STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TMY FARMS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 80-CE-71-SD 80-CE-72-SD 9 ALRB No. 10

DECISION AND ORDER

On October 12, 1980, Administrative Law Judge (ALJ)[1/] Ron Greenberg issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the ALJ's Decision and a supporting brief, and General Counsel and Respondent each filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[2/] 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 ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm his rulings, findings and conclusions only to the extent consistent herewith.

[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] All section references herein refer to the California Labor Code unless otherwise specified.

Alleged Bad Faith Bargaining

On January 12, 1978, after negotiating for a year, Respondent and the UFW signed a collective bargaining agreement, which, by its terms, was to expire April 7, 1980. In April 1980 the parties began to negotiate a new agreement and, at their first meeting, agreed that the contract then in effect would be extended on a daily basis until either party terminated it by 24-hour written notice to the other party.

Between April 1980 and January 1981, the parties met 17 times. At each of the bargaining sessions, one or both parties presented one or more package proposals. At the April 24 meeting, Jorge Rivera, the UFW's negotiator, offered a contract duration of one year, retroactive to April 7. Laurie Laws, Respondent's negotiator, testified that, immediately after the April 24 meeting, she and Mike Horwath, Respondent's General Manager, decided to submit a five-year-duration proposal in response, and that proposal was included in the package Respondent offered on May 20. Contract duration became the major issue dividing the parties.

The ALJ concluded that Respondent violated section 1153(e) and (a) of the Agricultural Labor Relations Act (Act) by engaging in surface bargaining. The ALJ based that conclusion on the conduct of Respondent's negotiator, and Respondent's "predictably unacceptable" proposals and failure to address the Union's major concerns. Respondent has excepted to the ALJ's conclusion. We find merit in those exceptions.

In order to determine whether an employer has engaged in bad faith bargaining, we must review the totality of its

bargaining conduct, and find, e.g., whether it attempted to avoid reaching agreement. (Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36; O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63.) In the instant case, although we find that Respondent's bargaining conduct presents some indications of surface bargaining, there is insufficient evidence to establish that Respondent was engaged in an attempt to frustrate bargaining and had no intent to compromise its differences with the Union and to reach agreement.

The ALJ found that Respondent demonstrated an unreasonable bargaining position by making proposals that were "predictably" unacceptable to the Union. For example, the ALJ found that, although Rivera indicated that the Union's four major concerns were hiring, contract duration, retroactive pay, and cost-of-living increases, Respondent's next proposal failed to address any of those issues. We find that the record does not support that finding. Although Respondent did not immediately address all of those issues in its next proposal, it later reached agreement with the Union on hiring, the proposal it made at the next meeting included retroactive pay, and its proposal at the following meeting included a bonus to compensate for the cost-of-living increase in the fourth and fifth years of the contract, and an increase in the travel allowance in the fourth and fifth years of the contract if the price of gasoline exceeded a certain amount. The ALJ also found that Respondent's proposal that the Union be required to issue identification cards and explain the benefits of the Martin Luther King Fund to workers at bimonthly meetings interfered with "strictly internal" union matters, and was evidence of Respondent's bad faith.

We reject that finding, noting that the proposal was subsequently withdrawn and had a minimal impact on the parties' bargaining.

The ALJ also found suspicious Respondent's offer, at the July 29 meeting, of two typewritten proposals where the second indicated that it had been prepared before the first was submitted. Laws testified, however, that she took several versions of each article to the meeting, and that she and Horwath stapled together a new proposal during a caucus. It was common for the parties to exchange more than one complete package proposal at a bargaining session, and those proposals often incorporated some, but not all, of the items included in the previous proposals. We find that no inference of bad faith can be drawn from Respondent's offer of the two typewritten proposals at the July 29 meeting.

The ALJ also noted that negotiator Laws cancelled scheduled negotiation meetings on three occasions, giving the Union only one day's notice of two of those cancellations. We find that the ALJ's reading of the record was incorrect and that the inferences he drew from the facts were unwarranted. After attempting on November 17 to cancel the meeting scheduled for November 18, Laws reconsidered, and the November 18 meeting was held as planned. Laws did cancel the other two meetings, but, as each of them was rescheduled for the following day, Laws' conduct did not interfere with the parties' ability to meet on a regular basis.[3/]

By May 20, 1979, the parties had agreed to adopt the old

[3/] Jorge Rivera, the Union's negotiator, also cancelled one meeting because of illness.

contract language covering many noneconomic items. Most of the remaining items as to which changes had been proposed were resolved by late November 1979. The agreed-upon language in those articles tends to reflect positions midway between the parties' opening proposals, suggesting that they were able to reach compromise through the bargaining process. On December 1, 1979, David Burciaga, a UFW negotiator, sent Laws a written proposal which indicated that the Union was in agreement with everything in Respondent's November 18 proposal except for contract duration and retroactive pay. The Union proposed a three-year contract, with the same wages as the first three years in Respondent's proposal, while Respondent continued to propose a five-year contract term. The Union proposed that retroactive pay be paid in four installments, while Respondent offered three installments.

It was at that point in the negotiations, according to the ALJ, that Respondent began bargaining in bad faith. On December 1, Laws sent Burciaga a telegram indicating that Respondent proposed to implement a wage increase, and to terminate the Martin Luther King Fund, the Juan de la Cruz Pension Plan, and the Robert F. Kennedy Medical Plan payments and institute its own medical insurance program.[4/] Laws did not mention that telegram to Burciaga when she spoke with him by telephone on December 1. A representative from the State Mediation and Conciliation Service

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[4/] Burciaga responded to Laws' telegram, objecting to the changes and objecting to Laws' attempt to schedule a meeting just to discuss the proposed changes when the parties had not reached agreement on a full contract. Laws answered that her telegram was only a proposal. There was no evidence that Respondent implemented the proposed changes.

attended the next two negotiations meetings, at the UFW's request, but the parties were unable to resolve their differences. At the second meeting (the last meeting described in the testimony), the UFW offered a five-year contract with a wage reopener after three years, and also offered two other full proposals, one with a two-year contract term and one with a three-year term with lower wages than those proposed by Respondent. Laws did not respond to any of those three offers, and claimed that she did not receive copies of the last two proposals, although copies were produced at the hearing, pursuant to subpoena, from her files.[5/] There was no record evidence of any bargaining between the parties from January 14, 1981, the date of the last meeting, until February 11, 1981, when the hearing in this matter began.

Although Respondent's conduct during the last few weeks of bargaining provides some evidence of bad faith (for example, Laws' denial that she received the Union's last two written proposals and Respondent's failure to respond to the Union's last three offers), we find that evidence insufficient to support the ALJ's conclusion that Respondent thereby engaged in surface bargaining. In particular, we reject the ALJ's reliance on Respondent's insistence on a five-year contract, which he considered a "predictably unacceptable proposal."[6/]

[5/]The ALJ found that Laws' illogical explanation of her failure to receive certain documents suggested dilatory tactics.

[6/]We disagree with the ALJ's statement that the National Labor Relations Board has found an employer's insistence on a five-year contract to be bad faith bargaining. In the cases relied upon by

(fn. 6 cont. on p. 7.)

Although we must review the totality of the Parties' conduct, and take some cognizance of the reasonableness of the positions taken by the parties in the course of bargaining (NLRB v. Reed and Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131 [32 LRRM 2225]), we cannot compel agreement or concessions, or sit in judgment of the substantive terms of a contract. Such decisions are to be left to the give-and-take of the collective bargaining process. (Porter Co. v. NLRB (1970) 397 U.S. 99 [73 LRRM 2561].) Although the bargaining obligation does not require an employer to yield positions fairly maintained, the Board will examine the totality of the conduct to determine whether an employer made some reasonable effort to compose its differences with the Union. (NLRB v. Reed and Prince, supra, 205 F.2d 131.)

We find that Respondent did make a reasonable attempt to respond to the Union's concerns by offering higher wages and a bonus to compensate for the long contract duration it sought. The ALJ found that Mike Horwath's asserted reasons for needing a five-year contract were pretextual. Horwath testified that he intended to be in business for a long time and wanted to be able to accurately forecast the future of his operation. Some of Horwath's reasons for wanting a five-year contract are less than convincing. For example, he claimed that a longer contract would create better, more stable labor relations with his employees,

(fn. 6 cont.)

the ALJ, Vanderbilt Products (1961) 129 NLRB 1323 [47 LRRM 1182] and Mooney Aircraft (1961) 132 NLRB 1194 [48 LRRM 1499], the employer's contract duration proposal was only one aspect of bargaining conduct, and the national board found other persuasive evidence of the employer's lack of sincere desire to reach agreement.

even though a large group of employees gave him a petition indicating that they did not want a five-year contract. However, we find Horwath's statement, that he wanted to be able to predict his costs for five years, was not evidence that he was attempting to avoid reaching agreement. When the Union negotiators explained their reasons for rejecting a five-year contract, Respondent increased its wage offer to compensate for the possible future effects of inflation on the employees' earnings. Although the Union did not believe that Respondent's wage proposals provided adequate protection against the uncertainties of the future, we find that the wage offers were not so unreasonable as to indicate that Respondent had no intention of reaching agreement with the Union.

This is a case in which both parties engaged in fruitful bargaining on most issues, and maintained reasonable, albeit opposing, viewpoints on the issue of contract duration. We find that the General Counsel has failed to establish that Respondent engaged in surface bargaining without a sincere intent to reach agreement, and we therefore dismiss the allegation in the complaint that Respondent unlawfully refused to bargain by engaging in bad faith bargaining.

The October 3 Discharges

The ALJ concluded that Respondent did not violate the Act on October 3 by discharging the employees who attended a negotiating session that day. Rather, he concluded, Respondent lawfully discharged the workers pursuant to the no-strike clause in the collective bargaining agreement then in effect between the UFW and

Respondent. Both General Counsel and the Charging Party except to the ALJ's conclusion that Respondent did not thereby violate the Act, arguing that Respondent unlawfully retaliated against the workers because they participated in protected concerted activities by attending a negotiating session. We affirm the ALJ's conclusion that Respondent's conduct in discharging the workers did not violate the Act.

The evidence concerning the events of the morning of October 3 is clear, although it appears that the participants in those events did not share a common understanding of what transpired.

After work on October 2, the workers met and decided to attend the bargaining session that would be held the next day. Jorge Rivera, the UFW negotiator, explained the status of the bargaining, and noted that the parties were deadlocked over the duration of the contract. Some of the workers had difficulty believing that Respondent was insisting on a five-year contract, particularly in light of the fact that, in September, the workers gave general manager Mike Horwath a petition explaining that they did not want a five-year contract. Some of the workers felt that the UFW negotiating committee members were not doing their jobs and, after a committee member suggested that the workers attend a bargaining session, the workers agreed to attend the meeting the following day.

The workers decided that, before work began on October 3, some members of the negotiating committee would inform Respondent that the employees intended to go to the meeting. The other

workers would go to the UFW's field office in San Ysidro at about 5:30 or 6 a.m., and wait for a call regarding permission to leave. If Respondent did not give permission, the workers would ask for a reasonable time to get to work. The negotiating committee representatives planned to telephone the Union office before 8 a.m. if there were any problems.

Javier Acosta, field director for the UFW's San Ysidro office, translated for the negotiating committee members at Respondent's San Pasqual site on the morning of October 3. At 6:15 or 6:30 a.m., the workers spoke with foreman Tomas Yonakura and told him that they were going to the negotiations meeting. When Yonakura asked why he was not notified earlier, the employees explained that they decided to attend the meeting the night before. Acosta testified that Yonakura said, "That's not right. I'll call Mike and find out." When Mike Horwath arrived, the workers told him that they were not going to start work, but were going to the negotiating meeting instead. Horwath told the workers that they knew they were supposed to work, and that it was not right for them to leave. The workers again explained that they had decided the night before to attend the meeting. Horwath said that not all of the workers could go, and the workers replied that they were all going and intended to leave at 9:30 a.m. Acosta testified that Horwath said, "Okay," but that anyone who left at 9:30 would not be able to return to work because of bookkeeping problems. Yonakura said that anyone could go to the meeting as a "volunteer" and that anyone who wanted to stay could stay.

Horwath corroborated Acosta's version of the conversation.

Horwath did not remember any employee(s) asking for permission to attend the negotiating session, but testified that the workers simply announced that they were going. Horwath told the employees that it was a workday and that anyone who left work or did not report to work should not come back that day, since he did not run a ranch where workers could come and go as they pleased. Horwath explained that he had work planned for the day, and that his bookkeeping was not set up to have people leave work during the day.[7/]

On October 2, Margarita Huerta, a member of the ranch committee and the negotiating committee, had asked her foreman for permission to attend the October 3 bargaining session. Her entire crew worked an extra hour on October 2 to compensate for the committee members' planned attendance at the next day's bargaining session. Huerta was one of the workers who waited at the UFW's office on the morning of October 3. She testified that workers waited until 8 a.m. and, since they had not received a call, proceeded to the bargaining session, traveling in a bus owned by the Union. While en route, they stopped at Respondent's San Pasqual work site to be sure that everything was all right. They did not talk to Horwath, but spoke with the members of the negotiating committee, who said they had talked to Horwath and that there would be no problem. The workers waited for the other employees to stop working at their 9:30 a.m. break, and then all the workers left for

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[7/]Laurie Laws testified that Horwath explained the bookkeeping problem to her when they met later in the morning of October 3. Horwath told her that the foremen sign up all workers in the morning and do not monitor the workers who leave during the day.

the bargaining session. Huerta testified that she believed there would be no problem, since the workers had a good relationship with Respondent, and she assumed they had received permission to attend the meeting, because no one had telephoned the Union office by 8 a.m.

At the negotiating session, Laurie Laws asked whether the contract was still in effect and whether the employees were on strike. Jorge Rivera answered that the contract was still in effect, but the workers had a right to be at the meeting and were not on strike. Acosta testified that, at the negotiating meeting, he described the earlier meeting between Horwath and the negotiating committee members. Laws read the contract's no-strike clause to the workers and, when she asked Rivera to put the workers back to work, Rivera did not respond. Laws then gave the workers two hours to return to work. Rivera said that the workers were not wearing their work clothes, and Laws reminded him that he had said that the workers would return to work as soon as the meeting ended. After a very short discussion of the mechanization article in the contract proposals, Laws ended the meeting, and indicated that Respondent would be willing to meet with the entire crew on Sunday. Rivera noted that Sunday was the workers' only day off. Laws repeated the order that the employees return to work, and gave them a full two hours to do so, until 2 p.m.[8/]

Margarita Huerta testified that, when the meeting ended,

[8/] Respondent's Otay Mesa site is a 40- to 50-minute drive from the location of the negotiating meeting, and the San Pasqual site is 15 minutes from the meeting place. Laws testified that she and Horwath believed the workers could easily return to work by 2 p.m.

the Union bus took the workers back to the Union's office, which was 45 or 50 minutes from the site of the negotiating session.[9/] At the meeting, Rivera suggested that the workers go directly to the fields, but the workers believed that they would not be fired, if they failed to do so, because they had asked permission to attend the meeting. The workers went back to the Union's office to decide whether they would return to work. Huerta testified that she decided not to go back to work because it was too late and Horwath had said that he did not want any bookkeeping problems. She also testified that she believed that Laws was serious about firing the employees, and that she intended to return to work because of the order that Laws gave to do so, but she did not return because it was too late and she thought there would be no problem with the no-strike clause because the workers had asked permission to attend the meeting.

Laws testified that Respondent's normal workday ends at 3:30 p.m., while Huerta testified that work ends at the Otay Mesa location at 2 or 2:30 p.m. Twenty-one workers returned to the San Pasqual location by 2 p.m. and were allowed to return to work. Laws asked Respondent's foremen to prepare a list of all the workers who were not at work at 2 p.m. on October 3, and who did not have permission to be absent. Respondent discharged all the

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[9/] Respondent's San Pasqual site is 35 to 45 miles from the UFW's office.

workers on the list.[10] Many of those workers made several unsecessful attempts to return to work.[11]

The ALJ found that, even if Horwath had given the workers permission to attend the bargaining session, that permission was revoked when Laws and Horwath ordered the employees to return to work by 2 p.m., on October 3. The ALJ found that Respondent gave the employees a reasonable amount of time to return to work, and that they were discharged for failing to return to work in a timely manner, rather than because of any protected concerted activity. The ALJ concluded that Respondent discharged the workers because they violated the no-strike clause in the collective bargaining agreement between Respondent and the UFW.

We agree with the ALJ that Respondent terminated the workers because they failed to comply with its order to return to work by 2 p.m. The contract's no-strike clause was broad enough to cover the workers' attendance at the negotiations meeting and their failure to return to work by 2 p.m., since it prohibited any "strikes, slowdowns, work stoppage, boycott, or interruptions of

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[10] Included in that list, and subsequently discharged, was Diego Oropeza, an employee who did not attend the bargaining session, but did not go to work on October 3 because the person he rode to work with did not pick him up that day. Also included were the members of the negotiating committee, who had received permission to attend the session.

[11] On October 4, Respondent terminated the collective bargaining agreement by telegram. On October 7, the workers who had been discharged filed a grievance pursuant to the terms of the terminated contract. After Respondent's unsuccessful attempts to change the arbitrator, an arbitration session was conducted without Respondent participating. The arbitrator found that Respondent's application of the no-strike clause was unreasonable and awarded the workers reinstatement with backpay.

work." The National Labor Relations Board has described several exceptions to the applicability of general no-strike clauses,[12/] but none is relevant here. While General Counsel argues that the employees' actions were protected, she offers no precedent to explain why the workers' failure to return to work by 2 p.m. should be treated differently than any other work stoppage or interruption, except to argue that the workers had permission to attend the meeting and that the order to return to work was unreasonable. The testimony indicates that, although Horwath did not intend to give the employees permission to leave and attend the meeting, the workers believed that they had permission and that there would be no problem. The negotiating committee members who spoke with Horwath before work believed that they were permitted to leave, and they relayed that impression to the rest of the workers. We agree with the ALJ, however, that, even if it were reasonable for the workers to believe that they had permission to attend the bargaining session, Horwath revoked that permission at the meeting when he told the workers to return to work by 2 p.m. Employee Huerta testified that she understood the order to return

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[12/] For example, the Board has held that a general no-strike clause did not waive the employees' right to strike solely against an employer's "flagrant" unfair labor practice (Mastro Plastics Corp. v. NLRB (1956) 350 U.S. 270 [37 LRRM 2587]; Arlan's Department Store of Michigan, Inc. (1961) 133 NLRB 802 [48 LRRM 1731]; The Dow Chemical Company and United Steelworkers of America, AFL-CIO-CLC (1979) 244 NLRB 1060, revd. The Dow Chemical Company (3d Cir. 1980) 336 F.2d 1352 [105 LRRM 3327], and did not apply to work stoppages which did not impair production (Empire Steel Manufacturing Company (1978) 234 NLRB 530 [97 LRRM 1304, 98 LRRM 1304], but see Newport News Shipbuilding Co. v. NLRB (4th Cir. 1980) 631 F.2d 263 [104 LRRM 2633]) or to a sympathy strike (Kellogg Company v. NLRB (6th Cir. 1972) 457 F.2d 519 [79 LRRM 2897]).

to work and believed that Respondent was serious about firing the workers if they failed to comply with the order.

When they did not return to work by 2 p.m., the employees were engaged in a work stoppage or work interruption, arguably prohibited by the contract's no-strike provision. At the bargaining session, Rivera suggested that the workers return directly to the fields, but they decided to return to the Union's office instead. Respondent then discharged the employees pursuant to the no-strike provision of the collective bargaining agreement, which states that the "company may discharge or discipline any worker who violates the provisions" of the no-strike clause. We note that Respondent's reliance on the no-strike clause appears rather harsh and inconsistent. For example Diego Oropeza, an employee who was not at work October 3 because the person who drives him to work did not pick him up, was discharged without ever hearing the order to return to work by 2 p.m. In addition, the negotiating committee members, who unquestionably had received permission to attend the meeting, were discharged along with the other workers who requested permission from Horwath on the morning of October 3. Our inquiry, however, is limited to a determination of whether Respondent discharged the workers because of union activity or other protected activity, and thereby violated the Act. We find that General Counsel has failed to establish that Respondent discharged the workers because of their involvement in activities protected by section 1152 of the Act.

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ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: March 11, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

TMY FARMS, INC.
(UFW)

9 ALRB No. 10
Case Nos. 80-CE-71-SD
80-CE-72-SD

ALJ DECISION

The complaint in this case alleged that Respondent TMY Farms, Inc. violated section 1153(e) and (a) of the Act by refusing to bargain in good faith with the UFW. In its answer to the complaint, Respondent asserted that the UFW had bargained in bad faith. During the hearing, General Counsel amended the complaint to allege that Respondent also violated section 1153(c) and (a) of the Act by discharging 75 employees who attended a negotiations session on October 3, 1980.

The complaint alleged that Respondent's bad faith bargaining posture was evidenced by its (1) discharging the employees who attended the October 3 negotiations session; (2) rejecting the arbitration and grievance procedure and refusing to participate in an expedited arbitration at the request of the UFW; (3) offering predictably unacceptable proposals to the UFW; (4) reneging on substantive articles previously agreed to; and (5) employing dilatory tactics.

The ALJ concluded that Respondent violated the Act by engaging in surface bargaining, but that this bad faith was not manifested until quite late in the negotiations. The ALJ also concluded that Respondent did not violate the Act by discharging the employees who attended the October 3 negotiations meeting, since the employees engaged in a work stoppage in violation of the no-strike clause in the collective bargaining agreement.

BOARD DECISION

The Board rejected the ALJ's finding that Respondent intentionally frustrated agreement by offering predictably unacceptable proposals. Since the Board found that Respondent gave reasoned explanations for its proposals and made reasonable efforts to compose differences on firmly held positions, the Board concluded that Respondent did not violate Labor Code section 1153(e). The Board adopted the ALJ's analysis regarding the October 3 discharges and dismissed the complaint in its entirety.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

TMY FARMS, INC., aka TMY II Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 80-CE-71-SD 80-CE-72-SD

APPEARANCES:

Deborah Escobedo, of
El Centro, for the General
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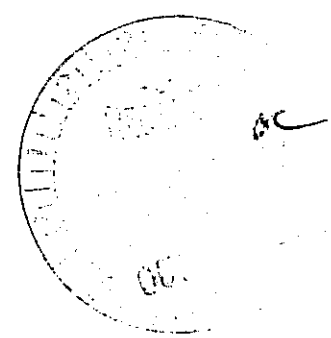
Marion I. Quesenbery,
Dressler, Quesenbery, Laws &
Barsamian, Newport Beach,
for the Respondent

Frederico G. Chavez, of Keene,
for the Charging Party.



DECISION

STATEMENT OF THE CASE

RON GREENBERG, Administrative Law Officer: This case was heard before me on February 11, 12, 13, 16, 17, 18, 19, 25, and 27, 1981, in San Diego, California.

The complaint, issued and duly served on all parties

on December 15, 1980,[1/] alleged that Respondent violated Sections 1153(e) and (a) of the Agricultural Labor Relations Act (hereinafter the "Act") by refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (hereinafter the "UFW" or "Union") the certified bargaining representative of its employees. On December 24, Respondent filed and duly served its Answer, denying commission of any unfair labor practice. By way of affirmative defense, Respondent alleged that the UFW had bargained in bad faith by its totality of conduct, including, but not limited to: (a) circumventing the bargaining agent, (b) continually changing their negotiators, (c) offering proposals to the Company which it knew were predictably unacceptable to the Company, and (d) continually changing their position on substantive issues. Respondent further raised the defense that the UFW has refused to uphold its obligations under the "no strike" clause of the collective bargaining agreement.[2/]

During the hearing, General Counsel amended the complaint, alleging a violation of Section 1153(c) and (a) of the Act by its discharging 75 employees who attended a negotiation session on October 3. The amendment was formalized in writing pursuant to Board regulation and duly served on the parties on February 24, 1981.

[1/] Unless otherwise stated, all dates refer to 1980.

[2/] I find no merit in the affirmative defenses raised by Respondent. They will be later discussed in the body of the Decision.

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

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, as admitted in its answer, is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The UFW, as admitted in Respondent's answer, is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Sections 1153(e) and (a) of the Act by failing to bargain in good faith as evidenced by: (a) discharging 75 employees who attended the October 3 negotiating session, (b) offering predictably unacceptable proposals to the UFW, (c) reneging on substantive articles previously agreed to, (d) rejecting the arbitration and grievance procedure and refusing to participate in an expedited arbitration at the request of the UFW, and (e) employing dilatory tactics. The amended complaint further alleges that Respondent violated Sections 1153(c) and (a) of the Act

by discharging 75 employees who attended the October 3 negotiating session.

III. Background Facts

Respondent, TMY Farms, grows vegetables, which are marketed all over the United States and Canada. The company leases approximately 1300 acres of land in San Diego County--1200 acres in San Pasqual Valley and 100 acres at Otay Mesa, southeast of Chula Vista. The two ranches are approximately 40 miles apart. In 1980, TMY grew and harvested leaf lettuce, squash, zucchini squash, cucumbers, pumpkins, butternut squash, acorn squash, sweet corn, celery, and cabbage.

Since 1973, Mike Horwath has been the general manager. On January 1, 1980, he became a partner, sharing ownership with S&H Packing and Sales and Horwath & Co. S&H Packing is owned by Robert Horwath and Clarence Horwath, Mike Horwath's father and uncle respectively. Robert Horwath secures crop financing from banks; Clarence Horwath has no day-to-day function. Horwath & Co. is owned by Pat Horwath, Mike Horwath's brother.

Mike Horwath makes all the major decisions dealing with running the farm. He testified that he normally decides whether an employee should be discharged, whether to request workers from the union, and which days there will be work out in the fields. He is also responsible for labor relations with personnel.

On January 12, 1978, a collective bargaining agreement was reached between TMY Farms and the United Farmworkers after a year of negotiations. The agreement expired April 7, 1980.

IV. The Negotiations

In March, 1980, Horwath received a letter from UFW headquarters, notifying him that Jorge Rivera would negotiate the next collective bargaining agreement for the UFW.[3/] Rivera had been assigned to the TMY negotiations by Richard Chavez, Director of the UFW Negotiations Department, in February. During the month of March, Rivera met with the TMY negotiating committee, a group of four TMY workers: Marguarita Huerta, Martin Covarrubias, Sam Baltazar, and Salvador Estrada. About that time, Rivera called Horwath and scheduled a meeting for April 2. Horwath told Rivera that he would be doing the negotiating himself.

In late March, Horwath attended a meeting of growers in the Chula Vista area. At the meeting, Laurie Laws, an attorney for the Western Growers Association, explained to the growers the basic requirements of collective bargaining. Horwath indicated that he wanted Laws to represent him. He set up a meeting for Laws to see the fields and operation of his San Pasqual site. According to Horwath, he then sat down with Laws and went page by page over the old contract, explaining what he

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[3/] Rivera had worked for the union since 1976, first as an organizer, and later as a negotiator. Rivera had previously negotiated eight or nine contracts for the UFW in San Diego County.

felt were problems. He first noted that he had a problem with hiring. All hiring normally was done through the union hiring hall in San Ysidro, but Horwath wanted to utilize the local work force. Regarding the seniority article, he wanted to make it easier for TMY to terminate workers who did not perform their job function. In addition, Horwath felt the no-strike, discipline and discharge, and management rights clauses were not sufficiently specific. He testified that he wanted to make certain that the leave of absence clause left him control to prevent the whole work force from leaving at the same time. According to Horwath, he also was concerned about problems with the Robert F. Kennedy medical plan, and was unsure of where TMY's contributions were going in the medical, pension, and worker education plans. Finally, he stated that he was interested in a contract of longer duration, since he planned to be in business a long time, having secured a long term lease and small business loans.

Laws testified that she and Horwath decided to deal throughout the negotiations with packages, rather than arguing about each contract article individually.

During the last week of March, Laws called Rivera and informed him that she could not attend the meeting of April 2. They rescheduled the meeting for April 3.

A. Meeting #1--April 3[4/]

Rivera asked whether TMY received a letter sent by the UFW, which suggested extending the terms of the collective bargaining agreement until one party submitted a request in writing for termination. Laws said that Horwath received the letter, and agreed to the extension.[5/] TMY then supplied all the information requested by UFW except the tool information, which they said they inadvertently forgot. Laws told Rivers that she would supply it at the next meeting. Rivera then asked for further information regarding crops.

At that point, the parties set ground rules. They agreed to meet in Escondido. They also decided that when they agreed on any article, they would both initial and date it, and then put it aside. Rivera testified that they also agreed to deal either with packages or with individual articles. Horwath and Laws explained that they both had authority to reach an agreement for TMY, while Rivera noted that he could reach agreement for UFW subject to approval of the UFW legal department.

Rivera then submitted several written proposals. First,

[4/] Laws and Horwath attended this meeting for TMY. Rivera and the negotiating committee represented the union.

[5/] The parties agreed to extend the agreement on a day-to-day basis until either party requested termination, which required 24-hour notice in writing. Thus, the collective bargaining agreement remained in effect on October 3, the day Respondent terminated approximately 75 employees who attended the negotiating session. Respondent served notice following the October 3 meeting that it intended to terminate the collective bargaining agreement immediately.

he proposed lowering the amount of time necessary to acquire seniority from fourteen days to one day. In addition, he proposed that layoffs be made according to social security numbers. Second, on discipline/discharge, the union suggested that warning notices be issued within 48 hours, and that they be valid for only one month. Rivera also wanted a mandatory union label, with a right to strike. Laws testified that Rivera claimed that mandatory union label was a UFW policy. Finally, Rivera proposed increased leaves of absence from 30 to 60 days.

TMY noted that they would have a response by the next meeting, and Respondent asked Rivera to submit an economic proposal at the same time. The parties scheduled the next meeting for April 17. Around April 12 or 13, Laws cancelled the meeting. It was rescheduled for April 24.

B. Meeting #2--April 24

TMY represented by Laws and Horwath, provided the tool information (GCX 7), but did not provide the crop information requested by the union. The UFW was represented by Rivera and the negotiating committee that day.

TMY then gave a written response to the union proposals (GCX 8). For seniority, the company suggested a fourteen-day probation period before a worker could acquire seniority. Workers on layoff for more than ten months would lose their seniority. Furthermore, layoffs and the filling of vacancies

now would be determined by the company, judging worker skill rather than by seniority. Laws proposed that discipline/ discharge warning notices would remain in effect for two years. Also, TMY spelled out specific examples of just cause. In addition, in the management rights article, the company delineated decisions which would be subject to management prerogatives. TMY also orally suggested that the leave of absence and union label clauses remain the same as in the original contract.

Rivera then presented the UFW's written economic proposal (GCX 9). He offered $5.00 an hour for general field and harvest wages. The proposal also contained new articles on apprenticeship, injury on the job, sick pay, and cost of living adjustment (COLA). The contract would have a one-year duration and would be retroactive to April 17, The mechanization article, which dealt with displaced workers, allowed no new machinery at TMY, unless the company held negotiations with the union.

Laws testified that immediately after the meeting, she and Horwath decided to submit a five-year contract in response to the union's one-year proposal.

On April 30, Laws mailed a letter to Rivera requesting information on the administrative costs of the Robert F. Kennedy Medical Plan [RFK], the Juan De La Cruz Pension Plan [JDLC], and the Martin Luther King Worker Education Fund [MLK].

C. Meeting #3--May 8

Rivera, attending the meeting for the UFW with the negotiating committee, handed Laws and Horwath a letter explaining that they had the right to ask for information on the plans directly from the Board of Trustees (GCX 10). Laws, again representing the company with Horwath, testified that she objected to this, informing Rivera that he was obligated to provide the information himself. Rivera indicated that he would not provide it. Laws also testified that she explained to Rivera at this point that all letters to her should be addressed to her post office box, rather than to the actual address of the firm, because there was a mail delivery problem. Her notes, however, did not reflect that she informed him of this.

Rivera testified that the summary plan description of RFK, and the IRS trust documents for JDLC were located in the Keene, the La Paz UFW office. Rivera never requested these documents for negotiations.

Rivera suggested that the parties initial the contract articles on which they were agreed. Laws requested time, however, to sit down with Horwath and discuss the original collective bargaining agreement.

TMY then gave an oral travel proposal of $2.00 a day--a 25 cent increase. The company also submitted a written wage proposal of $3.40 for general field and harvest workers (GCX 11). Laws agreed to give 10 cents more an hour for San Pacqual if

the union accepted the travel proposal. TMY also said that they would have more proposals at the next meeting.

The UFW then made an oral counteroffer on its original four proposals. The union deleted some language from the union label article and increased the warning notice from one to four months under discipline/discharge. Leave of absence and seniority remained unchanged.

TMY then answered Rivera's questions concerning the crops.

On May 14, Rivera received a letter from Laws asking for confirmation that she had provided all information (GCX 13). He received a second letter from Laws on the same day repeating her request for information on the administrative costs of the plans (GCX 14). Also on May 14, Rivera sent a letter to Laws, requesting information on the corn harvest (GCX 15). On May 16, Rivera sent Laws a letter referring her to the letter he had handed to her at the May 8 meeting (GCX 10) for information about the various plans (GCX 16). Laws testified that she had not seen either letter until the hearing. Nevertheless, both letters were found in her files. The former was marked "received 5-19" (GCX 69) and the latter was stamped "Western Growers Association--May 19" (GCX 70).

D. Meeting #4--May 20[6/]

TMY did not respond to the request for corn information, as Laws claimed she had not received the letter.

[6/] Laws and Horwath represented TMY at this meeting, while Rivera and the negotiating committee attended for the UFW.

Both parties then initialled agreed-upon articles (GCX 17).

The UFW offered a written proposal on celery rates. TMY then made an oral proposal. Laws agreed to an extra 30 days leave of absence if it would be at TMY's discretion. She set wages for general field and harvest work at $3.40 with a 20 cent raise each year, the contract duration being five years. TMY then requested information on a North County Hiring Hall, an explanation of the UFW's COLA article, and again asked for data on the administrative costs of the JDLC, RFK, and MLK funds.

Rivera asked to put general negotiations aside, and rather, to discuss the squash rate for harvesting which was to begin the next day. He proposed a separate piece rate for squash harvested by knife. TMY responded with a package proposal. The company agreed to the union's piece rate, as long as the union agreed to leave management rights and mechanization unchanged from the original agreement.

The union accepted the squash rates and management rights article, but submitted a new written mechanization proposal with a provision for six months notice to the union. TMY then offered three months notice with no negotiations. The union said they would agree with the package if the contract had a one-year duration, or if the mechanization clause provided for arbitration. TMY did not agree, but offered a 79 cent interim squash rate.

The UFW then offered a package proposal. Rivera proposed the same squash rate and management rights as he had been proposing, and the same jury duty and union label as in the original agreement. He suggested a preferential hiring list for seniority, with the rest of the article unchanged. The union offered a six-month warning for discipline/discharge and accepted TMY's previous offer on leave of absence. The offer was retroactive to the first day of picking.

Laws said she would respond at the next meeting. The parties agreed to an interim increase on the squash rates. A new meeting was scheduled for May 29, but was cancelled by Rivera due to illness.

Rivera received a letter from Frank Dennison, attorney for the RFK medical plan, which had been sent to Laws, explaining that any employer contribution to RFK went to increased benefits and not to administrative costs (GCX 20).

E. Meeting #5--June 6

Rivera, who represented UFW at this meeting along with the negotiating committee, began by explaining UFW's formula for COLA. Laws then told Rivera that she would not give him the corn information because the company had decided to drop the corn piece rate proposal.

At that point, TMY presented a written response to the UFW's package proposal. Laws dropped the discipline/discharge warning notice duration from two years to eighteen months. The proposal contained a bereavement section offering three

days pay if the worker had to travel 300 miles. Laws created a ten day probationary period for seniority. The contract duration proposed by TMY was five years. Laws also orally proposed that hours of work and standby be the same as in the original contract.

Rivera then asked whether TMY would accept an apprenticeship program under company proposal that TMY do the hiring. Laws asked for more information on apprenticeship. She also wanted more information on the plans, as she was not satisfied with the Dennison letter.

Rivera then responded to TMY's latest proposal with his own package proposal. The UFW decreased leave of absence from 60 to 40 days, and dropped bereavement to three days. Rivera also lowered his wage offer to $4.80 and dropped COLA entirely. The UFW proposed duration of one year.

The parties then agreed to across the board interim wage increase of 30 cents per hour.

F. Meeting #6--June 14[7/]

Rivera told Laws that he would mail her the apprenticeship information because he had just received it from UFW headquarters and wanted to review it himself.

TMY then made an oral package proposal. Laws tied apprenticeship and hiring together, stating that she needed to

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[7/] Laws and Horwath attended for TMY, while Rivera and the negotiating committee represented the UFW.

see the apprenticeship information. She lowered the seniority probationary period from ten to seven days. Union label, vacations, jury duty, mechanization, and payroll deductions remained unchanged from the original agreement, while discipline/discharge contained a twelve month warning. Hours of work, rest periods, and standby were "state law." The company offered four paid holidays: Good Friday, Labor Day, Thanksgiving, and Memorial Day or Rufino Contreras' Day. TMY refused, however, to check-off workers' salaries for Rufino Contreras' Day. Laws said that the company would bring in its own proposal for a medical plan. She testified that she gave Rivera a copy of Pan American Plan 22 as an example of the type of plan the company was considering. Her notes, however, do not reflect this.

The company dropped the JDLC pension plan, and added the contribution to the wages. The proposal offered a contract with a five year duration. Laws also offered a 30 cent wage increase followed by a 25 cent increase for each of the next four years. Thus, wages for general field and harvest, including the pension addition, totalled $3.88, $.13, $4.38, $4.63, $4.88, respectively, over the five years of the contract. TMY offered the same percentage increase on piece rates.

Rivera rejected this proposal and presented a counteroffer. Rivera offered an eight month warning notice on discipline/discharge. He accepted TMY's June 6 offer on leave of absence. The union proposed contract language for union label

and state law language in writing for reporting and standby. On bereavement, Rivera wanted three days with contract language, while on vacations, he proposed an eligibility increase from 400 to 500 hours. Rivera suggested replacing Good Friday with July 4 on holidays, and wanted check-off on Rufino Contreras. He offered 30 cents on RFK, 20 cents on JDLC and 6 cents on MLK. The UFW suggested rest periods of twenty minutes every four hours, and three days of sick leave. Rivera decreased travel pay to $3.00. The contract duration proposed was one year. Rivera dropped wages by 20 cents to $4.60, and indicated that hiring and apprenticeship proposals were pending. The rest of his offer remained unchanged from the May 20 proposal.

Laws countered with TMY's own package proposal. She offered seniority after seven consecutive days; those laid off would be put on a preferential hiring list. The company agreed with the union's language on discipline/discharge, but wanted a twelve month warning notice. Rivera testified that Laws again offered her June 6 proposal on leave of absence along with her latest proposals on union label and reporting and standby. Laws testified that she offered state law in writing on standby. She also offered two fifteen-minute rest periods, the latter at 3:00 in the afternoon. For vacations, TMY offered 2% with 1000 hours and one year seniority, 2% with 900 hours and two years seniority, and 4% with 800 hours and five years seniority. The company suggested five holidays, including

a Rufino Contreras checkoff, and 18 cents for JDLC. The contract proposed had a five year duration. The package contained an injury on the job article, which would give an injured worker the balance of the day's pay, unless the worker was able to perform another job. Laws offered four days sick pay, and original contract language for mechanization. Finally, TMY proposed $2.00 with the original language for travel pay, and $3.75 for general field and harvest wages, with a 25 cent increase in years two and three, and a 30 cent increase in years four and five.

G. Meeting #7--July 2

This meeting began one hour late. The UFW, represented by Rivera and the negotiating committee, claimed not to know that TMY was ready to start.

The UFW presented an oral and written package response. Rivera decreased his last wage offer to $4.25 with a 25 cent increase per year and COLA. The package contained an injury on the job article, stating that an injured worker could return to work only with a physician's approval. Rivera agreed with TMY on seniority and rest periods, except that he wanted the second period to begin at 2:30. He also lowered the discipline/discharge warning to eight months. He increased overtime eligibility from 8 to 9 hours, and vacation eligibility from 500 to 600 hours. The union proposed six paid holidays, including Rufino Contreras' checkoff. Finally, Rivera lowered travel to $2.00 and increased duration to three years. The rest

of the proposal was substantially the same as the UFW's last offer. Rivera then gave Laws the written apprenticeship information.

Laws rejected this proposal and offered a new package. She offered to pay apprenticeship rates as long as the company did its own hiring. She also offered daily overtime after nine hours, with Saturday overtime after 12:00. On vacations, the company proposed 2% after one year seniority and 1000 hours, 3% after two years and 900 hours, and 5% after seven years and 800 hours. Rivera testified that Laws then offered 20 cents per hour on RFK and made no proposal on MLK. Laws, however, testified that she offered 5 cents on MLK, and again asked for information on administrative costs. TMY made the same sick pay offer, adding that two of the days could accumulate after the end of the year. Laws raised her last wage offer to $4.00, with a 15 cent raise for years two and three, a 20 cent raise for year four, and a 25 cent raise for year five. She also increased travel to $2.50. The company agreed to the union's language for injury on the job. The rest of the TMY proposal stayed the same.

Horwath then made a speech, explaining TMY's need for a five year contract. He mentioned that he planned to be in business a long time, and that he had a thirty year lease and Small Business Administration loans. Horwath testified that the Small Business Administration agents never asked about the duration of his collective bargaining agreement. He also

stated that, although other lending institutions did ask about contract duration, he never had difficulty obtaining a loan.

The UFW rejected TMY's package and offered its own. Laws testified that, at this point, Rivera said that the UFW was getting to "the bottom line" and couldn't move much more. Rivera increased the discipline/discharge warning period to nine months. He then mentioned that he needed to see TMY's hiring proposal in writing. The union agreed with the company on sick pay and overtime. On vacation, Rivera proposed 2% after one year seniority and 800 hours, 3% for three years and 700 hours, and 5% after six years and 700 hours. In addition, Rivera offered $2.25 for travel pay, with a 25 cent increase each year. He cut wages by 15 cents down to $4.10, with a 25 cent raise each year, and a COLA of 5/10%. The rest of the proposal was substantially the same as the UFW proposal offered earlier during the same meeting.

TMY ended the session by again asking for information on MLK benefits and RFK administrative costs.

H. Meeting #8--July 11

Laws and Horwath attended this meeting for the company, while Rivera, the negotiating committee and Barbara Macri represented the union. Macri, a national representative of the union, and a UFW negotiator, was administrator of the UFW legal department. According to Macri, she began to attend the meetings in order to assist Rivera, continue his training, and help find ways to facilitate agreement. On three other

occasions she had helped Rivera in negotiations, stating that this was a common practice during negotiations. Macri testified that she had full authority to negotiate a contract.

Macri began the meeting by explaining the RFK plan. She noted that continuance of the present plan would cost 22 cents. She also explained that the Board of Trustees and administrators of the plan intended to meet on July 25 to cost out a new plan. There was going to be a dramatic increase in surgery and major medical. Macri did not present a written copy or summary of the proposals. In addition, Macri referred Laws to Frank Dennison, counsel for the RFK Fund, for specific questions. Macri suggested that Laws and Horwath visit Central Campesino, recipient for MLK money, and speak with the women in charge of providing services.

Macri then went over the rates of the Egger & Ghio contract. Horwath explained that his operation differed from Egger & Ghio. According to Macri, the discussion turned into a "yelling match."

Laws then presented a written and oral proposal, including a written version of TMY's hiring article. TMY changed its position on discipline/discharge by offering a ten month warning notice. On leave of absence, the company suggested thirty days with an extra thirty at TMY's discretion. Laws altered the vacation clause, proposing 3% for 1000 hours and one year seniority, 3% for two years and 900 hours, 3% for four years and 800 hours, 5% for six years and 800 hours. TMY also

added an additional holiday during the last two years of the contract. Laws lowered travel to $2.00 during the first three years, and $2.50 in years four and five. Laws testified that the parties had been arguing loudly throughout the reading of the package, and that by this time, the yelling got out of hand, preventing her from finishing her reading of the company proposal. She did not, however, remember whether she was able to read the wage proposal.

Rivera, on the other hand, testified that Laws completed reading the offer. He stated that she offered 27 cents for RFK, 18 cents for JDLC, and that she proposed to drop MLK entirely. He also testified that she offered wages of $4.10, with a 30 cent raise during year two, and a 25 cent raise during the last three years. The package contained no provision for retroactive pay or COLA.

Rivera rejected this package and offered his own. He agreed with TMY on travel pay, discipline/discharge, and leave of absence. On vacations, he offered 2% for one year and 800 hours, 3% for four years and 800 hours, 5% for six years and 800 hours. Rivera changed his holiday proposal to five days and a sixth during the third year. The union proposed 6 cents for MLK, 22 cents, 29 cents, and 38 cents for RFK, and 18 cents, 18 cents, and 20 cents for JDLC. Wages remained at $4.10 for the first year, but increased by 30 cents for the next year, and 50 cents for the year after. The COLA article allowed a one cent raise for every 6/10% increase in the cost of living

index, with a 15 cent cap. Rivera set the effective contract date at July 1, 1980, retroactive to April 7. Finally, Rivera mentioned that the UFW would not give up the hiring hall because the union was planning a North County Hiring Hall in the foreseeable future. He concluded by spelling out the four most important issues for the UFW: hiring, duration, COLA, and retroactive pay.

Horwath then gave another speech. He said that he was "flabbergasted and confused with the dramatic changes in union position." He thought the parties were close on hiring and apprenticeship. He also was confused by the tremendous increase in third year wages in the union's contract.

Rivera subsequently made a new package proposal with the following changes. He lowered wages to $4.05 in the first year, $4.35 in the second year, and proposed a reopener with the right to strike in the third year. For RFK, he offered 22 cents, 29 cents, and a reopener with the right to strike. The UFW also decreased sick pay to one day. Rivera stated that this proposal addressed TMY's concerns of having to pay a significant amount of travel pay because of the South County Hiring Hall, thus amending the economic proposal downward. He proposed a reopener because TMY thought the third year wages were too high. The company indicated that it would respond at the next meeting.

On July 16, Rivera, Horwath, Laws, and another Western Growers attorney went to the San Ysidro MLK office. The service center people explained to them the various services. At the

center, Horwath mentioned that he wanted to increase wages to $4.00, since wages in the area had gone up, stating his desire to blunt the impact of retroactive wages. Rivera agreed to the interim increase.

I. Meeting #9--July 29 [8/]

Macri explained the results of the July 25 Board of Trustees meeting. She discussed the different medical plans, and read a memo of proposed changes for a 36 cent plan (GCX 31). TMY asked whether the workers preferred higher wages or a better medical plan. The UFW caucused and returned saying that wages were more important.

TMY followed with a written package proposal, labelled proposal #1 (GCX 3). Laws insisted that TMY do the hiring. But she decreased seniority to five days. She proposed 45 days for leave of absence with clause B2 from the original contract. The company decreased holidays to four a year, with a fifth during the final two years. On RFK, Laws proposed 36 cents, 38 cents, 42 cents, 50 cents, 54 cents, noting that TMY felt an adequate medical plan was important for their operation. The MLK clause contained language requiring the union to meet once every two months to inform workers of the services, and to issue ID cards. The arbitration clause noted that grievants must obtain a list of thirteen mediators from the Federal

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[8/] Horwath and Laws negotiated at this meeting for TMY. Rivera, Macri, and the negotiating committee attended for the UFW.

Mediation and Conciliation Service. Laws proposed $2.10 for travel, with a 15 cent increase in year two, a 25 cent raise in year three, and a 15 cent raise in the final two years. The contract eliminated sick pay, and offered no retroactive wages. Wages were set at $4.15, $4.60, $5.10, $5.45, and $6.10 for the fifth year.

The UFW rejected this proposal as Macri did not feel that it responded to the raised concerns. Rivera recounted the UFW's four major concerns of hiring, duration, COLA, and retroactive. Laws testified that he also stated that there was absolutely no way the union could give TMY the hiring responsibility. The UFW then made a proposal. Rivera agreed to eliminate sick pay, and accepted TMY's vacation clause. He offered the original contract language for hiring. In addition, he objected to some of the language in mechanization, seniority, discipline/discharge, and leave of absence. Rivera altered overtime, mostly "to comply with state law," and changed two of the days in the holiday clause. On MLK, he removed the language requiring a meeting. The contract had a three year duration and provided for full retroactive pay. Rivera set wages at $4.05, $4.35, $4.95 with a COLA capped at 15 cents.

TMY countered with a typed offer, package proposal #2 (GCX 4). Laws changed the language in seniority, discipline/discharge, and leave of absence, and removed the ID language from MLK. She increased holidays to five for the first three years, and six for the last two. She also proposed retroactive

pay of 20 cents per hour.

Rivera accused TMY of playing games, claiming that the proposal was prepared beforehand. Laws testified that she and Horwath prepared four or five variations of each article and typed them up before the negotiating session. Horwath testified that they were put together and stapled during caucuses.

Rivera proposed to adjourn the session. The parties scheduled a meeting for August 13. Laws called to cancel the meeting on August 12, explaining that she had an ALRB hearing to attend. Rivera told her that he thought the cancellation was in bad faith. Laws testified that she then asked for a meeting on the 14th, and that she and Rivera scheduled a meeting for the 25th. Rivera did not recall agreeing to meet on the 25th, nor did he recall Laws' request for an August 14th meeting.

Rivera then called Horwath, and told him that the UFW had worked hard on a proposal. He stated that the union was "thinking very seriously about filing a bad faith charge." Horwath agreed to meet on the 14th.

J. Meeting #10--August 14

This meeting took place in a TMY packing shed in Chula Vista. Mike Horwath represented TMY. Rivera, Macri, and the negotiating committee attended for the UFW.

Macri began with a speech on duration. She pointed out that the union had moved from one year to three years. She also mentioned that the union had not negotiated longer

contracts with employers who were paying over a dollar an hour more in wages. Macri felt the wages rates were "terribly depressed" in San Diego, in that workers in Salinas were getting $6.10 an hour. Finally, she explained that the union never had been able to negotiate a contract as high as the rate of inflation.

Macri also saw a problem with COLA, which she testified having explained to Laws at an Egger & Ghio negotiating session. In order to reach the dollar cap, offered by Laws for the fifth year, the cost of living would have to go up 60 points, which equals a 30-35% inflation rate. Thus, according to Macri, the $6.10 fifth year wage rate really was worth $4.00.

Macri then showed TMY a graph of the mechanization-arbitration process, which indicated that such an arbitration could last at least six and one half weeks.

Macri explained that all the contracts in the San Diego area had been signed except TMY, and that the UFW wanted a contract as soon as possible. She then presented a union proposal (GCX 26). Rivera explained that it provided for utilization of the local work force by proposing that the ranch committee do the hiring in San Pasqual. Also, the UFW agreed with the company's last seniority proposal. Macri offered July 1 as the starting date, giving Horwath a three month break on the increases, a savings of approximately $50,000. Macri costed out this offer and TMY's last offer and determined that the parties were only $9000 apart.

Horwath caucused and returned with Laws. Laws stated that she felt that the union was trying to circumvent her, and that they were bargaining in bad faith. Laws reminded Rivera that he had said it was impossible for him or Macri to meet on the 14th. According to Laws, the UFW had made no effort to contact her at home or the office. She also stated that the union's position had changed from Rivera to Macri, and that Macri's presence was hindering negotiations. Finally, she needed time to study the union proposal, offering to meet the same day at 4:30 at the farm bureau in Escondido.

When they met again at 4:30, the company presented package proposal #3 (GCX 27). Rivera testified that the package contained an employer's bonus, which provided 25 cents an hour in the fourth year, and 20 cents in the fifth, if the cost of living increased more than 15 percent in the previous year. Laws offered partial retroactive pay over a five month period. The company also offered an addition to the travel proposal, paying 20 cents if gas goes up to $2.50 a gallon in the fourth or fifth year. Laws also agreed with the union on hiring and increased her COLA proposal. The remainder of the offer was unchanged.

Rivera rejected this package and gave an oral response. He wanted rest periods at 2:30 rather than at 3:00. He also insisted on a three year duration and full retroactive pay in one payment. He told TMY that the package would have to be ratified by the workers.

TMY responded with package proposal #4 (GCX 28). Changes included full retroactive pay over a five month period, and a ten minute rest period 2 hours after lunch. The company also increased COLA on piece rates and hourly daily rates. Laws testified that she first offered the employer's bonus at this time.[9/]

K. Meeting #11--August 25

The UFW was represented by Rivera, the negotiating committee, and Richard Chavez, Director of the UFW Negotiating Department and UFW Board Member. Chavez indicated that Macri no longer would be present, and that he would play the same role that she had. He noted that he had full authority to negotiate a contract. Laws testified that he also said that there was "no way that the union [could] give the company a five year contract."

The UFW offered a written proposal (GCX 29). The union dropped one day from the holidays article, and offered TMY two weeks to pay full retroactive pay.

TMY then explained their need for a five year contract, noting that they would be in a better position to forecast their operations. Horwath explained that he had a thirty year lease as well as several loans, and that improvements could be amortized with a five year contract. He also mentioned that the wage increase totalled 18% per year, which was better than

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[9/] As previously noted, the bonus was part of package proposal #3 (GCX 27).

any other two year San Diego contract.

Laws then changed her last proposal by offering full retroactive pay to one-third of the workers after 30 days, one-third after 60 days, and one-third after 90 days. She then explained that she and Horwath had obligations and had to leave at 4:00.

Rivera became upset, stating that Chavez had come all the way from La Paz and the meeting had gone on for only an hour. He stated that TMY would be negotiating in bad faith if they left the meeting. Laws and Horwath made a phone call and arranged to stay until 6:00.

The UFW then made a proposal which Rivera said was their "bottom line." Rivera dropped Good Friday from the holidays article. He also spread out the retroactive payments so that one-half of the workforce would receive their pay after two weeks, the other half after six weeks. The rest of their proposal was unchanged.

The company altered its last proposal by offering one-fourth retroactive after two weeks, one-half after six weeks, and the final one-fourth after ten weeks. Laws testified that she also offered to raise the Chula Vista rates by 10 cents.

The union, after caucusing, stated that the workers had reevaluated their position and could still move on some issues. Laws testified that Rivera specifically said that if TMY would not move on duration, then the union was wasting its time. Rivera then proposed one-half retroactive after three weeks and another half after seven weeks. He also lowered the piece rates.

L. Meeting #12--September 19

Chavez, Rivera, and the negotiating committee attended this meeting for the UFW. Ken Msemaji, a visitor from the United Domestic Workers in San Diego, also was present.

TMY stated that it did not agree with the union's "bottom line" proposal. Rivera clarified that the last proposal was not bottom line, and that some movement still could be made. TMY then reinstated package proposal #4 and also offered package #5 (GCX 30 and RX 7). Package #5 was a four year contract with no retroactive pay. Wages were decreased by 10 cents. This was the first and only time Laws proposed a contract of less than five years duration.

The UFW made another three year offer. Rivera dropped one holiday, making four total paid holidays. On retroactive pay, he proposed half after 30 days, and half after 60 days. The union dropped COLA in the second year, and put in a 20 cent cap in the third year. Rivera again decreased piece rates and proposed 38 cents for the third year of RFK. On wages, he agreed with the first three years of TMY's package #5.

According to Rivera, Laws then took back proposal #5, noting that she thought the union had reached its "bottom line." This testimony, however, is not reflected in Rivera's notes.

Laws changed her package #4 by offering one-third retroactive in 30 days, one-third in 60 days, one-third in 90 days. She agreed to Rivera's language concerning seven arbitrators

in the mechanization clause. TMY also proposed to start paying retroactive pay immediately. The workers, however, did not agree to the interim change. They wanted to wait until the contract was signed.

M. Events Leading to Meeting #13 on October 3

On September 9, at the Otay Mesa worksite, Martin Covarrubias and Margarita Huerta, TMY workers and members of the ranch and negotiating committees, delivered a petition to Mike Horwath with signatures of the Otay Mesa workers. The petition explained that the workers themselves, not just the negotiating committee, did not want a five year contract. According to Horwath, he offered to speak with his attorney, without making any promises.

On October 2, Huerta asked Glen Yonakura, the general foreman of Otay Mesa, for permission to attend the next day's negotiating session. Members of the negotiating committee generally informed their foremen of meetings a day in advance. Yonakura kept the entire Otay Mesa crew an extra hour that day to make up for Huerta's and Covarrubia's expected absences on the following day.

On the evening of October 2, the TMY workers met with Rivera and the negotiating committee at the UFW San Ysidro Field Office. Javier Acosta, director of the field office, also was present. Rivera explained to the workers what TMY was offering and the problems encountered with duration. According to Rivera, the workers could not believe that the company

insisted on a five year contract, some workers claiming that the committee was not doing its job. One committee member suggested that if the workers did not believe them, they should go to a negotiations meeting themselves. The workers decided to attend a meeting. They planned that certain workers would go to TMY Farms early in the morning to ask Horwath's permission. The other workers would go to the union office between 5:30 and 6:00 in the morning and wait for a phone call. If the company did not authorize the meeting, someone would call by 8:00. They would then ask the employer for a reasonable time to return to work.

At 6:30 a.m. on October 3, Juan Baltazar, a member of the ranch and negotiating committee, Javier Acosta, Martin Covarrubias, and Luis Gomez met with Mike Horwath in the parking lot of the San Pasqual site. Baltazar notified Horwath that the workers planned to go to the negotiating meeting instead of attending work. He explained that they wanted to see why an agreement had not yet been reached, and that the workers would leave for the meeting at 9:30. According to Acosta, Horwath replied that anybody who left at 9:30 would not be allowed to return to work that day because of bookkeeping problems. Horwath, however, testified that he had said it was a work day, and that anyone who left work should not come back at all, since his bookkeeping had not been set up to have people come and go.

Soon after, Tom Yonakura, a foreman, told his crew that

anyone who wanted to go to the meeting would be a volunteer. Anyone that wanted to stay could stay.

The rest of the workers, not having received a call from Baltazar, went to TMY at San Pasqual to make sure there would be no problems. They then proceeded to the Farm Bureau in Escondido for the negotiation session.

N. Meeting #13--October 3

TMY was represented at this meeting by Mike and Kathleen Horwath, and Laws. Rivera, Javier Acosta, Ken Msemaji, and about 70 workers also attended.

Laws asked Rivera if the contract was still in effect. Rivera said yes. Laws then asked if the workers were on strike under the article 6 "no strike" clause.[10/]

When Rivera replied no, Laws stated that it was the company's position that the workers were on strike. Acosta then mentioned that Horwath had authorized the workers' attendance, and only required that, due to bookkeeping problems, the workers could not return the same day. Laws testified that she did not recall Acosta saying this.

Rivera explained that the union had not given notice of a strike so there was no strike. He felt the workers had a right to be there, to find out how the contract negotiations

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[10/] Article 6, in pertinent part, reads:
[There shall be] no strikes, slowdowns, work stoppages, boycotts, or interruptions of work by the Union. . . . the company may discharge workers who violate provisions of this no strike clause.

were progressing. He suggested that they begin negotiating.

Laws read the no strike clause aloud to Rivera and then asked him to put the workers back to work. Rivera said the workers would return to work as soon as the meeting ended.

Laws and Horwath, in a caucus, decided to stop the meeting, put everyone back to work, and then set up another meeting on non-work time when everyone could be present. Laws then told all the workers that TMY was willing to meet with the entire crew on a non-working day and that the company was not playing games, but rather, was negotiating in good faith. She announced that the workers had two hours, until 1:45, to return to work, or they would be fired under the Article 6 no strike clause. Kathleen Horwath interpreted this speech, but, according to worker testimony, the translation was unclear.

Rivera argued that the workers had a right to be at the negotiations session, and that the union could not sign a five year contract. At 12:00, Laws restated the notice, giving the workers a full two hours to return to work. She also mentioned that the company had copies of their last proposal and would be glad to distribute them to the workers.

Rivera attempted to begin negotiations several times, but the company persisted in discussing the alleged work stoppage. Rivera stated that if the company refused to negotiate, then Rivera was wasting his time.

The parties began to discuss mechanization. Rivera changed his last package offer by agreeing to TMY's mechanization

proposal. Laws rejected this and reinstated package #4.

Laws broke negotiations so that she and Horwath could go to the worksite to insure that there were no problems with people returning to work. Laws told Rivera that the company could meet with the workers on Sunday. Rivera pointed out that Sunday was the workers' only rest day. He noted that the workers were willing to meet any day after work in San Ysidro. Laws said that the company could not meet in San Ysidro, only in Escondido. According to Laws, at no time during the months of negotiations had Rivera ever requested negotiations during non-working time.

Horwath and Laws left at that time. The bus took the workers to the union office. Most workers did not return to work.

Twenty-one workers returned to San Pacqual by 2:00. Laws obtained a list from Glen and Tom Yonakura of those with permission to be absent from work. She discharged those without an excuse who were not at work on Friday, October 3 as of 2:00 p.m.

Huerta and the other workers returned to work on Saturday, October 4. Alfred Ortez, the field foreman, told them there would be no work until Monday, and that he did not know about the paychecks. Huerta called Horwath, who said the workers would be paid on Monday.

On Monday, Glen Yonakura distributed the paychecks, but said there was no work for them that day. According to Huerta,

Yonakura told him that people without residence papers for immigration were working.

On December 1, Huerta and several other discharged workers went to TMY farms to ask for work picking celery. Glen Yonakura ran everyone off except for Huerta and Covarrubias. Horwath told the two workers that he would speak with his attorney about hiring them, and would call them back at the union. On December 5, Huerta and Covarrubias gave Horwath a letter, asking him to answer by mail, rather than by phone. They never got a response from Horwath.

O. The Case of Worker Diego Oropeza

On October 3, Diego Oropeza Escobar waited at his usual pickup point for his ride to work. According to Oropeza, he waited from 5:30 to 7:00 a.m., but his ride never came. He did not call TMY to tell them he would not be at work nor did he attend the October 3 negotiations session. His ride did not show up on Saturday either. On Sunday, the person, who normally drove him, called and said he had orders not to pick up any riders.

On Tuesday, October 7, he went to San Pasqual to work and to pick up his paycheck. According to Oropeza, when Yonakura told him that he did not know if there was any work, Oropeza, along with Salvador Estrada, Juan Baltazar, and Luis Gomez asked Horwath if they were fired. Horwath replied: "That has ended. This is finished." Baltazar asked what this meant. Horwath replied that they were all fired.

Jean Eilers was in charge of the arbitration division of the UFW Collective Bargaining Department. In looking through the list of workers discharged on October 3, she discovered the names of three workers, Oropeza, Nicholas Sanchez, and Trinidad Bravo, whom she believed had not attended the negotiations session.

She called Horwath to see if she could straighten out the problem. After several days, Eilers had her secretary call Horwath to see if he had come up with anything. According to Eilers, Horwath told her secretary that the workers still were fired.

P. The Grievance-Arbitration Procedure

On October 4, TMY terminated the contract by telegraming the UFW office (GCX 54). On October 7, the UFW received a letter from Laws listing the names of those workers who were discharged (GCX 55). Horwath also sent a letter with corrections from the first list (GCX 56). On that same day, the UFW filed a grievance, requesting second step action. A second step procedure, according to Eilers, consisted of management and union representatives meeting in a formal setting.

On October 10, the UFW filed an unfair labor practice. The ALRB arranged a meeting at a restaurant in Escondido. Acosta and Eilers represented the union, while Horwath and Laws attended for TMY. While the ALRB representatives had stepped out, the parties held a second step discussion, but were unable to resolve the firings. Acosta gave TMY a handwritten request

for expedited arbitration (GCX 59).[11/]

Eilers testified that she then told Laws of her intention to contact Reverend John Blethen, the permanent arbitrator named in the contract. Laws denied that Eilers made the statement. After TMY again met with ALRB representatives that day, Eilers told Laws that Blethen could hold a hearing on Monday or Tuesday. Laws replied that the company wanted a different arbitrator. Eilers told Laws that this request was not timely, noting that TMY had initialled the grievance and arbitration article during contract negotiations, which maintained Blethen as permanent arbitrator.[12/]

Laws gave Eilers a handwritten request for a change of arbitrator (GCX 60). Laws also mentioned that she was only available to meet on Friday.

Eilers sent a mailgram informing Laws that Blethen could meet on Friday (GCX 61). The union and the company then exchanged a series of mailgrams (GCX 62). The company let the union know that it would stand firm on its request for a new arbitrator. The union contended that a request for change of arbitrator was untimely, having been made after full notification of the time and place of arbitration.

[11/] Article 5 of the original collective bargaining agreement provided for an expedited grievance and arbitration procedure, such that the grievance was to be heard no later than two days (other than Sunday) after notice was given.

[12/] Article 5 also provided, however, that any permanent arbitrator may be replaced upon the request of either party at any time after such selected permanent arbitrator has served for at least six months..

Blethen sent a mailgram to TMY requesting the company's presence at the hearing, and informing the company that he would hear arguments regarding whether he had jurisdiction (GCX 63).

The arbitration hearing was held on October 17. No one was present for TMY. Blethen ruled for the union, finding the discharges unlawful, also retaining jurisdiction of the back pay issue.

On October 30, Eilers sent a mailgram to Horwath, informing him that the UFW intended to reopen the hearing in order to ask the arbitrator to make a definite and certain award (GCX 65). The company did not accept the arbitrator's award of $62,184.39 plus plan payments.

On January 12, a San Diego Superior Court judge granted a union motion to enforce the arbitrator's award. Eilers asked the company when the workers could return to work. Laws stated she would discuss it at the next negotiations meeting.

Q. Meeting #14--October 24

During the grievance arbitration proceedings, negotiations had continued.

At the October 24 meeting, the union was represented by the negotiations committee and David Burciaga, a full-time UFW negotiator since 1970. According to Laws, she had not been informed that Burciaga would replace Rivera.

Some workers asked whether they were still employees. The company did not, however, want to discuss the worker discharges.

Since the grievance arbitration procedure was proceeding on its own, Laws testified that she felt it was not an essential part of contract negotiations.

The company presented package proposal #6. This offer reflected all the minor changes that had been discussed at prior meetings. Laws also changed the arbitration article, removing Blethen as permanent arbitrator.

Burciaga wanted to review the offer before he asked questions. Laws offered to call Burciaga to set up a new meeting. Burciaga mentioned that he did not want to meet in Escondido, and that it would be bad faith bargaining to insist on Escondido. The meeting lasted about three hours.

On October 28, Laws called Burciaga, offering to meet on November 25. Burciaga did not want to wait that long. He explained that he was free any day except November 7, 14, or 21. Two or three days later the company offered to meet on November 3, but Burciaga felt he did not have enough time to prepare. On November 3, TMY offered to meet on November 17, but Burciaga could meet only on the 18th, 19th, or 20th. Burciaga then arranged with Laws' secretary to hold negotiations on November 18 in San Diego. Laws testified that she agreed to meet in San Diego to avoid a bad faith bargaining charge. On November 17, Laws informed Burciaga that she had to cancel. Later, she reconsidered and rescheduled the meeting for the 18th.

R. Meeting #15--November 18

Burciaga, representing the UFW at this meeting along with eight to ten workers, mentioned that the grievance/arbitration article already had been initialled by the company, so that TMY could not make a new grievance proposal in package #6.

Burciaga then wanted to discuss individual articles in the company's offer. Laws, however, insisted that it was a package proposal; Burciaga could accept it, reject it, or repropose something.

To explain why the union opposed a five year duration, Burciaga began to discuss a four year contract that the UFW had negotiated with Mont Le Salle Vineyards, and a three year contract with Vintner's Employer's Association. He prepared a wage comparison chart, showing that Vintner's employees earned approximately $1.00 more per hour during the fourth year, because their contract was renegotiated. Finally, Burciaga said he would prepare a proposal and mail it to the company.

On December 1, Burciaga told Laws by phone that he had mailed her a letter with a written proposal, and that he would mail a copy of the RFK medical plan. He noted that the union was willing to discuss lower wage rates. He and Laws agreed to meet during the week of December 8. Laws testified that she never received a copy of the RFK plan.

In his letter and written proposal (GCX 41 and 42), Burciaga said that he had some questions about some of the articles, but that he would agree to every article except

duration. He again stated that the union would discuss lower wage rates.

Burciaga received a letter from Laws, dated December 1, stating that the company still awaited a reply to its proposal. Laws testified that she mailed this letter before speaking with Burciaga on the phone. Burciaga received a mailgram from Laws, also dated December 1, in which "TMY Farms propose[d] to implement the following changes on 10 December 1980":

(1) increase wages by five cents

(2) increase Pan American Plan 22 Basic Group Insurance

(3) terminate MLK and JDLC

(4) institute a quarterly bonus of ten cents per hour.

Laws did not mention the proposed changes in her phone conversation with Burciaga.

On December 3, Burciaga left a message for Laws, requesting a meeting on December 5, 13, or 16. He also objected to the unilateral changes. Burciaga sent a mailgram on the same day, repeating the message (GCX 45). Laws left a message that day offering to meet on December 8, 9, 11, or 12, in order to discuss the interim wage increase proposal (GCX 46).

On December 6, Burciaga sent a mailgram to Laws, stating that the UFW objected to the unilateral changes, and that the union was ready to negotiate. He said he could meet any day during the following week except December 9.

On December 8, Burciaga called Laws and the parties agreed to meet on December 16. Soon after, Burciaga received a letter

from Laws, dated December 8, emphasizing that TMY merely proposed interim changes. She also noted that Burciaga contradicted himself concerning available dates for meetings. Burciaga received a second letter from Laws on the same day (GCX 49), in which she confirmed the meeting of December 16, and changed the implementation date of the proposed changes to December 17.

On December 12, Burciaga notified Laws by mailgram that the UFW had requested the services of a state mediator for the next meeting (GCX 50). He also restated that the UFW had no real objection to package #6, except for the five year duration. Laws testified that she did not receive this mailgram prior to the December 16 meeting.

S. Meeting #16--December 16

Bob Scott of the State Mediation and Conciliation Service served as mediator at this meeting.

Laws began by pointing out that TMY offered high wages to compensate for the long contract duration. She also mentioned that the last proposal sent by the union was non-responsive to the company offer and a "typing exercise." Burciaga then read aloud the last paragraph of his letter to Laws dated December 1 (GCX 41): the UFW was willing to settle for lower wages.

Laws contended that Burciaga's Vintners-Mont Le Salle comparison did not apply to TMY, because the Mont Le Salle four year contract did not contain COLA or employer's bonus clauses. Laws also complained that the company never had received copies

of the full contracts and consequently did not know the complete benefits.

Burciaga told Scott that the UFW would accept a five year contract with a reopener on economics after three years. Scott said that TMY had not changed its position, but suggested that Burciaga reduce the proposal to writing.

T. Meeting #17--January 14

Bob Scott was again present at this meeting. The parties remained in separate rooms and never met face-to-face.

Burciaga submitted a chart that showed the percentage increases of the rates proposed by TMY without COLA or employer's bonus, to show that the increases were not at all substantial (GCX 51).

The UFW then presented a written proposal--a five year agreement with a reopener after three years for economic articles (GCX 52). Burciaga also gave two more proposals to Scott (GCX 53): (1) a two year proposal with wages at the rates of the Egger & Ghio contract; and (2) a three year proposal with Egger & Ghio rates for years one and two, and TMY package #6 rates for year three. Laws testified that she did not see the two proposals, GCX 53, until the present hearing. There were, however, stamped-received copies of these proposals in her files.

Burciaga never received a response to any of these proposals.

ANALYSIS AND CONCLUSIONS

Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce employees in the exercise of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and . . . the right to refrain from any or all such activities."

Section 1153(c) makes it an unfair labor practice to discriminate "in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

Section 1153(e) makes it an unfair labor practice "to refuse to bargain collectively in good faith with labor organizations certified . . . " pursuant to the Act.

Section 1148 directs the Board to follow applicable precedents of the National Labor Relations Act, as amended in 29 U.S.C. Section 151, et seq. (hereinafter the "NLRA").

I. The Surface Bargaining Issue

Section 1155.2(a) of the Act defines good faith bargaining as:

> the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms, and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

According to the NLRA, a party who bargains in bad faith lacks both "a willingness to enter into discussion with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties" Pay N' Save Corp., 210 N.L.R.B. 311, 324, 86 L.R.R.M. 1457 (1974).

In NLRB v. Reed and Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1952), cert. denied, 346 U.S. 887 (1953) the court focused on "the totality of the employer's conduct" in determining whether the employer in good faith could not agree with the union, or whether "he went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement" (Id. at 134).

In each surface bargaining case, the Board or court must make a subtle determination of the employer's intent, drawing a fine line between hard bargaining and bad faith. In the first place, an employer is not required to make concessions: "the employer may have either good or bad reasons, or no reason at all, for insistence on the inclusion or exclusion of a proposed contract term. . . . The obligation of an employer to bargain in good faith does not require the yielding of positions fairly maintained" (NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960)). On the other hand, the Board can examine the reasonableness of an employer's bargaining position: "[t]he employer is obliged to make some reasonable effort in some direction to compose his differences with the union" (NLRB v. Reed & Prince Mfg. Co., 205 F.2d at 134-35).

"A finding of surface bargaining is dependent not upon evidence of specific unlawful acts every time the parties meet, but, instead, upon a pattern or course of unlawful conduct which precludes the attainment of agreement or genuine impasse between the parties (MacFarland Rose Production, 6 A.L.R.B. No. 18, at 24 (1980)).

And while no bad faith bargaining case can be a determinative precedent for another, Hartford Fire Insurance Co., 191 N.L.R.B. 563, 569, 77 L.R.R.M. 1581 (1971), enf'd per curiam, 456 F.2d 201 (1972), the NLRB has found certain indicia, which often indicate bad faith: "failing or refusing to meet regularly or promptly, failing to supply information necessary to and requested by the union . . . shifting positions, retreating from agreements reached and taking an adamant position thus leaving no scope for bargaining, or demanding conditions that no self-respecting union could consider" (Milgo Industrial, Inc., 229 N.L.R.B. 25, 30, 96 L.R.R.M. 1347, enf'd, 567 F.2d 540 (2d Cir. 1977)).

In N.L.R.B. v. United Clay Mines Corp., 219 F.2d 120, 126 (6th Cir. 1955), the court held that nothing in the National Labor Relations Act "requires an employer to abandon a settled position on a certain issue because of either the quantiy or quality of concessions offered by the Union . . . ." On the other hand, the employer must make a reasonable effort to compose his differences with the Union (Masaji Eto, 6 A.L.R.B. No. 20, at 15 (1980)).

The result of the application of these two seemingly contradictory principles is presented in Gulf State Canners, 224 N.L.R.B. 1566, 93 L.R.R.M. 1425 (1976). In Gulf State, the Board, adopting the conclusions of the trail examiner, held that "[r]igid adherence to proposals which are predictably unacceptable to a union may indicate predetermination not to reach an agreement, or a desire to produce a stalemate . . ." (Id., 224 N.L.R.B. at 1575). I find that TMY, over the course of negotiations, clearly demonstrated such an unreasonable bargaining position. Rather than merely refusing to abandon a settled position, the company consistently made proposals that were predictably unacceptable to the union.

On July 11, Jorge Rivera explained to the company the union's four major concerns--hiring, duration, retroactive pay, and COLA. Nevertheless, on July 29, TMY's response to these raised concerns was a change in its proposals on seniority and leave of absence. The company paid no attention to the union's four raised concerns, instead, making minor changes in unimportant articles. Similarly, in Romo Paper, 220 N.L.R.B. 519, 525, 90 L.R.R.M. 1397, 1404 (1975), aff'd, 93 L.R.R.M. 2336 (2d Cir. 1976), the Board stated: "we fail to see how 'some movement' by the Respondent, after 6 months of negotiation, on a relatively minor matter could counterbalance the unrealistic demands the Respondent was placing on the Union as the price for an agreement."

In the same July 29 proposal, Laws added language to the MLK article, requiring the Union to explain the plan benefits to the workers once every two months, and to issue identification cards, thus making a proposal that interfered with a strictly internal union matter.

Later, during the same meeting, Laws presented a second proposal--one which already had been typed up. The proposal included partial retroactive pay. It thus appears that the second proposal had been prepared prior to making their first proposal that day. "This deliberate withholding of counter-proposals . . . under all circumstances tends to show an effort to draw out bargaining" (Hartford Fire Insurance Co., 191 N.L.R.B. at 571).

During that same July 29 meeting, Laws specifically asked the members of the negotiating committee whether the workers preferred higher wages or larger contributions to the RFK medical fund. The committee responded that the workers wanted higher wages. In TMY's next proposal, Laws raised her last RFK offer by 9 cents, offering 14 cents more than the union had asked for the first year, rather than applying the money to increase wages.

Furthermore, on May 20, Laws and Rivera initialled all agreed-upon articles, including the article on grievance and arbitration. Nevertheless, on October 24, Laws offered package proposal #6 to the union, which contained an altered arbitration article. The company thus brought back into the bargaining

process an already agreed-upon article. In American Seating Co. v. N.L.R.B., 424 F.2d 106, 108 (5th Cir. 1970), the court found that "withdrawal by the employer of contract proposals, tentatively agreed to by both the employer and the Union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith." See also Hemet Wholesale Co., 4 A.L.R.B. No. 75 (1978).

Furthermore, on three separate occasions, Laws cancelled scheduled negotiation meetings because of other conflicts. For two of these cancellations, on August 12 and November 17, Laws gave only one day's notice to the union.

In O. P. Murphy, 5 A.L.R.B. No. 63, at 5, 7 (1979), the Board found that "Respondent does have an affirmative duty to make prompt and expeditious arrangements to meet and confer and this is not met by delaying arrangements for meetings, and by failing to advise when another meeting could be arranged." See also Imperial Tile Co., 227 N.L.R.B. 1751, 94 L.R.R.M. 1416 (1977); "M" Systems, Inc., 129 N.L.R.B. 527, 47 L.R.R.M. 1017 (1960); J. H. Rutter Rex Mfg. Co., 86 N.L.R.B. 470, 24 L.R.R.M. 1653 (1949). TMY Farms' last minute cancellations thus slowed down the bargaining process.

Throughout the seventeen negotiating meetings, TMY consistently demanded a five year contract. (On September 19, Laws did offer a four year contract with no retroactive pay, but then withdrew the proposal at the same meeting.) The UFW, on the other hand, proposed a contract from one year to

three years duration. In addition, in his December 1 letter, negotiator David Burciaga explained to TMY that the union could agree to all the company's proposals except duration, and that the UFW would discuss lower wage rates for a shorter term contract. TMY, however, was inflexible in its position for a five year contract. In Western & Southern Life Insurance Co., 188 N.L.R.B. 509, 513, 76 L.R.R.M. 1342 (1971), the Board found that "Respondent never significantly retreated from its initial bargaining position, so making negotiations an exercise in futility."

On July 2, Horwath finally explained his reasons for a five year contract. He stated that he planned to be in business for a long time, and that he had a thirty year lease, crop loans, and Small Business Administration loans. He also mentioned continuity of workforce and his relationship with the workers as factors, although at no time during his testimony could Horwath explain their connection to duration. In addition, Horwath testified that the Small Business Administration never asked about the length of his collective bargaining agreement. While certain other lending institutions did ask about TMY's contract duration, the company had no problems obtaining crop loans while under a previous contract of three years duration. In Queen Mary Restaurants Corp. v. N.L.R.B., 560 F.2d 403, 409 (9th Cir. 1977), the court noted that "patently improbable justifications for a bargaining position will support an inference that the position is not being

maintained in good faith." Horwath's justifications, ones which apparently were not required by the lending institutions, suggest that TMY bargained in bad faith.

The NLRB has, in the past, found an employer's insistence on a five year contract to be bad faith bargaining. In Vanderbilt Products, 129 N.L.R.B. 1323, 47 L.R.R.M. 1182, enf'd per curiam, 297 F.2d 833 (1961), the Board ruled that an employer, who insisted on a five year contract, as well as no seniority, no mandatory union membership, and no checkoff, had bargained in bad faith: "It is difficult to believe that the company with a straight face and in good faith would have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion." Id. at 1329, quoting N.L.R.B. v. Reed & Prince Mfg. Co., 205 F.2d 131, 139 (1st Cir.), cert. denied, 346 U.S. 881 (1953). See also Mooney Aircraft, 132 N.L.R.B. 1194, 48 L.R.R.M. 1499 (1961), enf'd per curiam, 310 F.2d 565 (5th Cir. 1962).

Most damaging perhaps, in examining TMY's course of conduct during negotiations, was Laws' denial of receiving certain documents from the union. Laws claimed never to have received two letters (GCX 15 and 16) sent by the union. Laws also testified that she never saw a copy of the final two union proposals (GCX 53). All three of these documents, when subpoenaed, however, turned up in Laws' files, stamped received and dated by the Western Growers Association.

Similar mail problems have been found to be some evidence of bad faith: "[l]ong delays unaccounted for in the matter of correspondence and the preparation of documents . . . appear in the record . . . . the impact of such occasions or actions, considered as a whole. . . . may afford a basis for the finding of the Board" (N.L.R.B. v. National Shoes, Inc., 208 F.2d 688, 682 (2d Cir. 1953)). Laws' illogical explanations for her failure to receive the documents, and their "magical" appearance in her files, strongly suggest dilatory tactics, aimed at preventing agreement.

Following receipt of these proposals from the union, TMY further demonstrated its bad faith by failing to explain its rejection of the UFW's last four proposals (GCX 41, 52, and 53), and by not presenting any counterproposals. In Fitzgerald Mills, 133 N.L.R.B. 877, 880, 48 L.R.R.M. 1745, 1748 (1961), enf'd, 313 F.2d 260 (2d Cir.), cert. denied, 375 U.S. 834 (1963), the Board explained that "[f]ailure to do little more than reject proposals is indicative of a failure to comply with the statutory requirement of good-faith bargaining." Other than Laws' opinion that the union's December 1 proposal (GCX 41) was a "paper exercise," Burciaga and the union received no response to their final proposals.

In a letter dated December 1, Laws proposed several unilateral changes regarding wages and the medical and pension funds. On the same day, she spoke to Burciaga on the phone, yet did not mention the proposed changes at all. She also

failed to tell Burciaga that she had sent a letter to the union again requesting a reply to the company's previous proposal.

Thus, by December 1, all semblance of good faith bargaining by Respondent had broken down. Laws became deceptive in her handling of the negotiations, apparently prepared to remain tough and allow the union to pursue its attempt to bargain with TMY through the unfair labor practice procedure. Her firm denials of receiving proposals that sat in her files demonstrated a blatantly cavalier attitude about the bargaining process. She clearly had no more intention of bargaining in good faith at that stage of the negotiations, and she seized all control of the bargaining process, apparently advising Horwath to have faith in her and to follow her lead. On tenuous footing, she dragged her client into an indefensible position in the bargaining process.[13/] The totality of TMY's conduct--the company's constant submission of predictably unacceptable proposals, the unsound justifications for a five year contract, failure to explain rejections, TMY's generally

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[13/] The Respondent contended, through its raising an affirmative defense, that the UFW was in bad faith during the course of negotiations. Most significantly, Respondent contends that the changing of negotiators hampered the bargaining process. I find no merit in this contention. Although the line of UFW negotiations included Rivera, Macri, Chavez, and Burciaga, their conduct throughout was consistent with an intention of reaching a contract. Negotiator Burciaga, the last in the line, almost immediately agreed to all articles in the Company's last proposal except for duration. And addressing that point, he offered to lower wages still further in order to get a contract of less than five years. The Company never responded to Burciaga's proposal.

non-responsive proposals--all indicate surface bargaining, the lack of any desire to reach agreement. I therefore find that TMY violated Section 1153(e) and (a) of the Act.

II. The October 3 Discharges

Article 6 of the UFW-TMY collective bargaining agreement states that there shall be "no strikes, slowdowns, work stoppages, boycotts, or interruptions of work by the Union. . . . the company may discharge workers who violate provisions of this no strike clause."

The NLRB has held that an employer may lawfully discharge an employee who engages in a strike forbidden by the provisions of a no-strike clause. Such activity is not protected by the Act (Chrysler Corp., 232 N.L.R.B. 466, 96 L.R.R.M. 1382 (1977)). The A.L.R.B. followed this decision in Bruce Church, Inc., 4 A.L.R.B. No. 45, at 3 (1978), noting that a "no-strike provision in a collective bargaining agreement may act to waive employee's rights to engage in protected activity, and the participating workers may lawfully be discharged."

On October 3, approximately seventy workers from TMY's Otay Mesa and San Pasqual sites failed to appear at work, and instead, in violation of the contract, attended a negotiations meeting. That day, corn was being harvested at San Pasqual, and celery was being planted at Otay Mesa. The workers' attendance at the negotiations meeting interrupted scheduled work, and was thus a work stoppage. At the meeting, Laurie Laws read aloud the no-strike clause twice to the workers to

ensure that they understood the ramifications of their actions. The workers refused to return to work. Rivera and UFW representative Acosta refused to order the workers to return to work.

According to the Article 6 no-strike clause language, TMY would have been justified in discharging the workers when they appeared at the negotiations session. But Laws and Horwath, having decided that the workers might have at first misunderstood the clause, gave the workers a full two hours to return to work.[14/] Even so, the discharged workers did not go back to the fields. While the union contends that the workers could not have returned to the worksite on time since some of the workers had to change into work clothes, and further, that these workers would have reported to work had Horwath not given them permission, these contentions do not withstand scrutiny. Since some of the workers were not wearing their work clothes, they obviously never had any intention of asking permission, or reporting to work if permission subsequently was denied. Furthermore, the farthest workside, Otay Mesa, is located less than one hour away from the Escondido Farm Bureau, where the negotiations meeting took place, making two hours a reasonable amount of time to return to work.

The union further contends that the discharges violated the

[14/] Laws' and Horwath's action in so warning the workers blunted claims that Horwath had given the workers permission to attend the session. Thus, even if I were to credit that worker testimony, Horwath then decided to change his course, advising the employees that they would be in violation of the no-strike clause if they chose to remain at the session.

Act because three discharged workers did not even attend the negotiations session. TMY did not fire the workers for attending the meeting, but rather for violating the no-strike clause by not showing up for work at 2:00 on October 3. Oropeza and the other two workers were absent from work on October 3, did not have permission to be absent, and never called to inform the company that they would not be at work. Thus, General Counsel, offering no additional evidence to point up a discriminatory motive in these three discharges, has failed to prove that they violated the Act.[15/]

An employer may fire an employee for any reason, as long as not motivated by anti-union animus:

> In controversies involving employee discharges or suspensions, the motive of the employer is the controlling factor. (citations omitted) Absent a showing of anti-union motivation, an employer may discharge an employee without running afoul of the fair labor laws for a good reason, a bad reason, or no reason at all.

Mueller Brass Co. v. N.L.R.B., 544 F.2d 815, 819 (5th Cir. 1977). "If the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is non-discriminatory" (Edgewood Nursing Center, Inc. v. N.L.R.B., 581 F.2d 363, 368 (3d Cir. 1978)).

[15/] Mr. Diego Oropeza was a particularly sympathetic witness. He became a victim of the circumstances of the day, intending to report for work. Dependent on other transportation, he waited for a ride on October 3, a ride that never materialized. Unfortunately, the act provides no remedy, however, for workers who are fired for any reasons other than ones stemming from a deprivation of those worker rights defined in Section 1152 of the Act.

Furthermore, an employer may discipline employees for acts otherwise punishable, committed while engaged in a protected activity (Gould, Inc. v. N.L.R.B., 612 F.2d 708, 733 (3d Cir. 1979)). As the 9th Circuit court has held, "the mere fact that an employee is or was participating in union activities does not insulate him from discharge" (N.L.R.B. v. Ayer Lar Sanitarium, 436 F.2d 45, 49 (9th Cir. 1970)).

TMY discharged the workers, not for attending the negotiations meeting, but for failing to return to work in violation of the no-strike clause. Furthermore, the non-discriminatory motive is evident from the fact that the Company fired all employees who were absent from work that day without permission, irrespective of whether they attended the meeting.

I therefore find that the Company's discharge of more than 70 employees on October 3 did not violate Section 1153(c) and (a) of the Act.

THE REMEDY

Having found that the Respondent refused to bargain in good faith in violation of Sections 1153(a) and (c) of the Act, I shall recommend that it be ordered to cease and desist from their unlawful conduct and take certain affirmative actions designed to effectuate the policies of the Act. By its conduct, Respondent is responsible for the parties' failure to reach an agreement. Accordingly, in addition to meeting the usual notice requirements, they shall be affirmatively directed to

meet and bargain collectively in good faith with the UFW, upon its request, and to make their employees whole for the wage and other economic losses incurred as a result. See section 1160.3; see also, e.g., Adam Dairy, 4 A.L.R.B. No. 24 (1978); Hickam, 4 A.L.R.B. No. 73 (1978); O. P. Murphy Produce Co., Inc., 5 A.L.R.B. No. 63 (1979); Montebello Rose Co., Inc., 5 A.L.R.B. No. 64 (1979).

In O. P. Murphy and Montebello Rose, supra, a majority of the Board held that the make-whole remedy should commence on that date upon which, in view of the totality of the circumstances, the respondents' unlawful conduct was first manifested. The very nature of a surface bargaining case makes it difficult to identify with exactitude the first appearance of bad faith (O. P. Murphy, supra.).

In the present case, I have found that the first clearly identifiable manifestation of bad faith occurred on December 1, 1980, the date that negotiator Laws' conduct became deceptive, denying she received two union proposals, failing to respond to outstanding union proposals, and failing to inform negotiator Burciaga that the Company had made a significant shift in its bargaining position.

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

Kyutoku Nursery, supra.

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

ORDER

Respondent, TMY FARMS, INC., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

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

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

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

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

(b) Make whole its present and former agricultural employees for all losses of pay and other economic losses sustained by them as the result of its failure and refusal to bargain in good faith. The period of said obligation shall extend from December 1, 1980.

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

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

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

(f) Within 30 days after issuance of this order, mail copies of the attached Notice in all appropriate languages to all agricultural employees employed at any time from December 1, 1980 to the present.

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

(h) Arrange for a representative of the Respondent or the Board to distribute and read the attached Notice in appropriate languages to the Respondent's assembled employees on company time: the reading or readings shall be at such times and places as are specified by the Board's regional director and, following each reading, a Board agent shall be given the

opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice of their rights under the Act; the regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

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

DATED: October 12, 1980

Agricultural Labor Relations Board

By: Ron Greenberg
Ron Greenberg
Administrative Law Officer

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board has ordered and also tell you that:

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

Because this is true, we promise that:

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

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement on a collective bargaining contract concerning your wages, working hours, and other terms and conditions of employment.

Dated: TMY FARMS, 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.