Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 79-CE-70-EC 79-CE-170-EC 79-CE-178-EC 79-CE-248-EC 79-CE-248-1-EC 80-CE-39-EC 80-CE-110-EC 8 ALRB No. 88

DECISION AND ORDER

On January 21, 1981, Administrative Law Officer (ALO) Norman I. Lustig issued the attached Decision in this proceeding. Thereafter, the General Counsel, United Farm Workers of America, AFL-CIO (UFW or Union) and Mario Saikhon, Inc. (Respondent), each timely filed exceptions and a supporting brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (Board) has delegated its authority in this proceeding to a three-member panel.

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

Bargaining History

Although the complaint in the instant matter alleges that Respondent violated section 1153 (e) and (a) of the Agricultural

[1/]All section references herein are to the California Labor Cede unless otherwise stated.

Labor Relations Act (Act) by unilaterally increasing its employees' wages in 1979, those increases did not occur in isolation, but rather in the context of Respondent's overall bargaining conduct. On August 18, 1977, the Board certified the UFW as the collective bargaining representative of Respondent's agricultural employees. Respondent and the UFW executed their first collective bargaining agreement on February 9, 1978. The contract expired on January 1, 1979, and the parties began negotiations for a new contract in November 1978. Respondent was bargaining as a member of a group of growers, whose bargaining conduct we described in Admiral Packing Company, et al (Dec. 14, 1981) 7 ALRB No. 43. On January 22, 1979, Respondent's employees began an economic strike, which was converted into an unfair labor practice strike on February 21, 1979. (Admiral Packing, supra, 7 ALRB No. 43.) In our Admiral Packing Decision, we found that Respondent and the other grower-members of the bargaining group violated the Act by refusing to bargain in good faith with the Union. Our finding was based on the growers' participation in a campaign to bypass and discredit the Union, the take-it-or-leave-it strategy of their representatives during negotiations on February 21, 1979, 'and their bad faith declaration of impasse on February 28, 1979.

The instant, case involves the bargaining history between the UFW and Respondent subsequent to the bargaining history litigated in Admiral Packing, supra. There was no communication between Respondent and the UFW from the declaration of impasse on February 28, 1979, until July 10, 1979, when Respondent sent the UFW a telegram proposing a wage increase.

Bargaining Issues

An employer violates section 1153 (e) and (a) when it fails or refuses to meet and bargain in good faith with its employees' collective bargaining representative, and when it institutes unilateral changes in its employees' wages or any other working condition without giving the collective bargaining representative notice or an opportunity to bargain about the changes. (Montebello Rose Co., Inc./Mount Arbor Nurseries, Inc. (Oct. 29, 1979) 5 ALRB No. 64; NLRB v. Katz (1962) 369 U.S." 736 [50 LRRM 2177].) An employer also violates section 1153(e) and (a) by merely going through the motions of making bargaining proposals and giving the collective bargaining representative an opportunity to respond to the proposals, when the employer initiates the preliminary steps to bargaining without any intent of actually reaching an agreement through compromise. Such an approach is concerned with the form, rather than the substance, of real collective bargaining. (J. R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76; Winn-Dixie Stores, Inc. (1976) 224 NLRB 1418 [92 LRRM 1625].)

In the instant case. Respondent has utilized both of the above bargaining approaches, during/ an unfair labor practice strike, to thwart the bargaining process and has thereby violated section 1153(e) and (a). We take official notice that the acts and conduct of Respondent which we found unlawful in Admiral Packing, supra, 7 ALRB No. 43, also constitute evidence of Respondent's overall failure to bargain in good faith here. (Local 833, UAW, AFL-CIO v. NLRB (D.C. Cir. 1962) 300 F.2d 699 [49 LRRM 2485].)

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Unilateral Wage Increases

The April 5, 1979 Wage Increase. On April 5, 1979, Respondent unilaterally raised the wages of its tractor drivers to the level last proposed by the employers' group at the February 21, 1979, negotiation meeting. The UFW did not learn of that increase until after the opening of the hearing in this matter. The issue was fully litigated at the hearing and is clearly related to the allegations in the complaint, and Respondent raised no objection to the litigation of the issue. (D'Arrigo Brothers Company (June 22, 1982) 8 ALRB No. 45; NLRB v. International Association of Bridge, Etc. (9th Cir. 1979) 600 F.2d 770 [101 LRRM 3119].) The ALO concluded that if Respondent's prior declaration of impasse was made in bad faith, Respondent committed a per se violation of section 1153(e) and (a) by failing to give the UFW notice and an opportunity to bargain over the wage increase. As we found, in Admiral Packing, supra, 7 ALRB No. 43, that Respondent's declaration of impasse was in bad faith, we conclude that Respondent's April 5, 1979, unilateral increase of its tractor drivers' wages violated section 1153(e) and (a).

Respondent excepts to the ALO's conclusion, arguing that it was relieved of its duty to bargain about the wage increase because of strike violence attributable to the UFW and because of the business necessity to increase wages in order to prevent its tractor drivers from seeking employment elsewhere for higher wages.

We find no merit in Respondent's exception. The NLRB has recognized that violent or coercive union-sanctioned strike misconduct can so inhibit good faith bargaining that the employer is

entitled to condition the continuance of bargaining upon the union's assurance that such misconduct will cease. (Laura Modes Company (1963) 144 NLRB 1592 [54 LRRM 1299]; Union Nacional de Trabajadores (1975) 219 NLRB 862 [90 LRRM 1023], mod. on other grounds sub nom., NLRB v. Union Nacional de Trabajadores (1st Cir. 1976) 540 F.2d 1 [92 LRRM 3425].) However, Respondent has not established the most basic elements of such a defense. (See Admiral Packing, supra, 7 ALRB No. 43 at p. 68; Kohler Co. (1960) 128 NLRB 1062, 1103 [46 LRRM 1389], mod. on other grounds sub nom., Local 833, UAW, AFL-CIO v. NLRB, supra, 300 F.2d 699.) Respondent's defense is not based on actual or anticipated violence affecting its own operations or its own employees, but rather on strike violence which occurred at the work sites of two other growers in the Imperial Valley. We do not see how such violence can excuse Respondent's duty to bargain, especially when no evidence was offered to demonstrate the effect, if any, of the violence upon Respondent. Furthermore, Respondent's only evidence concerning the violence was adduced in the testimony of one of its negotiators, who did not attribute the conduct to specific employees or to union agents.

Concerning Respondent's business necessity defense, we have adopted the same case-by-case analysis used by the NLRB to determine whether any particular exigencies or circumstances justify an employer's unilateral changes in wages or other working conditions without prior notice to, or bargaining with, the union. We have emphasized that bargaining must continue to the extent that the situation permits. (Joe Maggio, Inc., Vessey & Company, Inc. &

Colace Brothers, Inc. (Oct. 7, 1982) 8 ALRB No. 72; see Local 777, Democratic Union Organizing Committee v. NLRB (D.C. Cir. 1978) 603 F.2d 862, 890 [101 LRRM 2628].) As in its defense of strike misconduct, Respondent offered only the conclusory statements of its managerial staff to support its business necessity defense. In Winn-Dixie Stores, Inc. (1979) 243 NLRB 972 [101 LRRM 1534], the employer argued that it had to implement a wage increase in order to keep its rates competitive with the rates paid by other employers. The union declined to agree to the implementation of the increase because it wanted to reach an agreement on other mandatory subjects of bargaining before agreeing to any increase in wages. The employer's arguments failed in Winn-Dixie because there was inadequate record evidence to support the existence of a compelling business justification. Similarly, Respondent has not presented any evidence to show that it would have lost workers to competitors had it not instituted the wage increase, nor has it explained its failure to give the Union notice of and an opportunity to bargain concerning the change.

The August 17, September 20, and October 7, 1979 Wage Increases. The General Counsel and' the UFW excepted to the ALO's conclusion that Respondent did not violate section 1153 (e) and (a) by granting wage increases on August 17, September 20, and October 7, because Respondent gave the UFW notice and an opportunity to bargain before implementing those wage increases, and the UFW waived its right to bargain about the increases by insisting that Respondent bargain over a full contract. We find that these exceptions have merit. During the period in question, Respondent

engaged in a "pro forma" or "ritual" approach to bargaining, and gave shifting reasons for the unilateral wage increases, while allowing the Union inadequate time to bargain about the proposed increases before characterizing them as historical and therefore not subject to bargaining.

On July 10, 1979, Respondent sent the UFW a telegram proposing an increase in its base wage rate for general laborers and other job classifications. The ALO found that the telegram provided adequate prior notice to the UFW of the wage increases which Respondent granted in August and_ September 1979. We reject that finding and hold that Respondent's telegram did not express a willingness to bargain but instead suggested an intent to avoid bargaining with the UFW.

Respondent's July 10 telegram stated that the "provisional wage increase" would be "effective July 16, 1979," and requested that the UFW "please notify us if this is acceptable as soon as possible." Within three days, after replying by telephone on the date of the telegram, the UFW sent a telegram in response, stating:

> We are not at impasse on any matter in negotiations, unilateral changes would therefore constitute unfair labor practices. We stand ready to negotiate on any matter. Wage increases should be discussed in good faith at the bargaining table.

Respondent's negotiator replied by letter two weeks later, on July 27, 1979, stating that

> ... the increase is merely historical and is done in no way to undermine the bargaining agent. The employees receive a wage increase at this time of the year and to fail to do so would result in employees seeking employment elsewhere and would seriously hamper the Company's ability to recruit and hire labor. Therefore, this letter will serve

> as notification to you that we will implement the historical pay raise as discussed in my mailgram of July 10, 1979. [Emphasis added.]

The notice Respondent provided did not afford the UFW an opportunity to bargain concerning the proposed unilateral wage increases. The July 10 telegram indicated that the wage increase would be effective in six days. The UFW's expression of its willingness to bargain about wages and other matters was ignored by Respondent. In its July 27 reply, Respondent characterized the wage increase as "merely historical," i.e., one which did not require bargaining. That characterization, Respondent's silence concerning the UFW's expressed willingness to bargain about wages and other subjects of bargaining, and Mario Saikhon's testimony that he decided to implement the proposed wage increase regardless of the UFW's response to Respondent's July 10 telegram, clearly indicate that Respondent was merely engaging in "pro forma" bargaining, and had no intention of bargaining with the UFW about the wage increases. (Winn-Dixie Stores, Inc., supra, 243 NLRB 972; J. R. Norton, supra, 8 ALRB No. 76.)

We find no merit in Respondent's argument that the unilateral wage increases were justified because of Respondent's past practice. Our analytical approach to an employer's past practice as a justification for unilateral changes places two burdens upon the employer. First, we require evidence that past wage increases were granted with such regularity that they can be considered automatic. If we find the increases were in fact automatic, then we determine the degree, if any, of discretion used by the employer in establishing the timing and amount of the

increases. Any discretionary matters involving mandatory subjects of bargaining should be the subject of negotiations between the employer and the union. (Joe Maggio, supra, 8 ALRB No. 72; Oneita Knitting Mills, Inc. (1973) 205 NLRB 500 [83 LRRM 1670].)

Respondent has not presented sufficient evidence to establish that previous wage increases were granted with such regularity that they can be considered automatic. Respondent argues that its past practice has been to maintain wages that are competitive with other growers' wages. The record indicates that Respondent's past wage increases have been governed by agreements with employees' collective bargaining representatives in seven of the preceeding ten years. In the other three years, a union did not represent Respondent's employees, and wages were determined solely by Respondent. We find that Respondent's asserted past practice defense is not supported by the record, and that since the increases granted by Respondent involved a substantial degree of discretion as to timing and amount, Respondent was obligated to notify and bargain with the UFW prior to implementing the increases. (Kaplan's Fruit and Produce Company (July 1, 1980) 6 ALRB Mo. 36.)

The ALO found that the UFW waived its right to bargain concerning the August, September, and October wage increases by failing to initiate discussion of the first of those increases at the August 8, 1979, negotiating session and by "consistently demanding, in its response to Respondent's September 26 and October 5 communications, that Respondent negotiate a comprehensive agreement rather than seeking to bargain over a specific interim wage increase. We find merit in the exceptions of the General Counsel

and the UFW with respect to that finding.

We do not interpret the UFW's silence at the August 8 meeting as a waiver of its bargaining rights. "We will not construe a party's silence on a bargaining issue to constitute a voluntary waiver of its right to bargain unless the evidence of intentional waiver is clear and unequivocal." (Kaplan's Fruit and Produce, supra, 6 ALRB No. 36 at p. 18', citing Caravelle Boat Company (1977) 227 NLRB 1355 [95 LRRM 1003].) The UFW's position, as indicated in its July 13 telegram, was that it" was ready to negotiate about wages and any other matters at the bargaining table. The UFW's clearly expressed willingness to bargain about wages and other matters included in a full agreement cannot be viewed as a waiver of bargaining rights. Under Labor Code section 1155.2, each party has an obligation 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 ...." Furthermore, as we found in Admiral Packing, supra, 7 ALRB No. 43, the August 8 meeting was attended by other growers, and neither party raised the issue of the proposed unilateral wage increases.[2/]

The record evidence of the communications between the parties (particularly Respondent's correspondence of July 27,

[2/] The August 8 meeting was requested by some of the employers who had attempted to bargain as a group with the UFW. We found, in Admiral Packing, that those employers merely asked the UFW whether it was willing to change its position on any issues. When the UFW answered in the negative, the employers ended the meeting. It is unlikely that Respondent and the UFW could have engaged in detailed negotiations, on wages or any other matter, with each other in those circumstances.

September 26, and October 5, 1979) shows that Respondent continually attempted to limit the subjects the parties were to discuss and, thereby, undermined the collective bargaining process. Respondent attempted to cause the UFW to bargain for a contract on a piecemeal basis, even though Respondent's business conditions did not justify or require abandonment of the normal approach to collective bargaining.

Based on the above, and the record as a whole, we conclude that Respondent's unilateral wage increases" of August 17, September 20, and October 7, 1979, violated section 1153 (e) and (a). (J. R. Norton, supra, 8 ALRB No. 76; Winn-Dixie Stores, Inc., supra, 224 NLRB 1418.)

The December 15, 1979 Wage Increase. Respondent excepts to the ALO's conclusion that it violated section 1153 (e) and (a) by unilaterally increasing the lettuce harvest piece rate above the level of its February 21, 1979 offer, without giving the UFW notice or an opportunity to bargain about the change.

Respondent first argues that prior notice to the UFW of that increase would have been futile since Respondent expected the UFW to continue to request bargaining over mandatory subjects other than Respondent's proposed interim wage increase. However, a unilateral wage increase greater than the increase the employer has previously offered to the union in negotiations, even when there is a bona fide impasse, is a per se violation of section 1153 (e) and (a). (Bi-Rite Foods, Inc. (1964) 147 NLRB 59, 65 [56 LRRM 1150]; Montebello Rose, supra, 5 ALRB No. 64.)

Respondent's second contention is that the December 15

increase was historical. Respondent attempts to support that position by arguing that it has paid its employees the "prevailing rate" for the last ten years. As previously noted, in order to sustain this argument, Respondent must demonstrate that such increases were automatic, and that the amount and timing thereof were determined by factors other than its own discretion. (Joe Maggio, supra, 8 ALRB No. 72; Kaplan's Fruit and Produce, supra, 6 ALRB No. 36; NLRB v. Katz, supra, 369 U.S. 736.)

The ALO rejected Respondent's past practice defense, and stated,

> ... [B]ased upon the demeanor of the witnesses, the inconsistency of the accounts, and the use of naked assertions without any corroboration of substance, under circumstances in which corroboration should have been easy, the Administrative Law Officer finds that Respondent has not met the burden of demonstrating a lawful justification for a wage increase ....

We find that the record supports the ALO's finding. In its exceptions brief, Respondent argues that Mario Saikhon testified that the alleged historical increase was based upon Respondent's policy of maintaining wages which were competitive with those of other growers. This testimony, however, is insufficient to establish that the wage increase granted on December 15, 1979, was a continuation of Respondent's past practice or was granted according to objective criteria. The record shows that most of Respondent's previous wage increases were determined, in timing and amount, in accordance with collective bargaining contracts between Respondent and its employees' collective bargaining representative.

Mario Saikhon testified that there were four factors he considered in deciding the amount of the wage increases for his

1979 lettuce harvest employees: (1) the wage increases granted pursuant to past agreements with the employees' union; (2) a survey taken by the Imperial Valley Growers Association to determine competitive wages; (3) information furnished by Respondent's foreman Carl Fiore concerning the wages he was paying harvest employees in Arizona; and (4) wage data and information which Respondent's employees furnished to their foremen, who in turn relayed the information to Mario Saikhon. Saikhon's testimony shows that Respondent exercised a substantial measure of discretion in determining the amount of the December 15, 1979, wage increase. The institution of that increase, without prior notice to or bargaining with the Union, violated section 1153(e) and (a).

Lettuce Wrap Machine Operation

Respondent excepts to the ALO's conclusion that it violated section 1153 (e) and (a) by failing to give the UFW notice and an opportunity to bargain concerning the effects on employees of its institution of a new lettuce wrap machine operation in December 1979.[3/]

We find no merit in Respondent's contention that it introduced the lettuce wrap machine's because of consumer demand for wrapped lettuce. The impact of technological innovation on the employees in a bargaining unit is a mandatory subject of bargaining because it affects their wages, hours, and other, terms and conditions of employment. (Metromedia Inc., KMBC-TV v. NLRB

[3/] While the complaint alleged that Respondent violated section 1153 (e) and (a) by its decision to use the lettuce wrap machines, neither General Counsel nor the UFW excepted to the ALO's finding that Respondent had no duty to bargain over the decision itself.

(8th Cir. 1978} 586 F.2d 1182 [99 LRRM 2743]; NLRB v. Columbia Tribune Publishing Company (8th Cir. 1974) 495 F.2d 1384, 1391 [86 LRRM 2078].) Respondent had previously harvested all its lettuce by using three-person teams called "trios". Respondent's witnesses testified that employees in a trio were paid according to a piece rate and each employee averaged $17 to $18 per hour, whereas members of a lettuce wrap machine -crew were paid only $4 to $5 per hour. The record also indicates that Respondent's use of the machines affected more than its employees' wages. Respondent's harvesting foreman testified that the work of a trio is more strenuous and proceeds at a faster pace than the work of the machine crew.

Respondent argues, in defense of its unilateral action, that violence occurring at the operations of other growers, the UFW's anticipated refusal to bargain about the implementation of the lettuce machines, and business necessity relieved Respondent of any duty to bargain. Respondent's first two defenses are without merit. Respondent relies on the same arguments it made concerning its earlier unilateral wage increases: the alleged violence and the UFW's anticipated rejection of an interim wage increase. Our previous rejection of these defenses is equally applicable here. We also reject Respondent's defense of business necessity. Respondent argues that the machines were used to prevent the lettuce from spoiling, but the record does not support that assertion. Mario Saikhon testified that the machines were used because Respondent was developing a new business. The record also indicates that the machines handled only 1,000 to 1,500 cartons of lettuce per day,

whereas a trio harvested about 5,000 cartons of lettuce a day. If Respondent was truly concerned with the prevention of spoilage, it could have harvested much quicker by using trios rather than assigning employees to the lettuce wrap machines.

We affirm the ALO's conclusion that Respondent violated section 1153 (e) and (a) by failing to give the UFW notice of, and an opportunity to bargain concerning, the "effects on its employees' working conditions caused by the implementation of a lettuce wrap machine operation.

Respondent's Refusal to Reinstate Strikers

The ALO found that Respondent received unconditional offers to return to work from 44 strikers on December 14, 1979, and from 12 strikers on January 24, 1980. He also found that Respondent had a legitimate and substantial business justification, i.e., fear of a series of "quickie" strikes by the returning strikers, for denying reinstatement to the strikers irrespective of whether they were economic strikers or unfair labor practice strikers. General Counsel and the UFW except to the finding of a legitimate and substantial business justification.

The reinstatement rights of economic strikers differ substantially from those of unfair labor practice strikers. Under well-settled principles of labor law, and applicable precedents of the National Labor Relations Act, Respondent must, upon receiving an unconditional request for reinstatement from unfair labor practice strikers, reinstate them to their former positions and oust any replacement workers, if necessary, to provide employment for the returning strikers. (Mastro Plastics Corp. v. NLRB (1956)

350 U.S. 270 [37 LRRM 2587]; German, Basic Text on Labor Law (1977) p. 341; O. P. Murphy Produce Company, Inc. (Oct. 26, 1979) 5 ALRB No. 63.)

Respondent has not established that the unfair labor practice strikers engaged in misconduct serious enough to warrant or justify denying them reinstatement to their former jobs. (0. P. Murphy Produce, supra, 5 ALRB No. 63.) In Coronet Casuals Inc. (1973) 207 NLRB 304, 305 [84 LRRM 1441], the NLRB held that:

> Each striker's eligibility for reinstatement must be judged solely upon the incidents in which the striker in question is alleged to have participated. Unauthorized acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence.

Therefore, when Respondent, on or after December 14, 1979, and on or after January 24, 1980, failed or refused to reinstate the unfair labor practice strikers who made unconditional offers to return to work, and failed to remove, if necessary, any or all of the replacement workers hired in their stead during the strike, it violated section 1153 (c) and (a) of the Act. (Mastro Plastics Corp. v. NLRB, supra., 350 U.S. 270; Vessey & Company, Inc. (Dec. 14, 1981) 7 ALRB No. 44.) We shall order Respondent to reinstate the strikers who unconditionally offered to return to work on December 14, 1979, and January 24, 1980, and to make them whole for all lost wages and other economic losses resulting from

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Respondent's unfair labor practices.[4/] The backpay period will run from December 14, 1979 or January 24, 1980, depending upon the date of each striker's offer, to the date on which Respondent offers them reinstatement to their prior or substantially equivalent positions.

Respondent's Lockout

On February 5, 1980, following several attempts by the parties to negotiate the return of those strikers who had unconditionally offered to return to work, Respondent notified the UFW that it was locking out all employees who had engaged in the strike. The ALO held that an employer cannot "convert a strike into a lockout with respect to a minority of striking employees who have mace an unconditional offer to return, because to allow such would be to allow the ability of a striking employee to return unconditionally to depend upon the discretion of the employer, and would sweep away a pillar of labor law." Respondent excepts to that analysis.

Respondent argues that it had a right to lock out the

[4/] At the compliance stage of this proceeding, Respondent may demonstrate that certain of the striking employees were permanently replaced prior to the conversion of; the strike to an unfair labor practice strike on February 21, 19^9. Such permanently replaced workers are entitled to reinstatement as of their unconditional offer to return on December 14, 1979 or January 24, 1980, unless Respondent also demonstrates that it was necessary to offer permanent employment to the replacements beyond the first harvesting season. Should Respondent make such a demonstration, the strikers who were thus permanently replaced for the subsequent season are entitled to preferential hiring to fill vacancies which occur after their unconditional offer to return to work. Additionally, if such vacancies occurred in subsequent seasons and the permanently replaced employees were refused rehire to fill those vacancies, then those employees eligible for the vacancies are entitled to backpay as of the date of the vacancy in the subsequent seasons. (Frudden Produce, Inc. (June 16, 1982) 8 ALRB No. 42; Seabreeze Berry Farms (Nov. 16, 1981) 7 ALRB No. 40.)

strikers because the strike was an economic strike, the conditions (an interim grievance procedure and a second strike vote) sought by Respondent as a quid pro quo for the strikers' return to work were reasonable, and the seasonal nature of Respondent's products would cause special business problems if Respondent reinstated the strikers.

The NLRB has held that an employer may lawfully lock out its employees "... for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." (American Ship Building Co. v. NLRB (1965) 380 U.S. 300, 318 [58 LRRM 2672].) Here, Respondent's bargaining position was not legitimate. Respondent, in bad faith, declared an impasse, and engaged in bad faith bargaining throughout, the strike. The facts here, and the arguments made by the parties, are similar to those in American Cyanamid Co. v. NLRB (7th Cir. 1979) 592 F.2d 356, 363 [100 LRRM 2640]:

> ... [T]he Company insists that it "strains credulity beyond the breaking point" ... to accept that the Union's unconditional back to work offer was bona fide. It describes the importance of the Fortier plant (which supplies numerous other Company plants with essential materials), the expense and danger to persons and property inherent in even a partial shutdown of the plant, the length and bitterness of the strike (including some serious incidents of violence), and on the basis of these factors characterizes the back to work offer as a Trojan Horse. The Company insists that the Union wanted to 'resume work only so that it could coerce the Company with the threat of another expensive and dangerous strike. Although such distrust is perhaps understandable in these unfortunately bitter circumstances, there is no support for it in the record. The Union repeatedly affirmed its good faith and its recognition that the Company was entitled to an assurance of a reasonable period without a strike. The Company points to the Union's refusal to propose such a reasonable time as evidence of its bad faith, but

this only demonstrates that the distrust was mutual....

. . . . . .

We need not decide under what circumstances an employer might be able to convert an economic strike to a permissible lockout or what conditions, if any, short of reaching agreement on the economic issues it might attach to ending such a lockout. Here we are faced with an unfair labor practice strike, which entitled the employees to reinstatement upon their unconditional back to work offer.

As in American Cyanamid, the strike in the instant matte: has been long and bitter. However, we agree with the NLRB and the court that these factors have an inconsequential impact upon the reinstatement rights of the returning unfair labor practice strikers. It is Respondent who prolonged the strike by its unfair practices and, thus, perpetuated the very circumstances and possible risks argued by Respondent to justify the lockout.

On the basis of the record evidence, we find that Respondent's lockout was not a permissible lockout.[5/] Rather, we find that it was an act of discrimination and retaliation against the strikers for engaging in union activity. The NLRB upheld the

[5/] In Darling & Co. (1968) 171 NLRB 801, 802 [68 LRRM 1133], enforced sub nom. , Lane v. NLRB (D.c. Cir. 1979) 418 F.2d 1208 [72 LRRM 2439] the NLRB held that an employer's lockout is legitimate if the record does not contain evidence allowing an inference that the employer was guided by a motive to discourage union activity or to evade bargaining. Absent such evidence, the NLRB would still find the lockout illegal if it inherently prejudiced union interests and was devoid of significant economic justification. The NLRB found the lockout legitimate because the parties had bargained extensively and in good faith on all subjects, the union had declared that it would strike, if it did so, at a tine of its own choosing, and there had been a history of work stoppages in the employer's busy season. (See, Carlson Roofing Co., Inc. (1979) 245 NLRB 13, 16-18 [102 LRRM 1532]; Gorman, Basic Text on Labor Law (1977) pp. 358-360.)

administrative law judge's decision in McGwier Co., Inc. (1973) 204 NLRB 492 [83 LRRM 1570] , which distinguished a privileged from an unlawful discriminatory lockout:

> In the instant case, unlike the situation in American Ship Building Co., 380 U.S. 300 (1965), and as noted in O'Daniel Oldsmobile, Inc., 179 NLRB 398, there is an obvious disparate treatment of employees in that the Company locked out only those employees who, by striking, had identified themselves as union adherents, while continuing to operate with those employees who had not joined the strike and then later with replacements. It cannot be said that Respondent's action was taken to enhance its bargaining position, for no bargaining position had yet even been taken by Respondent; rather, it seems that the purpose of the lockout was to undermine adherence to the Union by demonstrating to the employees, by the disparate treatment accorded union and nonunion employees, the advantages from the standpoint of job security of rejecting the Union or of refraining from concerted action in support of the Union.
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> On the basis of the above, it is found that the lockout in the instant case was not privileged and, by deliberately limiting the impact of the lockout to those employees who had struck, Respondent discriminated against them for striking, and by such action violated Section 8(a)(3) and (1) of the Act.

We find that Respondent declared the lockout for discriminatory purposes. Respondent did not claim that the lockout was justified because it sought to protect its claimed legitimate bargaining position. Respondent made a general note in its exception brief of the fact that its product is subject to spoilage, with neither a presentation of the extenuating circumstances faced by Respondent[6/] nor a showing of how the strikers, if reinstated,

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[6/](See Duluth Bottling Association (1943) 48 NLRB 1335, 1347-1350 [12 LRRM 151].)

would jeopardize production.[7/] Respondent also argues that the lockout would not have been imposed had the Union agreed to hold another strike vote as a condition of Respondent's reinstatement of those strikers who had unconditionally offered to return to work. The record does not support this argument. Respondent's negotiator testified that he offered the strike vote proposal, but admitted that he 'had not discussed it with Respondent.

We find ourselves faced with an issue similar to one resolved by the NLRB in Abilities and Goodwill, Inc. (1979) 241 NLRB 27 [100 LRRM 1470], enforcement denied on other grounds, 612 F.2d 6 [103 LRRM 2029]. (See Pappas & Company (Aug. 13, 1979) 5 ALRB No. 52.) The issue there was whether to require strikers who were unlawfully discharged to make an application for reinstatement. Here, we are faced with an unlawful lockout, which was, in effect, an unlawful discharge of the strikers.

Since unfair labor practice strikers are not entitled to backpay unless the employer refuses to reinstate them upon their unconditional offer to return to work, we must determine whether the strikers here could reasonably have believed that such an offer would be futile because of Respondent's conduct.[8/] Respondent's rejection of the 56 strikers' offers to return to work and its

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[7/](See International Shoe Company (1953) 93 NLRB 907, 909, 921-923 [27 LRRM 1504].)

[8/]Respondent's declaration of a lockout to the Union agents constituted constructive notice of the lockout to all the strikers, in view of the close relationship between the strikers and their Union. Respondent's declaration of a lockout to the union agents could reasonably be expected to have been communicated to all the strikers, making clear to them that a request for reinstatement would be a futile act.

subsequent unlawful lockout would surely tend to influence the other strikers in deciding whether to make application for reinstatement.[9/] Given that reasonable inference, it is likely that each individual striker was deterred from seeking reinstatement by Respondent's unlawful conduct. (J. R. Norton, supra, 8 ALRB No. 76.) We therefore resolve the issue here by using the NLRB's reasoning in Abilities and Goodwill:

> ... [B]ecause the uncertainty is caused by the employer's unlawful conduct, we will not indulge in the presumption that the discharge itself played no part in keeping the employees out of work. Rather, it seems to us more equitable to ^resolve the ambiguity against the wrongdoer and presume*, absent indications to the contrary, that the discharged strikers would have made the necessary application were it not for the fact that the discharge itself seemingly made such an application a futility. (Abilities and Goodwill, supra, 241 NLRB at p. 28.)

Therefore, we conclude that Respondent violated section 1153(c) and (a) of the Act by locking out all strikers on or after February 5. (Dimo Ambulette Service, Inc. (1981) 255 NLRB 5 [106 LRRM 1343].) We find that the locked-out strikers who did not make an unconditional offer to return to work prior to the lockout are entitled to reinstatement and to reimbursement for all lost wages and other economic losses resulting from Respondent's unlawful lockout. The backpay period for these strikers will run from February 5, 1980, to the date Respondent offers them reinstatement

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[9/] We note that in some circumstances the refusal to reinstate some unfair labor practice strikers who had offered to return to work may be a sufficient basis for the other strikers to believe that application for reinstatement would be futile. The negotiations between the Union and Respondent, and the strikers' January 24 offer to return, indicate to us that the strikers still believed, prior to the lockout, that reinstatement was possible.

to their prior or equivalent positions.

Remedy

Based on the record as a whole, we have concluded that Respondent violated section 1153 (e) and (a) by its unilateral changes and by its failures and refusals to bargain, continuing the acts and conduct which we found to be unlawful in Admiral Packing, supra, 7 ALRB No. 43. Respondent's refusal to reinstate the strikers who had made unconditional offers to return to work, and its subsequent unlawful lockout of the remaining strikers, were clearly in violation of section 1153 (c) and (a).

We shall therefore order Respondent to make whole its employees for all losses of pay and other economic losses they have suffered as a result of Respondent's acts of discrimination and refusals to bargain. (Montebello Rose, supra, 5 ALRB No. 64; 0. P. Murphy Produce, supra, 5 ALRB No. 63.) The record in this case presents the parties' bargaining history from February 28, 1979, the date the growers declared an impasse in the group bargaining, to July 14, 1980, the first day of the hearing in this case. We found in Admiral Packing, supra, 7 ALRB No. 43, that the employers, including Respondent herein, first refused to bargain in good faith on February 21, and we ordered makewhole awards for the affected employees to be computed from that date. Therefore, in our remedial order in this case, we shall order Respondent to make whole its employees for the economic losses they suffered from February 21, 1979, to July 14, 1980 (the date the hearing herein opened), and from July 14, 1980, until such time as Respondent commences good faith bargaining with the UFW which leads to a

contract or to a bona fide impasse. (John Elmore Farms, et al (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, supra, 7 ALRB No. 43. Respondent's employees will, of course, be made whole only once for the losses they incurred as a result of Respondent's bad faith bargaining.[10/]

ORDER

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

1. Cease and desist from:

(a) Unilaterally changing the wages or any other term or condition of employment of its agricultural employees, without first notifying and affording the United Farm Workers of America, AFL-CIO (UFW) a reasonable opportunity to bargain with respect thereto.

(b) Failing or refusing, through its general course of conduct, or otherwise, to bargain collectively in good faith, on request, with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

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

(c) Failing or refusing to bargain in good faith with the UFW concerning the effect on its employees' wages, or any other term or condition of their employment, caused by Respondent's implementation of a new harvesting operation.

(d) Failing or refusing to rehire or reinstate, or otherwise discriminating against, any agricultural employee because of his or her union activity or other protected concerted activity.

(e) Locking out, or otherwise discriminating against, any agricultural employee because of his or her Union activity or other protected concerted activity.

(f) 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 employees and embody any understanding reached in a signed agreement.

(b) If the UFW so requests, rescind its unilateral wage increases of 1979 and thereafter bargain in good faith with the UFW over any proposed wage increases for its agricultural employees.

(c) If the UFW so requests, rescind any or all changes in its employees' wages and working conditions caused by the implementation of lettuce wrap machines and thereafter bargain.

in good faith with the UFW over the effects of any proposed change in operation on the wages, working hours, or any other term or condition of employment of its agricultural employees.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's 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 July 14, 1980, and from July 14, 1980, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(e) Offer to the below-named strikers, who made an unconditional offer to return to work on December 14, 1979, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them, 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:

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Jesus Arredondo
Cesar Beyam
Lidia Buzo
Gilberto Correa
Santiago Covarruvias
Ernesto G. De La Rosa
Ramon Duran
Guillermo Duron
Jose A. Franco
Asencion Galabiz
Higinio Gallo
Jose Guzman
Amador Hernandez
Gilberto Hernandez
Jesus Hernandez
Elicio Herrera
Mario Larios
Atilano Leyva
Enrique Lopez
David Marquez
Adrian Martinez
Antonio Martinez
Armando Martinez
Enrique Martinez
Hector Martinez
Ignacio Martinez
Jose Martinez
Ladislao Martinez
Pedro Martinez
Nazario Mendez
Juan Morales
Aniceto Murguia
Marcelino Palacio
Elias Peceno
Isabel Perez
Jose Quijas
M. Quintero
Jesus Reyna
Manuel Rivera
Carlos Rodriguez
Santiago Ronquillo
Ramon Sepulveda
Hilario Sierra
Cecilio Zuniga

(f) Offer to the below-named strikers, who made an unconditional offer to return to work on January 24, 1980, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them, 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. 13, 1982)

8 ALRB No. 55:

Ramon Burgos
Lorenzo Contreras
Julian de Lucas Garcia #2
Emeterio Gallegos
Ruben A. Gonzalez
Elias Torres Jaime
Manuel Navarro
Guadalupe Pacheco
Juan Placencia
Felipe Rios
Vicente Saucedo
Domingo Solis

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(g) Offer to all the strikers Respondent locked out on February 5, 1980, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of Respondent's unlawful lockout, 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.

(h) 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 backpay and makewhole periods and the amounts of backpay, makewhole and interest due under the terms of this Order.

(i) 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.

(j) 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 April 5, 1979, until the date on which the said Notice is mailed.

(k) Post copies of the attached Notice, in all

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

(1) 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.

(m) 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.

(n) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, 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: December 15, 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, by the United Farm Workers of America (AFL-CIO) (UFW), the certified bargaining representative of our employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Mario Saikhon, Inc., 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 changing employees' wages and working conditions without notifying or bargaining with the UFW; by failing to bargain in good faith with the UFW; by failing or refusing to reinstate unfair labor practice strikers who offered to return to work on December 14, 1979, and or. January 24, 1980; and by locking out all unfair labor practice strikers on February 5,.1980. The Board has told us to post and publish this Notice. We will, do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all 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 promise that:

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

WE WILL meet with authorized representatives of 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, plus interest.

WE WILL NOT fail or refuse to rehire or reinstate, or otherwise discriminate against, any agricultural employee in regard to his or her employment because he or she has engaged in a lawful strike or otherwise supported the UFW or any other labor organization or engaged in any other protected concerted activity.

WE WILL offer to reinstate all employees, then on strike, who offered to return to work on or about December 14, 1979, and on or about January 24, 1980, to their former or substantially equivalent positions, without loss of seniority or other employment rights or privileges. We will reimburse them for all losses of pay and other economic losses they incurred because we discharged or failed to rehire them, plus interest.

WE WILL offer to reinstate all employees, then on strike, who we locked out on or about February 5, 1980, to their former or substantially equivalent positions, without loss of seniority or other rights or privileges. We will reimburse them for all losses of pay and other economic losses they incurred because we locked them out, plus interest.

Dated: MARIO SAIKHON, 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.

CASE SUMMARY

Mario Saikhon, Inc.
(UFW)

8 ALRB No. 88
Case Nos. 79-CE-70-EC
79-CE-170-EC
79-CE-178-EC
79-CE-248-EC
79-CE-248-1-EC
80-CE-39-EC
80-CE-110-EC

ALO DECISION

Respondent's employees engaged in an economic strike to induce Respondent to come to terns on a contract renewal with their bargaining representative/ the UFW. Respondent was a member of the employer group in Admiral Packing Company, et al. (Dec. 14, 1981) 7 ALRB No. 43. The ALO found that, if the Board found that the impasse the growers declared in the Admiral Packing case was bona fide, then Respondent's unilateral increase in its tractor drivers' wages was permissible. However, if the impasse was not bona fide, then the increase was a per se violation of section 1153 (e) and (a) of the Act.

The ALO concluded that Respondent violated the Act by unilaterally granting an increase in the lettuce workers' piece rate which exceeded its last offer before declaration of impasse, but that Respondent's institution of a unilateral increase in its irrigators' wages did not violate the Act because the UFW waived its bargaining rights as to that increase by not initiating discussion at a negotiating meeting and by rejecting bargaining over the increases in lieu of pursuing negotiations over a comprehensive agreement. The ALO also concluded that Respondent did not violate the Act by raising its general labor rate, finding that the UFW waived its right to bargain about that rate by requesting the bargaining of a comprehensive agreement and by responding in a manner which discouraged the initiation of bargaining over the specific increase.

The ALO concluded that, although Respondent did not have to bargain over its decision to use lettuce wrap machines, it violated section 1153(e) and (a) of the Act by failing to give the Union notice and an opportunity to bargain over the effect on employees of that decision. The ALO found that General Counsel failed to establish that Respondent bypassed the Union by dealing directly with employees concerning proposed wage changes.

The ALO concluded that Respondent did not violate the Act by refusing to rehire striking employees who had offered to return to work. Although a large number of the employees made unconditional offers to return to work, the ALO found that Respondent had a legitimate and substantial business justification for denying the strikers reinstatement. Respondent had asked the Union for an interim grievance procedure, a second strike vote, and assurance that

there would not be any work stoppages by the returning strikers. The Union responded that it could not prevent employees from engaging in protected concerted activity. The ALO found that Respondent legitimately placed conditions on the strikers' reinstatement, but that Respondent could not convert the strike into a lockout.

BOARD DECISION

In view of its findings in Admiral Packing that the employer group engaged in bad faith bargaining and that there was no bona fide impasse, the Board concluded that Respondent violated the Act by unilaterally increasing its tractor drivers' wages. The Board affirmed the ALO's conclusions that Respondent violated section 1153(e) and (a) of the Act by unilaterally increasing its lettuce piece rate and by continuing the bad faith bargaining it began in the Admiral Packing case. The Board rejected Respondent's defense that its duty to bargain was suspended by strike violence involving other employers, since Respondent failed to adduce any evidence about the effect the strike violence had upon the bargaining of the parties and since there was minimal evidence about such violence. The Board also rejected Respondent's argument that it had to raise the tractor drivers' wages in order to retain a stable work force.

The Board reversed the ALO's finding that Respondent gave the UFW notice and an opportunity to bargain over the increases it instituted in the irrigators' wages and the general labor rate. The Board found that Respondent's notices merely announced to the UFW when the wage increases would be implemented, and that Respondent attempted to limit bargaining and to negotiate an agreement on a piecemeal basis. The Board reversed the ALO's conclusion that the UFW waived its right to bargain, noting that ALRB and NLRB precedent require that a waiver be intentional, clear and unequivocal.

The Board concluded that Respondent violated Labor Code section 1153 (e) and (a) by unilaterally using the lettuce wrap machines without notifying and giving the UFW an opportunity to bargain over the effects of their usage.

The Board reversed the ALO's finding that Respondent was relieved of its duty to reinstate the strikers who made an unconditional offer to return to work, citing NLRB precedent which required a showing of each unfair labor practice striker's misconduct before judging whether his or her misconduct was serious enough to justify denial of reinstatement. The Board ordered reinstatement of the strikers, and backpay commencing from the date of their unconditional offer to return to work.

The Board concluded that Respondent's lockout discriminated against the strikers for engaging in union activity and thereby violated section 1153(c) and (a) of the Act, finding that Respondent failed to adduce evidence to establish that the lockout was justified by

business necessity. The Board found that Respondent's declaration of the lockout .tended to discourage strikers who had not made an unconditional offer to return to work from making such an offer because the declaration reasonably implied that such an offer would be futile. The Board therefore ordered reinstatement and backpay as of the date of the lockout for the strikers.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	CASE NOS. 79-CE-70-EC 79-CE-170-EC 79-CE-178-EC 79-CE-248-EC 79-CE-248-1-EC 80-CE-39-EC 80-CE-110-EC Decision of Administrative Law Officer

Appearances:

Deborah Escobedo, Esq.,
El Centro, California, for General Counsel

Dressier, Stoll, Quesenbery, Laws & Barsamian,
Newport Beach and El Centro, California, by
Marion I. Quesenbery, Esq., and Daniel D.
Haley, Esq., for Respondent

Chris Schneider, Keene, California,
for Charging Party

DECISION

STATEMENT OF THE CASE

NORMAN I. LUSTIG, Administrative Law Officer:

These cases were heard before me in El Centro, California, on July 14-15 and August 14-15, 1980. The Order Consolidating Cases and the Consolidated Complaint were issued on May 27, 1980. The Consolidated Complaint alleges violations of Sections 1153(a),

1153(c), and 1153(e) of the Agricultural Labor Relations Act (Labor Code Sections 1140 et seq) hereinafter called "the Act", by Mario Saikhon, Inc., hereinafter called "Respondent". The Consolidated Complaint is based on charges filed on August 3, November 30, December 6 and December 31, 1979, and on January 16 and February 21, 1980. Respondent filed an answer to the then Complaint on December 7, 1979. Copies of the charges and Consolidated Complaint were duly served on Respondent by the United Farm Workers of America, AFL-CIO, hereinafter called "the Union".

The outcome of part of this complaint will turn upon the good faith status of a declaration of impasse on or about February 28, 1979, by a joint employer bargaining group which included Respondent. The parties herein have stipulated that the status of the declaration vis-a-vis this case will be determined by the decision of the Board in the case of Admiral Packing, et al, Case Nos. 79-CE-78-EC, et al, presently pending before the Board. To the extent applicable, this decision responds to both possible alternative decisions in that case.

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

Upon the entire record, including my observation of the demeanor of the witnesses, detailed examination of the physical evidence, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

The Respondent Corporation grew lettuce at all relevant tines in Imperial County, California. The Respondent is now and has beer, at all times material an agricultural employer within the meaning of Section 1140.4 (c) of the Act.

The Union is now, and has been at all times material herein, a labor organization within the meaning of Labor Code Section 1140.4 (f) .

II. Overview of The Alleged Unfair Labor Practices.

The Consolidated complaint alleges:

A. That Respondent violated Section 1153(a) of the Act by (1) unilaterally increasing the wages paid to its agricultural employees on or about July 27, 1979, without negotiating the increase with the Union; (2) by increasing wages paid to its agricultural employees after October 1, 1979, to a level in excess of Respondent's last bargaining offer, without notice to or bargaining with the Union; (3) by increasing its wages to its agricultural employees on or about December 15, 1979, for the lettuce harvest season, in excess of Respondent's last bargaining offer, without notice to or bargaining with, the Union; (4) by using lettuce wrap machines for the first time on or about December 15, 1979, without notice to or bargaining with the Union; and (5) by failing to rehire into vacancies strikers who unconditionally offered to return en or about December 11, 1979 and on or about January 24, 1980; all to the interference with, restraint, and coercion of agricultural employees' exercise of rights guaranteed by Section 1152.

B. That Respondent violated Section 1153 (e) of the Act by virtue of the acts listed in A. (1)-A(4), supra, those acts constituting unilateral changes of the terms and conditions of employ-

ment constituting a refusal to bargain in good faith;

C. That Respondent violated Section 1153 (c) of the Act by virtue of the acts listed in A.(5), supra, in that Respondent discriminated in regard to hiring and tenure against supporters of the Union, in order to discourage membership in the Union;

D. That Respondent violated Section 1153(e) of the Act by virtue of the acts listed in A.(5), supra, in that Respondent engaged in acts to undermine the authority of the certified bargaining representative.

The Respondent denies that the Act Has been violated.

III. The Operative Facts

The Respondent farms, inter alia, lettuce in the Imperial Valley. The Union was certified as the representative of Respondent's agricultural employees on August 18, 1977, and a collective bargaining agreement was thereafter entered into between the Respondent and the Union in February, 1978.

On January 22, 1979, the Union struck against the Respondent. During that month and the following month, the Respondent negotiated with the Union as part of a joint employer group. On February 21, 1979, that group presented a proposal, including wages, to the Union. On February 28, 1979, the Union gave a counterproposal to the group. The employers declared an impasse that same day. As indicated above, the validity of that impasse will be decided in another proceeding. The strike, which was ongoing at the time of the hearing, was marked by violence. It was also clear from the hearing that the Respondent (as well as the Charging Party) was

highly sophisticated both in the use of tactics under the ALRA, and in the presentation of a severely and consciously limited hearing record.

Wage Increases

On April 5, 1979, about 5 weeks after the employers' proposal, the Respondent raised the wages of its tractor drivers (only) to the wage level for tractor drivers offered in the group proposal of February. No prior notice of the implementation was given to the Union, nor was any substantial excuse for the failure raised at the hearing of this matter. I found the testimony of Mario Saikhon (the individual) on this and all other points to be conflicting, casual, and generally unbelievable, and I strongly discount it.

On July 10, 1979, Respondent notified the Union, by telegram, of its intention to raise the base pay rate and other rates in proportion. No mention was made of the previously increased tractor rates. Three days later, on July 13, 1979, the Union replied by telegram, stating that any raise would constitute an unfair labor practice, that there had been no impasse in bargaining, and that the Union stood ready to resume negotiations. Respondent replied on July 27, giving notice of implementation of a "historical" wage increase .

The parties met and bargained inconclusively on August 8, 1S73, but the subject of this announced raise was not raised by the Union or otherwise covered at the meeting. Thereafter, on August 17, the Respondent put into effect its second relevant wage increase, increasing irrigators' wages, but to a level below the level proposed for irrigators in the February 21 employer offer. About a month later, on September 20, irrigators' wages were again raised, but

to a level still below the February 21 offer.

On September 26, Respondent notified the Union that all wages would be raised to the last employer offer of February 21. The Union responded that it was opposed to unilateral increases and that it wanted to negotiate a general settlement of the strike. On October 7, the Respondent raised the general labor pay rate to the February 21 offer level. Other than its -pro-forma objections, the Union made no apparent effort to bargain over the wage increases.

On December 15, 1979, at the beginning of the lettuce harvest, the Respondent raised the lettuce piece rate to 75C per box, a level in excess of the February 21, 1979 employers' offer. The justification for this increase was generally claimed to be information as to the prevailing rate necessary to be paid in order to obtain workers.. That information was variously claimed to have come from other employers, a foreman who had worked in immediately previous lettuce harvest in Arizona, and workers. However, the timing of the increase strongly suggested that it was set prior to access to any such information. The Union was not notified of the increase, nor was any reason advanced for the lack of notice (other than the expectation that the Union would not agree to the increase). The 75$ per box rate matched the level in a contract between the Union and "Sun Harvest"; there was no clear evidence of the piece rate paid by other growers.

Returning Strikers

Shortly prior to December 14, 1979, the day before the beginning of the lettuce harvest, two of the striking workers approached

one of Respondent's foremen and offered to return to work. The foreman told them that he would have to check with Mario Saikhon (the individual) and told the workers to return for an answer that weekend. The foreman also told the workers that if they returned, they could not again go out on strike as happened at other companies in the Imperial Valley. The workers indicated that they wished only to work.

The workers returned at the appointed time, carrying a list of 42 other striking workers who wished to return to work. The list, which was prepared by the Union, did not indicate that the offer to return to work was an "unconditional" offer, but did not place any conditions upon the return. No Company representative was available to speak to the potentially returning workers at the time set for the meeting. The foreman to whom the workers had previously spoken was away owing to a death in his family, and Mario Saikhon (the individual) did not appear. The list and written offer to return was left at the Company offices on December 14, 1979.

On December 26, 1979, Ron Barsamian, an attorney for Respondent, contacted the Union for the first time after the back-to-work offer, initiating a series of meetings and letters between the Union and the Respondent, extending until January 21, 1980. The subject matters of the contacts were the Respondent's desire for assurance that the returning workers had the permission of the Union to return (in view of their disqualification under the Union constitution if they crossed a picket line without permission), whether the offer constituted an end to the strike, and primarily, the Respondent's attempt to extract a commitment from the Union

that the returning workers would not engage in a series of on-and-off walkouts. The Respondent had the latter concern because of the general level of violence attendant to the Union's strikes against growers in the Imperial Valley in the relevant time frame, and on-and-off walkouts by strikers against other growers in the Valley. In its contacts with the Union, the Respondent discovered that the return offer did not constitute the end of the strike against it, that the Union would not agree that the returning workers would not go out again for a set period of time, that the Union would not agree to holding a new strike vote before the returning workers would go out again, and that the Union would not agree to an interim grievance procedure to minimize the possibility of a new walkout. The Union stated that it could not prevent the returning employees from walking out over a new problem, and that the Union did not condone violence although it could not always prevent it. On January 17, 1980, Barsamian wrote to the Union to announce that the Respondent would not allow the offering strikers to return. That decision was taken by the Respondent sometime after the last meeting, on January 10, between Barsamian and a Union attorney.

Thereafter, on January 21, 1980, Union attorney Frank Fernandez, wrote to Barsamian making an "unconditional" offer to return on behalf of the employees on the December 14 list. Also thereafter, on January 24, 1980, a second list of strikers offering to return, was given to the Respondent.

On February 5, 1980, Charley Stoll, another attorney for Respondent, wrote to the Union, stating that the Company was locking

out its striking employees.

Lettuce Wrap Machines

At some time during the 1979-80 lettuce harvest season, the Company used two lettuce wrap machines in the harvest, the first time in many years that the Company used lettuce wrap machines. Lettuce machine employees are paid by the hour, rather than by the piece as are employees in lettuce ground crews. Employees in lettuce ground crews make substantially more money than do employees on lettuce machines, and the individual jobs differ substantially between the two crews, in type, or workload, or both. The lettuce harvested by machine crews in 1979-80 was less than 5% of the total harvest, and there was no showing that the amount of Respondent's harvest remained constant from year to year so that a diminution in the work for ground crews was demonstrated for the 1S79-80 year. However, the expired contract between Union and Respondent required prior notice to the Union of the rate for any new jobs, and arbitration if the Union and the Company were in disagreement.

As alluded to above, the actions at Respondent's operations did not occur in a labor relations vacuum, affecting that Company only. There was substantial contemporaneous labor interaction between the Union and employers in the Imperial Valley, and a substantial level of violence (although none attributed to any of the potentially returning strikers, nor was much violence in the Mario Saikhon strike itself, demonstrated). The bargaining attempts by the Union with the Respondent during the post-alleged "impasse" period were minimal, in that the sole meeting between the Union and the Respondent (other than the flurry of letters and meetings

about the returning strikers) during the relevant time period did not relate to the matters under issue in this complaint. Other than the flurry of activity surrounding the returning workers, and the sole unrelated meeting, the Union contacts with the Respondent consisted of objections to specific proposed pay increases coupled with demands to bargain on all contractual issues, usually without specificity and always without follow-up. It was clear, in the context, that the Union did not respond to any wage increase announcement in a manner calculated to enter into negotiations over the specific increase.

Recall Notices

The Respondent did not send recall notices to its (striking) employees for the 1979-80 lettuce harvest season, although it sent such notices to the striking employees during the prior weeding and thinning season, and had done so in the past while the contract was in effect. No striking employees responded to the weeding/ thinning notice.

Direct Bargaining

Mario Saikhon (the individual) testified generally, that he received information concerning prevailing wages in part from reports of conversations between his foremen, and hourly employees.

Finally, as indicated, both the General Counsel and the Respondent attempted to control the record in the hearing closely, so as to advance their respective positions. While that tactic is certainly legitimate, it has clearly resulted in giving the Administrative Law Officer an understanding of the facts which is far from comprehensive, and has resulted in both parties' request in

their briefs, that some findings be based on conjecture. The Administrative Law Officer declines to go beyond the facts proved.

IV. Discussion of the Issues, Conclusions, and Findings of Law

A. The Wage Increases.

As indicated above, the parties have stipulated that the issue of impasse is to be determined in another case. Accordingly, I have set forth findings with respect to the wage increases in the alternative, whether there was an impasse, or not, In summary, I find and recommend that the Board find the commission of a per se unfair labor practice by the Respondent under Sections 1153(a) and (e) of the Act with respect to the increase in the lettuce piece rate on or about December 15, 1979, regardless of the existence or absence of an impasse on February 28, 1979; I find and recommend that the Board find the commission of an unfair labor practice under Sections 1153(a) and (e) of the Act with respect to the April 5, 1979 increase to tractor drivers, only if no impasse existed on February 28, 1979; and I do not find, and recommend that the Board not find any unfair labor practices with respect to the wage increases for irrigators in August and September, 1979, and the general labor increase in October, 1979, regardless of the existence of an impasse, or not, on February 28, 1979.

1. The Lettuce Piece Rate Increase.

On or about December 15, 1979, the lettuce piece rate was increased to 754, above the "alleged impasse" level. There was testimony by witnesses for the Respondent that the increase was in response to surveys of the prevailing wage of various levels

of formality, that the "going rate" must be paid or workers are unavailable, and that the increase was a "historical" practice. Based upon the demeanor of the witnesses, the inconsistency of the accounts, and the use of naked assertions without any corroboration of substance, under circumstances in which corroboration should have been easy, the Administrative Law Officer finds that the Respondent has not met the burden of demonstrating a lawful justification for a wage increase without prior notification, and beyond the "alleged impasse" level. While a wage increase after notification and affording a union the opportunity to bargain, may be permissible (NLRB v. Katz (1962) 369 U.S. 736, 50 LRRM 2177; Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36), and while a unilateral increase, without "notice, to an impasse level may be permissible, the respondent failed both tests in this instance and violated the Act regardless of the existence or absence of an impasse, and regardless of the state of mind 'of the Respondent.

2. The April 5, 1979, increase to Tractor Drivers.

The Respondent offered evidence concerning the April 5, 1979, increase to tractor drivers, similar in thrust and quality to the evidence concerning the lettuce piece rate increase. The Administrative Law Officer also finds that the Respondent has not met the burden of demonstrating a lawful justification for the increase, in the absence of notice to the Union and the opportunity for it to bargain, unless there existed an impasse on February 28, 1979. If an impasse existed, a unilateral increase to the impasse level, without notice, was permissible, if not, a per se violation occurred.

3. The Wage Increases in August, September, and October, 1979

Wage increases no higher than the "alleged impasse" level were given to irrigators in August and September, 1979, and to general labor in October, 1979. The increases were preceded by notices to the Union on or about July 12, and on or about September 26. The uniform tone of the Union responses was that there was no impasse in the Union view, that the Union was opposed to the specific increases, and that the Union concern was with the negotiation of a comprehensive settlement. The Union made no suggestions other than opposition to the increases, and failed to follow through to bargain over the increases, as opposed to an overall settlement. In fact, a bargaining session, apparently the only one during 1979 after February 28, was held on or about August 8, 1979, and the increases announced prior to that date, but not yet implemented, were not even raised by the Union. The Administrative Law Officer finds, and recommends that the Board find, that the Union waived its right to bargain over the increases, by its failure to pursue its bargaining rights.

Under the recounted circumstances, the Administrative Law Officer finds that the Respondent fulfilled its legal duties with respect to the increases under the authorities cited above, and that no violation of the Act occurred with respect to the August, September, and October, 1979, wage increases.

B. Lettuce Wrap Machine.

As indicated, the Respondent used two lettuce wrap machines during the 1979-80 harvest without notice or bargaining, after many years of exclusive use of ground crews. Although there was no

showing that the work of the ground crews was diminished thereby, the Union is the bargaining agent for all lettuce harvest employees of Respondent regardless of the mode of harvest. Further, the former collective bargaining agreement contained a "New or Changed Operations" Article 18, which requires prior notice to the Union of the wage rate to be paid for a new or changed operation, and resort to the grievance procedure including arbitration if agreement is not achieved concerning the acceptability of the proposed rate.

While it is likely, as the Respondent argues in its brief, that the management rights reserved to the Respondent in the contract would allow it to institute a new or changed operation without direct notice of such to the Union, under the contract as written (and the Administrative Law Officer discounts the testimony of Union witness Smith that the plain language of Article 18 "really" covers bargaining over all aspects of changed operations/ not just wages), the Respondent was still clearly obligated to give notice of new wage rates (and indirectly of new jobs) to the Union, and the Respondent did not fulfill that contractually based duty. Therefore, I find and recommend that the Board find that the Respondent violated Sections 1153 (a) and (e) and committed an unfair labor practice in failing to give to the Union, notice of the wage rates for the new (or changed) lettuce machine operation. Further, although the Administrative Law Officer has some doubts as to the theoretical justification for the extension of law, the federal courts, under the NLRA, appear to have uniformly moved in the direction of preserving arbitration rights contained in an expired

contract, even if the arbitration called for by the expired contract is interests arbitration. Steelworkers of America v. Fort Pitt Steel Casting (3rd Circuit, No. 80-1431, November 20, 1980) 236 Daily Labor Report (BNA) F-l. A per se violation occurred.

C. The Failure to Send Recall Notices.

The Respondent did not send recall notices to its (striking) employees for the 1979-80 lettuce harvest season, although it sent such notices to the striking employees during the prior weeding and thinning season, and had done so in the past while the contract was in effect. No striking employees responded to the weeding/thinning notice.

The Administrative Law Officer finds, and recommends that the Board decide, that the Respondent did not violate the Act by its failure to send recall notices to striking employees, many of whom received and did not respond to the earlier weeding/thinning notice. The law does not require an idle act, and a recall notice to employees on strike against the work which is the subject of the recall, appears to have no practical justification. In an analogous situation, the Board has indicated that the realities of a strike situation should be recognized. Colace Brothers, Inc. (1980) 6 ALRB No. 56.

D. The Failure to Recall Strikers Who Offered to Return To Work.

On or about December 14, 1979, and on or about January 24, 1980, two groups of striking employees offered to return to work. The first offer touched off a series of letters and meetings between attorneys for the Union and the Respondent concerning

whether the offers constituted an abandonment of the strike, whether the offers were unconditional, and whether the Union would agree to procedures which would prevent the Respondent from being subject to repeated "quickie" strikes. The written return to work offers did not specifically state that the offer was "unconditional", but no specific language is required in an offer. Servair, Inc. v. NLRB (10th Circ. 1968) 67LRRM 2337. I find that there was a valid unconditional offer to return on or about December 14, 1979.

If an unconditional offer to return to work is made, then economic strikers must be restored to an appropriate vacancy not filled by a permanent replacement, and unfair labor practice strikes must be restored even if permanently replaced, unless a legitimate substantial business justification exists for denying reinstatement. NLRB v. Fleetwood Trailer (1967) 389 U.S. 375, 66 LRRM 2237; American Cyanimid v. NLRB (7th Circ. 1979) 100 LRRM 2640. The employer bears the burden of establishing that no places are available for returning economic strikers. W.C. McQuaide, Inc.; (NLRB, 1978) 98 LRRM 1595. I find that the Respondent has not met that burden.

The issue then raised is whether the Respondent had any legitimate and substantial business justification for denying reinstatement to either economic or unfair labor practice strikers. The only such justification possible is that under the instant circumstances, the Respondent had a legitimate and substantial fear of a series of quickie strikes which would disrupt the annual lettuce harvest if they occurred. The Respondent did act as if that possibility were a legitimate and substantial fear, and attempted to gain reasonable assurances from the Union to guard against unsanc-

tioned disruptions. I find that the Respondent did so in good faith. The Union declined to give such assurances, perhaps motivated by the unspoken fear that the assurances would render the return to work offer, conditional. (See American Cyanimid v. NLRB, supra)

The Administrative Law Officer is aware of the weight of law under the NLRA that an employer generally may not attach conditions to unconditional offers to return, and the view of the courts that employers tend to be over-apprehensive about the likelihood of disruptions by returning strikers. (See American Cyanimid v. NLRB, supra.) However, the situation involving Respondent has significant differences from the normative NLRA situation. The actuality of disruption had been demonstrated in apparently parallel situations in the Imperial Valley in the same time frame, rather than being a theoretical possibility for a single employer viewed independently. Unlike most manufacturing situations encountered by the NLRB, respondent had somewhat limited control over the time of production (harvest) and no apparent ability to shift its production to other facilities. Further, a somewhat shaky majority of the NLRB has taken account of the special problems faced by employers with seasonal products, in the context of an "offensive" lockout. See Inter Collegiate Press (NLRB,1972; 81 LRRM 1508; Sargent Welch Scientific Co. (1974) 208 NLRB 811. Finally, I find that good faith proposal of institution of a "second strike vote" or "interim grievance procedure" is not inherently destructive of rights guaranteed by the Act.

In view of the foregoing and in view of Section 1148 of the

Act, the Administrative Law Officer finds and recommends that the Board find, that the conditions placed by the Respondent upon the unconditional offer to return by the strikers were legitimate and substantial, reflecting compelling business concerns, and their non-acceptable by the Union constitutes a defense for the Respondent. The Administrative Law Officer cannot condone the initial delay in response to the request, nor the cavalier treatment of the returning strikers, when they appeared for a meeting, but cannot find, in the context of the related interaction between the Union and the Respondent, the commission of an unfair labor practice. The Administrative Law Officer declines to adopt the NLRB five day response standard as requested by the General Counsel, and notes, in support of a more flexible standard, that the returning strikers appeared at the beginning of the harvest, very close to the Christmas holiday, and after having been on strike for approximately ten months. While twelve days is at the outer limit of a lawful response time, it is not clearly outside that limit. Finally, the Act prohibits certain acts in connection with Agricultural Employment; it does not require interpersonal pleasantness and tact generally in agricultural employment.

In the event that the Board does not agree with the foregoing analysis, the Administrative Law Officer deems it appropriate to deal briefly with the defense of "lockout". Having reviewed American Cyanimid, supra, and the other precedents, the Administrative Law Officer does not consider a general ruling upon the legal ability of an employer to "convert" a strike into a lockout,

either necessary or appropriate in this case. However, in the event a more narrow ruling becomes appropriate, the Administrative Law Officer concludes that an employer cannot convert a strike into a lockout with respect to a minority of striking employees who have made an unconditional offer to return, because to allow such would be to allow the ability of a striking employee to return unconditionally to depend upon the discretion of the employer, and would sweep away a pillar of labor law.

E. Direct Bargaining With Employees.

The Administrative Law Officer finds that this allegation, not alleged in the Complaint, was not fully litigated at the hearing. Based upon the evidence to the extent adduced at the hearing, the General Counsel has not sustained the burden of demonstrating direct dealing, as opposed to irregular use of employees as informational conduits. As indicated above, Mario Saikhon's (the individual) testimony was so contradictory, casual, and unreliable, that it benefits the General Counsel no more on this point than it did the Respondent on other points.

The Administrative Law Officer finds and recommends that any allegations and causes of action not specifically covered by this opinion be dismissed as unproved.

V. Remedy.

On the record of this case alone, the Administrative Law Officer deems a make-whole remedy to be inappropriate, in part in view of the circumstance that replacement employees were working throughout. However, in the event that the Board substantially upholds the recommenced decisions of the respective Administrative

Law Officers in both Admiral Packing, et. al., 79-CE-78-EC, et. al., and this case, then this Administrative Law Officer recommends that the Board consider fashioning a make-whole remedy for both cases which covers the unfair labor practices found herein.

On the basis of the foregoing findings of fact and conclusion of law, and the entire record in this proceeding, and pursuant to the provisions of Section 1160.3 of-the Act, I recommend that the following order be issued by the Board:

ORDER

By authority of Labor Code section 2:160.3, the Agricultural Labor Relations Board hereby orders Respondent, Mario Saikhon, Inc., its officers, agents, successors, and assigns to:

1. Cease and desist from:

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

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

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

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

other terms and conditions of their employment.

(b) Without limiting (a), upon request promptly meet and bargain with the UFW over the wages paid to lettuce wrap machine employees, proceed to arbitration on the issue if no agreement is reached, and bear all costs of arbitration, including reasonable attorney's fees, unless the Arbitrator specifically finds that the Union proceeded to the arbitration step in bad faith. If the Arbitrator finds bad faith on the part of the Union, each party shall bear its own costs.

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

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

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

(f) Mail copies of the attached Notice in all appropriate languages, within 30 days after the date of issuance of the order to all Respondent's agricultural employees employed or on its seniority roster at any time during the payroll periods immediately preceding January 15, 1979, and January 15, 1980.

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

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

Dated: January 21, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By: _____
Norman I. Lustig
Administrative Law Officer

NOTICE TO EMPLOYEES

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

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

1. To organize themselves;

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

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

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

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

Because this is true, we promise you that:

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

MARIO SAIKHON, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.