Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LU-ETTE FARMS, INC., Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-125-EC 79-CE-199-EC 80-CE-38-EC 8 ALRB No. 91

SUPPLEMENTAL DECISION

On December 21y 1982? we issued a Decision and Order in the above-captioned matter. On our own motion, and pursuant to Labor Code section 1160.3, paragraph 2, we make the following modification in our original Decision.

Footnote 4, on page 6, should read as follows:

> In Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, we concluded that Respondent herein discriminatorily refused to rehire strikers who had made written and/or oral unconditional offers to return to work.

Dated: January 18, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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DECISION AND ORDER

On May 21, 1983, Administrative Law Officer (ALO) Robert LeProhn issued the attached Decision in this proceeding. Thereafter, Respondent Lu-Ette Farms, Inc. timely filed exceptions and a supporting brief, and General Counsel and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed a reply brief.

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

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

We affirm the ALO's conclusions that Respondent violated section 1153 (e) and (a) of the Agricultural Labor Relations Act

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

(Act or ALRA) by unilaterally increasing the wages of its tractor drivers, irrigators, and lettuce weeders and thinners, by unilaterally increasing its lettuce harvest piece rate, and by unilaterally reinstituting its prior practice of giving pay advances during its 1979-80 lettuce harvest.

However, we reverse the ALO's conclusion that Respondent violated section 1153(e) and (a) in October 1979, by instituting a new system of machine harvesting honeydew melons, without prior notice to or bargaining with the UFW about that change. Applying the standards we set forth in O. P. Murphy Produce Co., Inc. (Nov. 3, 1981) 7 ALRB No. 37, the ALO found that Respondent's decision to automate or mechanize its melon harvest was a mandatory subject of bargaining. We find, however, that Respondent was not required to bargain over its decision to use the melon harvesting machines, since General Counsel failed to establish that the introduction of the machines reduced the amount of bargaining unit work or caused workers to be displaced. (Joe Maggio, Inc., Vessey & Company, Inc., & Colace Brothers, Inc. (Oct. 7, 1982) 8 ALRB No.72.)

In Joe Maggio, an employer instituted a lettuce wrap operation without giving the union notice or an opportunity to bargain about the change. Prior to implementation of the new operation, the workers cut the lettuce by hand and packed it in boxes placed between the rows, and they were paid by the box. After the machines were introduced, the employees continued to cut the lettuce by hand, and then placed it on a conveyor belt which carried the lettuce to a machine where it was wrapped and packed by another group of employees. Both the cutters and the

machine workers were paid an hourly wage. We held that the employer's decision to use the new lettuce wrap machines was not a mandatory subject of bargaining, based on our interpretation of the Supreme Court's decision in First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]. Although the lettuce wrap machines changed the character of the harvest substantially, they did not displace workers or reduce the amount of work to be performed. We noted, however, that the effect of the changed operation on employees' wages, hours, and working conditions was a mandatory subject of bargaining.

The introduction of lettuce machines in Joe Maggio is quite similar to the type of mechanization that occurred in Respondent's melon harvest in the instant matter. The melons, like the lettuce, continued to be cut by hand. The only change caused by the use of the machines was that the workers, rather than loading the melons directly onto a truck for transport, picked up the melons in the field and placed them on a conveyor belt leading to a truck. There is no evidence that the introduction of the melon harvesting machines reduced the amount of bargaining unit work or caused workers to be displaced. Therefore, pursuant to the interpretation of First National Maintenance Corp. we set forth in Joe Maggio, we find that Respondent did not have a duty to bargain over its decision to use, or its implementation-of, the melon machines.

The new machines did, however, change the character of the harvesting work, and caused Respondent to adopt a new wage system. Respondent therefore had a duty to bargain, on request,

over the effects on employees of its decision to use, and its use of, the melon harvesting machines, and we conclude that Respondent violated section 1153(e) and (a) of the Act by failing to notify the Union of the change and thereby to give the Union an opportunity to request bargaining about the effects of the unilateral change on the wages, hours, and working conditions of its employees. (Highland Ranch and San Clemente Ranch, Ltd. (Aug. 16, 1979) 5 ALRB No. 54; Joe Maggie, supra, 8 ALRB No. 72.) Respondent's Defense — Strike Violence

We affirm the ALO's rejection of Respondent's defense that it had no duty to bargain with the UFW during the period of time in which it implemented the aforesaid unilateral changes because it had good cause to believe that the UFW was no longer the representative of a majority of its employees.[2/] Respondent based that argument on increased employee turnover resulting from the strike and on its contention that strike violence against the replacement workers caused them to withdraw any support they may have had for the Union.

In Nish Noroian Farms (Mar. 25, 1982) 8 ALRB No. 25, we held that, just as the means by which a union will be recognized under the ALRA is through winning a secret ballot

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[2/] We also affirm the ALO's rejection of Respondent's remaining defenses. Respondent cannot justify the unilateral changes it implemented based on the impasse declared by a group of employers, including Respondent, in Admiral Packing Company, et al (Dec. 14, 1981) 7 ALRB No. 43, since we found in that case that no bona fide impasse existed. Respondent has also failed to prove that the changes were based on its past practice (see Joe Maggio, supra, 8 ALRB No. 72; J. R. Norton Company (Oct. 13, 1982) 8 ALRB No. 76), or that they were required because of business necessity (see Joe Maggie).

election and being certified by the Board, withdrawal or termination of recognition must be left to the election process:

> Once a union is certified, it and the employer should be able to bargain unhindered by real or imagined fluctuations in the percentage of support among employees in the bargaining unit.... In addition, a "certified until decertified" rule is easier to administer. The duty to bargain to contract or a bona fide impasse will not hinge on the percentage of support among the employees in the work force, which could fluctuate widely in a short time period, or on whether someone's belief in a loss of majority support is held in good faith or bad faith. (Nish Noroian Farms, supra, 8 ALRB No. 25 at p. 15.)

Once a union has been certified, it remains the exclusive collective bargaining representative of the employees in the unit until it is decertified or a rival union is certified, or until the union becomes defunct or disclaims interest in continuing to represent the unit employees, none of which events occurred in this matter. Therefore, as the ALO correctly found, Respondent's duty to bargain with the UFW continued throughout the strike, since that duty had not been terminated by any Board certification or decertification or any other change in the certified union's status.[3/]

From February 28, 1979, when Respondent and other growers involved in group bargaining declared impasse (Admiral Packing, supra, 7 ALRB No. 43), to October 30, 1979, there were no

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[3/] As the ALO noted, the strike violence established by uncontroverted testimony at the hearing was not so widespread or so grave as to relieve Respondent of its duty to bargain. (Admiral Packing, supra, 7 ALRB No. 43; Union Nacional de Trabajadores (1975) 219 NLRB 862 [90 LRRM 1023].)Furthermore, there is no evidence that Respondent based its refusal to meet on strike related violence, and we have found that the strike was prolonged by Respondent's unlawful bargaining conduct. (Admiral Packing, supra; NLRB v. Ramona's Mexican Food Products, Inc. (9th Cir.1975) 531 F.2d 390 [92 LRRM 2611].)

negotiations between Respondent and the UFW. On September 26, 1979, Respondent notified the UFW of its intention to raise wages to the level proposed by the employer group in the February 21, 1979, negotiations meeting. On October 30, 1979, the parties met at the UFW's request, and the Union's representative requested crop and acreage information and asked Respondent whether it intended to rehire the striking seniority workers.[4/] The Union also modified its medical plan proposal, and asked Respondent to submit another proposal on that subject. To the date the hearing in this matter began (November 4, 1980), there had been no further contact between Respondent and the UFW. Based on the record as a whole, we affirm the ALO's conclusion that Respondent violated section 1153(e) and (a) by instituting unilateral changes in its employees' wages and working conditions. In addition, as the record discloses no change in the acts and conduct of Respondent which we found to be unlawful in Admiral Packing, we conclude that Respondent violated section 1153 (e) and (a) by its continuing refusal to bargain in good faith with the Union.

The Makewhole Remedy

As part of his proposed remedy, the ALO recommended that Respondent be ordered to make its employees whole for the economic losses they suffered as a result of Respondent's failure and refusal to bargain in good faith. Respondent excepts to imposition of the makewhole remedy, arguing that it has the right to maintain

[4/] In Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, we concluded that Respondent herein discriminatorily refused to rehire strikers who had made written unconditional offers to return to work.

a reasonable, good faith position, without risk of liability for makewhole, in order to protect its employees' free choice.

In J. R. Norton Co. v. Agricultural Labor Relations Bd. (1979) 26 Cal.3d 1, the Supreme Court held that section 1160.3 of the Act does not authorize the Board to impose the makewhole remedy as a matter of course in cases in which an employer has refused to bargain with a union in order to obtain judicial review of the Board's certification of that union. On remand of the Norton case, we held that, in determining whether the makewhole remedy is appropriate in such technical refusal-to-bargain cases, we shall determine, on a case-by-case basis, whether the employer litigated in a reasonable good faith belief that the election was conducted in a manner which did not fully protect employees' rights, or that misconduct occurred which tended to affect the outcome of the election. (J. R. Norton Company (May 30, 1980) 6 ALRB No. 26.) In subsequent technical refusal-to-bargain cases, we held that we would evaluate the reasonableness of the employer's litigation posture, and determine whether it acted in good faith, on a case-by-case basis and only in situations presenting a question as to whether employees' free choice in the election had been impaired. Accordingly, we declined to apply a Norton analysis, and awarded makewhole: in Adam Farms (July 18, 1980) 6 ALRB No. 40, where the employer refused to bargain while appealing our Decision that it had violated the Act by hiring workers for the primary purpose of having them vote in an election; in Montebello Rose Company (Jan. 22, 1982) 8 ALRB No. 3, where the employer refused to bargain after expiration of the certification year in order to test its

interpretation of the statute; and in Highland Ranch and San Clemente Ranch, Ltd. (Feb. 19, 1982) 8 ALRB No. 11, where the employer refused to bargain in order to challenge the Board's Decision finding that it was a successor employer.

Respondent argues that the right of employees to freely choose their bargaining representative is a major issue in the instant matter, since the strike replacements did not support the Union, and the Union no longer represented a majority of the employees. Respondent argues that, in order to be consistent with our Decision in Harry Carian Sales (Oct. 3, 1980) 6 ALRB No. 55, the Board must find that a union's certification can be terminated by something other than a Board-conducted election. In Harry Carian, we held that this Board has the power to impose a bargaining order as an unfair labor practice remedy, even though the union did not win a majority of the votes cast in an election, if we find that the employer's widespread unfair practices made it impossible to hold a fair and free election. Respondent argues that a union, like an employer, can act in such a coercive manner that employees are unable to freely express their choice of a bargaining representative, and the Board must therefore recognize that, under some circumstances, an employer may lawfully withdraw recognition from a certified bargaining representative absent a decertification or certification of a rival union. Respondent argues that the Union acted in a violent and coercive manner, which interfered with the employees' free choice, and made a fair election impossible.

Respondent's legal argument was settled by our Nish Noroian Decision. However, we must determine whether Respondent's

refusal to bargain in this case was reasonable and in good faith and based on its belief that the employees' free choice had been affected, to the extent that imposition of the makewhole remedy would be inappropriate pursuant to the Supreme Court's J. R. Norton decision. Respondent argued that its litigation posture was reasonable, since federal labor law precedent allows an employer to assert a good faith and reasonably grounded belief that the union no longer enjoys the support of a majority of the employees in the bargaining unit (Dayton Motels, Inc. (1974) 212 NLRB 553 [87 LRRM 1341]), and since this Board is required to follow applicable National Labor Relations Act precedents (section 1148).

Although employee free choice is arguably at issue in this case, it is clear that Respondent did not refuse to bargain in order to protect the free choice of its employees, but instead based its refusal to bargain on the alleged impasse in negotiations, which we described in our Admiral Packing Decision. When asked at the hearing why he did not notify the Union about the wage increases Respondent instituted in its employees' wages, Bill Daniell, Respondent's president, testified that he did not notify the Union because his attorneys told him that there was an impasse and that he could do anything he wanted to do. Although Daniell testified that he was aware of some strike related violence, there is no evidence that Daniell or any other representative of Respondent ever asserted that the reason for Respondent's refusal to bargain was strike violence or a belief that the Union had lost its

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majority status.[5/]

Based on the record as a whole, we find that Respondent refused to bargain based on its belief that the parties were at impasse, a condition which we found, in Admiral Packing, supra, 7 ALRB No. 43, did not occur. As that basis for refusing to bargain does not raise an issue concerning employee free choice, we shall adopt the ALO's recommendation to award makewhole in this case in order to remedy Respondent's refusal to bargain.[6/]

Respondent also excepted to the ALO's recommendation that it be ordered to provide each new employee with a copy of the Notice to Agricultural Employees during the 12 months following the issuance of the Order in this case. Respondent argues that this provision of the ALO's recommended Order is punitive. We disagree. In other cases in which we have found that employers violated section 1153(e) and (a) by refusing to bargain, or by engaging in surface bargaining, with their employees' certified bargaining representative, we have ordered the employers to distribute the Notice to Agricultural Employees to all new employees hired during the 12 months after the issuance of our

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[5/] After the close of the hearing, but before the ALO's Decision issued, the UFW filed a motion to reopen the record in order to introduce the testimony of William Daniell at another hearing involving Respondent. Respondent opposed the motion, contending that the UFW failed to establish that the evidence it sought to introduce was previously unavailable. We find it unnecessary to rule on this motion or to reopen the record as the evidence the UFW sought to introduce would be cumulative.

[6/] We note that the makewhole remedy ordered herein overlaps the remedial Order in Admiral Packing, which also applied to Respondent. 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.

Orders. (O. P. Murphy Produce Co., Inc. (Oct. 26, 1979) 5 ALRB No. 63; Montebello Rose Co., Inc./Mount Arbor Nurseries, Inc. (Oct. 29, 1979) 5 ALRB No. 64, affd. Montebello Rose Co. v. Agricultural Labor Relations Bd. (1981) 119 Cal.App.3d 1; Admiral Packing, supra, 7 ALRB No. 43; Joe Maggie, supra, 8 ALRB No. 72.) When an employer refuses to engage in good faith bargaining with its employees' certified bargaining representative, it is important that all the employer's workers be made aware that the employer is required by our Act to bargain in good faith with their chosen representative. We seek to encourage the participation of workers in the collective bargaining process, so that the proposals made in negotiations accurately reflect the views of the employees. We find that, in order to effectuate that purpose and to fully remedy Respondent's violation, it is appropriate to advise new employees of the Respondent's obligation to bargain with the Union, and its past failure and refusal to do so.

In this case, Respondent refused to bargain in good faith with the Union from February 21, 1979, until at least November 4, 1980, when the hearing in this matter began. We find that, in order to remedy the effects of Respondent's unlawful refusal to bargain with the Union for more than twenty months, it is appropriate to order, inter alia, that Respondent distribute the attached Notice to all of the agricultural employees it hires within the

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12 months following issuance of our Order.[7/]

ORDER

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

1. Cease and desist from:

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

(b) Unilaterally changing the wages or any other term or condition of employment of any of its agricultural employees, without first notifying the UFW and affording it a reasonable opportunity to bargain with respect to any such change.

(c) Failing or refusing to meet and bargain in good faith, on request, with the UFW concerning the effect on its employees' wages, or any other term or condition of their

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[7/] In Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, we did not order Respondent to distribute the Notice for 12 months following issuance of our Order because we found in that case that Respondent did not violate section 1153(e) and (a) by its general refusal to bargain, but did so by its failure or refusal to provide the UFW with requested information and by unilaterally increasing its employees' wages. In the instant matter, in addition to affirming the ALO's conclusion that Respondent committed several per se violations of section 1153(e) and (a), we have also concluded that Respondent violated the Act by its continued refusal to bargain after the grower bargaining group of which its was a member declared an impasse on February 28, 1979. (See Admiral Packing, supra, 7 ALRB No. 43.) By ordering Respondent to distribute the Notice for 12 months, we seek to remedy its long-standing refusal to fulfill its obligation to meet and bargain in good faith with the Union.

employment, of Respondent's implementation of a new melon harvesting operation.

(d). 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 the unilateral changes made in employees' wages after February 29, 1979, and thereafter bargain collectively in good faith, on request, with the UFW with respect to such wage increases or change and any future wage increases or other changes of its employees' working conditions.

(c) If the UFW so requests, rescind the wage rates instituted for its melon harvesting machine workers and bargain collectively in good faith, on request, with the UFW with respect to such wage rates or any other changes in employees' working conditions resulting from Respondent's utilization of the melon harvesting machines.

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

faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55, the period of said obligation to extend from February 21, 1979, until November 4, 1980, and from November 5, 1980, until the date on which Respondent commences good faith bargaining with the UFW which results in either a contract or a bona fide impasse.

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

(f) 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.

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

(h) 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.

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

(j) 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.

(k) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply 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 United Farm Workers of America, AFL-CIO, as the exclusive collective bargaining representative of the agricultural employees

of Lu-Ette Farms Inc. be, and it hereby is, extended for one year from the date of issuance of this Order.

Dated: December 21, 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 Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Lu-Ette Farms, 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 failing and refusing to bargain with the United Farm Workers of America, AFL-CIO (UFW), our employees' exclusive collective bargaining representative, by changing wage rates and reinstituting our former policy of granting pay advances without giving the UFW notice or an opportunity to bargain about such changes, and by introducing melon harvesting machines without giving the UFW notice of that change or an opportunity to bargain about the effects of the change. 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

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

WE WILL, if the UFW requests, rescind any changes we made in your wages, hours, or conditions of employment after February 28, 1979.

WE WILL meet and bargain in good faith, on request, with the UFW, 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 losses of pay and/or other economic losses as a result of our failure and refusal to bargain in good faith with the UFW since February 21, 1982.

Dated: LU-ETTE FARMS, INC.

By: _____
Representative Title

8 ALRB No. 91

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

Lu-Ette Farms, Inc.
(UFW)

8 ALRB No. 91
Case Nos. 79-CE-125-EC
79-CE-199-EC
80-CE-38-EC

ALO DECISION

The ALO concluded that Respondent violated section 1153(e) and (a) of the Act by instituting the following unilateral changes in its employees' wages and working conditions without giving the employees' certified bargaining representative notice or an opportunity to bargain about the changes: (1) increasing the wages of its tractor drivers, irrigators, and lettuce weeders and thinners, and its lettuce harvest wage rate; (2) implementing a machine harvesting system for its honeydew melon harvest; and (3) reinstating its prior practice of giving pay advances to employees. The ALO rejected Respondent's defenses that it did not have an obligation to bargain with the Union concerning those changes because: (1) the parties were at impasse; {2) the changes were necessary in order for Respondent to remain competitive; (3) the changes were made pursuant to Respondent's past practice; and (4) strike violence and high employee turnover had resulted in the Union's loss of majority status as the employees' bargaining representative. The ALO found that Respondent's last argument, regarding its alleged good faith doubt of the Union's majority status, was foreclosed by the Board's Decision in Nish Noroian Farms (Mar. 25, 1982) 8 ALRB No. 25. The ALO also found that the strike violence was not so widespread or so grave as to relieve Respondent of its duty to bargain.

BOARD DECISION

The Board affirmed the ALO's findings and conclusions regarding the unilateral wage changes and the reinstatement of the pay advance practice. The Board concluded that Respondent did not violate the Act by instituting a new system of machine harvesting honeydew melons, since that change did not displace workers or reduce the amount of bargaining unit work to be performed. Respondent, however, did violate section 1153(e) and (a) by failing to notify the Union of the change and thereby to give the Union an opportunity to request bargaining about the effects of the unilateral change on the employees' wages, hours, and working conditions.

The Board affirmed the ALO's rejection of Respondent's defense that it had no duty to bargain with the Union during the period of time in which it implemented the unilateral changes because it had good cause to believe that the UFW was no longer the representative of a majority of its employees.

The Board ordered Respondent to make its employees whole for the economic losses they suffered as a result of Respondent's failure to bargain in good faith, rejecting Respondent's argument that makewhole is an inappropriate remedy in this case because

Respondent's litigation posture was reasonable and in good faith. The Board found that while employee free choice was arguably at issue in the case, Respondent did not refuse to bargain in order to protect its employees' free choice, but instead based its refusal to bargain on an alleged impasse in negotiations. The Board ordered Respondent to provide all new employees with a copy of the Notice to Agricultural Employees for 12 months following the issuance of the Order in this case, since it found that distribution of the Notice was necessary in order to remedy the effects of Respondent's refusal to bargain and to encourage the participation of workers in the collective bargaining process.

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

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: LU-ETTE FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 79-CE-125-EC 79-CE-199-EC 80-CE-38-EC

Appearances:

Sarah A. Wolfe
Dressier, Stoll, Quesenbery,
Laws & Barsamian 200
New Stine Road, Suite 228
Bakersfield, CA 93309
for Respondent

Chris A. Schneider
United Farm Workers
P. O. Box 30 Keene, CA 93531
for Charging Party

Deborah Escobedo
Agricultural Labor Relations Board
El Centro Regional Office
319 Waterman Avenue
El Centro, CA 92243
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW OFFICER

ROBERT LePROHN, Administrative Law Officer: This case was heard November 4, 12, 17, 25 and 26, 1980, in El Centro, California. At issue are the following charges: 79-CE-125-EC, 79-CE-199-EC and 80-CE-38-EC. Each alleges a unilateral change in wages, hours and working conditions in violation of Labor Code sections 1153(e) and (a).[1/] During the course of the hearing the parties entered into a Stipulated Settlement Agreement which disposed of seven additional charges alleging various violations of section 1153(a).[2/]

Respondent admits it was duly served with the charges at issue. The First Amended Consolidated Complaint was filed on August 19, 1980, and duly served by mail. Respondent filed its Answer on November 3, 1980.[3/]

As Charging Party, the United Farm Workers of America (UFW) moved to intervene. Its motion was unopposed. General Counsel and Respondent filed post-hearing briefs. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following:

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1. Unless otherwise stated all code section references are to the California Labor Code.

2. 79-CE-4-EC, 79-CE-7-EC, 79-CE-28-EC, 79-CE-29-EC, 79-CE-48-EC, 79-CE-218-EC and 80-CE-22-EC.

3. Separate complaints, not in evidence, were filed in each of the charges at issue. Respondent filed an answer to 79-CE-125-EC on February 26, 1980; to 79-CE-199-EC on March 4, 1980; and to 80-CE-38-EC on April 9, 1980. Each answer was timely filed and duly served.

FINDINGS OF FACT

I. Jurisdiction

Lu-Ette Farms, Inc. is a corporation engaged in agriculture in Imperial County, California within the meaning of section 1140.4(a) and is an agricultural employer within the meaning of section 1140.4(c). The Agricultural Labor Relations Board (Board) has on prior occasions asserted jurisdiction over Respondent, which admitted in its Answer it was an agricultural employer within the meaning of section 1140.4(c).[4/]

Respondent denied for lack of information and belief sufficient to answer that the United Farm Workers of America (UFW) is a labor organization within the meaning of section 1140.4(f). This denial is patently frivolous. The Union has been found to be a labor organization in prior unfair labor practice proceedings and was at all times material the certified bargaining representative of Respondent's Imperial County agricultural employees.

II. Background

Respondent, Lu-Ette Farms, has been engaged in agricultural operations in the Imperial Valley since 1964. It currently farms between 2,500 and 3,000 acres in the Valley. Its crops include lettuce, honeydew melons, alfalfa, cotton, pumpkins and banana squash. William Daniell, Respondent's President, makes all management decisions, including those affecting wages, hours and other conditions of employment of Lu-Ette's employees.

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4. See Admiral Packing Company, et al. (1981) 7 ALRB No. 43.

During the period from January 1973 through July 15, 1975, Respondent was party to a collective bargaining agreement with an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Pursuant to the provisions of that agreement, Respondent was required to grant annual wage increases to its employees during July or August.

The UFW was certified as the bargaining representative of Respondent's agricultural employees on September 29, 1976. Lu-Ette and the UFW entered into a collective bargaining agreement on December 2, 1977. The agreement was due to expire on January 1, 1979, but was extended by the parties until January 15th of that year; thereafter, the UFW struck Respondent. The parties stipulated the strike commenced on either January 24 or January 25, 1979. What began as an economic strike was transferred into an unfair labor practice strike on February 21 by Respondent's failure to bargain in good faith commencing that day. (Admiral Packing, et al. (1981) 7 ALRB No. 43.) Respondent operated during the strike with striker replacements.

Commencing November 27, 1978, Respondent and the Union engaged in negotiations with the object of obtaining a new collective bargaining agreement. In early December, Respondent became part of what was known as the "industry group." It consisted of twenty-eight Salinas and Imperial Valley vegetable growers who for convenience began negotiating simultaneously, but individually, with the UFW.

On February 21, 1979, spokesmen for the industry group

presented a common proposal to the Union.[5/] It took the form of a total collective bargaining agreement and contained the following wage proposals for the first year of the agreement:

Irrigators: $4.18 per hour;

Weeding and Thinning: $4.10 per hour;

Tractor Driver "A": $4.90 per hour;

Tractor Driver "B": $4.80 per hour;

Trio rate (lettuce harvest): 61$ per carton.

The Union responded to the February 21st proposal at a meeting on February 28th. The wage rates contained therein were substantially higher than those proposed by the industry group. The record does not indicate whether the Union's February 28 proposal was a modification of an earlier wage position. After a caucus, spokesmen for the industry group asserted the parties were at impasse, and the meeting adjourned. The Board has held there was no genuine impasse as of February 28, and the employers' declaration on that date manifested a failure to bargain in good faith commencing February 21st.[6/]

III. Unilateral Changes in Wages

From February 28th until October 30th, Respondent and the UFW had no meetings.[7/] Lu-Ette has submitted no modified wage proposal since February 21st. During the period following February 28, Respondent effected a series of wage increases. Lu-Ette's President, Bill Daniell made the decision to do so. He did not

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5. Lu-Ette was one of the growers on whose behalf the proposal was submitted.

6. Admiral Packing Company, et al., supra.

7. Unless otherwise indicated, all dates are 1979.

notify the UFW of these increases because "we were at impasse." After the February 28 bargaining session, his attorneys told him he could do anything he wanted to do, that he had an open door and could raise wages without going back to the Union.

It has been a general practice in the industry to grant annual wage increases around July. In July 1979 Daniell raised tractor drivers to $4.80 and $4.90 per hour, and raised irrigators to $4.00 per hour. The rate proposed for irrigators on February 21 was $4.18 per hour. Daniell's explanation for the $4.00 figure is that "It seems like $4.00 was a good figure. That's where we were. And we're . . . still at that figure."[8/] The new tractor driver rates were those proposed to the Union in February 1979.

At the outset of lettuce weeding and thinning in October 1979, Respondent raised wages to $4.00 per hour. Everything else was going up, and Daniell felt that those people needed a little compensation. He made the decision to grant the increases without regard to what other people were paying. Daniell had no recollection of being aware that his attorney, Charley Stoll, had contacted the UFW concerning wage increases. However, he is sure he authorized Stoll to do so.

The piece rate paid by Respondent for the 1979 lettuce harvest was 75 cents. This was the going rate and Lu-Ette just "fell in line".[9/]

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8. II:25.

9. The trio rate of 75 cents was the rate arrived at in the agreement between Sun Harvest and the UFW. The Sun Harvest agreement became the UFW's pattern agreement.

"It was never negotiated with the UFW, and it was never negotiated with the people [Lu-Ette] employed; it was just that they asked what the rates were going to be, and we told them it was 75 cents."[10/] The figure proposed by Lu-Ette as part of the industry group on February 21 was 61 cents. As noted, it was Daniell's understanding that he could exceed the 61 cents because the parties were at impasse.

Daniell's conclusion that 75 cents was the industry rate was based upon conversations with some grower friends in Yuma, Arizona. He regarded these contacts as relevant because the workers move into the Imperial Valley after the Arizona harvest concludes. Daniell had no recollection of meeting with other Imperial Valley lettuce growers prior to the harvest for the purpose of discussing rates. However, he did recall a meeting with Imperial Valley lettuce growers in September 1979, without being able to recall who was present. Daniell testified he was unsure whether he had seen the newly negotiated Sun Harvest/UFW contract and was unsure he was aware that the 75 cent rate was contained therein. He further testified that even if he had seen the contract, it was not the motivation for his 75 cent rate; reiterating that his adoption of 75 cents was predicated on his conversations with growers with whom he is friendly.

By letter and mailgram of September 26, 1979, Respondent's lawyer notified the UFW that Lu-Ette proposed to raise wages to the level contained in its February 21 proposal and offered to meet to

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10. II:34.

discuss the proposed rates.

At the request of the Union a meeting was set for October 30, 1979. At that meeting the Union requested information about Respondent's crop program and acreage schedule and its intentions (in the forthcoming season) regarding striking seniority workers. The Union also modified its February 28 medical insurance proposal. Smith asked Respondent to submit a modified proposal. Respondent's lawyer said it would take the matter under consideration and get back to the UFW. There has been no further contact by the employer.

Honeydew Harvest

With the advent of the 1979 October honeydew harvest, Respondent without notice to the UFW implemented a system of machine harvesting which was accompanied by a new system for compensating harvest workers. During the 1978 harvest workers were paid on the basis of footage harvested during a day. The total footage was divided equally among the crew. In 1979, pickers were paid ten cents per box and employees working on the harvest machine were paid $4.00 per hour.

When melons are hand harvested the following steps are involved: the melons are cut from the vine, picked up and placed in sacks holding 15 to 18 melons. the loaded sacks are carried up a gang plank on the back of a field truck and dumped. The work is regarded as too heavy to be performed by women.

Daniell described the machine harvest process in the following way: Melons are cut by a crew working in front of the machine and left lying in the bed. The machine (essentially a mobile conveyor belt) proceeds through the field, and the melons are

placed upon the conveyor and transported to a waiting truck. The elimination of bag carrying permits the use of women to place melons on the conveyor.

The described system of machine harvesting, by eliminated bag dumping of melons reduces the likelihood of bruising thus increasing the chances of maintaining quality and a longer store life. It does not appear that Respondent's sale of melons in 1979 was dependent upon changing it harvest system.

Pay Advance System

Prior to entering into its contract with the UFW, Lu-Ette gave pay advances to workers in the lettuce harvest, the melon harvest and the thin and weed crews. "It's been a historic practice of the Company from the beginning of time. (sic)"[11/] Workers were either given pay advances or paid on a daily basis. With respect to lettuce harvest workers, the practice began in 1975, the year Lu-Ette began harvesting its own lettuce. Daniell testified pay advances were not permitted under the 1977-79 UFW contract.[12/] The practice was admittedly resumed during the 1979-80 lettuce harvest. Advances ranged in amount from $10 to $420.

The union was not notified that Respondent had reverted to its pre-UFW contract practice. Daniell testified that Respondent reinstituted making pay advances because most of his harvest workers were striker replacements and granting them advances helped stabilized his work force.

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11. II:76.

12. Contrary to Daniell's testimony, the 1977-79 contract contains no language dealing with pay advances.

STRIKE VIOLENCE

In support of its contention that strike violence relieved it of the obligation to bargain prior to making any of the unilateral changes noted above, Respondent elicited testimony from five current employees. The testimony of each was uncontroverted and generally credible.

Eleuterio Martinez

Martinez has been employed by Respondent for 10 years. On the day the strike started there were a lot of pickets at the location where he was working (Pampas 8). Chavistas arrived and told him he had to stop working because there was a strike. He stopped and did not work for fifteen days. The people who approached him were carrying UFW flags.

After the 15 days, he drove around Pepper ranch and observed a lot of women with flags. He was stopped and asked whether he was working. When he said he wasn't, he was told to be very careful not to work because our coworkers could beat you up. Martinez did not recognize any of the people who stopped him.

Although he was frightened Martinez returned to work. There were still people with UFW flags at the field. He observed a young man get stoned and knocked down as he was pouring fertilizer into a tractor;[13/] the tractor's tires were also slashed before the people departed. The incident occurred at a field leased by Lu-Ette. Martinez had a conversation that day with a picket who

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13. This person was not a Lu-Ette employee. He was employed by the contractor supplying Lu-Ette with fertilizer.

told him he would have to stop working so the workers would be paid more and get better benefits. When Martinez responded that he had to keep working because he had many children, the picket departed. This was the only occasion he spoke to a picket. Martinez did not know the name of the person to whom he spoke or the names of the persons who stoned the young man.

Arturo Campos Morales

Campos was first employed by Respondent in February 1979 as an irrigator. The day he started work, Campos was approached by a group of people carrying UFW flags and told to leave the field because they were going to shut off the water. Thereafter, there were three days on which he observed people with UFW flags at a field where he was working. On one of the days, about a month after he started work, the following events occurred: people carrying UFW flags confronted him in the fields and asked him to leave. They told him they would burn his car. Campos left that particular field and went to another of Respondent's fields and resumed work. He did not know or recognize any of the people with whom he was speaking.

Jorge Martinez Vega

Martinez Vega first began working at Lu-Ette as an irrigator on April 4, 1979. About 5 or 6 days thereafter as he was working at Pampas 8, stones were thrown at him. He was not struck. There were 80 to 100 people present many of whom, were carrying UFW flags. He was told they were going to his house and that they would come to beat him up at night. Martinez is unable to identify any of the persons among the 80 to 100 pickets.

Thereafter almost daily people with UFW flags would pass

by, yell at him and those with whom he worked and throw rocks.

Teodoro Mario Lopez Beltran

Lopez began working for Respondent as an irrigator during the second week of May 1979. On his first day of employment while working in Pampas 8, people bearing UFW flas approached him "with good words" to stop working and to unite with them. He responded that he was a person who had just recently emigrated and that he could not follow them because he was unaware of their motives. The pickets said it would be bad for him and spoke "bad words". Nothing further occurred.

Every day thereafter pickets stopped at his work site for approximately 10 minutes to yell at him. The group displayed UFW flags. On two occasions pickets followed him to the middle of a field and also shut off the water.

Alejandro Martinez Barbosa

Martinez Barbosa has worked for Respondent for 15 years. During the relevant time period, he was a tractor driver. On the last day he worked in January 1979, he was working in front of the Lechuga store when three men in a car stopped and told him there was a strike, and he should cease working. Since Martinez had almost finished the field, he continued to work. Thereafter he did not work for a week and a half.

On the day following his return, 20 to 25 people carrying UFW flags came to the field. The next day as he was working at Pampas 6, he saw people throwing rocks at parked tractors. Again there was a display of UFW flags. Another tractor driver who was present was stoned. Every day thereafter for varying periods of

time, flag bearing pickets were at Lu-Ette fields. They would yell at those working and ask them to come out. On occasion rocks were thrown at people who were working. Martinez Barbosa recognized some of the rock throwers as Lu-Ette irrigators.

ANALYSIS AND CONCLUSIONS

Subsequent to February 21, 1979, Respondent effected wage increases and a change in its method of harvesting melons without prior notification to the UFW and without having reached a bona fide impasse in negotiations.[14/]

The law is well established that an employer's unilateral changes prior to reaching a bona fide impasse constitute a refusal to bargain, irrespective of whether the change (if a wage increase) is less than, the same as or more than the last position presented to the employees' bargaining representative.[15/] Therefore unless one of the defenses raised by Respondent suffices to excuse its conduct, it must be found to have violated sections 1153(e) and (a).

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14. In Admiral Packing Company, et al. (1981) 7 ALRB No. 43, the Board found Respondent's declaration of impasse of February 28, 1979, to be premature and evidence of bad faith bargaining commencing February 21, 1979.

15. N.L.R.B. v. Katz (1962) 369 US 736; Industrial Union of Marine and Shipbuilding Workers of America (AFL-CIO) v. N.L.R.B. (3rd Cir. 1963) 320 F.2d 615, 621; M.A. Harrison Mfg. Co., Inc. (1980) 253 NLRB 675; Winn-Dixie Stores, Inc. (1979) 243 NLRB 972; Cal-Pacific Furniture Mfg. Co. (1977) 228 NLRB 1337, 1343; Alsey Refractories Co. (1974) 215 NLRB 785.

We turn now to examine the two basic lines of defense: (1) it had no duty to bargain with the UFW during the time period covered by the Section 1153(e) charges herein; (2) even if it were under a duty to bargain, the changes in wages and working conditions it effected were not violative of the Act.

Respondent's lack of duty defense rests upon its contention that it had good cause to believe the UFW was no longer the majority representative of its employees. This contention resting in turn upon the employee turnover resulting from the strike and upon strike violence having the effect of depriving the Union of support among replacements.

Respondent cites a series of National Labor Relations Board and Federal Court cases which stand for the general proposition there is a rebuttable presumption that striker replacements are not presumed to support the incumbent union to the same extent as strikers.[16/]

These cases are not appropriately cited. The Board has spoken with respect of the manner in which recognition may be withdrawn and held that recognition can only be withdrawn or terminated by way of the election procedures set forth in the Act. Statutory differences between the NLRA and the ALRA make NLRB precedents in this area inapplicable.

16. Arkay Packaging Corp. (1976) 227 NLRB 397; Peoples Gas System, Inc. (1974) 214 NLRB 944; National Car Rental System v. N.L.R.B. (8th Cir. 1979) 594 F.2d 1203.

> An employer under the ALRA does not have the same statutory rights regarding employee representation and election as employers have under the NLRA. Under the ALRA, employers cannot petition for an election, nor can they decide to or voluntarily recognize or bargain with an uncertified union. By these important differences the California legislature had indicated that agricultural employers are to exercise no discretion regarding whether to recognize a union; that is left exclusively to the election procedures of the Board. Likewise, whether or not recognition should be withdrawn or terminated must be left to the election process.
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> [U]nder the NLRA a union may be recognized once it has proven majority support, whether by an election or otherwise. Under the ALRA a union may be recognized by an employer only after it had been certified pursuant to a Board conducted election. Once a union has been certified it remains the exclusive collective-bargaining representative of the employees in the unit until it is decertified or a rival union is certified.
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> [A] certified until decertified rule is easier to administer. The duty to bargain to contract or a bona fide impasse will not hinge on the percentage of support among the employees in the work force, which could fluctuate widely in a short time period, or on whether someone's belief in a loss of majority support is held in good faith or bad faith. The duty to bargain, which springs from certification, will be terminated only with the certification of the result of a decertification or rival-union election where the incumbent has lost." (Nish Noroian Farms (1982) 8 ALRB No. 25, Slip Op. 13-16.)

While the principles enunciated in Nish Noroian are dispositive of Respondent's defense regarding good faith doubt of majority status, the defense would be unavailable absent that precedent. During the time frame involved herein Respondent is under order of the Board to bargain in good faith with the UFW; moreover, the UFW's certification was extended for a period of one year from the date on which Respondent commences to bargain in good faith, a period which did not commence to run during the time period relevant herein. Finally, whatever merit there might otherwise be

in Respondent's loss of majority argument is negated by the fact that the Board has determined that the strike became an unfair labor practice strike as of February 21, 1979. Thus, Respondent was not in a position to hire permanent replacements for the striking employees.

Although Respondent does not argue that strike violence provided an independent basis for removing or suspending its obligation to bargain, this possibility is appropriately examined.[17/] In Phelps Dodge Copper Products, Corp. (1952) 101 NLRB 360, the NLRB held that the employer's obligation to bargain was suspended during the course of a slow down although the union majority status was unaffected. The rationale was stated in the following language:

> . . . Although the Union's majority standing remained unaffected during the course of the slowdown, this alone does not provide the touchstone of the Respondent's bargaining obligation under the Act. Under unusual circumstances, a union may, by contemporaneous action in connection with bargaining, afford an employer grounds for refusing to bargain so long as that conduct continues. This is so because it cannot be determined whether or not an employer is wanting in good faith where measurement of this critical standard is precluded by an absence of fair dealing on the part of the employees' bargaining representative. We believe that the Union exhibited just such a lack of fair dealing here, by calling a slowdown in an effort to compel the Respondent to accede to bargaining demands.

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17. Respondent handles the alleged strike violence as further reason for concluding that the UFW no longer represented a majority of its employees, i.e., the violence may be presumed to have disenchanted the striker replacements.

> It is well established that a slowdown is a form of concerted activity unprotected by the Act. The vice of the slowdown derives in part from the attempted dictation by employees, through this conduct, of their own terms of employment. They are accepting compensation from their employer without giving him a regular return of work done. (Supra, at p. 368.)

Assuming arguendo the UFW's responsiblity for the acts described by Respondent's employees, that conduct is akin to traditional strike conduct and cannot be said to manifest an absence of fair dealing on the part of the UFW.

In Union Nacional de Trabajadores (1975) 219 NLRB 862, the NLRB found the following conduct of the union destructive of an harmonious bargaining relationship, thus excusing the employer from bargaining: physical threats by the union president during the course of a bargaining session, union officials entered the plant and physically attack and beat a supervisor and worker acting as an organizer and announcing by way of a bullhorn to employees on lunch break that if the employer continued to refuse to meet, the union would break down the gates of the plant. When the union, as a condition of the employer returning to the table, refused to give assurances it would cease such conduct, the NLRB found the employer's refusal to return to the table was excused.

The facts in Union National are so patently different from the picket line conduct in the instant case as to make the case distinguishable. Clearly some excesses are to be anticipated on a picket line. A labor dispute is not a tea party and the rules of the drawing room do not govern.[18/] "impulsive behavior on the

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18. See O.P. Murphy Produce Co., Inc. (1979) 5 ALRB No, 63, slip op. 23-16, for discussion of striker violence and its impact upon back pay in an 1153(c) context.

picket line is to be expected, especially when directed against non-striking employees and strike breakers."[19/] Montgomery Ward and Coronet Casuals dealt with striker misconduct in 8(a)(l) context [ALRA Sec. 1153(a)], i.e., whether such misconduct deprived particular strikers of reinstatement rights for proved misconduct short of physical violence. Here, we deal with the question of whether threats and isolated instances of violence suspended Repondent's obligations under section 1153(e). While the violence testified to might relieve Respondent of the obligation to reinstate the individual perpetrator, it doesn't follow that Respondent was also relieved of its obligation to bargain. While the conduct involved in the incidents described is not to be condoned, the incidents were not so grave or so widespread as to relieve Respondent of its obligation to bargain in good faith with the UFW, particularly in the context of a strike which Respondent extended, if not precipitated, by its unlawful conduct.[20/]

In sum, we start with the proposition that at all times material Respondent had an obligation to bargain with the UFW as the certified bargaining agent of its agricultural employees and turn to examine Respondent's contention that the changes in wages and conditions of employment effected without notice to the Union did not violate the Act.

19. Montgomery Ward & Co. v. N.L.R.B. (10th Cir. 1967) 374 F.2d 607, 608; Coronet Casuals, Inc. (1973) 207 NLRB 304, 305.

20. Cascade Corp. (1971) 192 NLRB 533, 536; World Carpets of New York, Inc. (1971) 188 NLRB 122.

Although a unilateral change in wages or working conditions without bargaining to impasse violates section 1153(e), such changes are to be viewed dynamically and the status quo against which the change is considered must take account of any regular and consistent past pattern of changes in employee status.[21] Such changes in wages or working conditions are conceptualized as maintenance of existing practices rather than unilateral changes.

> Indeed, if the employer, without bargaining with the union departs from that pattern by withholding benefits otherwise reasonably expected, this is a refusal to bargain in violation of section 8(a)(5).[22]

Respondent's contention that the wage increases granted here were required to maintain a dynamic status quo is unpersuasive. It is apparent from the record that the raises accorded tractor drivers, irrigators and weeders were in no sense automatic but rather were the result of Daniell's free exercise of discretion. But most important, there is no evidence of a "well-established company policy of granting wage increases at specific times which is part and parcel of the existing wage structure."[23] Since Respondent has been party to successive collective bargaining agreements since 1970, wage increases have resulted both as to timing and to amount from collective bargaining and not company policy. Thus, it cannot be said that Respondent's failure to grant general wage increases in 1979 would have manifested a change in

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21. Gorman, Basic Text on Labor Law, 1976 Ed. p. 450 et seq.

22. Ibid, p. 450.

23. N.L.R.B. v. Ralph Printing & Lithog. Co. (8th Cir. 1970) 433 F.2d 1058, 1062; cert, denied (1971) 401 U.S. 925.

conditions violative of section 1153(e).[24/]

Respondent argues that the wage increase granted lettuce harvesters did not violate section 1153(e) because it was made with the object of staying competitive. One can appreciate Lu-Ette's need to stay competitive wagewise with other growers. However, it does not follow that such need permits an employer to bypass the bargaining representatives and deal directly with his employees. Respondent raised the per carton trio rate fourteen cents above the last offer made the UFW. It's hard to envision an action which could have a more disparaging impact on the relationship between the union and the employees it represents. Such conduct is proscribed.[25/] The obvious message to workers is, who needs a union. The boss will take care of us. Look, he gave us more money than the union could get for us. Respondent's need to be competitive does not excuse its failure to notify the UFW of the proposed increase and to give the union a reasonable opportunity to bargain. It would be required to do so even if the claimed February 28 impasse had been found to be bona fide.[26/]

Respondent violated sections 1153(e) and (a) in effecting wage increases for irrigators, tractor drivers, lettuce harvesters and weeding and thinning crew workers as alleged in the complaint.

24. cf. Texas Foundries, Inc. (1952) 101 NLRB 1642, enf't denied on other grounds (5th Cir. 1954) 211 F.2d" 791.

25. Central Metalic Casket Co. (1950) 91 NLRB 572.

26. United Contractors Incorporated (1974) 244 NLRB 72.

Paragraph 24(b) alleges that Respondent violated section 1153(e) by utilizing a melon harvesting machine and changing the manner in which melon harvest employees are compensated.

A management decision to automate or mechanize is a mandatory subject of bargaining under the Act.[27/] The language of the Board in discussing mechanization in P.P. Murphy is equally appropriate in the instant case.

> [B]y requiring bargaining here over the decision to mechanize, no burden was placed on Respondent's decision making process . . . . Respondent's decision regarding mechanization does not require altering the scope and direction of the enterprise, only a minimal burden is placed on the employer's free conduct of its business by requiring bargaining over its decision.28/

Given Respondent's obligation to bargain regarding its decision to effect some melon harvest mechanization, the absence of impasse and the failure of Respondent to apprise the Union of its intention, it is clear that Respondent violated sections 1153(e) and (a) in unilaterally effecting a change in working conditions.

Paragraph 24(d) alleges that Repsondent on or about October 1979 effected a unilateral change in wages and working conditions by making pay advance or loans to its employees. Respondent does not argue that granting pay advances is not a condition of employment and, thus, a mandatory subject of bargaining; but rather argues that it merely reinstated a practice of long standing which had been interrupted during the period of the UFW 1977-79.contract because the Union opposed the practice.

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27. O.P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37

28. Ibid, (supra) p. 20.

The prohibition against pay advances, asserted by Respondent to be part of the total bargain reached in 1977, represented the status quo as of October 1979. As with any mandatory subject of bargaining, a change is interdicted absent notice to the Union and the opportunity to bargain. Here there was no notice and no opportunity to bargain regarding this subject matter. The allegations of Paragraph 24(d) having been proved, Respondent's act constituted an independent violation of sections 1153(e) and (a).[29/]

REMEDY

I have found that Respondent engaged in certain unfair labor practices within the meaning of sections 1153(a) and (e) of the Act. Upon the basis of the entire record, the findings of fact and conclusions of law, I hereby issue the following recommended:

ORDER

Lu-Ette Farms, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Failing to bargain collectively in good faith as defined in Labor Code section 1155.2(a) with the UFW as the exclusive representative of its agricultural employees, and in particular, failing or refusing to bargain in good faith with

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29. Neither party discusses the question of whether a pay advance is wages or other condition of employment. Since the advance does not appear to have impacted upon the amount of money earned, it would not appear to be wages. However, it does alter the method of wage payment and the periodicity of receipt of wage payments, thus, I conclude pay advances fall within the ambit of other conditions of employment, and the subject matter is therefore a mandatory subject of bargaining.

respect to wage increases, changes in the basis for employee compensation, pay advances or loans, and use of harvesting machines.

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

2. Take the following affirmative action:

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

(b) Make whole all its agricultural employees in the manner ordered by the Board in Admiral Packing, et al. (1981) 7 ALRB No. 43 at pp. 52-53.[30/]

(c) Upon request by the UFW, rescind wage increases unilaterally granted since October 1, 1979, and bargain collectively in good faith with the UFW with respect to such wage increases and any future wage increases.

(d) Upon request by the UFW, cease the use of harvesting machines in its melon harvest and rescind any changes in the basis for employee compensation from piece rate to hourly, and bargain collectively in good faith with the UFW with respect to such changes and any future changes.

(e) Upon request by the UFW, rescind its policy or practice of providing employees with pay advances or loans and

30. It would appear that a make whole remedy in this case is duplicative of that directed in Admiral Packing, supra. However, such a remedy is dictated by this record and will be recommended. It is apparent that no double recovery will result.

bargain collectively with the UFW with respect to such policy or practice.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due its employees under the terms of the remedial order.

(g) Sign a Notice to Employees embodying the remedies ordered. After its translation by a Board agent into appropriate languages, respondent shall reproduce sufficient copies of the Notice in each language for all the purposes set forth in the remedial order.

(h) Post copies of the Notice in all appropriate languages in conspicuous places on respondent's property, including places were notices to employees are usually posted, for a 60-day period, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(i) Mail copies of the Notice in all appropriate languages, within 30 days after a remedial order to all employees employed at any time between February 21, 1979, and the last day of respondent's 1979-1980 lettuce harvest.

(j) Provide a copy of the attached Notice to each employee hired by respondent during the 12-month period following a remedial order.

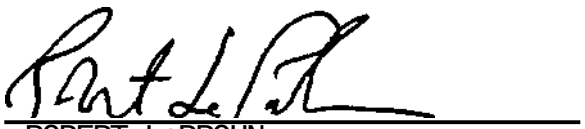
(k) Arrange for a Board agent or a representative of respondent to distribute and read the Notice in all appropriate

languages to its employees assembled on respondent's time and property, at times and places to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employee rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(1) Notify the Regional Director, in writing within 30 days after the date of issuance of a remedial order, what steps have been taken to comply with it. Upon request of the Regional Director, respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with the order.

DATED: May 21, 1982.

AGRICULTURAL LABOR RELATIONS BOARD



ROBERT LePROHN
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by failing or refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW), since February 21, 1979. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farm workers these rights:

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

WE WILL, on request, meet and bargain in good faith with the UFW about a contract because it is the representative chosen by our employees.

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

WE WILL, IF requested to do so by the UFW, rescind wage increases granted since October 1, 1979; stop using a harvest machine to harvest melons and rescind any changes in the method of compensating melon harvest workers.

WE WILL, IF requested to do so by the UFW, rescind our practice of providing workers with pay advances or loans.

WE WILL reimburse each of our agricultural employees, including employees who went on strike before February 21, 1979, in support of contract demands by the UFW who had not been permanently replaced as of that date, but not including employees hired before February 21, 1979, as temporary replacements for strikers, or employees hired after February 21, 1979, as replacements for strikers, for any

economic losses they suffered as a result of our failure or refusal to bargain in good faith.

Dated: LU-ETTE FARMS, INC.

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(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California; the telephone number is (714) 353-2130. Another office is located at 112 Boronda Road, Salinas, California; the telephone number is (408) 443-3160.

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

DO NOT REMOVE OR MUTILATE.