Appeal found that the "practice of granting wage increases following periodic surveys was an established condition of employment" and further that, "indefiniteness as to amount and a flavor of discretion do not, under these circumstances, prevent the undertaking from becoming part of the conditions of employment." (Eastern Maine Medical Center v. NLRB, supra.)

If the wage adjustment is part of the existing wage structure and therefore does not violate the status quo, it is subject to bargaining only to the extent that it involves employer discretion. (Oneita Knitting Mills, Inc. (1973) 205 NLRB 500 [83 LRRM 1670].)[1/] Thus, in such circumstances there can be a

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[1/] In affirming the findings of the Administrative Law Judge (ALJ) the NLRB included the following footnote:

> Respondent argues that a finding that the unilateral grant of merit increases was a violation of section 8(a)(5) would be inconsistent with the holding of this Board in Southeastern Michigan Gas Company, 198 NLRB No. 8, wherein we found a discontinuance of merit increases to have been a violation of Sec. 8(a)(5). We disagree. An employer with a

(fn. 1. cont. on p. 53.)

unilateral implementation of a wage adjustment, but only after notice and opportunity to bargain over the discretionary element has been afforded. In order to give the Union an adequate opportunity to participate in the discretionary aspects of the wage adjustment, bargaining must begin at a time sufficiently in advance of the customary date of implementation. So long as the employer has bargained in good faith over the discretionary aspects of the past practice, the absence of impasse will not prevent the practice from being implemented unilaterally, and lawfully, at the time when implementation has historically occurred.

A correct application of the historic past-practice defense requires a careful assessment of the facts involved. Unfortunately, the facts surrounding Respondents' unilateral wage increase for lettuce harvesters have been seriously misconstrued by the majority. A correct reading of the record shows that the piece rate for lettuce harvest workers was adjusted annually pursuant to a long-standing company-initiated practice which prevailed regardless of whether the Respondents were under a contract with a union. That practice called for paying the

(fn. 1 cont.)

merit increase program neither may discontinue that program (as we found in Southeastern Michigan) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. N.L.R.B. v, Katz, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Imperial Valley lettuce harvest workers a rate based on what they had received at the end of the Salinas harvest. (J.E. 1, pp. 81-82, 85, 89, 118-119.) Information from the workers themselves, supplemented by contacts with other growers in Salinas and the Imperial Valley helped Respondents to determine what the workers had been paid in Salinas (J.E. 1, pp. 100, 102, 108.) and thus to establish the prevailing rate which the workers expected to be paid at the beginning of the Imperial Valley harvest.[2/] The record shows that this method had been used by Respondents since at least 1969, at which time no contract with a union was in force. (J.E. 1, pp. 87, 546.) When contracts came into being beginning in 1973, the prevailing-rate method continued to be applied. The contractual rate was set in July of each year and implemented in December, but if the prevailing rate at the end of the Salinas harvest in September was different from the contractual rate, an adjustment was made. (J.E. 1, p. 86; J.E. 1, p. 263.) That adjustment was not mandated by a reopener provision in the contract, but rather was undertaken voluntarily by the Employer with the consent of the Union. (J.E. 1, p. 263.)

The record is clear that a new prevailing rate was established by the aforesaid process each and every year and resulted in an annual wage adjustment that could be considered

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[2/]Testimony on this point by Respondents Vessey and Colace was not, as the majority claims, vague and inconsistent. Principals for both Respondents were consistent in their testimony as to how the prevailing rate evolved. The majority makes the mistake of calling their testimony vague simply because the concept of prevailing rate does not lend itself to the unrealistic degree of exactitude and rapid determination that the majority expects.

"automatic," as that term is used by the majority. Respondents undertook that process in order to assure themselves an adequate supply of trained labor during each harvest season. The record contains uncontradicted testimony and declarations from lettuce harvest workers who indicate that they would not accept work in the lettuce harvest for less than the prevailing rate, regardless of whether there was a picket line (R.T. Feb. 11, 1980, proceedings, p. 120.)

In setting the prevailing rate, Respondents exercised a small degree of discretion as to amount. As previously noted, a minor degree of discretion does not remove the wage increase from the historic past-practice exception. The 15 to 20 employers[3/] in Salinas whose 1979 lettuce harvest piece rates determined the prevailing rate for the Imperial Valley all paid an amount that varied not more than a penny or two from one another, regardless of whether they were under contract with a union. Although the signing of the Sun Harvest contract caused the prevailing rate to take a substantial jump in 1979, the fact remains that the higher rate became the standard for the Imperial Valley and carried with it no greater degree of discretion than did the rate increases of previous years. To the extent that any narrow range of discretion did exist, the Union was entitled to be notified and given an opportunity to bargain over the setting of

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[3/] Contrary to the assertion in the majority opinion, Respondents did not determine the prevailing rate by reference to rates paid by the three largest lettuce growers: Bud Antle, Bruce Church, and Sun Harvest. Bud Antle and Bruce Church were in fact aberrant cases whose rates were not used in establishing the prevailing rate. (J.E. 1, pp. 88, 451-452; 664-665, 669.)

the actual rate. The Union was so notified on November 20, but refused to bargain over the setting of a new prevailing rate except within the context of bargaining over an entire contract. Respondents knew considerably in advance of November 20 that a higher piece rate would have to be established, but the question of whether sufficient time for bargaining was provided became moot when the Union refused to participate in setting a new prevailing rate apart from agreement on an entire contract.

In addition to mischaracterizing the process of determining a prevailing rate, the majority opinion tosses in a red herring when it refers to the fact that the wage rates for the non-harvest job classifications were not also increased along with the lettuce harvest piece rates in 1979. The wage rates for non-harvest job classifications--irrigator, tractor driver and thinner--were locally determined and did net depend in any way on what the rates for those jobs would be in Salinas or on what the lettuce harvesters were receiving. (J.E. 1, pp. 97-98.) While the rate for lettuce harvesters jumped substantially because of its Salinas origin and the impact of the Sun Harvest contract, the rates for the other jobs did not need to reflect the Sun Harvest contract and were based on the last negotiating offer by the Imperial Valley growers. (J.E. 1, pp. 101-102.)

It seems clear to me that the annual wage adjustment for lettuce harvest workers at the beginning of each harvest season was "a part and parcel of the existing wage structure." This longstanding practice pre-dated the existence of any collective bargaining agreement and was something that the workers fully expected,

and received, at approximately the same time every year. Thus, the fact that an adjustment in wages occurred at the beginning of each and every harvest was not a matter about which the Respondents were obligated to bargain. The precise amount of the adjustment is the discretionary aspect of the practice and would therefore be subject to bargaining. Although the majority does at the outset make the distinction between the bargainable and non-bargainable aspects of a historic past practice, it fails to apply that distinction to the facts at hand. The majority should take note of a recent NLRB case, Hanes Corporation and Amalgamated Clothing and Textile Workers Union (1982) 260 NLRB No. 77, slip opn., p. 6), where the distinction was properly made and applied.[4/] There, an 8.1 percent across-the-board wage increase was granted to all of the employees in the ten plants which made up the employer's Knitwear Division. The amount of the wage increase and the date it would be grantee: were determined by the plant managers with approval from corporate headquarters. Factors such as inflation and the profitability of the Knitwear Division were used to determine the size of the increase, but no fixed formula was involved. Wage increases like the one in issue had been granted in each of the five preceeding years. The first three had been granted in either July or August. The last

[4/] The majority's attempt to distinguish away the Hanes case is based on factors which are either inconsequential or without foundation. Contrary to the majority's assertion, the historic past practice was not begun under a collective-bargaining agreement. Furthermore, there is nothing in Hanes or logic which makes the holding of that case inapplicable where two entirely separate segments of the employer's work force have historically beer, subject to different hiring and wage-setting practices, as is the situation in the instant case.

two amounted to 7.1 percent and 9.4 percent respectively, and both were granted in January.

Given the foregoing facts, and considering a number of the cases cited by the majority in this case, the NLRB's Administrative Law Judge arrived at the following conclusions of law:

> The pattern of granting general wage increases once a year for the last five years to all of the Knitwear Division employees sufficiently establishes such increases as an existing term or condition of employment about which Respondent was not obligated to bargain. However, the wage increases were granted at several times of year in those five years and, at least for the last two years, had varied fairly substantially in amount. I am therefore satisfied that, though the voice of the Brooks Plant management may have been small in determining the discretionary elements of the annual wage increase, Respondent Hanes Corporation had, in fact, retained significant elements of discretion as to both its size and its timing. It was therefore obligated to bargain with the Union about those discretionary elements and its failure to do so constituted a violation of Section 8(a)(5) and (1) of the Act. (Emphasis added; fns. omitted.) (Hanes Corporation and Amalgamated Clothing and Textile Workers Union, supra, 260 NLRB No. 77, slip opn., p. 7.)

In upholding the ALJ, the national Board reiterated the key distinction between the historic practice itself, which is non-bargain-able, and its discretionary aspects, which do require bargaining:

> We agree with the Adminsitrative Law Judge that Respondent violated section 8(a)(5) of the Act by refusing to bargain with the certified representative regarding the specific discretionary aspects of a wage increase, of rules respecting the wearing of respirators, and of an economic layoff. In as much as it was the refusal to bargain over these discretionary aspects rather than Respondent's unilateral but lawful effectuation of the established or [non-discretionary] aspect that constitutes the violations in the circumstances of this case, we hereby modify the Administrative Law Judge's 'Further Conclusions of Law," paragraph 2, to reflect the precise violation committed, and we shall modify the recommended

Order accordingly.
(Emphasis added.)
(Hanes Corporation and Amalgamated Clothing and Textile Workers Union, supra, 260 NLRB No. 77, slip opn., p. 6.)

The annual wage adjustment in the instant case is no less an established term or condition of employment than the pattern of granting general wage increases was in Hanes Corporation. Bargaining over whether there will be a wage adjustment is therefore not required. As in Hanes, it is the discretionary element—the amount of the wage adjustment—that is subject to bargaining. Respondents attempted to initiate bargaining in that regard, but were rebuffed by the Union. Although Respondent had an obligation to bargain toward a complete contract at that time,[5/] the Union had a concurrent obligation to bargain over the discretionary element of the wage adjustment that was then due in accordance with past practice. The wage change could have been implemented unilaterally without arriving at impasse over either the entire contract or the amount of the increase as long as the historic time for implementation had arrived and the Union had been offered an adequate opportunity for bargaining by Respondents. As previously noted, the question of whether there was an adequate opportunity for the Union to bargain over the amount of the wage adjustment was rendered moot by the Union's refusal to even avail itself of that opportunity.

[5/] The impasse which I found to exist in my Dissent in Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, and which involved the Respondents herein, was at least temporarily broken when Respondents made a new wage offer on November 20. Under these conditions, Respondents were obliged to resume full-scale bargaining.

In short, the situation presented here is one of a historic past practice (an established condition of employment) containing a bargainable element of discretion. The discretion lies in the determination of a new prevailing rate, but the factors from which that rate historically evolves are beyond the control of the Respondents and leave little room for the exercise of discretion. It is also important to bear in mind that the bilateral process of ascertaining and implementing a new prevailing rate in no way precludes concurrent bargaining over whatever new rate the Union can obtain on the basis of its own economic leverage. In any event, Respondents attempted to consult with the Union on the discretionary aspect of an established wage adjustment policy prior to its annual implementation. Respondents have thus presented a valid defense based on historic past practice and the majority's failure to recognize that fact leaves the Employer in the untenable position of risking an unfair-labor-practice charge when it honors an established condition of employment.

Turning to Respondents' business-necessity defense, I find the majority to be correct in stating that the defense requires bargaining to the extent that the situation permits, that impasse need not exist as a prerequisite to lawful implementation of a unilateral change compelled by business necessity, and that the existence of exigent circumstances or business necessity is to be determined on a case-by-case basis. However, contrary to the majority's assertion, an employer is not prohibited from making a unilateral change based on economic considerations alone, as long as the union has been notified and afforded an

opportunity to bargain to the extent possible. The cases cited by the majority in support of its contention, Airport Limousine Service, Inc., supra, 231 NLRB 932; and Oak Cliff-Golman Baking Co., supra, 207 NLRB 1063, are inapposite because, unlike the instant case, they deal with an employer who made unilateral changes despite an existing contract and the proviso in section 8(d) of the National Labor Relations Act which states that during the contract term neither party may lawfully implement a change in wages or working conditions unless it has first giver, the other party notice of the change and an opportunity to negotiate about it to impasse. Here, there was no contract in existence and therefore the added restrictions of ALRA section 1155.3(a), the equivalent of NLRA section 8(d), do not come into play.

Glazer Wholesale Drug Co., Inc., supra, 211 NLRB 1363, was apparently cited by the majority for the proposition that strike circumstances and the need for obtaining replacement workers will not justify unilateral action. The majority notes the holding of the National Labor Relations Board that "such recruiting problems did not rise to the level of economic necessity excusing Respondent from notifying and consulting with the employees' bargaining representative about its intentions before it took action." (Id., at p. 1066.) The majority appears to have forgotten that the Respondents here took those very steps. Although Respondents could have initiated the process sooner than November 20, we have no way of knowing whether the period which Respondents allowed for bargaining was sufficient.

as the Union refused, to avail itself of the opportunity to consult with Respondents on the single issue of whether and to what extent business necessity warranted a wage change at the time proposed.

Respondents predicate their wage changes on a business necessity that carries considerable weight. Unlike the situation in the industrial setting, Respondents here were dealing with a perishable commodity that could not be stored. When the crop was ready for harvesting, the job had to be completed within two or three days. The Administrative Law Officer (ALO) acknowledged that fact. (ALOD, p. 20.) However, the majority disingenuously states that "the lettuce harvest lasts two to three months, rather than two to three days," implying that Respondents were somehow not faced with exigent circumstances. Surely the majority knows that the lettuce crop matures in stages and that unless the grower is prepared to harvest each portion of the crop as it matures, he will suffer a complete loss of part or all of his investment.

The evidence shows that Respondents would not have been in a position to undertake harvesting operations with an adequate labor supply at any given time during the season except by offering workers a wage at or near the prevailing rate. In both declarations and testimony at the hearing, lettuce harvest workers stated that they would not have worked in the December 1979 harvest for less than the 75 cents prevailing rate. The Union's only attempt to rebut that evidence was its contention that striking workers had made an unconditional offer to return to work, which, if it was a valid offer, would have entailed working at the pre-existing piece rate of 57 cents. That claim is without substantiation

in the record and, in any event, defies logic, for .it requires us to believe that Respondents passed up an opportunity to end the strike and harvest its crop at phenomenal savings.

Because the Respondents in this case were in a much more precarious situation than the typical industrial employer whose operations are being struck and because the General Counsel failed to refute Respondents' claim of business necessity, I would find that Respondents' implementation of the prevailing rate, especially in light of the Union's refusal to bargain on the subject, was a lawful unilateral act. In rejecting the business-necessity defense under these circumstances, the majority misapplies NLRA precedent and ignores the realities of agriculture.

Contrary to the members of the majority, I did not find that Respondents were engaged in bad-faith bargaining during the time that they were members of the employer bargaining group in Admiral Packing Company, supra, 7 ALRB No. 43. As discussed above, I would find that Respondents' unilateral changes, the only acts alleged as violations herein, were in fact lawful. Therefore, I dissent from the majority's conclusion that Respondents' conduct here was a continuation of the bad-faith bargaining which the majority found in Admiral Packing Company, supra. The complaint in this case should have been dismissed in its entirety.

Dated: October 7, 182

JOHN P. McCARTHY, Member

CASE SUMMARY

Joe Maggio, Inc., Vessey & Company, Inc., and Colace Brothers, Inc.

8 ALRB No. 72
Case Nos. 79-CE-186-EC
79-CE-188-EC
79-CE-191-EC
79-CE-200-EC

ALO DECISION

The ALO found that, based on the Hearing Officers' Decision in Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, no bona fide impasse existed in the negotiations between Respondents and the UFW. Therefore, Respondent Maggio violated Labor Code sections 1153(e) and (a) of the Act by thereafter implementing the wage rates it had previously offered to the Union, and Vessey and Colace violated Labor Code sections 1153(e) and (a) by raising their lettuce harvest piece rate after proposing the increase to the Union in their November 20, 1979, letters and meeting with the Union once. The ALO found that the wage increases implemented by Vessey and Colace were not justified by past practice or business necessity.

The ALO also granted General Counsel's motion, made at the end of the hearing to amend the complaint to include new allegations of unilateral changes in the employees' wages and terms and conditions of employment. Based on evidence supporting those allegations, the ALO concluded that each Respondent violated Labor Code sections 1153 (e) and (a) by instituting a unilateral wage change in the first half of 1979, and that Respondent Vessey violated Labor Code sections 1153(e)and (a) by utilizing a lettuce-wrap machine without notice to or bargaining with the Union. The ALO also concluded that Respondents violated Labor Code sections 1153(e) and (a) by bad-faith bargaining, finding that the impasse they declared on December 31, 1979, was not a bona fide impasse.

BOARD DECISION

The Board dismissed the allegations concerning unilateral wage increases which were amended into the complaint at the close of the hearing, finding that the ALO should have reopened the hearing in order to allow the parties an opportunity to litigate Respondent's claim that the wage increases occurred more than six months prior to the filing of the charges and were therefore time-barred by Labor Code section 1160.2 of the Act.

The Board noted that, in Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, it affirmed the ALO's finding that Respondents, along with other employers, engaged in group bargaining, violated Labor Code sections 1153 (e) and (a) of the Act by engaging in surface bargaining and declaring a spurious impasse where no bona fide impasse existed. The Board concluded that all three

Respondents continued to violate the Act by failing to engage in good-faith bargaining from the time of the impasse described in the Admiral Packing case until the time of the hearing in this case, finding that Respondents failed to offer any new proposals for nine months, and then offered wage increase proposals a few weeks before the beginning of the next harvest season and attempted to limit the negotiations to those proposals, summarily rejected the Union's proposal to bargain on other matters, unilaterally instituted the increases, and later declared an impasse on December 31, which was not bona fide. The Board also found that the parties were not at impasse concerning the single issue of wages at the December 7 meeting.

The Board found that all three Respondents violated Labor Code sections 1153 (e) and (a) by implementing the wage increases proposed in their November 20 letters. The Board affirmed the ALO's rejection of Respondents Vessey's and Colace's defense that the wage increases they implemented were justified by past practice and business necessity. After reviewing NLRB and ALRB precedent concerning the defenses of past practice, the Board found that the lettuce piece rate increase instituted by Respondents Vessey and Colace was not automatic. Both Respondents had granted wage increases in previous years, but only pursuant to collective bargaining agreements or after negotiations with the Union. The previous wage changes were granted in July and included all job classifications, whereas the 1979 increases occurred in December and affected only the lettuce piece rate.

The Board noted that the NLRB decides on a case-by-case basis whether a compelling business justification excuses unilateral implementation of a change in wages or working conditions. Respondents Vessey and Colace failed to establish that their unilateral wage increases were justified, since they knew in early September that they might wish to propose an increase, but waited two months, until just before the harvest began, to notify the Union of their intent to raise the piece rate, and even then Respondents were not available to meet for one and one-half weeks. Respondents failed to show that they had sufficient difficulty in recruiting lettuce harvesters to warrant a finding that the unilateral change in the lettuce rate was justified.

The Board reversed the ALO's finding that the decision to use lettuce-wrap machines was a mandatory subject of bargaining, since the evidence did not establish that the introduction of the machines had a substantial impact on the continued availability of work in the bargaining unit. Although Vessey notified the Union of its decision to use lettuce-wrap machines, the Union failed to request bargaining as to the effects of the introduction of the lettuce-wrap machines on wages, hours and working conditions, so the Board dismissed the allegation that Respondent Vessey was bargaining in bad faith regarding the lettuce-wrap machines.
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Remedy

The Board ordered Respondents to make their employees whole for the losses they suffered as a result of Respondents' failure and refusal to bargain in good faith with the Union. The Board ordered that the makewhole begin on February 21, 1979, the date Respondents first engaged in bad-faith bargaining. The Board noted, however, that although this makewhole order would overlap some part of the makewhole period in Admiral Packing Company (Dec. 14, 1981) 7 ALRB No. 43, employees would be made whole only once for Respondents' violations of the Act.

Dissent

Member McCarthy would find that the unilateral wage changes made by Respondents Vessey and Colace were lawful on the basis of either historic-past practice or business necessity. The piece rate for lettuce harvest workers was adjusted annually pursuant to a long-standing company-initiated practice which prevailed regardless of whether the Respondents were under a contract with the Union. That annual wage adjustment was part and parcel of the existing wage structure and the historic-past practice defense is not invalidated by the fact that in making the adjustment, Respondents exercised a small degree of discretion. It is only that small discretionary element that is subject to bargaining and Respondents afforded the Union an opportunity to bargain about the discretionary aspect of the wage adjustment.

In addition, Member McCarthy would find Respondents' business necessity defense to be valid because Respondents demonstrated that they would not have been in a position to undertake harvesting operations with an adequate labor supply at any given time during the season except by offering workers a wage at or near the prevailing rate and that, without an adequate labor supply, Respondents were vulnerable to the loss of part or all of their investment due to the perishability of their crop. He would find that Respondents afforded the Union an opportunity to consult with them on the single issue of whether and to what extent business necessity warranted a wage change but that the Union failed to avail itself of that opportunity.

Finally, Member McCarthy disagrees with the majority's finding and conclusion that Respondents' conduct in this case was a continuation of the bad-faith bargaining which the majority found in Admiral Packing. He would dismiss the complaint in its entirety.

* * *

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

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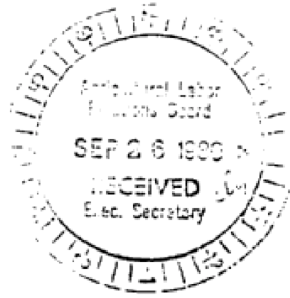
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



JOE MAGGIO, INC.,
VESSEY & COMPANY, INC., AND
COLACE BROTHERS, INC.

Respondents,

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Charging Party

CASE NOS.

79-CE-186-EC
79-CE-188-EC
79-CE-191-EC
79-CE-200-EC

DECISION OF ADMINISTRATIVE <u>LAW OFFICER</u>

Barbara Dudley of San Diego,
for the General Counsel

Thomas A. Nassif, Gray, Cary,
Ames & Frye, El Centro,
for the Respondents

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law officer:

Beginning in November, 1978, Respondent companies, Joe Maggio, Inc. (hereafter "Maggio"), Vessey and Company, Inc. (hereafter "Vessey") and Colace Brothers (hereafter "Colace") as part of a 28-grower negotiating group met with the United Farm Workers of America'; AFL-CIO (hereafter "UFW") in an attempt to negotiate a new contract for the 1978-79 season. Negotiations were halted on February 28, 1979.[1/] On March 1, the UFW filed a charge against all 28 employers who had been negotiating collectively, claiming they had refused to bargain in good faith in violation of Section 1153(e) and (a) of the Agricultural Labor Relations Act[2/] (hereafter "the Act"). Following the filing of charges against all 23 respondents, complaints issued and were consolidated for hearing in Case No. 79-CE-36-EC, et seq.

Prior to hearing the charges in Case No. 79-CE-36-EC, the UFW and 15 companies signed contracts. The UFW withdrew its charges against these companies.

A hearing was conducted by Administrative Law Officer Jennie Rhine which involved the remaining 13 respondents. Prior to the issuance of her decision, the UFW and two more companies entered into collective bargaining agreements.

The remaining respondents in Case No. 79-CE-36-EC included Vessey, Colace, and Maggio.

[1/] Unless otherwise stated, all dates refer to 1979.

[2/] All statutory references are to the California Labor Code unless otherwise stated.

On March 7, 1980, Administrative Law Officer Rhine issued her decision, finding the impasse not bona fide and that respondents Vessey, Colace, and Maggio violated Sections 1153(e) and (a) of the Act by engaging in surface bargaining without a serious desire to reach an agreement. ALO Rhine recommended that the respondents be ordered to cease and desist from their unlawful conduct and take certain affirmative actions designed to effectuate the policies of the Act. She further recommended that respondents be affirmatively directed to meet and bargain collectively in good faith with the UFW and to make their employees whole for the wages and other economic losses incurred as a result according to formulae set out by the Board in Adam Dairy, 4 ALRB No. 24 (1973), Hickam, 4 ALRB No. 73 (1978), O.P. Murphy Produce Co., Inc., 5 ALRB No. 6; (1979), Montebello Rose Co., Inc., 5 ALRB No. 64 (1979).

In accordance with those guidelines, ALO Rhine found the first manifestation of bad faith to be the delay in providing information necessary for the preparation of the union's economic proposal which occurred on December 3, 1978. However, most respondents, including Vessey Colace and Maggio, had pre-existing contracts with the UFW which remained in effect until January 1. Thus, the ALO concluded that the make-whole remedy should commence January 1.[3/]

ALO Rhine further recommenced that the certification of the UFW as the collective bargaining representative of each of respondents' agricultural employees be extended for a period of one year from the date

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[3/] Although the UFW in late December, 1978, agreed to further extend all contracts to January 15, ALO Rhine did not select that date because she determined all respondents to be bargaining in bad faith prior to the offered extension by the UFW.

on which the respondents commence to bargain in good faith. Adam Dairy, supra; AS-H-NE Farms, 6 ALRB No. 9 (1980); O.P. Murphy Co., Inc., 5 ALRB No. 63 (1979); Kyutoku Nursery, Inc., 4 ALRB No. 55 (1978).

This matter was heard by me on February 11 and 12, 1980, in El Centro, California. The complaint, dated December 12, and the subsequent amendment are based on charges filed by the UFW. On February 15, 1980, following the close of the hearing,[4/] General Counsel, pursuant to Section 20222 of the Board's Regulations,[5/] moved to amend the complaint.[6/] On March 3, 1980, I granted the General Counsel's motion to amend in its entirety.

[4/] There being no objection thereto, General Counsel's post-hearing motion to Correct Errors in Hearing Transcript is granted in the following respects:

1. Volume I, page 71, line 9, replace "and" with "the": "and for the employers, the Union's proposal from whence we..."
2. Volume I, page 3, line IS, replace "impasse" with "impact."
3. Volume II, page 95, line 24, "November 7th" should read "November 20th.'
4. Volume II, page 96, line 24, replace "receive" with "relay" and replace "through" with "to": "Q. And did you relay that letter to your clients'
5. Volume II, page 98, line 1, replace "didn't" with "did."

[5/] All references to the Board's regulations are to Title 8, California Administrative Code.

[6/] A. VESSEY AND COMPANY: 79-CE-186-EC

1. To add a new paragraph 6 as follows:

"6. On or about February 21, 1979, Respondent made a wage offer to the UFW. Following the submission of a counter-proposal by the UFW on February 28, 1979, Respondent declared impasse."

2. To add a new paragraph 7 as follows:

"7. Commencing on or about April 4, 1979, Respondent has unilaterally raised wages in some or all job classifications to the level proposed on February 21, 1979, without notifying or bargaining with the UFW regarding said increases."

3. To add a new paragraph 8 as follows:

"8. On or about November 20, 1979, Respondent notified the UFW that it was considering a wrapped lettuce operation in its 1979-1980 lettuce harvest."

4. To add a new paragraph 9 as follows:

"9. On or about December 10, 1979, when its

All parties were given a full opportunity to participate in the hearing. The record remained open until March 13, 1980, to allow Respondent to respond to my order granting General Counsel's motion to amend.

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lettuce harvest commenced, Respondent introduced a wrapped lettuce operation without negotiating said change with the UFW, and without the agreement of the UFW."

5. To charge the numbers of paragraphs 6 through 9 of the original complaint to be paragraphs 10 through 14, respectively.

6. To amend paragraph 8 of the original complaint to refer to "paragraphs 6 through 11."

7. To amend paragraph 9 of the original complaint to refer to "paragraphs 6 through 11" and to add after the word "wages", "and working conditions".

8. To amend the prayer to read as follows:

"WHEREFORE, it is prayed that Respondent be ordered:

1. To cease and desist from paying wages as changed unilaterally , and from implementing any mechanized harvesting operation which was introduced unilaterally;

2. To bargain in good faith with the UFW;

3. To make its agricultural employees whole for all losses caused by the violations of law complained of herein;

4. To compensate the Union for costs and expenses incurred as a consequence of the employers' refusal to bargain in coed faith.

5. To make a public apology to its employees made in front of an assembly of respondent's employees;

6. To issue a notice to its employees signed by respondent advising them of their rights under the ALRA and his promise not to interfere with these rights;

7. To assemble its employees for one hour of paid time, so they may be advised by representatives of the ALRB of their rights under the Act and ask the representatives any questions they might have regarding the act;

8. To give notice to the ALRB of the steps taken to comply with any order issued pursuant to this proceeding.

9. For such other relief as is fair and proper."

B. JOE MAGGIO, INC.: 79-CE-188-EC

1. To add a new paragraph 6 as follows:

"6. On or about February 21, 1979, Respondent made a wage offer to the UFW. Following the submission of a counter-proposal by the UFW on February 28, 1979, Respondent declared impasse and did not negotiate further."

2. To add a new paragraph 7 as follows:

"7. Commencing in or about March, 1979, Respondent unilaterally raised wages in many, if not all, job classifications to the level proposed on February 21, 1979, without notifying or bargaining with UFW regarding said increases."

3. To change the numbers of paragraph 6 through 9 of the

The General Counsel and Respondents filed post-hearing briefs pursuant to Section 20278 of the Regulations.

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original Complaint to be paragraphs 8 through 11, respectively.

4. To amend paragraph 8 of the original complaint to refer to "paragraphs 6 through 9."

5. To amend paragraph 9 of the original Complaint to refer to "paragraphs 6 through 9".

6. To amend the prayer to read as follows:

"WHEREFORE, it is prayed that Respondent be ordered:

1. To cease and desist from paying wages as changed unilaterally;

2. To bargain in good faith with the UFW;

3. To make its agricultural employees whole for all losses caused by the violation of law complained of herein;

4. To compensate the Union for costs and expenses incurred as a consequence of the employers' refusal to bargain in good faith;

5. To make a public apology to its employees made in front of an assembly of Respondent's employees;

6. To issue a notice to its employees signed by Respondent advising them of their rights under the ALRA and his promise not to interfere with these rights;

7. To assemble its employees for one hour of paid time, so they may be advised by representatives of the ALRB of their rights under the ACT and ask the representatives any questions they might have regarding the Act.

8. To give notice to the ALRB of the steps taken to comply with any order issued pursuant to this proceeding.

9. For such other relief as is fair and proper."

C. COLACE BROTHERS, INC.: 79-CE-191-EC; 79-CE-200-EC

1. To add a new paragraph 6 as follows:

"6. Commencing in November, 1978, Respondent and the UFW have bargained regarding wages, hours, terms and conditions of employment for Respondent's agricultural employees."

2. To add a new paragraph 7 as follows:

"7. On February 21, 1979, Respondent made a wage offer to the UFW. Following the submission of a counter-proposal by the UFW on February 28, 1979, Respondent declared impasse and did not submit a further proposal until November 20, 1979."

3. To add a new paragraph 8 as follows:

"8. Commencing in or about June, 1979, -Respondent unilaterally raised wages without notifying or bargaining with the UFW regarding said increases."

4. To change the number of paragraph 6 to paragraph 9.

5. To add a new paragraph 10 as follows:

"10. On or about December 7, 1979, Respondent made a wage offer to the UFW which the UFW requested to discuss in the context of contract discussion, proposals and counter-proposals."

6. To change the numbers of paragraph 7 through 9 of

Upon 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

Respondents (Vessey, Maggio, and Colace) are California corporations engaged in agriculture and are agricultural employers within the meaning of Section 1140.4 (c) of the Act.

The UFW is a labor organization within the meaning of Section 1140.4 (f) of the Act.

II. The Alleged Unfair Labor Practices

The amendment to the Complaint alleges that Respondents:

(1) Refused to bargain collectively in good faith with the UFW, in violation of Section 1153 (e) and (a) of the Act.

(2) Respondent Vessey, on or about December 10, introduced a wrapped lettuce operation without negotiating said change with the UFW. Respondents generally deny violating the Act.

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the original Complaint to be numbers 11 through 13, respectively.

7. To amend paragraph 7 of the original Complaint by deleting "December 7, 1979," and substituting the date "December 14, 1979.

8. To amend paragraph 8 of the original Complaint to refer to "paragraphs 7 through 11."

9. To amend paragraph 9 of the original Complaint to refer to "paragraphs 7 through 11."

10. To amend the prayer to include a new paragraph 4 as follows and to renumber the respective paragraphs accordingly.

"4. To compensate the Union for costs and expenses incurred as a consequence of the employees' refusal to bargain in good faith."

III. Bargaining Relationship Between Respondents and the UFW

On February 21, prior to the break-down of negotiations between the UFW and the 28 vegetable growers, the employers, as a group, presented an offer to the UFW in the form of a signed contract. Attorney negotiators Tom Nassif, Charley Stoll and Andrew Church signed their proposed contract and handed it to the UFW negotiator. UFW negotiator Ann Smith testified that it was presented as a total proposal, a total package for all proposed articles with wage rates for the entire industry. The wage rates included in this February 21 offer were $.61 per box of lettuce for the lettuce harvesting crew and $.34 a dozen bunches for carrots harvested. During the 1978-79 harvest, Vessey and Colace harvested lettuce while respondent Maggio harvested carrots, having eliminated its lettuce crop that year. Prior to negotiations, Vessey and Colace paid its lettuce harvest crew $.57 per box while Maggio paid $.32 a dozen bunches to its carrot crew.

On February 28, the UFW presented a counterproposal with a different wage scale. The employer representatives caucused at that time, finally indicating that the respondents and the UFW were at impasse in negotiations. According to UFW negotiator Smith, the union made no response. She further stated that the UFW never characterized the February 28 proposal as a final offer.

Carl Joe Maggio, owner of Maggio, testified that in March, Maggio began paying $.34 piece rate to carrot harvesters, which equaled the level proposed by the employers on February 21. According to Jon Vessey's testimony, in April, Vessey raised wages for all of its operations except lettuce harvesting to the rates proposed in the February 21 offer. Vessey stated that the UFW was not notified of the raise. Joe Colace testified that after February 23, Colace raised wages for all job classifications other

than lettuce harvesting to the amounts proposed in the February 21 company offer.

No further negotiating sessions were held until August 8, when the grower representatives initiated a session. According to Ron Hull, Manager of the Imperial Valley Vegetable Growers Association, the respondents asked the UFW which proposals the employers had failed to discuss. Hull testified that the UFW was not prepared to discuss new proposals. Hull stated that UFW negotiator Burciaga was unsure of the contents of the last proposal. According to Hull, UFW representative Richard King stated that until new grower proposals were forthcoming, there would be no new proposals from the union. Hull further testified that in response to employer representatives questioning him whether impasse existed, Burciaga stated that it did.

Tom Nassif stated that the growers' position at the August 8 meeting was to discuss what the union accused them of not discussing. According to Nassif, the union had nothing to discuss, concurring that the parties still were at impasse. No further bargaining proposals were offered by either side at the August 8 meeting.[7/]

In September, various Salinas based growers in the industry signed contracts with the UFW. The grower group signing contracts was headed by SunHarvest, one of the industry giants. According to the testimony of UFW negotiator Smith, the SunHarvest agreement served the function of a "master agreement" for the industry.

[7/] Evidence was presented at the hearing that Attorney Charley Stoll, in September, sent a telegram to the UFW proposing to raise the wage rates to the level of the February 21 offer. Attorney Tom Nassif disavowed the communication as unauthorized for respondents Vessey, Colace, and Maggio Stoll's proposal was rejected by the UFW on October 1.

On November 20, Attorney Massif sent three letters (GC Exhs. 4, 5, 6) to the UFW on behalf of Vessey, Colace, and Maggio. For Colace, Nassif proposed a $.75 per box rate for lettuce harvesting for the upcoming early December harvest. In his letter for Maggio, Nassif stated that the Company was interested in implementing all the rates that had been proposed on February 21. And finally for Vessey, the $.75 per box rate for lettuce harvesting was proposed. He further stated that the Company was considering a wrap lettuce operation, outlining rates for wrap machines as part of a new contract. According to Nassif, those rates reflected the 1979 Salinas company contract rates. All three letters indicated that the companies were interested in meeting to discuss these issues.

Ann Smith responded for the UFW by letter, suggesting meeting dates. Smith stated that the union was interested in representing its members to the fullest extent in negotiating a complete contract and net interested in wage rates for only one particular job.

A meeting was held on December 7. Ann Smith testified that the UFW told Nassif and company representatives that the union perceived two alternatives in terms of contract settlement in light of the companies' modification of their February 21 proposal: (1) talk about settlement on the basis of the SunHarvest contract that had been recently negotiated; or (2) continue bargaining from the proposals made in February by each side. Smith further testified that the only change in the bargaining proposal at this meeting from the employers was the $.75 per box lettuce piece rate. Smith testified that no one specifically discussed the wrapped lettuce operation mentioned in the November 20 letter from Nassif on behalf of Vessey. Jon Vessey also testified that the lettuce wrap operation was not discussed at this meeting.

Ann Smith further testified that the UFW did not agree to the $.75

rates proposed by Colace or Vessey. She further stated that the UFW never agreed to Maggio raising wages to the level of the February 21 proposal.

Joe Colace testified that he thought the UFW representatives came to the December 7 meeting "with their minds already made up", not prepared to give a response to the November 20 company proposal. According to Colace, Nassif stated at the December 7 meeting, "Then I am to understand that since you are not prepared and from your indication that we are to either accept the SunHarvest proposal or accept something worse." Colace testified that Smith agreed with that statement.

Jon Vessey testified that on December 10, his company began its lettuce harvesting operation in the Imperial Valley, paying workers $.75 per box piece rate. Joe Colace testified that his company's harvest began on December 14, paying the $.75 piece rate.

Subsequent to the December 7 meeting, Smith testified that the UFW made a verbal proposal modifying the union's February 28 proposal which was reduced to writing in a letter dated December 19, sent by Smith to Massif. The union letter addressed the $.75 per box rate proposed by Vessey and Colace. No response specifically was made by the UFW to the Maggio proposal.

On December 31, Nassif replied by letter that the UFW proposals were an "insult" to the companies and that impasse existed. On January 3, 1980, a hearing[8/] was held in the District Court of Appeal, Fourth Appellate District, on a motion by the ALRB's General Counsel for preliminary injunctions against the three respondents to cause them to roll back wages that had been allegedly increased unilaterally.

[8/] By stipulation of the parties, the transcript of this proceeding has been made a part of the record in this case.

By way of defense at the court hearing, the companies asserted that they had a practice of raising wages annually, and that in order to maintain the status quo, as allowed by law, it was necessary to maintain the historical practice and implement the prevailing wage rate.

Jon Vessey testified that the $.75 rate his company paid when the harvest began was based on the prevailing rate for lettuce harvesters. According to Vessey, the prevailing rate is determined by ascertaining, usually through the word of mouth of growers and workers, what the majority of companies in Salinas are paying for packing lettuce during the summer. Vessey stated that his company traditionally looks to Antle, SunHarvest, and Bruce Church, the companies employing the most people, in order to determine industry standards.

Vessey stated that for the last seven years the company has raised its wages in every job category once a year, pursuant to a contract. According to Vessey, under a Teamsters contract that expired in 1975, wages were increased in July for all job classifications and implemented in January. Vessey stated that the company signed a contract with the UFW in 1977, in which periodic wage increases were effective in July for all job classifications. Vessey further stated that in 1976, under a Teamsters contract, the company made a wage increase that was not provided for by contract. He testified that the increase was made pursuant to a wage reopener clause in the contract, in order to meet the prevailing wage.

Vessey further testified that he decided to pay the $.75 piece rate in lettuce when the Salinas harvest ended in September. Vessey further stated that his company was using the lettuce wrap machines that it proposed in the letter of November 20.

With regard to the lettuce wrap operation, Ann Smith testified that no company under a UFW contract could start a lettuce wrap operation without first bargaining about the subject. She stated that the matter would

come under provisions of mechanization and guidelines to be followed.

Joe Colace stated that his company has been represented by unions since 1972 or 1973. Under those contracts, periodic increases in wages occurred. Colace testified that in December, 1977 the company and union entered into a verbal agreement to raise the contract wage rates to the higher prevailing rate at that time.

Colace further testified that he determined the 1979-80 piece rate after discussing the matter with other company owners. He stated that he did not personally investigate the prevailing rate in Salinas, but "... it was understood that $.75 was the rate that was being paid."

Carl J. Maggio testified the company had been under contract with the Teamsters from 1971 or 1972 until 1976, and under contract with the 'JFW since 1976. Counsel for Maggio stipulated at the court hearing that raises, if any, were made by Maggio only up to the limit of the so-called impasse rate of the February 21 proposal. Counsel further stated that historical past practice was not alleged as a defense for Maggio.

Maggio further testified that he did not authorize those foremen recruiting workers for the carrot harvest to offer more than $.34 piece rate, nor was he aware of any foremen making such offers. He further stated that he had no intention of paying a 2½¢ bonus to workers at the end of the harvest. No evidence was presented at the hearing which indicated that any workers were promised or paid more than the $.34 piece rats.

By way of additional defense, respondents asserted that exigent circumstances required that the companies raise their wage rates. In order to harvest their highly perishable crops, respondents contended that it was necessary to pay the prevailing rate which was higher than the impasse rate of $.61.

Jon Vessey testified that after analyzing what was going on in Salinas, his company decided that it had to pay a $.75 piece rate to harvest its lettuce because "(i)f we didn't pay the going rate, we wouldn't harvest our lettuce." He further stated that he did not believe the company could get its fields harvested if the court ordered them to pay a $.61 piece rate and that the lettuce would last only 2-3 days before becoming unharvestable. Vessey further stated that he could not grow more lettuce until the following December; and lettuce comprised a substantial part of the company's income.

Vessey testified that his workers from prior years who offered to return to work had not stated they would only work if paid the $.75 piece rate. Colace testified that he could not recall if his foremen reported to him that they could not recruit workers for less than $.75.

Finally, by way of defense, respondents contend that the law allows implementation of raises and other changes in working conditions up to the companies' last offer prior to impasse. As that matter was fully litigated before ALO Rhine,[9/] and as she has decided that no bona fide impasse occurred on February 28, I accept her finding for purposes of this decision. I am therefore not considering that defense to the present proceedings.

[9/] In that I did not receive substantial evidence concerning the 23 negotiating sessions that occurred between November, 1978, and the end of February, 1979, I could make no finding regarding the declared February 28 impasse.

Moreover, the matter was fully litigated in the earlier proceeding.

ANALYSIS AND CONCLUSIONS

Section 1153(e) of the Act, which parallels Section 8(a)(5) of the National Labor Relations Act, states that it is an unfair labor practice for an agricultural employer "[t]o refuse to bargain collectively in good faith" with the certified bargaining representative of its agricultural employees. Section 1155.2(a) of the Act, using the same language as Section 8(d) of the NLRA, defines good faith bargaining:

> . . . to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Conduct which violates Section 1153 (e) derivatively violates Section 1153Ca) as well. See, e.g., Adam Dairy, 4 ALRB Mo. 24 (1978); O.P. Murphy produce Co., Inc., 5 ALRB No. 63 (1979). Further, Section 1148 of the Act compels the Board to observe applicable precedents of the National Labor Relations Act, as amended.

I. The Employers' Conduct

With no bona fide impasse existing on February 28, all three respondents soon thereafter unilaterally raised wages. In March, Maggio raised its carrot piece rate from $.32 to $.34, the amount offered to the union prior to the ingenuine declaration of impasse. In April, Vessey and Colace raised wage rates for all classifications except lettuce harvesting to the rates offered during negotiations prior to declaration of impasse. Colace and Vessey raised its piece rate for lettuce harvesting

to $.75 pursuant to attorney Massif's letters of November 20. That amount exceeded the $.61 piece rate offered by Vessey and Colace prior to the respondents' declaration of impasse.

Unilateral grants of benefits prior to impasse and without consultation with the union constitute a refusal to bargain under Section 1153(e) and (a) of the Act. The employer not only is obligated to notify and consult with the union regarding a proposed wage increase, he is precluded from unilaterally putting the increase into effect until an impasse has been reached. Alsey Refractories Co., 215 NLRB 785 (1975). While negotiations are sought or are in progress, the employer is precluded from unilaterally instituting changes in existing terms and conditions of employment. Taft Broadcasting Co., 153 NLRB 475 (1967).

The United States Supreme Court, in NLRB v. Katz, 369 U.S. 736 (1962), found an employer's conduct unlawful where the employer unilaterally granted merit increases, announced a change in sick leave policy, and instituted a new system of automatic wage increases without bargaining to impasse. She Supreme Court noted the changes as a ". . . circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal." Id., at p. 743. The Court further stated that even after an impasse is reached an employer has no license to grant a wage increase that is greater than any he has previously offered to the union.

Vessey and Colace raised the lettuce harvesting piece rate to $. 75 for the December harvest, more per hour than was offered to the union during pre-February 28 negotiations. Furthermore, the two sessions held on August 8 and December 7 did not put the employers in good stead prior to their final ingenuine declaration of impasse. According to Ron Hull and Tom Nassif, a declaration of impasse occurred on August 8, when "FW negotiator Burciaga concurred that impasse existed. Massif again declared

impasse on December 31, when he labelled the UFW proposals an "insult" to the companies.

Although Burciaga did not contradict the declaration of impasse by the employers on August 8, mutual recognition of a deadlock does not preclude an inquiry into whether it resulted from good faith bargaining. Reed & Prince Manufacturing Co., 96 NLRB 850 (1951), enforced 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). Furthermore, a bona fide impasse is reached only when the parties to negotiations are unable to reach agreement despite their best good faith efforts, not when it is caused by a party's bad faith bargaining posture. Montebello Rose Co., Inc., supra.

In analyzing these respondents' course of conduct following the February 28 ingenuine declaration of impasse, it is clear that the future attempts made by the employers were not done in good faith. All three companies raised wages for all classifications other than lettuce harvesters immediately following the February 28 break-down in negotiations. On August 8, the first contact made in several months, nothing of substance was discussed by either side and no further bargaining proposals were offered.

On November 20, Nassif announced in his letters to the union that Colace and Vessey were raising their lettuce piece rate to S.75. He further stated that Vessey was considering a wrap lettuce operation, outlining rates for wrap machines as part of a new contract. In his letter for Maggio, Nassif stated that the company was interested in implementing all the rates that had been proposed on February 21. As previously noted, Maggio had in fact previously raised rates in March in all classifications to levels offered prior to the declared impasse.

At the December 7 meeting, the UFW through negotiator Smith, told company representatives that it perceived two possible courses of negotiation in light of the companies' modification of their February 21 proposal: (1) discuss settlement based on the SunHarvest contract; or (2) continue bargaining from proposals made in February by each side. Smith and Vessey concurred that no one discussed the lettuce wrap operation mentioned in the November 20 letter. According to Smith, the only changed proposal coming from respondents regarded the $.75 piece rate in lettuce.

In a letter dated December 19, Smith responded to the $.75 piece rate proposed by Vessey and Colace. The UFW did not specifically respond to the Maggio proposal. Nassif responded to this letter, labeling the UFW proposals an "insult" and declaring impasse. The negotiations broke down at that point.

III. Employer Defenses

Vessey and Colace offer two defenses[10/] for their conduct; (1) the companies had an established practice of raising wages annually; and (2) exigent circumstances required raising the lettuce piece rate in order to harvest their highly perishable crops. The latter defense will also be considered in light of respondent Maggio's conduct.

Jon Vessey testified that his company raised wages in every job category once a year for the past seven years, pursuant to a contract. Under the Teamsters contract that expired in 1975, wages were increased in July for all job classifications and implemented in January. In 1976, the company increased wages pursuant to a wage reopener clause in the

[10/] A third defense, that impasse existed on February 23, has been ruled upon by ALO Rhine in Admiral Packing Company, 79-CE-36-EC.

Teamsters contract in order to meet the prevailing wage. Under the "FW contract signed in 1977, periodic increases were effective in July for all job classifications. Colace similarly testified that his company under union contract since 1972 or 1973 periodically increased its wages. In December 1977, wages were raised to the prevailing rate pursuant to a verbal agreement between the company and the UFW.

A defense can be raised by an employer showing a regular and consistent past practice with regard to changes in employees' wages or working conditions. However, it is necessary that the employer's action is accompanied by willingness to bargain. NLRB v. Ralph Printing, 433 F.2d 1058 (8th Cir. 1970). Furthermore, "[t]he employer carries a heavy burden of proving that such adjustments of wages and benefits are purely automatic and pursuant to definite guidelines. NLRB v. Allis-Chalmers Corp., 601 F.2d 870, 875 (5th Cir. 1979). The employees must have reason to know about the existence of a fixed program or practice of wage increases. NLRB v. Hendel Mfg. Co., Inc., 523 F.2d 133 (2nd Cir. 1975); Continental Insurance Co. v. NLRB 495 F.2d 44 (1974).

Respondents clearly have not met their heavy burden of establishing a purely automatic wage increase generally known to all its employees. The parties did not establish definite guidelines for periodic wage increases. At most, they established a yearly increase with additional modifications based on the prevailing wage rate. And most important, they did not establish a willingness to bargain during the time when wages were increased. The lettuce piece rate proposals were made by letter of November 20. The parties met one time after that date. The UFW proposed alternative methods of bargaining and a response to the $.75 piece rate proposal. On December 31, attorney Massif described the counter-proposal an "insult" and again

declared impasse. Thus, the respondents' conduct did not demonstrate a willingness to bargain at that time. The companies merely were concerned with harvesting their lettuce crop, not bargaining in good faith with the union.

Respondents raise a final defense that the crops needed harvesting and could remain in the fields for only 2-3 days. An employer can justify his action of unilaterally raising wages if extreme economic necessity exists. However, the employer must continue to bargain in good faith with the union during the time of extreme economic necessity. N.Y. Mirror, 151 NLRB No. 110 (1965); M.R.SR. Trucking Co. v NLRB, 434 F.2d 689 (5th Cir. 1970). The employer's act of unilaterally raising wages is viewed in the context of its past and present bargaining practices with the union. A history of good faith bargaining by the employer mitigates in its favor. Exposition Cotton Mills, 76 NLRB 1289 (1948).

Viewing the respondents' conduct in the context of the prolonged 1978-79 negotiations, it is clear that none of them had established a pattern of good faith bargaining with the UFW. In February, the employers presented a signed contract to the UFW, demonstrating their unwillingness to further bargain in a meaningful fashion. During the following months, all three respondents unilaterally raised wages in all job classifications except lettuce harvesting. In March, Maggio raised its piece rate for carrots to $.34. The wage rate was increased without notifying the union. "[I]t was [pot] contemplated that the parties would continue to bargain and negotiate as to the balance of the union requests and as to the form of a new contract." NLRB v. Bradley Washfountain, 192 F.2d 144, 150 (1951).

All parties then met briefly on August 8, and no new proposals were forthcoming from either side. In effect negotiations never were re-established;

in a spirit of good faith bargaining. After Vessey and Colace announced their lettuce piece rate increase, the parties again met briefly in December without any substantive discussion regarding new proposals. Mr. Nassif then declared an impasse by letter dated December 31. Similar in nature to the previous breakdown in negotiations, the parties did not bargain to bona fide impasse. Pay 'N Save Corp., 210 NLRB 311 (1974). Such conduct violates Section 1153 (e) and (a) of the Act.

In addition, Vessey established a lettuce wrap operation without any discussion with the UFW. According to Vessey, the machinery had been purchased a month before the November 20 letter was sent to the UFW. This conduct violates Section 1153 (e) and (a), constituting another unilateral change effected outside negotiations with the certified bargaining representative. Montebello Rose, supra.

THE REMEDY

Having found that the respondents refused to bargain in good faith in violation of Sections 1153(e) and (a) of the Act, I shall recommend that they be ordered to cease and desist from their unlawful conduct and take certain affirmative actions designed to effectuate the policies of the Act. By their conduct the respondents are responsible for the parties' failure to reach an agreement. Accordingly, in addition to meeting the usual notice requirements, they shall be affirmatively directed to meet and bargain collectively in good faith with the UFW, upon its request, and to make their employees whole for the wage and other economic losses incurred as a result. See Section 1160.3; see also, e.g., Adam Dairy, 4 ALRB No. 24 (1978); Hickam, 4 ALRB Mo. 73 (1978); O.P. Murphy Produce Co.,

Inc., 5 ALRB No. 63 (1979); Montebello Rose Co., Inc., 5 ALRB No. 64 (1979).

In Admiral Packing, 79-CE-36-EC, ALO Rhine found the first manifestation of bad faith occurred on December 8, 1978. However, these respondents had a previous contract with the UFW that expired on January 1, 1979. She therefore concluded that the make-whole remedy should commence on January 1, 1979.

The duration of the make-whole remedy is, as a general rule, that directed by the Board in O.P. Murphy. See, e.g., Montebello Rose, supra; AS-H-NE Farms, Inc., 6 ALRB No. 9 (1980). The make-whole remedy should be calculated in accordance with the principles of Adam Dairy, supra, as modified regarding piece rate workers by Hickam, supra. The Board has acknowledged, however, that the data relied upon in Adam Dairy to calculate the average negotiated wage rate is outdated. See Hickam, supra; Superior Farming Co., Inc., 4 ALRB No. 44 (1973); Kyutoku Nursery, Inc.,4 ALRB No. 55 (1978).

The appropriate source of data for the make-whole calculations is the contracts successfully negotiated between the UFW and the former respondents after the February 28, 1979, declaration of impasse.

The certification of the UFW as the collective bargaining representative of each respondent's agricultural employees shall be extended for a period of one year from the date on which the respondent commences to bargain in good faith. Adam Dairy, supra; see also AS-H-NE Farms, supra; O.P. Murphy, supra; Kyutoku Nursery, supra.

Accordingly, pursuant to Section 1160.3 of the Act, I recommend the following:

ORDER

Respondents COLACE BROTHERS, JOE MAGGIO, INC., VESSEY S COMPANY, INC.,

their officers, agents, successors and assigns, shall individually:

1. Cease and desist from:

a. Failing or refusing to meet and bargain collectively in good faith with the UNITED FARM WORKERS OF AMERICA, AFL-CIO (UFW);

b. Attempting to bypass the UFW as the exclusive collective bargaining representative of its employees.

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

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

a. Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its employees and embody any understanding reached in a signed agreement;

b. Make whole its present and former agricultural employees for all losses of pay and other economic losses sustained by them as the result of its failure and refusal to bargain in good faith, as such losses have been defined in Adam Dairy, 4 ALRB No. 24 (1978) and modified in Hickam, 4 ALRB No. 73 (1978); the period of said obligation shall extend from January 1, 1979 until such time as each respondent commences to bargain in good faith and thereafter bargains to contract or bona fide impasse;

c. Preserve and, upon request, make available to the Board or its agents, for examination and copying all records relevant and necessary to a determination of the amounts due under the terms of this order;

d. Sign the attached Notice to Employees and, upon its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth below;

e. Post copies of the attached Notice at conspicuous places on its premises for 90 consecutive days, the time and places of posting to be determined by the Board's regional director; and exercise due care to replace any Notice which is altered, defaced, covered or removed;

f. Within 30 days after issuance of this order, mail copies of the attached Notice in all appropriate languages to all agricultural employees employed at any time from December 8, 1978 to the present;

g. Provide a copy of the attached Notice to each agricultural employee hired during the 12-month period following the issuance of this order;

h. Arrange for a representative of the respondent or the Board to distribute and read the attached Notice in appropriate languages to the respondent's assembled employees on company time: the reading or readings shall be at such times and places as are specified by the Board's regional director and, following each reading, a 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 the respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period;

i. Notify the Board's regional director in writing, within 30 days after the issuance of this order, of the steps taken to comply with it, and upon request, notify the regional director in writing periodically thereafter of further steps taken to comply.

IT IS FURTHER ORDER2D that the certification of the UFW as the exclusive

collective bargaining representative of the agricultural employees of each above-named respondent be, and it hereby is, extended for a period of one year from the date on which that respondent commences to bargain in good faith with the UFW.

DATED: September 23, 1980.

RON GREENBERG
Administrative Law Officer

POSTSCRIPT

This postscript raises issues that could not be considered in the body of the decision, and it continues a dialogue with other judges about the essential elements of our profession. More specifically, it talks about good faith bargaining, the subject of the present case and a concept at the heart of the Agricultural Labor Relations Act.

The case law sets out multiple tests for determining whether a party has bargained in good or bad faith. For the most part they are mechanical tests that deal with the form of the negotiations rather than their content and context. As a concept that repeatedly appears in the law, bargaining in good faith, like truth and justice, cannot be successfully legislated or reduced to a concise and rational legal definition.

What meaning attaches to the terms bargaining and good faith? For most people, to bargain means to deal with another in order to reach a mutually acceptable agreement. However, in the legal setting, adjudication of a right and wrong is the normal end result rather than reaching a decision that is acceptable to all parties. Although most of us understand the concept of having faith in something, good faith bargaining necessarily requires faith in the collective bargaining process. The parties must demonstrate a willingness to engage in the process to make it work.

But, good faith bargaining may conflict with a lawyer's duty to represent his client's spoken interests. Traditionally lawyers are paid to win, not to bargain in good faith. The adversary system creates philosophic black and white zones which are staunchly defended by opposing attorneys. This system encourages them to become more expert at the rules of lawyering, learning to mold each case in the client's best interests.

Playing by the rules, however, does not necessarily mean operating in good faith. I have observed parties who meet all the legal litmus tests for good faith bargaining, i.e., attending all negotiation sessions, supplying all requested information, etc., who may not intend to sign a contract. Thus observing the law in form does not assure good faith bargaining.

Those parties who show an unwillingness to accept the principles of the collective bargaining process often do so to resist change. Yet change is built into agriculture, an industry that taps a work force which is always in motion. Resistance to change and movement is unrealistic in this setting, making the rewards of bad faith bargaining shortsighted. Each side desperately needs one another. Good faith bargaining consequently requires a spirit of cooperation in order to deal with these continually changing circumstances.

As judges, we must deal responsibly with the complex human element in the bargaining process. Rules of law defining good faith bargaining have value only if they ultimately protect basic human rights. Can laws be fashioned to require parties to bring greater humanity to the bargaining table, to require each side to treat the other with kindness and respect?

How can a judge encourage the parties to bargain more humanely? How can a judge bring his/her human experience to the judging process? How do truth and justice relate to bargaining in good faith?

While all civilizations need rules to order conduct, there exists an even more fundamental need for humane judges to interpret those rules. The profession would greatly benefit from a revised conception of the judicial role. For a judge positively to affect the bargaining process, s/he must also personally acknowledge a commitment to the collective bargaining process. As truth is not a partisan issue, neither is belief in the collective bargaining process.

NOTICE TO EMPLOYEES

After charges were made against us by the United Farm Workers and a hearing was held where each side had an opportunity to present evidence, the Agricultural Labor Relations Board has found that we violated the law by not bargaining in good faith with the union, and has ordered us to distribute and post this notice and do the things stated below. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

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

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

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

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

Because you have these rights, we promise you that:

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

WE WILL meet and bargain in good faith with the 'JFW about a contract because it is the representative chosen by our employees;

WE WILL NOT publish advertisements or distribute leaflets that undermine or bypass the union as the representative;

WE WILL pay our employees any money they lost because of our failure to bargain in good faith.

If you have any questions about your rights as farm workers or this notice, you may contact the UFW or any office of the Agricultural Labor Relations Board. One is located at 1629 West Main Street, El Centro, California, Telephone: 714/353-2130.

DATED: ______________________

Company: ______________________

By ______________________

(Representative) (Title)

This is an official notice of -he Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE