STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CARDINAL DISTRIBUTING COMPANY, INC., dba PETER RABBIT FARMS, CARDINAL PRODUCE SALES, INC., of COACHELLA VALLEY,	)	Case No. 78-CE-12-C
Respondent,	)	9 ALRB No. 36
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

DECISION AND ORDER

On July 25, 1980, Administrative Law Judge (ALJ)[1/] David C. Nevins issued the attached Decision in this matter. Thereafter, Respondent and the United Farm Workers of America, AFL-CIO (UFW or Union) each timely filed exceptions to the ALJ's Decision with a supporting brief, and General Counsel filed a reply brief.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties

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[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.)

and has decided to affirm the ALJ's rulings, findings,[2/] and conclusions, as modified herein, and to adopt his proposed Order as modified.

Respondent has excepted to all of the major conclusions of the ALJ, which can be grouped under three general headings. First, the ALJ found that Respondent failed to comply with its duty to supply the UFW with information requested by the UFW, thereby hindering the UFW in its attempt to meaningfully bargain on behalf of Respondent's agricultural employees, and concluded that Respondent thereby violated section 1153(e) and (a) of the Agricultural Labor Relations Act (Act or ALRA). Second, the ALJ concluded that Respondent's unilateral increase in the piece rate it paid to carrot bunchers, without notifying the UFW or giving the UFW an opportunity to bargain about that increase, violated section 1153(e) and (a) of the Act. Third, the ALJ found, after examining applicable National Labor Relations Act (NLRA) precedents (binding on this Board by section 1148 of the ALRA), that Respondent's decisions to cease growing green onions, beets, green cabbage, and parsley were mandatory subjects of bargaining. He concluded that Respondent, by presenting its decisions as to those crops to the UFW as a fait accompli,

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[2/] Respondent has excepted to certain credibility resolutions of the ALJ. To the extent that an ALJ's credibility resolutions are based upon the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALJ's resolutions of witness credibility to be supported by the record viewed as a whole.

deprived the UFW of an opportunity to request bargaining about those decisions and thereby violated section 1153(e) and (a) of the Act.

Failure to Provide Relevant Information

Respondent asserts that it fully complied, on a continuing basis, with all UFW requests for information, that it made available to the UFW the most complete information available, given the limitations in staff available to Respondent. Respondent contends that since the UFW could have obtained the requested information by seeking to locate the labor contractor utilized by Respondent, the ALJ's conclusion that it unlawfully failed to supply information was unwarranted. Additionally, Respondent now argues, for the first time, that much of the requested information was irrelevant to the UFW's bargaining obligations, because it concerned employees who are not in the bargaining unit.

After reviewing the record, we find that Respondent was consistently dilatory in providing the UFW with the information it had requested and gave incomplete and inaccurate information to the Union. The ALJ found that over a period of 15 months, UFW requests for data relevant to bargaining unit employees were responded to, if at all, with inexcusable delay and in an incomplete fashion, even considering the limitations of Respondent's available staff. Nothing in Respondent's exceptions convince us that those findings of the ALJ were in error.

The new argument raised by Respondent on appeal from

the ALJ's Decision is the claimed irrelevance of the information the UFW requested. We are not persuaded to modify any of the ALJ's findings or conclusions based on this new argument. Even assuming that the UFW's requests for information were overly broad, we note that Respondent neither sought clarification nor raised the issue of irrelevance or unduly burdensome information requests with the UFW. Respondent's argument is therefore meritless. (Minnesota Mining & Mfg. Co. (1982) 261 NLRB No. 2 [109 LRRM 1345].) Moreover, a labor organization is not required to seek alternative means to discover or obtain relevant information which is readily available to the employer. (Borden Chemical (1982) 261 NLRB No. 6 [109 LRRM 1359].) Under liberal relevance standards and the presumption that wage and related information pertaining to employees in the bargaining unit is relevant, Respondent has failed to prove that the information requested is irrelevant to the collective bargaining process. (Robert H. Hickam (1982) 8 ALRB No. 102; Leland Stanford, Jr. University (1982) 262 NLRB No. 19 [110 LRRM 1275]; Kohler Co. (1960) 128 NLRB 1062 [46 LRRM 1389].)

Unilateral Wage Increase

While negotiations were under way between Respondent and the UFW in February of 1979, Respondent unilaterally increased the piece rate of pay for its carrot bunchers, without giving any prior notice or opportunity to bargain to the UFW. Respondent asserts that: (1) the increase was an automatic increase to bring its wage rates up to the prevailing standards; (2) the

UFW had waived its right to bargain about such increases by its acquiescence to similar increases during earlier years; and (3) the raise followed a bona fide impasse in bargaining and did not exceed Respondent's prior bargaining proposals.

The ALJ found that the wage increase was not part of an established program of regularly granted raises to meet the prevailing wage rates, but irregular as to timing and discretionary as to amount and therefore was subject to bargaining prior to implementation. (Joe Maggio, Inc., Vessey & Co., Inc. and Colace Brothers Inc. (1982) 8 ALRB No. 72; Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36; Armstrong Cork Co. v. NLRB (5th Cir. 1954) 211 F.2d 843 [33 LRRM 2789].) We affirm the ALJ's analysis and his rejection of Respondent's waiver argument, for no showing was made that the UFW had been apprised of the wage increase prior to implementation. Even assuming prior knowledge, a waiver must be clear and unequivocal. It cannot be inferred from silence or acquiescence to prior increases. (Masaji Eto (1980) 6 ALRB No. 20.)

Finally, we affirm the ALJ's conclusion that even if the unilateral wage increase followed a bona fide impasse in bargaining, it exceeded prior offers made by Respondent during negotiations, and was therefore made in violation of Respondent's duty to bargain with the UFW. (Montebello Rose Co. (1979) 5 ALRB No. 64; D'Arrigo Brothers Company of California, (1982) 8 ALRB No. 66.)

Crop Decisions

Generally, a decision by management regarding what

crop to grow or discontinue is not subject to the collective bargaining process.[3/] Although such managerial decisions may substantially affect conditions of employment, we do not impose a mandatory duty to bargain about such decisions. An agricultural employer must retain the freedom to make such decisions because they are a basic right that lies at the core of entrepreneurial control.

The balancing test set forth in First National Maintenance Corp. v. NLRB (FNMC) (1981) 452 U.S. 666, 101 S.Ct. 2573 [107 LRRM 2705] for determining what types of management decisions are subject to the bargaining process is as follows:

> [B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of the business.
> (101 S.Ct. at 2581.)

In FNMC, the United States Supreme Court held that decisions to partially close a business are generally not suitable for the collective bargaining process. In particular, the Court pointed out that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision...." (101 S.Ct. at 2584.)

[3/] To the extent that this rule conflicts with the approach taken in Paul W. Bertuccio (1982) 8 ALRB No. 101, Paul W. Bertuccio is hereby overruled.

In arriving at that conclusion, the Court determined that the union's interest in protecting jobs for employees could be achieved through an opportunity for the union to bargain about the "effects" of an employer's decision to partially close its business, as opposed to bargaining about the decision itself. Furthermore, the Court noted that the union has protection against discriminatory employer action by virtue of section 8(a)(3) which prohibits partial closings motivated by a desire to weaken or defeat the union. The Court stated:

> ... although the union has a natural concern that a partial closing decision is not to be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union. (101 S.Ct. at 2582.)

Management, on the other hand, would be heavily burdened by a requirement that it bargain about a decision to partially close its business. The Court noted that management may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies or it may face significant tax or securities consequences that hinge on confidentiality or the timing of its actions. The Court rejected the lower court's approach that such decisions are generally presumed to be suitable for collective bargaining.

> An employer would have difficulty in determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain. If it should decide to risk not bargaining, it might be faced ultimately with harsh remedies forcing it to pay large amounts of backpay to employees who

> likely would have been discharged regardless of bargaining, or even to consider reopening a failing operation.... Also, labor costs may not be a crucial circumstance in a particular economically-based partial termination.... And in those cases, the Board's traditional remedies may well be futile.... If the employer intended to try to fulfill a court's direction to bargain, it would have difficulty determining exactly at what stage of its deliberations the duty to bargain would arise and what amount of bargaining would suffice before it could implement its decision.... If an employer engaged in some discussion, but did not yield to the union's demands, the Board might conclude that the employer had engaged in "surface bargaining," a violation of its good faith.... A union, too, would have difficulty determining the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision, or whether, in doing so, it would trigger sanctions from the Board. [Footnotes and citations omitted.] (101 S.Ct. at 2583.)

Making decisions as to what crops to grow or discontinue is no more than an exercise of the agricultural employer's exclusive right to manage and control its business.[4/] Growing crops involves a substantial investment of capital and agricultural employers, as the owners of capital, must be free to determine how their capital should be used and managed. A decision concerning what crop to grow involves the use and management of capital and is not primarily concerned with the conditions of employment, even though the decision may have a substantial adverse effect on employment.

Like decisions involving partial closures of business, collective bargaining agreements rarely provide for union participation in management decisions concerning what crops to

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[4/] See the concurrence in Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203, [85 S.Ct. 398], where three justices held that deciding what shall be produced is a managerial prerogative not subject to mandatory bargaining.

grow or discontinue. Where such decisions are economically motivated, the union's interest in protecting employees' job security can be met through bargaining with the employer over the effects of the decision, as in situations involving the partial closing of a business.[5/] Employees who suffer loss of employment as a result of management decisions motivated by anti-union animus are of course protected by section 1153(c).

The burdens mentioned earlier as encumbrances to an employer's decision to effect a partial closing of its business also apply to decisions as to which crops to grow or discontinue, e.g., the difficulty of determining: whether there is an obligation to bargain; at what point the duty to bargain arises where there is an obligation; and how much bargaining is required before the employer may lawfully implement its decision. However, the burden which decision bargaining places on the employer's right to exercise its judgment as to the conduct of its business, in this instance, its inherent right to manage and control invested capital, is a heavy one. A decision to invest capital is akin to a decision whether to be in business at all. We therefore find that the burden on the employer's right to decide, for economic reasons, which crops to grow or discontinue outweigh the incremental benefit that might be gained through the union's

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[5/] There may be cases where the employer and union will benefit substantially from discussions (or bargaining) before the decision is finalized. Such circumstances exist where labor costs are the motivating factor for the decision and the union's input or concessions may likely affect the decision. We encourage such voluntary discussions but would not require them. (See FNMC, supra, 101 S.Ct. at 2582.)

participation in the decision-making process. Such decisions lie at the core of entrepreneurial control and do not lend themselves to the collective bargaining process.

FNMC does not require each decision to be analyzed on a case-by-case basis. Indeed, the U.S. Supreme Court dealt generally with the category of decisions involving partial closures. We agree with the reasoning contained in Member McCarthy's dissent in Paul W. Bertuccio (1982) 8 ALRB No. 101, pp. 18-24, that decisions about which crops to grow or discontinue should be approached generally as a category of decision, not on a case-by-case basis. The rule that such crop decisions generally do not lend themselves to the collective bargaining process alleviates the uncertainty and confusion which is created by a case-by-case approach. Both the employer and the union can thus be certain of this Board's approach and this in turn enhances stability and certainty in labor relations and in the collective bargaining process. The employer is always required to notify and give the union an opportunity to bargain in good faith concerning the effects on employees of the employer's crop decision if it affects or tends to affect the employees' terms or conditions of employment or the continued availability of employment.

Our dissenting colleague, Member Henning, states that our rule concerning the duty to bargain over crop change decisions is too rigid and mechanical. We disagree. We have in fact balanced the benefits to the collective bargaining process (not to the certified bargaining representative) against the burden

placed on the employer's right to make such crop decisions, and concluded that the burden outweighs the benefits. Moreover, FNMC does not utilize a case-by-case analysis or balancing of every decision as Member Henning would have us do.[6/] In fact, the U.S. Supreme Court found that any decision to close a portion

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[6/] Some of the cases cited by the dissent are pre-FNMC and do not utilize the FNMC balancing test. Brooks-Scalon, Inc. (1979) 246 NLRB 476 [102 LRRM 1606] involves an employer's decision to partially close its business enterprise, the exact type of decision the U.S. Supreme Court dealt with in FNMC, and the NLRB held that bargaining over that type of decision was not mandatory. San Clemente Ranch, Ltd. v. ALRB (1981) 29 Cal.3d 874 involves a successorship issue. A decision to sell one's business to a successor is a decision to discontinue business and the decision itself is not a mandatory subject of collective bargaining. The same is true of the successor's decision to purchase the business; it is not a mandatory subject of bargaining.

Member Henning's reference to the California Supreme Court's language in San Clemente Ranch, Ltd. is puzzling because the reasoning in that case is not applicable in this matter. There are numerous facets of California's agricultural industry which are unique, hence dissimilar to the NLRB's industrial jurisdiction, and which warranted this Board's deviation from NLRB precedent regarding the approach to be taken in determining the legal issue of successorship. If in fact there are unique complexities before us regarding the issue of crop decisions we would not need to follow NLRB precedent because there would be no applicable NLRB precedent. Yet after discussion of the San Clemente decision in which he states that "[A]s with successorship cases, proper resolution of decision-bargaining cases also requires careful consideration of the 'numerous complicating factors which exist in California's agricultural context' ...", (fn. omitted), Member Henning fails to identify or discuss these "numerous complicating factors." Indeed he goes on to insist that FNMC and Bob's Big Boy Family Restaurants are applicable precedent and must be followed. As previously stated, the majority has followed both cases by balancing the burden on the employer's right to make managerial decisions which lie at the core of entrepreneurial control against the benefit to the bargaining process.

of one's business for nondiscriminatory reasons was beyond the scope of mandatory bargaining.[7/] The FNMC balancing test does not favor application of a rule so flexible as to necessitate review of the merits of each and every decision made by an employer. The flexibility advocated by Member Henning's dissent creates an unacceptable situation wherein the employer and union would be unable to "predict" what this Board will ultimately determine that their bargaining relationship should have been as to each and every employer decision. Employer-growers should not be placed in the untenable position of having to guess at whether they can exercise their managerial prerogative to change crops without having this Board impose a makewhole order. And unions should not be led to believe that the employer has a legal obligation to bargain, on request, with the union about every crop decision; such a belief could cause unwarranted and detrimental delay in bargaining about the effects on the employees involved.

If, as Member Henning's dissent points out, reasonable

[7/] Member Henning's conclusion that the U.S. Supreme Court and the NLRB have avoided laying down broad categorical rules is in error. To the contrary, a proper analysis of the cases would show that the U.S. Supreme Court established a categorical rule in FNMC that decisions involving partial closing are not mandatory subjects of bargaining.

The NLRB in Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178 [111 LRRM 1354] (Bob's Big Boy) established a rule that decisions which involve subcontracting are generally mandatory subjects of bargaining. This Board has previously established categorical rules for subcontracting, (Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85), mechanization (O.P. Murphy Produce Co., Inc. (1981) 7 ALRB No. 37) and complete closures (Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54).

minds can, on a case-by-case basis, review the same facts and law with regards to the duty to bargain about management decisions and yet come to different conclusions, how can we honestly and logically expect an employer to make any such decisions not to bargain without fear and uncertainty of incurring a makewhole order. In our view, nothing would have a more chilling effect on an employer in the operation of its business.

The NLRB set out an interpretation of the Supreme Court's ruling in First National Maintenance Corporation in Bob's Big Boy Family Restaurants, supra, 264 NLRB No. 178 and held that bargaining is required over decisions which, in reality, are those involving an employer's decision to subcontract out a component or portion of its business.

In Bob's Big Boy, Respondent's commissary operation prepared and distributed food products to Respondent's restaurants. Respondent's commissary was composed of five departments: shrimp preparation; meat; salad dressing; produce; and bakery. The raw shrimp for the shrimp processing department was purchased by Respondent and stored in freezers. To process the shrimp, the shrimp was removed from the freezer, defrosted, cut, breaded, and returned to the freezer. The breaded shrimp was then distributed to Respondent's restaurants.

Because of the escalating market price of raw shrimp and the problems encountered in maintaining the grading size of shrimp, which in turn affected portion control, Respondent decided to contract the shrimp processing to Fishking. Fishking had been supplying Respondent's restaurants with breaded cod

and scallops and sought to include the breaded shrimp in its work for Respondent. Initially, Fishking purchased from Respondent the raw shrimp which it had on hand, processed it, and returned it to Respondent for distribution. After Respondent's supply was depleted, Fishking purchased its own raw shrimp.

As of August 1979, Respondent had completely phased out its shrimp processing operation. In December 1979 or January 1980, Respondent sold its breading machines to Fishking and returned its leased cutting machines to the lessor.

In order to distinguish between a decision to partially close a business, which does not require bargaining, and a decision to subcontract, the Board stated that it is

> ... incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues 'particularly suitable for resolution within the collective bargaining framework.' If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents 'a significant change in operation,' or a decision lying at 'the very core of entrepreneurial control' the decision will not fall within the scope of the Employer's mandatory bargaining obligation.

Then the Board went on to say,

> A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the Employer's business before and after the action taken, the extent of capital expenditures, the bases for the action and, in general, the ability of the Union to engage in meaningful bargaining in view of the Employer's situation and objectives.
> (264 NLRB No. 178.)

The ALJ in Bob's Big Boy found that Respondent's decision to discontinue its shrimp processing operation and to purchase processed shrimp from Fishking was a decision to partially close and therefore was not encompassed in the scope of Respondent's mandatory bargaining obligation as stated by the U.S. Supreme Court in First National Maintenance Corp. v. NLRB, supra, 452 U.S. 666. The national board agreed that FNMC did not require bargaining over decisions concerning a partial closure but found the employer had not effected a partial closure but, rather, had subcontracted out its shrimp processing operation without first notifying and giving the union an opportunity to bargain about the decision.

The Board found that a proper analysis of the case began with an accurate characterization of the employer's business. While it was literally correct to say the employer was in the shrimp processing business, it was more accurate to state that it was in the business of providing prepared foodstuffs to its individual restaurants. Thus, the shrimp preparation existed as a component part of Respondent's business to provide prepared foods to its retail restaurants. The Board found that the decision was not a major shift in the direction of the company, as the employer engaged in the business of providing prepared food both before and after the subcontract. Thus, the employer's business was not substantially altered by the change in its shrimp processing operation. Secondly, Respondent did not undertake any substantial capital restructuring or investment. Thirdly, Respondent's reasons for entering into the

transaction with Fishking were of the type traditionally suitable for resolution through the collective bargaining process. Thus the Board concluded that the employer violated section 8(a)(5) by failing and refusing to bargain with the union about its decision to subcontract the unit work of shrimp processing.

Thus even though we would find that as a rule a decision to discontinue one crop and/or to grow another crop is not subject to mandatory bargaining, each such decision must be analyzed to determine the precise nature of the decision. Such a determination simply enables us to determine whether this employer action falls within a category of decisions that requires mandatory bargaining. If the crop decision falls within the category of decisions that lie at the core of entrepreneurial control, such as what crops to grow or discontinue, or involves a change in the scope and direction of the agricultural enterprise, it will not be subject to mandatory bargaining. But if the crop decision falls within a category of decisions that have as their focus aspects of the employer/employee relationship that are amenable to the collective bargaining process, e.g., subcontracting, or mechanization, then such decision will be subject to mandatory bargaining prior to implementation.

In analyzing Respondent's decisions in the case before us, we find that Respondent's decisions to discontinue growing parsley, green cabbage, and green onions were not subject to mandatory collective bargaining. All of those decisions fall within the general rule that no bargaining is required for crop

decisions.

We find that the decision to discontinue beets required bargaining because Respondent in effect subcontracted its beet production to another grower. Respondent's business is to provide produce for wholesale and/or retail consumer markets. Growing beets was one component of that (whole) business and was not a separate or distinct enterprise. Although Respondent discontinued growing beets, it continued to pack and market beets grown by its neighbor Keo-Farms Inc. (Keo-Farms) to whom it had leased 61 acres of land.

Respondent grew beets on 24 acres of land during the 1977-78 season. It decided to discontinue growing beets in July 1978, before the 1978-79 season. In mid-July 1978, Respondent leased 61 acres of land to an adjacent neighbor, Keo-Farms for the 1978-79 season. Keo-Farms grew beets on 15 of those 61 acres. Keo-Farms had never grown beets prior to the 1978-79 season but decided to grow beets after learning from Respondent that it was discontinuing beet production. Respondent's lease agreement with Keo-Farms provided that Keo-Farms would make a single payment to Respondent at the time of the account sale settlement.[8/] There was a tacit agreement

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[8/] Under that agreement, Respondent was to pack and/or market Keo-Farms' produce. Part of the money Respondent received from the sale of Keo-Farms' produce was to be retained by Respondent in a sales account and the remainder would be paid to Keo-Farms. Respondent was to retain a sum equal to or more than, the sum of the lease payment, packing charges and sales (marketing) costs. At some point in time, the account was to be settled between Respondent and Keo-Farms and Respondent was to retain what was owed and the remainder paid to Keo-Farms as full satisfaction of the debt.

between Respondent and Keo-Farms that Respondent would market the produce grown on the 61 acres, which included 15 acres devo to beets.[9/]

Both before and after the decision, Respondent marketed beets and there was no capital restructuring or investment which resulted from the decision. (See Bob's Big Boy Family Restaurants, supra, 264 NLRB No. 178.) Respondent reaped benefits from packing and marketing beets grown by Keo-Farms in that it was able to supply a wide variety of produce including beets to its customers, which made Respondent's marketing business competitive with other marketing businesses in the Coachella Valley. We therefore consider Respondent's decision to cease growing beets is more properly characterized as a subcontracting of that portion of its business. As such it is subject to mandatory bargaining.

Remedy

We adopt the ALJ's proposed remedy regarding Respondent's violation of section 1153(e) and (a) in failing to provide the information requested by the UFW and implementing

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[9/] Keo-Farms had a continuous business relationship with Respondent for over ten years, since the 1960's. Respondent packed and marketed Keo-Farms' produce, although Respondent did not have an exclusive marketing arrangement with Keo-Farms. Keo-Farms' produce was marketed by others as well. But there was an understanding that the produce grown on the 61 acres would be marketed by Respondent. John Powell, Respondent's general manager, testified he knew that Sam Keoseyan would pack and market crops through Respondent's enterprise because "a man of his honor would not just take my land, grow his merchandise and not come my way with it so that I could recover my lease agreement." Respondent did in fact pack and market the crops grown on the 61 acres.

a unilateral wage increase without first notifying and giving the UFW an opportunity to bargain over the proposed increase. We shall order Respondent to make its agricultural employees whole for the period from February 14, 1978 until April 20, 1979, the last day of the hearing, and from April 21, 1979 until Respondent begins good faith bargaining with the UFW which results in either a collective bargaining agreement or a bona fide impasse. We shall order that Respondent, at the UFW's request, rescind the unilateral wage increase it implemented in violation of section 1153(e) and (a). However, with regard to Respondent's decision to discontinue growing beets and thereafter to subcontract the production of 15 acres of beets to Keo-Farms, we shall not order restoration of the status quo ante as a part of the remedy. We note that Respondent's decision to subcontract the production of its beets was not motivated by antiunion animus and did not have an inherently destructive effect on the rights of the agricultural employees. (But see Frudden Produce, Inc. (1982) 8 ALRB No. 42.)

The purpose of our remedial orders is to place the injured party or parties in a position that it or they would have been in but for Respondent's violation of the Act. In this case, when Respondent discontinued and in effect subcontracted out its beet production it not only may have caused a number of workers to suffer economic losses,[10/] but also interfered

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[10/] The workers' losses would be proportionately decreased because the number of acres of beets was decreased from 24 to 15 so the workers would not have earned the same amount they earned during the previous (1977-78) season.

with the union's duty to protect the rights of its members. If the UFW had been given the opportunity to bargain with Respondent it may have been able to prevent some of the economic loss incurred by its members. The general rule is that uncertainties are resolved against the wrongdoer whose violation(s) created the uncertainties. (United Aircraft Corp. (1973) 204 NLRB 1068; NLRB v. The Madison Courier, Inc. (D.C. Cir. 1972) 472 F.2d 1307 [80 LRRM 3377]; Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73.) Because of the likelihood that economic losses could have been prevented if the UFW had been given an opportunity to bargain over the decision, our remedial order must contain more than an order to cease and desist from such conduct in the future. A cease and desist order itself would not remedy the injury suffered by the individual employees. To provide full backpay to those employees who suffered losses would not be equitable because this could not realistically have resulted from any negotiations which would have taken place between Respondent and the Union. In addition, imposition of such a remedy would obviate any need for negotiations between Respondent and the UFW. Therefore, in order to provide an appropriate measure of relief to both the union and employees we shall provide a limited makewhole order in addition to a cease and desist order which will remedy the violation.

We shall order Respondent to pay the agricultural employees who lost work in the beets as a result of the subcontracting their usual daily wages for the period commencing ten days after the date of issuance of this Decision and Order

and continuing until (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the matter within ten days after the date of issuance of this Decision and Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith about the matter. In any event the makewhole award for each agricultural employee shall not exceed the total (apportioned) backpay he/she would have earned in beet work during the 1978-79 season but for Respondent's violation and therefore any wages received by the affected employees during the 1978-79 season which were earned in lieu of earnings that would have been received from working in the beet crop shall be deducted from the makewhole amount.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Cardinal Distributing Company, Inc., dba Peter Rabbit Farms, Cardinal Produce Sales, Inc., of Coachella Valley, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

(b) Failing or refusing to provide to the UFW,

at its request, information relevant to collective bargaining.

(c) Failing or refusing to bargain collectively with the UFW concerning decisions to subcontract the production of crops.

(d) Instituting unilateral changes with respect to its employees' wages without first notifying the UFW and affording the UFW, as the certified collective bargaining representative of Respondent's agricultural employees, a reasonable opportunity to meet and bargain with Respondent as to such proposed changes.

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

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

(a) Rescind, upon request of the UFW, the certified bargaining representative of Respondent's agricultural employees, the wage increase given in February 1979.

(b) Upon request, meet and bargain collectively in good faith with the UFW, as the certified exclusive collective bargaining representative of its agricultural employees, with respect to its decision to subcontract the growing of beets.

(c) Upon request, meet and bargain collectively in good faith with the UFW, as the exclusive certified collective bargaining representative of its agricultural employees, and if agreement is reached, embody such agreement in a signed

contract.

(d) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's refusal to bargain by its failure to provide the UFW with requested information and by its refusal to bargain over mandatory subjects of bargaining, for the period from February 14, 1978, to April 4, 1979, and thereafter until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(e) Make whole all agricultural employees who lost work as a result of Respondent's decision to discontinue growing beets, for all economic losses suffered by them; such amounts to be computed in accordance with Board precedent, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 for the period from ten days after the date of issuance of this Decision and Order until: (1) the date Respondent reaches an agreement with the UFW regarding its decision; or (2) the date Respondent and the UFW reach a bona fide impasse; or (3) the failure of the UFW to request bargaining about the decision within ten days after the date of issuance of this Order or to commence negotiations within five days after Respondent's notice to the UFW of its desire to so bargain; or (4) the subsequent failure of the UFW to meet and bargain in good faith with Respondent

about the matter.

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

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

(h) Provide a copy of the attached Notice, in all appropriate languages, to each employee hired by Respondent during the twelve month period following the date of issuance of this Order.

(i) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time between February 14, 1978 to April 4, 1979, and thereafter until such time as Respondent commences good faith bargaining with the UFW which leads to a contract or a bona fide impasse.

(j) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to

replace any Notice which has been altered, defaced, covered or removed.

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

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

Dated: June 17, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we have violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by unilaterally changing our employees' wages without notifying or offering the United Farm Workers of America, AFL-CIO (UFW) a chance to bargain, by refusing to provide bargaining information to the UFW, and by subcontracting out the production of beets without notifying and giving the UFW the opportunity to bargain about that decision. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

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

WE WILL, on request, provide information relevant to collective bargaining to the UFW.

WE WILL NOT make any change in your wages or working conditions without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, we will reimburse all workers who were employed at any time during the period from February 14, 1978, to the date we began to bargain in good faith for a contract for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW plus interest.

WE WILL NOT subcontract out the production of crops without notifying and giving your certified bargaining representative

an opportunity to bargain about the decision.

Dated:

CARDINAL DISTRIBUTING COMPANY, INC., PETER RABBIT FARMS, CARDINAL PRODUCE SALES, INC. OF COACHELLA VALLEY

By: _____
(Representative) (Title)

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

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

DO NOT REMOVE OR MUTILATE.

MEMBER WALDIE, Concurring in part and dissenting in part:

I join Member Henning in rejecting the rule regarding crop decisions created by the majority in this case. Where agricultural employees are faced with loss of their livelihood because of a decision to rearrange a farming business, the question of whether to require "decision" bargaining over a crop change is far too complex to answer categorically. I depart from Member Henning, however, in my belief that a crop change that is designed to increase the profitability of the business should be subject to mandatory bargaining only when the employees can effectively address the employer's economic concerns with concessions such as wage and benefit cuts or work rules that increase productivity or quality control. In my view, that is the only area in which decision bargaining has any practical meaning.

I also agree with Member Henning when he describes the "balancing test" set out by the Supreme Court in

First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (FNMC) as "vague" and "elusive." FNMC is confusing and difficult to apply, as evidenced by the attempts of the majority herein, because it is not readily apparent what benefits are to be balanced against which burdens, or what weights should attach to which benefits or burdens. In my opinion, the Supreme Court in FNMC intended to require the NLRB General Counsel, in cases involving economically-motivated decisions, to answer the following questions: first, will the employer's decision result in a substantial loss of work for bargaining unit employees; second, will the employer's decision substantially change the nature of the business; third, do exigent circumstances require that the decision be made immediately or in secret; and fourth, can the employees effectively address the employer's reasons for the decision through the bargaining process?

Decision bargaining is only required when there is a substantial job loss; there is no substantial change in the nature of the business; exigent circumstances do not exist, and the employees can make concessions which address the employer's reasons for the decision. If any of these elements is missing or cannot be proved by substantial evidence, then the employer is free to make the business decision and must bargain only over the effect of the decision on the employees. That approach, in my view, incorporates conflicting interests in the analysis, but weighs heavily in favor of an employer's unfettered decision-making power. In other words, the "balance" referred to in FNMC has already been struck in the formulation of the elements of

the test.

The majority has paid lip-service to a test that balances the actual circumstances of a particular management decision, but has, in fact, returned "decision bargaining" to its pre-FNMC condition. That is, the union argues that every decision involves sub-contracting, while the employer claims the same decision is like a closure. By rejecting a functional, case-by-case analysis, the majority has, on one hand, revived feudal notions of the prerogatives of property ownership, and, on the other, blurred the concept of sub-contracting. That blurring has stripped away any clarity or certainty that might have been gained from a categorical property analysis.

Finally, although I agree with the limited backpay remedy ordered herein, I would also order Respondent to return to the status quo ante the unlawful discontinuation of beet production. (See my separate opinion in Paul W. Bertuccio (1982) 8 ALRB No. 101.)

Dated: June 17, 1983

JEROME R. WALDIE, Member

MEMBER HENNING Concurring in part and Dissenting in part:

I concur with the majority's conclusion that Respondent violated section 1153(e) of the Agricultural Labor Relations Act (ALRA or Act) by failing to provide its employees' certified representative with information the representative had requested for bargaining purposes. I also concur with the majority's conclusion that Respondent committed another violation of section 1153(e) by unilaterally increasing the piece rate it paid to carrot bunchers. Finally, I concur with the majority's conclusion that Respondent committed a third violation of section 1153(e) by failing or refusing to negotiate with its employees' representative about its decision to discontinue growing beets, and that, contrary to the conclusions of the Administrative Law Judge (ALJ), Respondent committed no such violation by its decisions to discontinue green cabbage, parsley and green onions. I concur as well in the remedial provisions the majority has ordered to correct the effects of Respondent's violations of

the Act to the extent that such correction is feasible.

I disagree, however, with the majority's approach to the issue of bargaining about crop change decisions. The importance of the issue warrants explanation of my views.

Not every decision about what crops to grow or discontinue, or what amount of a particular crop to grow, is so significant in the existence of an agricultural enterprise that it can fairly be said to concern a change in the scope and direction of the enterprise. Some crop change decisions are quite insignificant in relation to the enterprise as a whole. Disagreement on this point underlies the differences between my views and those of the majority on the violations of section 1153(e) alleged by the General Counsel and found by the ALJ to have been committed by Respondent in failing to negotiate with its employees' certified representative concerning decisions it made to discontinue growing parsley, green onions, green cabbage and beets.

In my view, under certain circumstances an agricultural employer contemplating a change in operations (including what crops are to be grown) intended to reduce production costs relating to labor, and thereby to increase profits or to improve the marketability of its product(s), which change will have a serious adverse impact upon its employees, should be required to afford its employees' certified representative an opportunity to request negotiations concerning the employer's contemplated decisions(s) or proposed change(s).

In December 1982, the Agricultural Labor Relations

Board (ALRB or Board) issued a Decision in the case of Paul W. Bertuccio (Bertuccio) (1982) 8 ALRB No. 101, which has become extremely controversial. Contrary to many over-simplified and unjustified accounts, the Board did not in Bertuccio make agricultural employee organizations the "partners" of management in the running of agricultural enterprises, nor turn over responsibility for basic managerial decisions to agricultural employee organizations.

What the Board did do in Bertuccio was to follow section 1148 of the ALRA[1/] and apply certain relevant precedents -- decisions of the United States Supreme Court and other federal courts and the NLRB interpreting and applying the NLRA -- to a situation that occasionally arises in California agriculture when the management of an agricultural enterprise makes a business decision which, while significant, is not of fundamental importance to the enterprise from a business perspective but is of fundamental importance to its employees from their perspective because it threatens their jobs and economic

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[1/] Section 1148 of the ALRA provides: "The Board shall follow applicable precedents of the National Labor Relations Act (NLRA) as amended." Prior to the issuance of the ALJ's Decision in the instant case, it had been the position of the National Labor Relations Board (NLRB) that any managerial decision which caused a reduction in bargaining unit work was presumed to be a mandatory subject of bargaining. The burden was then on the employer to show that such a presumption was inappropriate in light of the surrounding circumstances. (Brockway Motor Trucks (1977) 230 NLRB 1002 [95 LRRM 1462], enforced as mod. (3rd Cir. 1978) 582 F.2d 720 [99 LRRM 2013]; Ozark Trailers Inc. (1966) 161 NLRB 651 [63 LRRM 1264].) The ALJ here utilized this presumption approach, which has since been disapproved by the United States Supreme Court. It was not followed in Bertuccio and is not followed here.

livelihood.

Following the lead of the United States Supreme Court and the NLRB, the Board held that, under certain circumstances, an employer must bargain with its employees' labor organization about such a business decision. To bargain with a labor organization need not necessarily mean agreeing with the labor organization's position. This Board has consistently adhered to the rule expressed by the Supreme Court in First National Maintenance Corp. v. NLRB (FNMC) (1981) 452 U.S. 666, fns. 16 and 17 [107 LRRM 2705, 2710]:

> ...The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer from "refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." ... The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 1 LRRM 703 (1937). Cf. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549, 55 LRRM 2769 (1964) ('The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.')
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> . . .
>
> ...The employer has no obligation to abandon its intentions or to agree with union proposals. On proper subjects, it must meet with the union, provide information necessary to the union's understanding of the problem, and in good faith consider any proposals the union advances....

The crucial point that the obligation to bargain, which the law clearly imposes, does not involve, even by implication, any

obligation to agree, has generally been ignored in the controversy surrounding the Bertuccio case. The resulting misunderstanding interferes with the purpose of the ALRA "to bring certainty and a sense of fair play" (ALRA section 1) to agricultural labor-management relations.

The United States Supreme Court has ruled that in industries covered by the NLRA,

> [B]argaining over management decisions that have a substantial impact on the continued availability of employment [is] required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of business.
> First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705, 2710].

This Board determined in Bertuccio that the Supreme Court's ruling in FNMC, as applicable precedent within the meaning of ALRA section 1148, required us to weigh, on a case-by-case basis, the competing interests and considerations brought into play for employers and for their counterparts in the collective bargaining process by certain management decisions affecting what crops are grown.

Precisely because it is a weighing process that the Supreme Court has called for in cases of this type, the majority approach to crop decisions is inadequate. For the majority, no crop change decision need be submitted to bargaining unless the change falls into a category such as subcontracting or mechanization. (The majority's analysis of Respondent's so-called subcontracting of its beet growing operation will be discussed below.) Such a rigid rule lacks the flexibility inherent in

the balancing test propounded by the Supreme Court in FNMC. I believe the danger of rigid, mechanical rulings outweighs the virtue of predictability which the majority's approach purports to, but does not actually, afford.

One of the influences which leads me to this conclusion is the ruling of the California Supreme Court in San Clemente Ranch, Ltd. v. Agricultural Labor Relations Board (1981) 29 Cal.3d 874. The ALRB in that case had ruled that San Clemente Ranch, Ltd. (San Clemente) was, as a matter of law, a "successor employer" to the company whose business it had acquired, and was therefore required to bargain with the union selected by its predecessor's employees as their representative. The ALJ had previously come to the same conclusion, but had based his decision on a single factor, the number of the predecessor's employees who were on San Clemente's payroll on the date the representative asked San Clemente to enter into negotiations. The ALRB did not rest its conclusion on that single factor but, in the words of the Supreme Court:

> Undertaking a broad overview of the successorship doctrine, the ALRB pointed out that numerous facets of California's agricultural industry --relating to both employers and employees-- presented unique complexities in the application of successorship principles and called for a more flexible approach than was reflected in the ALO's [ALJ's] reasoning. (Fn. omitted.) (29 Cal.3d 881.)

The Supreme Court went on to comment approvingly upon the ALRB's recognition of the complexities characteristic of labor-management relations in California agriculture and the difficult nature of many of the decisions that must be made under the ALRA:

> After canvassing these numerous complicating factors which exist in California's agricultural context, the Board astutely observed that "[p]rotecting the collective bargaining rights of these workers from erosion due to changes in the ownership of an employing entity, without unduly burdening the transferability of capital in the agricultural industry, is a challenge of no small proportions." (Ibid.)

While the issues presented by decision bargaining cases differ in significant ways from those which arise in a successorship case, in both kinds of cases we must protect the rights of agricultural employees without undue imposition on the interests of agricultural capital. As with successorship cases, proper resolution of decision-bargaining cases also requires careful consideration of the "numerous complicating factors which exist in California's agricultural context." (San Clemente Ranch, supra, 29 Cal.3d at 881.)

We should squarely face the difficulties inherent in determining whether in a given set of circumstances bargaining about a decision would benefit labor-management relations or the collective bargaining process more than it would burden the conduct of the business.[2/] Neither simplicity nor unanimity

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[2/] It is important to note that the balancing test propounded in FNMC was not between the burden on the employer's ability to manage an enterprise, on the one hand, and on the other, the benefit to the labor organization or to the employees. Rather, what is to be balanced against the burden on the employer's ability to manage the enterprise is the elusive "benefit to labor-management relations and the collective bargaining process." It is not surprising that views differ as to what this vague guideline requires. (See, Note, Mandatory Bargaining and the Disposition of Closed Plants (1982) 95 Harv. L. Rev. 1896; Kohler, Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance 5 Industrial Relations Law Journal 402 (1983).)

may fairly be expected. Indeed, the Supreme Court in FNMC said that it had granted certiorari "[b]ecause of the importance of the issue and the continuing disagreement between and among the [NLRB] and the Courts of Appeals...." 452 U.S.666, [107 LRRM 2705, 2708]. Moreover, the fact that strong and well reasoned dissents were filed by members of the Supreme Court in FNMC and by members of the NLRB in Bob's Big Boy Family Restaurants (Boy's Boy Boy) (1982) 264 NLRB No. 178 [111 LRRM 1354], a recent decision applying the FNMC rule, indicates that this is an area of the law where reasonable minds assessing the same facts can and do come to different conclusions. That this results in a situation of some uncertainty is true, and may be regrettable, but that does not seem sufficient reason for ignoring the precedents section 1148 commands us to follow and for laying down the kind of broad categorical rule which the Supreme Court and the NLRB have avoided. (Cf. Brockway Motor Trucks v. NLRB (3rd Cir. 1978) 582 F.2d 720, [99 LRRM 2013, 2021].)

The majority's claim that its approach will produce certainty and predictability as to what decisions must be submitted to bargaining is undercut by its conclusion that bargaining was required about Respondent's decision with respect to its beet crop, which the majority characterizes as a decision to subcontract the growing of that crop. The record contains no evidence that either Respondent or Keo-Farms, Inc., regarded their relationship as a contract to grow or to harvest the beet crop. Neither does there appear to have been any consideration

exchanged to create such a contract. The only support the majority can cite for its characterization is a tacit agreement that Respondent would market the crops Keo-Farms, Inc., grew on land it leased from Respondent. If this Board is able to find a subcontracting relationship on evidence so scanty, it will be able to discover such a relationship in very many transactions where the parties themselves intended no such thing. Employers and labor organizations will have no certainty, then, which crop decisions fall within or without the purportedly "clear" subcontracting category. They will have to wait for the Board's interpretation of what the employer was actually deciding.

The Supreme Court in FNMC and the NLRB in Bob's Big Boy, supra, 264 NLRB No. 178, have delineated several factors which are to be taken intc account, on a case-by-case basis, in determining whether bargaining about a particular decision would provide benefit to labor-management relations or the collective bargaining process greater than the burden it would impose on the employer's conduct of the business. The NLRB in Bob's Big Boy, supra, 111 LRRM at 1356-1357 stated:

> ...it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control" the decision will not fall

> within the scope of the Employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the Employer's business before and after the action taken, the extent of capital expenditures, the bases for the action and, in general, the ability of the Union to engage in meaningful bargaining in view of the Employer's situation and objectives. (Fn. omitted.)

The NLRB in Bob's Big Boy found that the capital transactions undertaken by the Employer pursuant to its decision to subcontract one part of its business were not "substantial enough to remove the decision from the scope of Respondent's mandatory bargaining obligation." (Fn. omitted.) (111 LRRM at p. 1357.)[3/] The NLRB also found that the concerns which motivated Respondent's decision to subcontract -- escalating costs and control of the food portions being prepared -- "were of the type traditionally suitable for resolution through the collective bargaining process." (Ibid.) The NLRB therefore concluded that Respondent's failure or refusal to bargain about its decision constituted a violation of NLRA section 8(a)(5).

In applying the balancing approach to the facts of the instant case, as mandated by FNMC and Bob's Big Boy, I note first that no allegation has been made that Respondent's crop

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[3/] Despite the clarity of the NLRB's language quoted here, the majority takes the position that any investment or allocation of capital, no matter how small, which is due to a crop change decision suffices to remove the decision from the scope of the mandatory bargaining obligation. The majority fails to acknowledge that although some crop change decisions involve great amounts of capital, others involve only very small amounts. The latter cannot realistically be considered "akin to the decision whether or not to be in business at all."

decisions herein were based on its employees' support for their certified representative or on any other protected concerted activity of employees. Therefore, my analysis of those decisions begins with the presumption that Respondent's motivation in discontinuing those crops was purely economic. (Cf. Abatti Farms (1981) 7 ALRB No. 36; Royal Typewriter v. NLRB (8th Cir. 1976) 533 F.2d 1030 [92 LRRM 2013].)

If Respondent's four crop changes were regarded as constituting one decision, the severe impact on the bargaining unit -- i.e., the loss of some 70 percent of its jobs -- would weigh very heavily against the burden bargaining would impose on Respondent's conduct of its business. The record indicates that the nature of Respondent's business, farming row crops and packing and marketing farm products, was not changed by discontinuing growing beets, parsley, green onions, and green cabbage, as those crops cumulatively accounted for only some 15 percent of Respondent's row crop acreage. Moreover, Respondent's allocation of capital does not appear to have been significantly altered or affected by the crop changes. I believe that the record requires that each crop discontinuance should be regarded as resulting from a separate decision, as different considerations led Respondent to abandon each of the four crops. Looked at separately, only the decision to discontinue beets was one about which Respondent was under an obligation to bargain with the certified representative. In coming to this conclusion I have considered the impact of each managerial decision on the bargaining unit, the significance of the decision to the

employer's overall operation, whether the need for the change was so exigent that delay[4/] or publicity would have prevented the employer from responding to a bona fide business necessity and whether the UFW could have meaningfully and effectively addressed Respondent's reasons for the changes. These are the factors which should be considered, case by case, when a violation of section 1153(e) is alleged on the basis of a crop change decision. Needless to say, the particular characteristics of the employer's operation (including its capital structure, where that appears relevant) and employment patterns in the bargaining unit can present complexities unique to agriculture. (See San Clemente Ranch, supra, 29 Cal.3d 874.)

It does not appear from the record that the impact of the decision to discontinue beets on Respondent's overall operation was significant. Only some 24 out of 1,500 acres had been devoted to beets and the change to a different crop or crops was not shown to have required major investment in new machinery. Respondent did not establish that the change had to be effected with such speed or secrecy that offering to bargain about it would have entailed serious business risk.

Respondent's reason for the change concerned the high cost of preparing the crop and its poor profitability the previous season. These are considerations that the Charging Party, if given the opportunity, might have been able to address with

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[4/] I would hold that a labor organization waives its right to bargain about a crop change decision if it does not promptly request bargaining after receiving notice of the employer's contemplated decision or of the proposed change.

helpful proposals such as cost-saving concessions on pay, hours or methods of work. This feature of Respondent's decision as to beets -- the amenability of the underlying considerations to constructive proposals by the employees' labor organization -- differentiates it, for purposes of this analysis, from the decisions about green cabbage, parsley and green onions. Bargaining about the decisions to discontinue the three last-named crops was not necessary because it would have been futile, in that the considerations motivating Respondent's decisions were not the sort that a labor organization could likely address with meaningful, effective proposals.

It is clear from FNMC, Bob's Big Boy, and other authorities that bargaining over a decision is not required in circumstances where such bargaining would be futile because the considerations that prompted the employer's decision are not of a sort that a labor organization could address with effective, meaningful proposals. Only where the employer's concerns can be so addressed by the labor organization are they "the type traditionally suitable for resolution through the collective bargaining process." Bob's Big Boy, supra, 111 LRRM at p. 1357. For example, in Brooks-Scanlon, Inc. (1979) 246 NLRB 476 [102 LRRM 1606], petition to review den., 108 LRRM 2176 (D.C. Cir. 1981), the NLRB held that an employer did not have to bargain about a decision to close one of its two sawmills. The decision was based solely on economic considerations, the most important of which was the fact that the supply of prime timber in the surrounding districts was not sufficient to support

the continued operation of the sawmill. In concluding that bargaining was not necessary in these circumstances, the Board stated:

> ...The Board does not require an employer to bargain over the closing of an operation in situations, such as here, where the decision is predicated on economic factors so compelling that bargaining could not alter them. As the availability of a limited natural resource is clearly beyond the control of either party, we conclude that Respondent's decision to terminate the Redmond sawmill operation resulted from an economic condition which would have rendered bargaining pointless despite any good-faith effort by Respondent to reach accomodation. We do not see any useful purpose to be derived from requiring Respondent to perform a futile act. In our opinion, Respondent fulfilled its obligation to the Union by bargaining over the effects of this decision. (246 NLRB at 477.) (Fn. omitted.)

Contrary to the ALJ, I would find that bargaining about Respondent's decisions to discontinue parsley, green onions and green cabbage was not necessary because it would have been futile.

1. Parsley

Respondent contends, without contradiction by General Counsel or the Charging Party, that its decision to discontinue parsley was due to the crop's poor performance the previous season and to parsley's harmful effect on the soil. The latter consideration is clearly beyond the scope of any proposals the UFW could offer in negotiations. The relatively small area which had been allocated to parsley, some 8 acres, suggests a scale of operations in this crop too small for its marketability or profitability to have been significantly affected by any concessions the Union might offer as to wages, hours or conditions of employment for employees working on the crop. I therefore conclude that bargaining about Respondent's decision to

discontinue parsley would have been an exercise in futility and was therefore not required.

2. Green Onions

Respondent contends without contradiction that the market for green onions was proving to be very vulnerable to Mexican green onions, the popularity of which apparently reflected superior quality and not lower prices. As there does not appear to be any proposal the Charging Party could have made to change that situation, I conclude that with respect to the green onion crop too, bargaining would have been futile.

3. Green Cabbage

Neither General Counsel nor the Charging Party dispute Respondent's contention that it decided to discontinue green cabbage because seed for that crop was unavailable. That was not the sort of problem which a labor organization is likely to be able to address with meaningful, effective proposals. Again, I conclude that bargaining was not required because it would have proved futile.

Conclusion

In the hope of preventing my position from being misunderstood as the Board's Bertuccio Decision has been misconstrued, I emphasize that to require an agricultural employer to bargain with a labor organization about decisions like Respondent's decision here to discontinue growing beets would not amount to involving the labor organization in the day-to-day management of an enterprise by allowing the labor organization to substitute its judgement for the employer's as to effective

agricultural practices. In my view, for crop decisions based on such variables as weather, pest control, water supply or a regular pattern of rotation to avoid soil depletion, the labor organization's input generally would not have to be sought. However, when an employer contemplates a change in operations intended to reduce production costs relating to labor, and thereby to increase profits or improve the marketability of the product, the labor organization should be afforded the opportunity to address the employer's concerns with proposals related to such factors as economic benefits, productivity or quality control.[5/]

This approach would preserve the great underlying purpose of the collective bargaining process:

> The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. (FNMC, supra, 452 U.S. 666, fn. 16, citing NLRB v. Jones & Laughlin Steel Corp., (1937) 301 U.S. 1, 45, [1 LRRM 703]. Cf. John Wiley & Sons, Inc. v. Livingston (1964) 376 U.S. 543, 549, [55 LRRM 2769].)

I respectfully submit that the majority's approach will set back the development of the collective bargaining process which the Act was intended to promote, for it will encourage employers not to bargain with their employees' representatives about any crop change decisions, even those which will deprive many employees of their livelihood. At the same time the majority's

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[5/] See, Quarterly Report of the General Counsel, BNA Daily Labor Report (Jan. 5, 1983) D-1, in which the NLRB's General Counsel concludes that under FNMC and Bob's Big Boy, those plant relocation decisions which are motivated by labor cost considerations are subject to decision bargaining.

approach creates a strong possibility that an employer with no intention of subcontracting cultivation of a crop will later be found by this Board to have subcontracted it nonetheless, as has Respondent here, and to be liable for its failure to bargain about its decision to do so.

Dated: June 17, 1983

PATRICK W. HENNING, Member

CASE SUMMARY

Cardinal Distributing Company, Inc.,
dba Peter Rabbit Farms,
Cardinal Produce Sales, Inc.,
of Coachella Valley

9 ALRB No. 36
Case No. 78-CE-12-C

ALJ DECISION

The ALJ concluded that Respondent's responses to requests for information from the UFW were incomplete, inadequate and inexcusably delayed. The ALJ found that Respondent thereby manifested bad faith bargaining with the UFW and violated section 1153(e) and (a) of the Act.

Respondent also raised the wages of its carrot bunchers without giving the UFW prior notice and an opportunity to bargain over the increases. The ALJ found that the increases were not part of an established program of fixed, regularly granted increases; the UFW did not waive its right to receive prior notification of proposed changes; and no bona fide impasse in negotiations preceded the increases. He therefore found Respondent violated section 1153(e) and (a) of the Act.

Respondent notified the UFW that it intended to discontinue growing green onions, beets, cabbage, and parsley and offered to bargain over the effects of those decisions on the bargaining unit employees. The ALJ concluded that Respondent must also bargain over the decision to discontinue those crops. The ALJ based his conclusion on the following factors: (1) the decisions involved less than 15% of Respondent's total acreage but reduced the bargaining unit by over 70%; (2) no overall change in Respondent's operations resulted, i.e., Respondent still primarily planted and prepared row crops for market, and made no capital investments; and (3) no compelling need mandated swift managerial action. The ALJ, applying NLRA precedent, found that where an employer's managerial decision causes a reduction in bargaining unit work, that decision is presumptively a mandatory subject of bargaining.

The order proposed by the ALJ included a bargaining order and a makewhole remedy, but the ALJ did not order the crops replanted due to the UFW's delay in responding to the Respondent's notification of the crop discontinuances.

BOARD DECISION

The Board unanimously affirmed the ALJ's conclusions regarding Respondent's refusal to provide information and the unilateral changes made by Respondent. However, a majority of the Board found, applying the balancing test set forth by the U.S. Supreme Court in First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [101 S.Ct. 2573], that ordinary managerial decisions

concerning which crops to grow or discontinue are not mandatory subjects of bargaining. The majority concluded that because decisions regarding which crops to grow or discontinue lie at the core of entrepreneurial control they are not subject to a mandatory duty to bargain. The Board specifically overruled the approach in Paul Bertuccio (1982) 8 ALRB No. 101. The majority concluded that Respondent's decision to discontinue growing beets was actually a decision in effect to subcontract that work and as such is a mandatory subject of bargaining.

REMEDY

The Board affirmed the ALJ's remedy, and also ordered Respondent to pay a limited backpay award to employees affected by the discontinuation of the beet production part of its operation.

CONCURRENCE/DISSENT: MEMBER WALDIE

Member Waldie disagreed with the majority's crop decision analysis, although he joined in finding a violation as to the discontinuation of beet production. Member Waldie would continue to apply the functional, case-by-case analysis of crop decisions used in Paul W. Bertuccio (1982) 8 ALRB No. 101 and order restoration of the status quo ante for the violation, absent a showing of hardship by the employer.

CONCURRENCE/DISSENT: MEMBER HENNING

Member Henning concurred with the majority in its conclusions that Respondent committed three separate violations of section 1153(e) and (a). Member Henning disagreed with the majority's categorical approach to the issue of bargaining over crop change decisions. Relying on First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 and Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178, he argued for the Paul W. Bertuccio (1982) 8 ALRB No. 101 case-by-case approach in which the benefit to labor-management relations and the collective bargaining process is balanced against the burden thereby imposed on the employer's conduct of its business.

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

CARDINAL DISTRIBUTING COMPANY, INC. Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	Case No. 78-CE-12-C

APPEARANCES:

For the General Counsel,
Nancy Kirk and Robert Cheasty

For the Respondent,
Michael P. Melman, of
Los Alamitos, California

For the Charging Party,
Nancy Jarvis

DECISION

STATEMENT OF THE CASE

David C. Nevins, Administrative Law Officer: This case was heard by me in Indio, California, the hearing commencing on April 4, 1979, and ending on April 20, 1979. The case is based on an unfair labor practice charge filed on August 14, 1978, by the United Farm Workers of America, AFL-CIO (hereafter the "UFW"), which charge led to the General Counsel's complaint, originally dated March 1, 1979, and amended in writing on April 2, 1979. The unfair labor practice complaint charges that the Respondent, Cardinal Distributing Company, Inc. (sometimes referred to as the "Company"), violated Sections 1153(a) and (e) of the Agricultural Labor Relations Act (hereafter the "Act"). The Respondent denies that it violated the Act.

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All parties, including the UFW which intervened in the proceeding, were represented at the hearing and were given a full opportunity to participate in the trial. The General Counsel and the Respondent filed briefs after the close of the hearing. The following findings of fact and conclusions of law are based upon the entire record, including my observation of the witnesses' demeanor and consideration of the respective arguments and briefs of the parties.

BACKGROUND[1/]

Although officially captioned in this proceeding as Cardinal Distributing Company, Inc., the Respondent is composed of three entities: Cardinal Distributing is responsible for operating a packing shed, Cardinal Produce Sales is responsible for marketing farm products, and Peter Rabbit, Inc., is responsible for farming some 1,500 acres of farmland in the Coachella Valley. (No particular distinction is hereinafter made between these three entities, although the issues herein relate solely to the agricultural workers employed in the Respondent's farming operation, Peter Rabbit, Inc.). The Respondent generally grows row crops on its owned and leased farmlands, including such crops as carrots, corn, bok choy, cabbage, green onions, parsley, broccoli, beets, and others. The Respondent is managed by John Powell, whose family owns all three entities of the Respondent.

On March 29, 1977, the UFW was certified by the Agricultural Labor Relations Board (hereafter the "Board") as the bargaining representative of the Respondent's agricultural workers. On April 7 the UFW requested to commence collective bargaining and submitted a three-page request for the Respondent to provide information to it. The Respondent and the UFW began their negotiations on May 23, 1977, and continued to meet through March 30, 1979, attending some 27 bargaining sessions.

The issues in this proceeding relate to three basic charges:

1. That Respondent, since February 14, 1978, has refused to provide the UFW its requested information and records which are necessary and relevant to negotiate a collective bargaining agreement.

2. That in February, 1979, the Respondent unilaterally instituted a wage increase without bargaining about it with the UFW.

3. That in July, 1978, the Respondent failed to negotiate with the UFW regarding the Respondent's decision to

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1/Jurisdiction under the Act exists to make determinations with respect to the unfair labor practice allegations. The Respondent concedes it is an agricultural employer and that the UFW is a labor organization within the terms of §§1140.4(c) and (f) of the Act, respectively.

discontinue the farming of green onions, beets, parsley, and green cabbage.

Each of the foregoing issues is separately set forth below in terms of its pertinent facts and legal analysis.

I.

THE RESPONDENT'S ALLEGED REFUSAL TO PROVIDE THE UFW WITH CERTAIN REQUESTED INFORMATION FOR BARGAINING.

A. Introduction:

From until the UFW's original request for bargaining, on April 7, 1977, through the filing of the instant unfair labor practice charge, on August 14, 1978, numerous requests for information were made by the UFW, both through written correspondence and through verbal approaches at the various negotiating sessions and numerous responses were made by the Respondent to those requests. Most of the UFW's verbal information requests were directed to Mr. Al Caplan, a labor consultant, who served as the Respondent's spokesman throughout the collective bargaining. All of the UFW's information requests were eventually submitted to Mr. Walter (Terry) Watters, Mr. Powell's brother-in-law and the Respondent's controller, who was delegated the responsibility for responding to the UFW's requests.2/

Although the UFW's original request for information (April 7, 1977), which continued to serve as the foundation for its subsequent requests, was extensive, for purposes of this proceeding it can be broken down into four basic categories of information that was sought.3/ First, the UFW's request asked for what is referred to herein as "employee data," which pertained to the bargaining unit employees' names, ages, birthdates, residences (as well as the foregoing information for the employees' spouses), their social security numbers, job classifications, wages, and dates of hire. As a related matter, the UFW requested information as to the wages, fringe benefits, and other

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2/Several different UFW representatives served as the UFW's chief negotiator through the 16 or 17 months of negotiations that are involved in this proceeding. They were: Ruth Shy, who was the chief negotiator between May and October, 1977; Eliseo Medina, who was the chief negotiator between January and March, 1978; and Karen Flock, who was the chief negotiator beginning in July, 1978.

3/Some of the information originally sought from the Respondent was immediately provided or was nonexistent. Because this type of information is not in dispute in this proceeding, no effort has been made in the text above to catalog every specific information request made by the UFW or every specific response submitted by the Respondent.

compensation paid by the Respondent to nonbargaining unit employees, as well as seeking copies of any labor contracts covering such nonbargaining unit employees. Second, the UFW's request asked for what is referred to herein as "fringe benefit" data, which pertained to such things as the bargaining unit employees' holiday pay, vacation pay, medical benefits, life insurance and other benefits to which they were then entitled. In this connection, the UFW requested a copy of the employees' existing medical insurance plan, as well as the medical claims data over the last two years (as to the amount of loss and number of claims). Third, the UFW's request asked for what is referred to herein as "production data," which pertained to the crops grown by the Respondent, their respective acreage, growing and harvesting cycles, and several factors that related to "piece-rate" information. The piece-rate information sought included data as to the number of units produced in each crop, total hours worked on such crop units, amount paid to employees for such units of production, rates paid per unit, and the average hourly rate paid to the employees for each crop. Finally, the UFW's request asked for what is referred to herein as "health and safety" information, which pertained to the type of equipment used by the Respondent for each of its crops, the safety and protective equipment and clothing provided to employees, and the pesticides used on each crop, when they are used, and their means of application.

B. The UFW's Information Requests And The Respondent's Reactions

1. 1977

Five days after the UFW's April 7 correspondence, the Company, through Mr. Caplan, wrote and advised that the requested information was being compiled and noted that "some of the information requested is in the hands of the labor contractor who supplied most of the labor." The Company's agricultural work force was composed of two basic groups: the Company directly employed "steady" workers, numbering between 16 and 25, who were primarily responsible for the irrigation and tractor driving work, and who worked in year-round fashion and were paid by the Company; for the bulk of the work, such as thinning, hoeing, and the harvest (performed primarily on a piece-rate basis) the Company had employed (until August, 1978) the services of a labor contractor, Jose Ortiz. Ortiz had historically been responsible for maintaining the payroll and other information concerning his crews; his normal work pattern was to provide the Company his crews around early November each year, and these employees would remain until early April the following year, though some would remain with the carrot harvest until late May.4/

4/On March 11, 1977, the Board in Cardinal Distributing Co., 3 ALRB No. 23, rejected the Respondent's contention that Jose Ortiz, and not the Respondent, was the "employer" of Ortiz's crews, finding instead that "Cardinal Distributing Co. is therefore deemed the employer of the workers provided by Jos Ortiz." Mr. Powell admittedly was acquainted -- [continued]

On April 20 the Respondent submitted in writing to the UFW the basic information that it was to provide to the UFW for the remainder of 1977. For the requested "employee data" the Respondent provided the names of 18 steady employees, their sex, social security numbers, dates of birth, job classifications, pay, and dates of hire. No reference was made by the Company as to their residences or their spouses. The Company also made no mention of the piece-rate employees (also in the bargaining unit), not even that it was seeking to gather information concerning them. As for the information sought concerning the non-bargaining unit employees, the Company merely submitted a copy of a labor agreement entitled "Coachella Valley Grape Crop Agreement," although the Company had grown no grapes since the mid-1960's.5/

Similar deficiencies existed with respect to the other information requested by the UFW. The Company's April 20 letter supplied certain information concerning the employees' existing "fringe benefits," such as the monthly cost per employee for medical insurance and a copy of the medical plan which purportedly covered them, referred to as "Plan 22."6/ The Company failed to provide any claims experience data with respect to the medical plan, claiming it then lacked the time to analyze the existing information. As for the holiday and vacation pay information requested, the Company merely referred to the expired "Grape Agreement." As for the requested "production data" (involving piece-rate information), the Company responded that such information was "not applicable." Again no reference was made to Jose Ortiz or any effort to compile the requested "production data." As for the requested "health and safety" information, the Company responded with a list of the equipment it used and the name of one pesticide it employed; no reference was made as to the safety or protective equipment available for employees or

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4/[continued]--with the Board's finding regarding Ortiz and understood that, as a result of that finding, it was the Company's responsibility to maintain any required employee information for its workers. Powell claimed, nonetheless, to have given that responsibility over to Jose Ortiz, despite the fact that Powell admittedly thought Ortiz to be somewhat uncooperative and difficult to contact during the off-season.

5/At the time of its response to the UFW, the Respondent also operated a packing shed, whose employees were represented by the Fresh Fruit and Vegetable Workers Union, Local P-78-B, which had last signed a collective bargaining agreement with the Company on November 18, 1976. This agreement was neither mentioned nor submitted to the UFW.

6/It was uncontradicted that Plan 22 did not at that time cover bargaining unit employees, who were then covered by a "Plan 10." Rather, Plan 22 at that time covered the Company's shed workers, although this fact was not noted in the Company's response.

when and for which crops the one pesticide was used.

It was not until July 20 that the UFW made any further effort to request information from the Respondent. In earlier correspondence with the Company, on April 30, and at the initial negotiating session, on May 23, the UFW advised the Company that it was studying the information supplied by the Company and would let the Company know if further information was necessary.

At the negotiating session on July 20 the UFW gave to the Company a letter, dated the same day, in which it reviewed its information requests. As for the "employee data," the UFW noted that it wanted the bargaining unit employees' residences, information concerning their spouses, and the names of workers other than the "steadies." As for the "fringe benefit" information, the UFW noted that the Company had failed to submit the eligibility requirements for the existing medical insurance coverage, the past two years' claims experience regarding the medical insurance, the eligibility requirements for paid holidays, and the names of employees who received vacation pay during the past year. The UFW likewise noted that all information concerning the "production data" (involving the piece-rate information) was missing. As for the "health and safety" items, the UFW asked if the one pesticide mentioned by the Company was the only one it used and which safety and protective equipment the employees used. In its July 20 letter, the UFW also inquired whether the "Grape Agreement" covered all the nonbargaining unit workers, specifically mentioning the packing shed employees.

On August 19, in a letter of the same date, the Company provided the UFW's negotiator, Ruth Shy, with its next compilation of the requested information. As for the missing "employee data," the Company wrote that the "other" workers referred to by the UFW were hired by Jose Ortiz, who maintained their records, and that "[h]e can be contacted directly when he returns to the desert in late October." Similarly, in regard to the requested piece-rate information (part of the requested "production data"), the Company wrote that it was not familiar with the piece-rates paid to its employees and that "[y]ou will have to contact him [Jose Ortiz] directly when he returns to the desert in late Oct."7/ As for the "fringe benefit" information, the Company set forth the medical insurance eligibility for employees (though

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7/Despite the Respondent's written claim that it was unfamiliar with the piece-rates paid to its employees, at the hearing Mr. Powell described how at the beginning of each harvest season he would negotiate with Jose Ortiz as to the piece-rates to be paid employees and how much over that rate Ortiz would be paid. Also, as will be seen later with respect to the Company's unilateral piece-rate increase in 1978, Powell claimed that the Company had a practice of keeping advised of and paying to employees the prevailing piece-rates that existed in the Coachella Valley.

this information was still based on the packing shed employees' medical insurance program, Plan 22), listed the steady employees who had received vacation pay during the last year (though it did not specify amounts), and indicated that the requested claims information was not available because the medical insurance records failed to make a distinction between agricultural and nonagricultural claimants. As for the "health and safety" items, the Company now provided the names of four additional pesticides used by it (though without describing the means or periods in which they were used), and listed mechanical safety devices and protective apparel used by its employees. The information provided by the Company on August 19 was discussed at the negotiating session that day, and Ruth Shy continued to insist on getting the missing "employee data," particularly with respect to the piece-rate employees hired through Ortiz. Shy maintained that it was the Company's responsibility, not the UFW's, to gather the requested information from Ortiz.8/

The UFW's unsatisfied request for the "employee data" became a point of contention at subsequent negotiating sessions. At both the August 24 and September 16 sessions, Shy asked about the missing information regarding piece-rate workers, and Caplan claimed it was unavailable and that the Company would make no further effort to get it. A similar discussion took place, according to Shy, at the negotiating session on October 7, at which session she mentioned that the spousal information for the steady employees was still missing and Caplan indicated he would check on that spousal data.

2. 1978

In January, 1978, Eliseo Medina became the UFW's negotiator. On January 16 he wrote to Al Caplan and reminded him that the Company had still not provided the complete "production

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8/The Company's efforts during this period of time to get the requested information from its labor contractor remain somewhat shrouded in confusion. Terry Watters, the controller, claimed to have tried several times to telephone Ortiz at his local residence for several weeks following April 7, but without success. Neither Ortiz nor his wife was reached. Watters did not send any written correspondence to Ortiz's residence, and after his several unsuccessful attempts to contact Ortiz, "resigned" himself to waiting for Ortiz's return in the fall. Watters admitted, however, seeing Ortiz in September, but claimed that despite requesting Ortiz to provide the employee information, Ortiz did not do so until at least November, 1977. Powell also admitted seeing Ortiz one or more times between April and October. Al Caplan, the Company's negotiator, testified that he had no knowledge of what efforts, if any, the Company made to contact Ortiz. And the UFW was not advised of any Company effort to contact Ortiz.

data" that had been requested.9/ One day before the next scheduled negotiating session, which was January 20, the UFW filed an unfair labor practice charge against the Respondent, serving it on the 19th, charging that the Respondent had unlawfully refused to bargain by, inter alia, failing to provide the UFW its requested information.

At the January 20 negotiating session the UFW's information requests were discussed at length. At that meeting Caplan indicated that Jose Ortiz was now back and that the Company had his records. Terry Watters, who also attended the meeting, indicated to Medina that the Company was gathering the requested information. Medina also mentioned to Watters that the UFW had not received the spousal information with respect to the steady employees, but Watters told him that that information was not available. At the January 20 meeting Caplan handed Medina a letter which set forth the piece-rates paid by the Company for four of its crops (onions, parsley, beets, and carrots), although the piece-rates listed were for the 1976-1977 harvest season that had ended in April or May of 1977, not the current harvest then underway.

As for the records of Jose Ortiz that were turned over to the Company, the testimony is not consistent as to when they were turned over. Mr. Powell indicated that the Company received them in late October or early November, 1977; he recalled that Ortiz had returned to work at the Company on November 1. Watters at one time also indicated in his testimony that Ortiz returned in late October and turned over his records in November; at another point in his testimony Watters indicated that Ortiz turned them over in late December. None of the foregoing time estimates squares with the fact, as stated in Mr. Powell's later letter of October 2, 1978, that Ortiz's work commenced during the week of September 26, 1977.

The records of Ortiz apparently consisted of several things: payroll journals, employee signature cards, and a 1977 tax compilation for wages he paid that year. It may be that some of the foregoing material was turned over at various times, not all together. Ortiz's payroll journals identified by name and social security number those who specifically performed work for the Company and on which crop, indicating how many units each worker harvested on which day of each week he or she worked and how much each earned (and in some cases the hours worked were noted). Unlike the payroll journals, Ortiz's signature cards and tax list included, in indiscriminate fashion, all those who worked with Ortiz, irrespective of which grower they performed work for.

On two occasions in latter January, on the 23rd and on the 25th, Caplan wrote to Medina and informed him that the

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9/Negotiating sessions had also taken place on November 18 and December 12, 1977, before Medina assumed his responsibilities vis-a-vis the Company.

Company was making an effort to compile the requested "production data." In the latter letter Caplan noted, "[a]s soon as records are available and obtainable, copies will be given to you." At the negotiating session on February 12 Medina reviewed the kind of records he needed from the Company and the reasons for them. He again requested "employee data" in regard to spousal and residential information. Caplan indicated the Company was working on the records and they would be provided as soon as possible. Medina then wrote Caplan a letter on February 15, confirming that the Company was working on the production and employee records and that Caplan would have Mr. Watters call Medina to discuss the records. At the February 12 meeting Caplan had been unable to describe to Medina the kind of records that had been turned over to the Company by Ortiz. In Medina's February 15 letter he also confirmed that Caplan would check to see whether the Company's packing shed "packs any produce, under its labels, not harvested by workers covered by the UFW's certification." At the next negotiating session, on February 24, Medina again inquired about the "production data," and Caplan indicated he thought the information would be available in early March. Watters never called Medina to discuss the records he and his office staff were working on.10/

On March 3 the Respondent wrote to the UFW regarding the first "production data" with respect to piece-rate wages that it supplied. As requested by the UFW on April 7, 1977, the Company listed the acres on which four of its crops were grown, the units of each that were harvested, the "hours worked," the total wages paid for each harvest, the "average wages per unit," units produced per acre, units of production per hour, and the "average hourly rate."11/

10/At the February 24 meeting Mr. Medina also inquired of Caplan as to which employees the Company considered supervisors having the authority to hire and fire others. Caplan named eight such employees. A letter dated the following day, from Watters to Caplan, which named only two employees with the authority to hire and fire others, was never given to Medina.

11/It should be remembered that the UFW's negotiating team was not given a copy of Ortiz's records, receiving only the Company's summary and analysis of them. At the hearing, after reviewing portions of Jose Ortiz's payroll journal, Mr. Medina reflected that it was impossible to determine the number of hours worked by most of the piece-rate employees; thus, one could not tell their units of production per hour or their average hourly pay rate, which were reflected in the Company's summary. From the testimony and from the journal pages introduced in the record, it seems clear that Ortiz's records contained no hourly information for most of the piece-rate work. Even Mr. Watters, who calculated the Company's hourly figures as found in the summary, conceded that the records he most heavily relied on (pertaining to early 1977) did not all contain hourly information and that he had to "extrapolate" from the hourly figures that were given to the records where such information -- [continued]

On March 7 the UFW responded to the Company's "production data" in writing, raising several basic questions concerning the Company's information. The UFW first inquired whether the production figures were for the entire calendar year 1977 or for a particular harvest during that year; second, what the present wage rate was for each operation, since the Company had only stated the "average wages per unit"; third, whether different rates pertained at different times; and fourth, whether more than one employee worked under a single employee name and social security number.12/ The Company responded to the UFW's inquiry three days later, breaking down its 1977 production figures into "early" and "late" 1977 (thus, covering two distinct harvest seasons), specifying which piece-rates pertained to which portion of 1977, acknowledging that "one set of rates prevailed from January through April and another, higher set was established from October through December"; and indicating that Ortiz's records made no reference to more than one individual working under a single social security number.

On March 18 the Company submitted in writing certain "employee data." This information consisted first of a copy of Ortiz's 1977 general tax list, containing names of Company employees, checked off from among all those who had worked with Ortiz in 1977 (irrespective of which grower used them), and second of copies of employee signature cards for those Company employees for whom a card could be found among Ortiz's 8,000 to 10,000 cards. The cards, which contained certain personal data, were no

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11/[continued]--was not given. As noted at the hearing however, three full weeks of the onion harvest in early 1977 listed no hourly figures, and of the one week of records in late 1977 that contained hourly information only one of five pages pertaining to that particular week contained such information. The hourly information that was contained in the records was written in pencil, while most of Ortiz's production and earnings data were in ink. When questioned, Watters could not remember how he extrapolated from the records so as to devise his hourly information (e.g., he could not remember whether he used the same extrapolation formula based on the harvest in early 1977 and carried it over into the harvest for late 1977, or whether he relied on the one page of hourly figures in late 1977 to extrapolate information for the whole of late 1977).

12/Mr. Medina asserted at the hearing that Ortiz's records reflected in some instances that more than one worker performed work under a single employee's name and social security number. Examples of Ortiz's payroll journal that were introduced into evidence, which Medina had not seen during negotiations, reflect substantial discrepancies in the daily harvest production between certain workers. Based on his long experience with harvest production, Medina convincingly described how it was highly improbable for only one worker to have harvested as many units of onions on any given day as were listed for some employees in Ortiz's journal.

submitted for most of the employees checked off on the tax list a having been Company employees in 1977.

At the two negotiating meetings in March, the UFW protested the manner in which the Company provided its production and employee information. At the March 10 meeting, after he had received the "production data," Mr. Medina requested to see the records from which the Company's summaries were developed. Medina asserted to Caplan that the only means by which to verify the Company's information was to look at Ortiz's records. According to Medina, Caplan responded by saying "that was it," that it was all the information that would be provided. Medina also expressed his concern over the possibility that more than one worker was performing work under one social security number; he explained to Caplan that the harvest was then underway and the foremen would know if such a practice existed. At the March 27 meeting, after he had received the "employee data," Medina objected to Caplan that the employee list and the signature cards were incomplete, that some cards did not contain birthdates, that no spousal information was provided, and that no job classifications were provided. According to Medina, Caplan said that was all the information that was available. One more month passed when Ruth Shy, who again served as the UFW's negotiator at the next, May 26 meeting, tried to raise with Caplan questions concerning the information still missing from the UFW's requests. But, as Shy recalled, the discussion ended quickly because Terry Watters, who was expected to attend the meeting, did not appear.13/

On June 23 an attorney for the UFW, Ellen Greenstone, wrote Mr. Caplan, cataloging the information still sought by the UFW. Greenstone's letter noted in regard to "employee data" that the UFW was still without the residence and spousal information for the steady employees, that the UFW was still without any personal data concerning some 445 piece-rate employees (for whom signature cards were not submitted), that the UFW was still without spousal information and job classifications for any of the 594 piece-rate employees listed on Ortiz's tax compilation, and that the UFW was still without information concerning the wages and working conditions of the Company's shed employees. Her letter went on to mention missing medical insurance claims information, information as to the vacation pay received by the employees who had taken vacations, information to determine whether family groups or only individuals worked under a single social security number, and the means and schedule of application for most of the pesticides listed by the Company for its operations.

13/According to Shy, a discussion ensued on May 26 concerning some economic proposals and reference was made to the Grape Agreement. Shy recalled that Caplan initially denied that the Grape Agreement had any bearing on the Company's employees, but he retracted that viewpoint when she told him that the Company had submitted the Grape Agreement as one which had covered the Company's employees.

On July 31 the Company responded, in part, to the UFW's letter of June 23.14/ In this July 31 response the Company provided a list of 22 steady employees, their hire dates, their job classifications, their wage rates, their addresses, and the names of their spouses.15/ The Company also provided a description of the means of and schedule for the application of five pesticides it employed in its operations.

On August 22, following a negotiating session conducted on August 18, the Company provided still more of the information requested by the UFW. It provided a list of 12 steady employees who had received vacation pay during the Company's last fiscal year and the amounts of that pay (as well as some other pay data for these employees). The Company also advised the UFW that its medical insurance underwriter could now provide the requested medical claims insurance information and enclosed a copy of its letter to the underwriter requesting such data for the last year. Finally, the Company advised the UFW that the union which represented its packing shed employees would forward a copy of its collective bargaining contract to the UFW. Then, on August 24, the Company submitted to the UFW a list of its steady employees who also performed harvest work, noting the harvest that each worked in. On September 1 the Company submitted another letter to the UFW which set forth the aggregate total of medical

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14/Two incidents that occurred in the meantime are of note. On June 26 Mr. Caplan forwarded to Watters the UFW's June 23 letter and urged Watters to supply the information Greenstone requested, stating, "As I indicated to you, it would be helpful in this coming ALRB trial, if we could finally get all the information that's available to the Union." The second incident occurred on July 8, when the Company advised the UFW that it had decided to discontinue the farming of green onions, beets, and parsley, effective the 1978-1979 operating season. Following this July 8 announcement (which will be discussed further in more detail), some correspondence was exchanged and negotiating sessions held wherein the Company's crop discontinuance was discussed and information concerning it exchanged. With the possible exception of information requested by the UFW as to employee seniority data, the Company provided the UFW with substantial information concerning the crop discontinuances.

15/According to Mr. Watters, the Company devised an employee information card that was distributed to its steady employees and the cards were filled out within about two weeks. Watters asserted that when the Company had originally attempted to gather some personal data from its steady employees, back in 1977, the supervisor who was given the task reported back that the employees did not wish to provide such information. Watters, however, could not testify as to the means employed by the supervisor in 1977 to gather the information, nor whether more than one steady employee had then refused to provide the information The supervisor did not testify.

claims that were paid to its farm employees during the last fisc year.16/ Then, on September 20, the Company mailed to the UFW a copy of the collective bargaining agreement that covered the packing shed workers, acknowledging that the union which represented those workers had not provided a copy of it to the UFW.

C. Analysis And Conclusions:

1. Introduction: Some General Principles

In looking to the National Labor Relations Act (hereafter the "NLRA"), as amended (29 U.S.C. §151, et seq.), as we must do under the terms of our Act, several obvious and clear principles can be delineated for measuring whether an employer has lawfully complied with the demands for information made by his employees' collective bargaining agent. As a general proposition,

> The Board [NLRB] and the courts have uniformly held that a collective bargaining agent is entitled to all wage and other employment information essential to the intelligent representation of the employees. [Cases omitted.] Moreover, while an employer is not required to furnish such information at the exact time or in the exact manner requested, it must be made available in a manner not so burdensome or time consuming as to impede the process of bargaining. [Cite omitted.] It follows that where the information is necessary to and is sought in connection with current collective bargaining negotiations, such information must be delivered with reasonable promptness so as not to impede those negotiations.17/

Clearly, a union's request for information relating to the wage and fringe benefit data for bargaining unit employees is presumptively lawful and must be complied with by the employer [Electrical Mfg. Co., 173 NLRB 878, 879-90 (1968)], and just as clearly "it is necessary for the union to have full information as to the names of the employees in the unit, their wage rates, and their classifications in order for it intelligently to

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16/It is not clear why the Company chose to provide only the aggregate total of such medical claims. When the insurance underwriter provided the claims information to the Company, that information set forth the claims information with respect to each individual employee listed (i.e., the steady employees).

17/Kohler Co., 128 NLRB 1062, 1073 (1960).

represent the employees in the contract negotiations." Cincinnati Steel Castings Co., 86 NLRB 592 (1949); see also, Curtiss-Wright Corp., 347 F.2d 61 (3rd Cir. 1965).18/

If the information sought by a union is relevant to collective bargaining, the employer's only excuse for not providing it is if the information is unavailable or if compiling it would be too burdensome. See Korn Industries, Inc. v. N.L.R.B., 389 F.2d 117, 57 L.C. ¶20,658 (4th Cir. 1967), and Westinghouse Electric Corp., 129 NLRB 850 (1960). But, the employer must make a reasonably diligent effort to obtain legitimately requested information,19/ and, when such information can be obtained, only partial disclosure of it to the union is insufficient. I.T.M. Corp. v. N.L.R.B., 382 F.2d 366, 65 LRRM 3002, 3005 (3rd Cir. 1967), cert. denied, 389 U.S. 1039. A corollary principle is that "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims." N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956).

2. The Respondent's Compliance With The UFW's Information Requests Did Not Comport With The Act

Little purpose would be gained from a full review of the relatively uncontested facts surrounding the numerous UFW requests for information and the Company's responses, as set forth earlier. A brief summary of these facts, however, will be noted in the following paragraphs, and the Respondent's basic explanations for its conduct analyzed. For a more complete understanding of the factual circumstances in this case, the following discussion will center specifically on the four basic categories of information sought by the UFW and the Respondent's reaction as to each of them.

a. Employee Data:

Beginning on April 7, 1977, and continuing through June 23, 1978, in negotiating meetings and in its correspondence, the UFW requested information concerning two groups of Company employees. One group was the bargaining unit workers, consisting of both steady employees and piece-rate employees; for this group the UFW sought information concerning their wages,

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18/Little need be said concerning the relevancy of the information sought by the UFW in its negotiations with the Respondent. Almost all of the requested information pertained to the identification of bargaining unit members and their working conditions, including such things as their wages, fringe benefits, and health and safety issues affecting them. The Respondent did not at the hearing, nor in its post-hearing brief, challenge any of the information requests as nonrelevant to the bargaining between it and the UFW.

19/N.L.R.B. v. John S. Swift Co., 277 F.2d 641 (7th Cir. 1960).

identities, job classifications, dates of hire, and personal dat (such as their ages, social security numbers, residences, and ce tain information regarding their spouses, such as their addresse ages, and names).20/ For the second group, nonbargaining unit workers, the UFW sought a summary of wages, fringe benefits, and other compensation, and a copy of any labor contract that might cover such workers. By my count, the UFW raised requests concer ing "employee data", in one respect or another, on some 12 occasions between April 7, 1977, and June 23, 1978.

As for the "employee data" requested in regard to bargaining unit employees, the Company's responses were inexcusably delayed and incomplete. Although the Company quickly re ponded to the UFW's initial information request by supplying cer tain information in regard to steady employees, who were hired and paid directly by the Company, not even the information submitted with respect to these employees was timely. From April 20, 1977, the date of its initial submission of informatio until July 31, 1978, some 15 months later, the Company failed to provide the UFW with the steady employees' residences and spouse names. Never supplied by the Company was information as to the ages and addresses of the spouses. And it was not until August 24, 1978, that the Company specified which of its steady employees performed harvest work in addition to their other duties.

No legitimate reason has been cited by the Company for failing to provide some of this basic information to the UFW for so long a period of time. The information requested concerned employees who were on the Respondent's regular payroll and who were readily available from whom to gather such information. Indeed, when the Company finally got around to seeking personal data from its steady employees, in May of 1978, it took all of some two weeks to gather that information. The Company has produced no credible evidence as to its prior efforts to gather such information. And clearly, the UFW was entitled to a prompt response from the Company insofar as identifying members of its bargaining unit and their personal features so that communication with them could occur and bargaining proposals could be submitted to provide for them and their families.

As for the "employee data" requested in regard to the second group of bargaining unit employees--namely, the piece-rate workers--again no legitimate explanation emerges from the evidence to support the Company's unduly long refusal to provide that information or fail to provide it at all. First, good reason exists to question the diligency of the Company's initial efforts to gather information concerning its piece-rate workers. Although what information then existing (April of 1977) was

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20/Some of the information sought concerning bargaining unit employees has been delineated herein as falling within the request for "production data" (e.g., the wage and production output for piece-rate employees) or for "fringe benefit" data (e.g., vacation pay, holiday pay, and medical insurance information).

originally in the hands of Jose Ortiz, the Company's labor contractor, Ortiz was apparently still performing work at the Company when the UFW originally sought its information in April of 1977 as his harvest crews normally worked until late April and some until mid-May. Even had Ortiz personally departed the area by the time the UFW first sought its information in regard to piece-rate workers, the Company's effort to subsequently contact him to retrieve such information seems superficial at best. The evidence reflects only a few telephone calls to his home, no written correspondence to him, no consistent effort to contact his wife, who was still in the Coachella Valley, and no notice to the UFW in writing or at negotiating sessions of any effort to contact Ortiz. In fact, the Company's initial views regarding the piece-rate employee information possessed by Ortiz was that such information was "not applicable" to the bargaining and that the UFW, itself, would have to locate Ortiz or wait until he returned to the Valley in the fall.

Second, however legitimate the Company's initial inability to locate Ortiz, no legitimate explanation exists for its subsequent failure to attain the piece-rate "employee data." Ortiz's crews began returning to work at the Company as early as September 26, 1978; even if Ortiz, personally, did not initially accompany their return to work, nothing prevented the Company, itself, from beginning to compile a list of those employees by name, social security number, pay rate, residence, age, spousal information, and the like. In this regard it must be noted that the Act and its regulations, admittedly understood by the Company's chief operating official, Mr. Powell, required the Company to maintain certain employee information, such as employee names, job classifications, and addresses. Yet, the Company made no direct effort to compile this minimum, required information.

It was not until March 18, 1978, some four months after Ortiz admittedly returned to work at the Company (and more likely five or six months after he in fact returned) that the Company provided the names and some sketchy personal data concerning piece-rate employees. Not only has no reasonable excuse been proferred to explain the long delay in providing such basic, identifying data about bargaining unit employees for whom the UFW was then attempting to negotiate a contract, but the information provided by the Company, even after so long a delay, did not even satisfy the UFW's basic demands.21/ For one thing, the list of

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21/As will be noted later in regard to the requested "production data," the Company claimed that the time between November and April is its busiest work time, one which places high demands on the Company's small clerical staff. But no matter how busy the staff was during that time it can scarcely explain why a list could not be drawn up with the names and job classifications of the piece-rate employees, or why they were not made to fill out information cards to be turned over to the UFW, or why Ortiz's payroll journals could not be copied so as to provide the name and job classification data requested.

names provided to the UFW reflected employees who had worked on Ortiz's crews sometime in 1977. The list did not reflect whethe the named workers were working in the then current 1977-1978 har vest or had only worked during the past 1976-1977 harvest; more- over, the list did not reflect any employees who may have come t work for the Company after January 1, 1978 (over three months prior to when the Company supplied its list of names). For another thing, personal data, of any kind, were missing for three-fourths of the piece-rate employees named on the Company's employee list. That information (e.g., birthdates, residences, and spousal information) was never supplied by the Company to th UFW. Similarly, the UFW was never informed of the piece-rate em- ployees' job classifications, even though such information was readily available from Jose Ortiz's payroll journals, which spe- cified the crop or crops each employee worked in. Thus, basic information concerning the piece-rate employees was never pro- vided (even up to the time of the instant hearing), even though the Company's harvest period lasted from September 26, 1977, through April, 1978, and the piece-rate workers were physically present in the Company's fields at some juncture during that seve month period. The Company's consistent refusal to make any direct effort to gather "employee data" from its piece-rate em- ployees can neither be justified nor excused. Throughout 20 months of negotiations the UFW was not even informed by the Com- pany of the full identity of employees for whom it was negotiat- ing a contract.

As for the "employee data" requested in regard to nonbargaining unit employees, only two facts need to be cited to understand the Company's approach to fulfilling that request. First, when the UFW initially requested nonbargaining unit infor- mation the Company responded solely by providing a copy of the Grape Agreement. Not only did this Agreement not pertain to bar- gaining unit employees, since the Company had not grown grapes fo over 10 years, but the Agreement did not apply to the nonbargain- ing unit employees who worked in the packing shed. Second, the Company gave no notice to the UFW that its packing shed workers were under another labor contract until August 22, 1978, some 15 or 16 months after bargaining had commenced, and a copy of their contract was not supplied to the UFW for another month, until September 20, 1978.

b. Production Data:

As with the "employee data," the UFW began on April 7, 1977, and continued through June 23, 1978, in both nego- tiating meetings and in its correspondence, asking for informa- tion concerning "production data."22/ By my count the UFW raised

22/The "production data" in issue in this proceeding relates essentially to information concerning the pay and produc- tion of the piece-rate workers. The Company promptly supplied the UFW, on April 20, 1977, with a description of its crops, acreage, and farming schedules. The only information that re- mained to be submitted was production data that -- [continued]

questions concerning production data in regard to the piece-rate employees on some 11 occasions.

As with certain of the "employee data" requested by the UFW, the Company's initial responses to the UFW's request concerning piece-rate information was that such information was not applicable and that the UFW would have to seek out such information from Jose Ortiz. It was not until March 3, 1978, that the Company provided any information with respect to the production and pay rates for its piece-rate employees; and it was on March 10, 1978, that the Company attempted to redefine that information in terms of which particular harvest the information pertained to. After March 10 the Company's reaction to the UFW's continued demands for clarification regarding the information provided and to review the underlying records was a consistent refusal.

Several features of the Company's piece-rate information call for comment. First, it is difficult to understand why the Company waited until January 20, 1978, to provide any statement whatsoever as to the piece-rates paid to its employees.23/ As earlier noted, Mr. Powell indicated in his testimony that each harvest season he personally negotiated the applicable piece-rates with Jose Ortiz and that the Company made a periodic effort thereafter to maintain the piece-rates paid by its competitors in the Coachella Valley. Given this personal involvement in setting the piece-rate wages for his employees it is difficult to comprehend why Mr. Powell could not sometime earlier than January, 1978, inform the UFW what the Company's various piece-rates then were and had been.24/

22/[continued]--related to the earnings' characteristics of the piece-rate employees.

23/It should be remembered that on January 20, a day after the UFW filed its first unfair labor practice charge against the Company, the Company provided a schedule of piece-rates paid to workers for four of its crops. The information contained in this Company response, however, was outdated; it pertained to the 1976-1977 harvest that had been concluded some eight months before and did not reflect the then current piece-rates.

24/Part of the Company's explanation for its dilatoriness in supplying piece-rate wage information was that the UFW had initially informed the Company that it would not seek to negotiate wages until all other matters pertaining to the contract had been agreed upon. While the UFW may have initially led the Company and its negotiators to feel that the piece-rate wage information need not be supplied immediately, the UFW requested such piece-rate wage information again on July 20, 1977, and several times in January and February, 1978, as well as raising requests for piece-rate employee information in meetings on August 19 and 24 and September 16, 1977. These continuing requests did not indicate that the UFW shared the -- [continued]

Second, when the Company did provide its piece-rate wage information to the UFW in March, 1978, the information was misleading. Thus, the Company summarized data relating to the piece-rate employees' hourly earnings, hourly production, and average hourly earnings. Yet, this hourly information was based on scant, incomplete data at best, extrapolated by Mr. Watters, the controller, whose summary painted a detailed picture with regard to the hourly information that was unsupported by the underlying data in Ortiz's records. Given the changing piece-rates during the harvest season (as indicated by Mr. Powell) and given the changing production due to weather and growth factors of the crops, it was just as likely to misinform as to provide valuable information for the Company to state its hourly figures as if such figures were established through Ortiz's production records, when, in fact, little hourly information was contained therein.25

The problems in relying on the Company's stated hourly statistics were compounded by the Company's refusal to allow the UFW negotiators to review the underlying data in Ortiz' records. Had the UFW been able to review those records, which consisted of uncomplicated, straightforward payroll entries, the UFW could have quickly determined that the scant hourly data were insufficient to base any firm conclusions on.

Finally, the Company's refusal to permit the UFW to review Ortiz's records and its unwillingness to be forthcoming about the production figures contained therein, prevented the UFW from establishing the likelihood that more than one worker was performing work under a single employee name and social security number. Of course, with more than one employee working under a single name, the production data given by the Company further cast a misleading impression as to the earnings potential for employees. The Company, however, continued to refuse to provide the UFW with copies of Ortiz's records, despite the UFW's demands to see them.

The Company's chief explanation for not having provided piece-rate wage information sooner than it did was because it was initially in Ortiz's possession and that, after it became available, the Company's clerical staff worked diligently on the records during the Company's busiest work period. While this explanation may go to justify the Company's failure to provide the "production data" before October or November of 1977, it clearly cannot serve to justify its failure to provide that information until mid-March, 1978.

No need existed for the Company's staff to

24/[continued]--Company's view that such information was not currently needed for the ongoing negotiations.

25/As Mr. Medina of the UFW testified, the hourly data was of extreme importance to the UFW in order to understand the real wages received by piece-rate workers and to be able to compare them to one another.

compile a summary of Ortiz's records (and as we have seen, such a summary created not a realistic picture of the underlying wage data but a misleading one). Since all the useful information, what there was of it, was contained in Ortiz's payroll journal, the easiest, most straightforward approach would have been for the Company to supply the UFW with copies of those journals. Copying the journal pages would have taken only a brief time to complete. It is difficult to see how the Company can excuse its dilatoriness in providing the piece-rate wage information by pointing to the alleged time it took to engage in an unneeded, convoluted method of summarizing what was simple payroll journal information, which the UFW would have been capable of interpreting or analyzing as well as was the Company.

c. Fringe Benefits:

The basic complaint relating to the requested "fringe benefit" data is in respect to the Company's medical insurance plan and the claims data under that plan.26/ At the outset of the negotiations the UFW requested the last two years' claims data for the Company's agricultural workers and for a copy of those employees' medical insurance plan. In several respects, the Company response to those two requests further confirms its lack of good faith in pursuing its negotiations with the UFW.

Although the Company submitted to the UFW, on April 20, 1977, a copy of the medical insurance plan purportedly covering its employees, the Company submitted the wrong plan. The Company submitted Plan 22, which never covered its agricultural workers but, rather, covered its packing shed employees. During the next 15 or 16 months the Company never corrected this basic error and delivered the correct medical insurance plan to the UFW.

Similarly, the Company's response with respect to the requested medical claims data was inadequate. To begin with, the Company refused to provide the requested data allegedly because they were too difficult to gather. But, from the testimony of Mr. Watters, it appears that the difficulty then existing was simply in segregating from a common file those claims pertaining to shed workers, who were direct employees of and known to the Respondent, from those of the farm workers. To have segregated the claims would not have been a sufficiently

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26/There is some reference in the General Counsel's brief to the fact that the Company did not inform the UFW until August 22, 1978, of the specific amounts of vacation pay received by individual employees during the last year. But, the UFW's original information request did not explicitly seek information as to the specific vacation monies received by employees; it was not until June 23, 1978, that the UFW, in its letter from Ellen Greenstone, requested such specific information. Although the Company took another two months to respond to that request, und reliance should not be placed on that single delay.

burdensome task so as to justify the Company's ignoring the UFW's request.

In addition, the claims data finally given to the UFW was incomplete and again either misleading or unhelpful. Rather than supply the data for the requested two-year period, the Company--without explanation--supplied data for only one year. Rather than supply the data given to it by its insurance underwriter, which identified the individual claimants and the amounts paid on their claims, the Company took it upon itself to aggregate the total claims and supply the UFW with only a single aggregate claims figure. And even the aggregate claims data supplied by the Company failed to reflect the fact, as was acknowledged during the hearing, that the data did not pertain to any medical services provided in Mexico, where it is not uncommon for farm workers to receive their medical care. What information was supplied by the Company with respect to the claims data was not supplied until September 1, 1978, despite the fact that the UFW had originally requested the information on April 7, 1977, repeated its request on July 20, 1977, and again repeated its request on June 23, 1978.

d. Health And Safety Information:

Two features surrounding the UFW's request for "health and safety" information stand out. First, after the Company was originally asked to indicate what pesticides it employed what safety equipment was used, and what protective clothing was available for employees, on April 7, 1977, the Company failed to provide any substantial information with respect to those matters until August 19, 1977, some four months after the request was made.

Second, it was not until July 31, 1978, that the Company provided details as to the means and the schedules for applying its various pesticides. The Company's approach to providing this pesticide information was consistent with its general piece-meal and dilatory approach to the other information request made by the UFW.

3. The Remedy And The Statute Of Limitations Problem

Section 1160.2 of the Act provides, in part, that "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and service of a copy thereof upon the person against whom such charge is made. . . ." Although the Respondent did not explicitly raise §1160.2's "statute of limitations" as an affirmative defense in its answers to the unfair labor practice complaint, in its amended answer the Respondent did raise as an affirmative defense the contention that the UFW "forfeited its right to [a] remedy" due to its "unreasonable delay in pursuing said remedy." Further, the Respondent did explicitly cite §1160.2 of the Act in its post-hearing brief as

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warranting dismissal of the complaint.27/ For the purpose of this proceeding, it appears that the Respondent's affirmative defense of "unreasonable delay," as raised in its amended answer would constitute sufficient notice to raise the statute of limitations defense under §1160.2 of the Act.

Inasmuch as the unfair labor practice charge in this case was not served on the Respondent until August 14, 1978, §1160.2 of the Act bars an unfair labor practice finding based on facts that occurred prior to February 14, 1978.28/ Nonetheless, the general rule exists that events occurring outside the six-month period may be used to shed light on matters arising within that six-month period. Boise Implement Co., 106 NLRB 677 (1953), enforced, 215 F.2d 652 (9th Cir. 1954); Montebello Rose Co., Inc., 5 ALRB No. 64 (1979), p. 14, n. 12. Thus, the many incidents previously discussed as occurring between April, 1977, and February 14, 1978, may be cited as shedding the relevant and important light they do on the events that occurred after February 14.

Ample evidence, of course, exists from within the six-month period in question (i.e., after February 14, 1978) to warrant the finding that the Respondent violated §§1153(e) and (a) of the Act by its refusal to provide information requested by the UFW in connection with the ongoing collective bargaining negotiations. Little purpose would be served in again reviewing that evidence, but clearly occurring after the date in question were the following indicia of the Company's statutory violation:

a. The failure to provide residential and spousal information pertaining to the steady employees;

b. The failure to provide residential, spousal, and job classification information pertaining to the piece-rate employees (or, even for that matter, an up-to-date list of such employees);

c. The failure to provide a summary of the wages and working conditions of or the relevant collective bargaining

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27/As the Board has recognized, "The six-month limitations period for filing charges, as set forth in Section 1160.2 of the Act, provides an affirmative defense which must be asserted by the party charged." Masaji Eto, dba Eto Farms, 6 ALRB No. 20 (1980), p. 20 (and cases cited).

28/The date on which the charge was served on the Respondent is somewhat unclear. The original complaint alleged such service on August 18, and the Respondent's answer admitted the allegation. The amended complaint alleged service on August 14, and the Respondent's amended answer admitted that allegation. From the face of the charge it seems clear it was filed with the Board on August 14, and this is the date which is employed here for purposes of the statute of limitations.

agreement governing the packing shed employees;

d. The failure to provide up-to-date and accurate wage and production data with respect to the piece-rate employees;

e. The failure to provide the requested medical insurance contract and medical claims data with respect to the bargaining unit employees;

f. The failure to provide substantial information with respect to the means and timing of the application of various pesticides.

Some of the foregoing information that was missing as of February 14, 1978, was supplied by the Company after that date, but much of that pertinent information was never submitted by the Company. And, of course, the information that was still missing as of February 14 was missing after requests had been made therefor for some eight to 10 months. Clearly, such an unreasonably long delay in providing relevant information to its employees' bargaining representative, and submitting such information sometimes only in partial fashion and at other times in misleading fashion, does not comport with the Company's mandate under the Act to engage in good faith bargaining. See, e.g., Eto Farms, supra, 6 ALRB at pp. 17-19; Arkansas Rice Growers Cooperative, 165 NLRB 577 (1967), affirmed, 400 F.2d 565.

Given the Respondent's substantial, consistent, and unreasonable refusal to provide the UFW with the information requested, from which the inference clearly arises that the Respondent's illegality was conscious and in bad faith, it is appropriate to order that the Respondent make whole its employees for the losses they suffered as a result of the Respondent's unlawful refusal to bargain, in conformity with §1160.3 of the Act and comparable Board findings in the past. See Eto Farms, supra, 6 ALRB No. 20; Montebello Rose, supra, 5 ALRB No. 64. Little or no question can exist that by its substantial refusal to provide the UFW with relevant bargaining information that the Respondent unduly frustrated and made more difficult the negotiation of a collective agreement. Clearly, the Company's information responses impeded in substantial fashion the bargaining it was required to engage in in conformity with §§1153(e) and 1155.2 of the Act.29/

29/Inasmuch as the General Counsel seeks a make-whole remedy only relating back six months prior to the date of the unfair labor practice charge (see G.C. Brief, p. 47), no question arises as to whether that remedy should extend further back in time. The Board has recognized that this six-month period is the appropriate length of time on which to base a make-whole order. See, As-H-Ne Farms, Inc., 6 ALRB No. 9 (1980).

II.

THE COMPANY'S UNILATERAL WAGE INCREASE.

A. The Facts:

The facts surrounding the Company's wage increase are essentially undisputed. As of the payroll period ending February 21, 1979, the Company raised its piece-rate for workers engaged in carrot-bunching from $.26 per harvest unit to $.32 per harvest unit. The Company made no effort to discuss this wage raise with the UFW, nor to even advise the UFW of it.

Mr. Powell, who was responsible for the wage increase, asserted that it had become necessary for the Company to raise its piece-rates in order to attract a sufficient number of employees to harvest the carrots. Powell said the Company was then having difficulty hiring enough employees for the harvest and he checked among other growers in the area, learning that others were paying a higher rate than the Company. The piece-rate was then raised, and afterward the employee force increased in size. Powell explained that the Company ordinarily attempted to keep its wage rates up to those prevailing in the area.

Powell recalled that the 1979 wage increase was the third time that the Company had raised its wages while negotiations with the UFW were underway. The first time occurred in November of 1977, at which time the Company advised David Martinez, then the UFW's negotiator, of a piece-rate increase. According to both Powell's and Caplan's uncontradicted testimony, Martinez responded to the Company's notice of the wage increase by saying that the UFW did not object to it and could not legally oppose it, just so long as it was understood that such a wage increase would not prejudice the UFW's bargaining position on wage proposals. The second wage-rate change occurred in November, 1978, when Karen Flack, by then the UFW's negotiator, was informed of it. Again according to Powell and Caplan, Flack did not object to the raise. Caplan recalled that he explained to Flack about the prior wage increase and what Martinez had said, and Flack merely said to go ahead with the wage increase.

B. The Respondent's Unilateral Increase In Wages Violated The Act:

For an employer to unilaterally increase its wages, while engaged in bargaining with its employees' bargaining representative, is generally considered a per se violation of the duty to bargain in good faith. See Kaplan's Fruit and Produce Co., 6 ALRB No. 36, pp. 16-17 (1980) (and cases cited). See also, Korn Industries, supra, 57 L.C. ¶20,663. As explained in N.L.R.B. v. Insurance Agents' International Union, 361 U.S. 477, 485 (1960):

> . . . an employer's unilateral wage increase during the bargaining process tends to subvert the union's position as the

> representative of the employees in matters of this nature, and hence has been condemned as a practice violative of this statutory provision [Section 8(a)(5) of the NLRA].

Several circumstances may exist with respect to a unilateral wage increase during bargaining, however, which would forgive the increase from being a violation of statutory bargaining requirements. Since the Respondent raises three such considerations in an effort to construe its undisputed unilateral wage increase as lawful, the exceptions to the general per se rule against such increases will be reviewed separately below.

The Respondent, first, asserts that its wage increase in February, 1979, was in keeping with its general policy of maintaining the prevailing wage for its employees, claiming that it was lawful for it to continue pursuing that ongoing policy. As has been generally recognized,

> An exception to this [per se] rule is where increases in wages are merely aimed at maintaining the status quo. Where there is a well-established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases.30/

The Board, itself, has noted, "While this is an exception to the general rule, the Katz case (N.L.R.B. v. Katz, 369 U.S. 736 (1962)) specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary." Kaplan's Fruit, supra, 6 ALRB No. 36, at p. 17. See also, Armstrong Cork Co. v. N.L.R.B., 33 LRRM 2789, 2793 (5th Cir. 1954).

In this case the Respondent's February, 1979, wage increase does not fall within the recognized exception that is applicable to fixed, regular wage increases. There was nothing fixed or regular about the Respondent's wage increase. The record merely reflects, at best, that the Company attempted to maintain the wage rates prevailing in the geographic area; apparently at irregular and discretionary intervals the Company would from time-to-time increase its wages, as employers commonly do. But, its wage increases were not mandated by any fixed Company policy either as to the time they were to be granted or to the amounts involved. Clearly, such discretionary, irregular wage increases cannot be construed as merely continuing the integrity of the Company's ongoing wage structure, but were, rather, determined changes in the wages paid to employees and, thus, an important

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30/N.L.R.B. v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 63 L.C. ¶19,702, ¶19,705 (D.C. Cir. 1970), cert. denied, 401 U.S. 925.

ingredient in bargaining. Such wage increases required notice to and bargaining with the UFW.31/

The Respondent, next, argues that the UFW "waived" its right to bargain about the February, 1979, wage increase. The Respondent points to the fact that on two prior occasions, once in 1977 and a second time in 1978, the UFW did not object to unilateral wage increases and, indeed, advised the Company that it could not object to those increases. The law is clear, however, that a union's waiver of bargaining rights must be clear and unequivocal, and is not to be inferred from past silence or inaction. See Eto Farms, supra, 6 ALRB No. 20, at p. 22. Under the NLRA it has been consistently held that a waiver, as is purportedly involved in this case, cannot be based on a union's past silence or acquiescence in an employer's conduct. See Murphy Diesel Co., 184 NLRB 757, 763 (1970), affirmed, 454 F.2d 303; N.L.R.B. v. J. H. Bonck Co., 424 F.2d 634, 74 LRRM 2103, 2105 (5th Cir. 1970); N.L.R.B. v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969). There was nothing in the UFW's past responses to the Company's wage increases (of which the UFW was notified, unlike in February, 1979), except perhaps for its equivocally stated, mistaken belief that it could not object to such increases, that could lead the Respondent to believe that all future wage increases would be approved and accepted by the UFW. Compare Times Publishing Co., 100 NLRB 638 (1952).

Finally, the Company seeks to legitimize its wage increase by claiming that the increase followed in time the point at which an impasse in bargaining had occurred and, thus, the increase was permissible. Several factors lead me to conclude that the Company's argument with respect to impasse is misplaced. To begin with, if an impasse had been reached in late February, 1979, it chronologically followed the Company's unlawful refusal to provide the UFW with its requested information, as has been noted earlier. When an impasse in bargaining has been reached after one party has engaged in bad faith bargaining, the law does not recognize the stalemate as an impasse. Pacific Grinding

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31/The cases cited by the Respondent in order to justify its wage increase are generally inapposite (see Co. Brief, pp. 52-54). For example, N.L.R.B. v. Southern Coach & Body Co., 336 F.2d 214 (5th Cir. 1964), involved regular wage increases that were granted at three and six-month intervals. Werthan Bag Corp., 167 NLRB 11 (1967); Guyan Machinery Co., 155 NLRB 591 (1965); Charmin Paper Products Co., 186 NLRB 601 (1970); and Kallaher & Mee, 87 NLRB 410 (1949), all cited by the Company because they involved employer efforts to maintain a prevailing wage rate, are all cases which involve wage increases tested under Section 8(a)(1) of the NLRA, where timing and motive for the increases were in issue, and are not cases involving an employer's bargaining obligation, where timing and motive are essentially irrelevant. No case cited by the Respondent has held that a unilateral wage increase due to an effort to maintain a prevailing wage rate, without notice to the union, is lawful.

Wheel Co., 220 NLRB 1389 (1975); see also, Board of Education v. Hawaii Public Employee Relations Board, 88 LRRM 2543 (1974, Hawaii Supreme Court). For another thing, it is impossible to conclude that an impasse had been reached in February, 1980, as claimed by Al Caplan, the Company's negotiator: immediately prio to that unilaterally declared impasse the Company changed its position with respect to contributions to the UFW's Martin Luthe King Fund and the UFW had compromised in its vacation proposal; thus, not only was there movement in the parties' bargaining positions immediately before Caplan's unilateral declaration of impasse, but Mr. Caplan made no detailed effort to factually portray the origin of the impasse, how it was manifested, or describe a situation where no further compromise and bargaining could be expected. Accordingly, it is impossible to determine that, in fact, an impasse had been reached in the bargaining. See Taft Broadcasting Co., 163 NLRB 475, 478 (1967).32/

Even if an impasse in bargaining had been reached prio to the February wage increase, however, it cannot serve to justify the Company's increase. In order for an employer to unilaterally change its wages or working conditions after an impasse has been reached, it is necessary for that employer to have proposed those changes during the bargaining and given the union a chance to negotiate them. Where an employer unilaterally increases wages in nonconformity with his prior bargaining proposals, that unilateral action also violates the statutory bargaining obligations. See Montebello Rose Co., supra, 5 ALRB No. 64, at p. 26; N.L.R.B. v. Crompton-Highland Mill, Inc., 337 U.S. 217 (1949); J. H. Bonck, supra, 74 LRRM at 2105. Here, there is no evidence at all that the Company even offered a wage increase in its proposals during the bargaining, that an increase was offered for the carrot-bunching, or that a $.06 increase per harvest unit was offered for any piece-rate group. Accordingly, no proof exists that the Company's unilateral wage increase in question was within the confines of its earlier bargaining proposals; therefore, a pre-existing impasse cannot serve to forgive that increase.

For all the foregoing reasons, and based on the cases cited above, it is concluded that the Company unlawfully raised its wages in February, 1979. The Company was obligated to advise the UFW of its intended increase and give the UFW an opportunity to bargain regarding it, pursuant to §1153(e) of the Act.33/

32/Reliance cannot be placed on Caplan's testimony that an impasse had been reached. His testimony as to the impasse, as it was in several other respects, was vague, uncooperative and not forthcoming, argumentative, and conclusory. The quality of his testimony and of his demeanor (reflected, in part, by his open refusal to answer legitimate questions put forth by the General Counsel and his needless arguing with her concerning those questions) were not credible.

33/Although the remedy for the Company's unlawful wage increase will be set forth infra, it should be noted -- [cont.]

III.

THE DISCONTINUANCE BY RESPONDENT OF FOUR CROPS.

A. The Facts:

In a letter dated July 8, 1978, the Respondent advised the UFW that the Respondent "for economic reasons has decided to discontinue the farming of green onions, beets and parsley. . . . ."34/ On August 18, 1978, while at a negotiating session, the Company further advised the Union (by way of a letter dated August 16) that it was discontinuing the farming of green cabbage.

Although the land used for growing green onions, parsley, beets, and green cabbage had not taken a substantial portion of the Company's land, the discontinuance of the four crops would (and did) have a substantial impact on the Company's employee force. The acreage involved was the following: green cabbage, 112.3; green onions, 52; parsley, 8; beets, 24.35/ The employee force lost as a result of the discontinuance (as determined by comparing the harvest of 1977-1978 and the harvest of 1978-1979) was the following: for green onions, approximately 472 employees were lost; for beets, parsley, and turnips (which the Company also discontinued), approximately 137 employees were lost; and for green cabbage, approximately 40 employees were lost. Thus, the employee force of approximately 879 workers who had worked for Respondent during the 1977-1978 harvest was reduced to one approximately 235 workers during the 1978-1979 harvest.36/ In

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33/[continued]--that such a wage increase, particularly when standing alone, would be unlikely to warrant a make-whole remedy under Section 1160.3 of the Act. See Kaplan's Fruit, supra, 6 ALRB No. 36, p. 19.

34/At the time the UFW received the Company's letter it was in the process of changing negotiators for the Company. Karen Flack was the newly designated negotiator.

35/These figures are taken from data compiled and supplied by the Respondent.

36/The number of steady workers included in the above figures were derived from the Company's own records; the number of piece-rate and hourly workers were derived, in part (for the 1977-1978 harvest), from Jose Ortiz's records. All of the employee figures were compiled under the direction of Nancy Jarvis, the UFW's representative at the hearing. The number of piece-rate and hourly workers set forth above represent the number of individual employee names appearing on Jose Ortiz's payroll journals for the crops in question; thus, the actual number of workers needed during the harvest was somewhat less than translated above. The numbers above do not account for the employee turnover during the harvest, and the numbers above -- [continued]

the 1978-1979 harvest season, which followed the discontinuance, the Respondent increased the number of acres devoted to corn, carrots, red cabbage, and broccoli, although the number of harvest employees needed for these specific crops did not increase in any significant way.

According to John Powell, the Company had several reasons for discontinuing the crops it did. It discontinued growing parsley because it was a small crop that was not worthwhile to continue growing, due to the fact that the parsley was not plentiful the previous year and because it had a negative effect on other crops which were later grown in the same fields. The Company discontinued red beets because it was not an economical crop, as beets were grown only in small parcels, required more preparation than other crops, and had not been worthwhile the previous year. Green cabbage was discontinued because Powell could not purchase a sufficient amount of the kind of seed normally used by the Company. The Company discontinued green onions its most labor intensive crop, because of the increasing competition from Mexican fields, because customers were increasingly demanding the Mexican green onion, and because Powell had heard that a substantial increase in Mexican green onion production could be expected in 1978-1979.37/ The Company makes no claim

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36/[continued]--also include some employees who have been counted twice or more because they worked with two or more crops. The numerical conclusions and underlying data deduced by Ms. Jarvis were introduced into evidence, and the Respondent made no serious effort to challenge the accuracy of Ms. Jarvis's compilations, even though the Respondent had the opportunity to similarly review its and Jose Ortiz's original records. Except for the Respondent's general reflection that an employee turnover existed in the harvest and that some employees worked on more than one crop, Ms. Jarvis's compilations and resulting analysis appear to be accurate and establish the approximate number of persons employed during the two harvests in question.

37/Powell's views with respect to Mexican green onions were corroborated by Mr. Hugh Calder, a high-ranking official of Pacific Fruit and Produce, the Company's largest single customer over the last two years, and by Calvin Kaminskas, an official from the Riverside County Agricultural Commissioner's office, whose annual reports reflected that onion production in the Coachella Valley was steadily decreasing. The testimony of Mr. Calder and Mr. Kaminskas cannot be given undue weight, however, inasmuch as Calder could only describe the recent buying practices of his company and was not aware of what other produce purchasers were doing with respect to domestic green onions, and inasmuch as Kaminskas's crop reports were based largely on hearsay statements made by individual farmers in the area. Nevertheless, their testimony, credibly given, does reflect that some trend was evident that showed an increasing popularity for Mexican green onions and a decreasing popularity for domestic green onions, as Powell also sought to describe in his testimony.

that its decision to discontinue any of the four crops in question was based on financial losses suffered from them, and the change in crops led to no new capital expenditures or changes.

At about the same time that Powell decided not to grow green onions, beets, and parsley, he had several conversations with one of his neighbor farmers, Sam Keosean of Keo Farms. Powell acknowledged that he informed Keosean that the Company was not going to grow those three crops. During these conversations, Keosean expressed a continuing desire to lease some land from the Respondent, and an agreement to that effect was reached on July 1. Keosean leased 61 acres of newly developed land from the Company, and the lump sum lease price was "to be paid to the lessor at the time of account sale settlement." Of the 61 acres leased Keosean planted about 40 in green onions and about 15 in red beets, growing also some eight acres in parsley on his own land.38/

Although no writing was made to confirm their arrangements, Mr. Keosean asked and Mr. Powell agreed that the Company, through its marketing divisions, would pack and sell for Keo Farms its green onions, beets, and parsley. The Company did, in fact, pack and sell those crops for Keosean under the Company's Peter Rabbit label. In 1978-1979 it was the first time that the Company leased any land to Keo Farms or sold for it green onions, beets, or parsley (apparently, it was the first time that Keosean had grown these crops).39/

After the UFW initially learned that the Company had "decided" to discontinue green onions, beets, and parsley, the UFW waited two weeks before responding. On July 24 the UFW wrote Al Caplan, asking Mr. Caplan a number of questions concerning the discontinuance. The questions raised were centered on such subjects as the acreage involved and the Company's future intentions with respect to that acreage. The UFW asked for an early negotiating session with the Company, requesting that Powell be present for it. Caplan responded to the UFW on July 27, suggesting August 18 as the date on which to meet, informing the UFW that Powell would be out of town until August 16.

38/None of the Company's land that had been previously used to grow any of the discontinued crops was leased to Keosean. Rather, the land leased to him was land on which the Respondent had grown nothing the year before.

39/As it turned out, most of Mr. Keosean's green onion crop was plowed under, rather than being sold. But as Mr. Powell acknowledged, it was important for the Company's marketing division to have a full line of products to sell because many buyers wanted to purchase their produce at one convenient place. Thus, Powell's Company also sold Mexican green onions, which it in turn had purchased from competitors, selling approximately the same amount in both the 1977-1978 and 1978-1979 seasons.

On August 18 the parties met.40/ Karen Flock, speakin for the UFW, requested information concerning the crop discontin ance, which was supplied by Powell, either orally or in the writ ing dated August 16; Powell also agreed to check certain facts f Flock in the future. According to Flock, Caplan acknowledged that the Company had an obligation to inform the UFW of its crop discontinuance and to bargain over the effects resulting to employees from that discontinuance. According to Flock, as well a Ruth Shy who also attended the meeting, Caplan asked if the UFW had any proposals to make at that time. Flock indicated she had no proposal to make then and that the UFW wanted more time to review the information concerning the discontinuance. No proposals were put forward by the UFW regarding the crop discontinuance at the August 18 meeting, and the parties went on to discuss other matters.41/ No attempt was made by the UFW after the August 18 meeting to submit any proposal regarding the Company's decision to discontinue the four crops, although on August 14 the UFW filed its unfair labor practice charge, challenging the Company's unilaterally made decision.42/

B. Analysis And Conclusions:

The parties' basic dispute regarding the Respondent's

40/On August 9 the UFW telephoned Caplan and sought to gather its requested information concerning the crop discontinuance. Caplan said Powell, not he, had that information.

41/Mr. Caplan claimed that at the August 18 meeting he informed the UFW that while the Company was not obligated to bargain about its decision to discontinue growing the crops in question, he would listen to any proposals the UFW wanted to make regarding the Company's decision. I do not credit Caplan's testimony in this regard, which was not corroborated by Powell, who also attended the meeting, and was disputed by more credibly give testimony from Ms. Shy and Ms. Flock. I discredit Caplan's testimony not only for the reasons earlier cited, but because it is difficult to believe that the Company, whose position then, as it is now, was that no obligation existed to bargain over its decision to discontinue the crops, would have voluntarily agreed to discuss the matter and consider any UFW proposals.

42/Subsequent to August 18 Flock and Watters attempted to devise an employee seniority list. The list finally prepared by Watters was misleading and contained an erroneous assumption concerning Jose Ortiz's records, but Watters testified, without contradiction, that his list was based on a format worked out with Ms. Flock. The record evidence with respect to the seniority list compiled in the fall of 1978 is sufficiently vague and confusing to preclude basing any finding adverse to the Respondent on it. Nor does the General Counsel explicitly cite the seniority list "problem" as one directly relating to the unfair labor practice complaint.

decision to discontinue the four crops in question is over whether that decision was subject to the bargaining requirements stated in §1153(e) of the Act.43/ Although §1148 of the Act mandates me to "follow applicable precedents of the National Labor Relations Act. . .," the basic question in dispute with respect to the Company's discontinuance decision is not one that has been uniformly resolved under the NLRA and, thus, "the state of the federal law in this area remains unsettled." Social Workers Union, Local 535 v. Alameda County Welfare Dept., 11 Cal.3d 382, 392, n. 13 (1974).

The General Counsel, in his thorough and helpful brief, has amply set forth the state of law under the NLRA with respect to the bargaining issues in this case (see G.C. Brief, pp. 71-100). A summary of that state of law must begin with the United States Supreme Court's landmark decision in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203 (1964). In Fibreboard it was determined that an employer was obligated to submit its decision for the subcontracting of work within its plant to the plant employees' representative for bargaining because that subcontracting decision could have substantial impact on the plant employees' "terms and conditions of employment," thus coming within the statutorily mandated areas for collective bargaining, particularly when that decision would likely terminate bargaining unit employees' jobs. Notwithstanding the employer's economic motive for its subcontracting decision, the court remarked (379 U.S. at 213-214):

> These [economic considerations regarding the cost of certain work functions] have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests.

Other decisions, more pertinent to the issue in this case, then followed Fibreboard, attempting to apply its guidelines to instances not of subcontracting, but to instances where an employer discontinues a portion of his business operations. For example, with only some minor exceptions,44/ the National Labor Relations Board (hereafter the "NLRB") has consistently held

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43/It is significant to keep in mind that the General Counsel does not contend in this proceeding that the Respondent failed to comply with its duty to bargain over the effects that would result to employees from the crop discontinuance. Insofar as the record reflects, the Respondent apparently did bargain, or stood ready to bargain, with the UFW over treatment to employees effected by its decision.

44/See General Motors Corp., 191 NLRB No. 149 (1971), enforced, 470 F.2d 422 (D.C. Cir. 1972); Summit Tooling Co., 19 NLRB 479 (1972), affirmed, 83 LRRM 2044 (7th Cir. 1973).

that such employer decisions must be submitted to the collective bargaining process before they are effectuated. See Ozark Trailers, Inc., 161 NLRB 561 (1966); Senco, Inc., 177 NLRB No. 102 (1969); Royal Typewriter Co., 209 NLRB 1006 (1974), reversed in relevant part, 533 F.2d 1030, 1039 (8th Cir. 1976). The NLRB's approach has been followed by certain federal courts, such as in N.L.R.B. v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir. 1966), cert. denied, 385 U.S. 935, where the employer gave up certain work and commissioned an outside company to perform that work off the employer's premises; and in Weltronic Co. v. N.L.R.B., 419 F.2d 1120 (6th Cir. 1969), cert. denied, 398 U.S. 939, where the employer transferred bargaining unit work to another plant. But, by numerical count, a majority of federal courts have generally rejected the NLRB's approach, such as in N.L.R.B. v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965), where the employer discontinued a portion of his operations; in N.L.R.B. v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969), where the employer closed one of his transport terminals; and in N.L.R.B. v. Transmarine Corp., 380 F.2d 933 (9th Cir. 1967), where the employer moved his operations from one transport terminal to another.

An objective, helpful appraisal of the cases cited in the foregoing paragraph and of an employer's obligation to bargain over partial business discontinuances or closures can be found in Brockway Motor Trucks v. N.L.R.B., 582 F.2d 720 (3rd Cir. 1978). The Third Circuit in Brockway concluded its analysis of the existing state of law by rejecting the conflicting "per se" approaches argued before it, rejecting the NLRB's approach that bargaining is always required irrespective of the employer's motive and rejecting the employer's approach that bargaining is never required when the employer's motive for discontinuing or closing a portion of his business is economic. Rather, the Third Circuit concluded that a more balanced approach was required under the NLRA. See also, United Automobile Workers v. N.L.R.B., 470 F.2d 422, 69 L.C. ¶13,070 (D.C. Cir. 1972).

The Brockway court determined that one must begin with the presumption that an employer who intends to close, terminate, or transfer a portion of work performed within a bargaining unit should submit that intention to the employees' bargaining agent for negotiation, inasmuch as that decision will significantly affect the employees' terms and conditions of employment by decreasing or eliminating work opportunities within the bargaining unit. But, the Third Circuit reflected that when circumstances exist which demonstrate a severe economic necessity behind the employer's decision, or which demonstrate a real exigency that makes bargaining over the employer's intention impracticable or harmful to the employer's operations, then the employer is not obligated to submit his intended decision to the collective bargaining process. The Brockway court stressed that simply because the employer's intention to cease a portion of his business is economically motivated does not free him from his collective bargaining obligations. Rather, one must balance the rights and interests of both the employer and the bargaining unit employees

based on the existing factual circumstances.

In a recently decided case, whose circumstances were similar to those found in this case, I held that an agricultural employer was obligated under the Act to submit his decision to discontinue the growing of a major, labor-intensive crop to his employees' bargaining representative for collective negotiation. Abatti Farms, Inc., 78-CE-53-E (March 23, 1980). I found that if one applied either the view of the NLRB or the view expressed by the Third Circuit in Brockway, the employer in Abatti Farms was so obligated.

The facts in this case which call for imposing the duty to bargain on the Respondent can be briefly reiterated. By discontinuing the growing of green onions, beets, parsley, and green cabbage, the Company was eliminating the bulk of its harvest work and the vast majority of its harvest employees. As earlier noted, the four crops accounted for approximately 640 harvest workers out of a total work force of approximately 879; moreover, some five months of harvest labor were involved with those crops.

Against the dire consequences imposed on a large number of the Company's employees due to the crop discontinuances, the Company's need to implement its discontinuance decision rapidly and unilaterally seem far less compelling. No change in capital investment was made by the Company regarding the discontinuance. The ground preparation involved both before and after the discontinuance was basically the same, as admitted by Mr. Powell. No compelling economic or other need mandated swift and unfettered implementation of the Company's decision: the crops were not discontinued because of pressing weather problems, precipitate biological or horticultural phenomena, severe financial losses, abrupt changes in the sales market, or because the Company determined to alter the basic thrust of its farming business, which had been and continued to be the growing of row crops. In addition, the Company continued to market and sell (at least) green onions, beets, and parsley, as grown by its neighbor, Mr. Keosean, who employed land owned by the Company to grow the green onions and beets, and by others as well, for the Company's selling division recognized the continuing need to maintain a wide range of products for its customers.

There is, of course, the question of whether the precedent established under the NLRA, developed with respect to industrial experience, is applicable to an agricultural setting. Agriculture is commonly understood to be more generally fluid and variant than its industrial counterpart. A grower of row crops, like the Company, periodically, if not regularly, varies the portions of his fields that will be planted in a particular crop and must determine which crops need emphasis or rotation. In contrast, an industrial employer commonly is more consistent in the nature of his business or product lines produced by him.

While accommodations may well have to be made for the agricultural employer when his decision-making relates

essentially to an emphasis or de-emphasis on a particular crop (i.e., increasing one crop or decreasing another) or to exigencies created by such inherent features relating to agricultur as weather changes, availability of water, or crop rotation, our Act is written so as to protect the bargaining rights of employees, whose interest in continued employment opportunities falls within those subject areas committed over to the bargainin process. To completely ignore the employees' interests in maintaining their employment opportunities with the Company, merely because of an ideological preference to protect unfettered management decisions, would be to ignore an important feature of the wages and working conditions that our Act consigns to the realm of bargaining.

In a situation where an agricultural employer determines to wholly discontinue one or more of his regular crops, an where that determination will lead to a substantial impact on th available bargaining unit work, and where that determination is not compelled by pressing needs that make bargaining impracticable or injurious to the employer, or the performance of a futile act, our Act mandates that the employer timely advise his employees' collective bargaining representative of his intended action and enter into good faith negotiations concerning it.45/ Our Act does not mandate that an agreement must emerge from such bargaining or that an employer is barred from implementing his intended discontinuance when no agreement is reached from good faith bargaining. While a bargaining obligation may impose on a agricultural employer the need to make his crop decisions sufficiently in advance to give good faith bargaining a chance to work, or encourage an interest in establishing by way of a collec tive bargaining agreement his unilateral right to implement crop changes, the bargaining obligation itself will not preclude the employer, in the last analysis, from exercising his normal entrepeneurial control. See N.L.R.B. v. Production Molded Plastics, 604 F.2d 453, 102 LRRM 2040 (6th Cir. 1979). But, the bargaining obligation will allow the employees involved an opportunity to consider the competing interests behind the employer's intention to discontinue a major crop and whether some accommodation can be found so as to alter or reverse the employer's intention, thereby saving work opportunities within the bargaining unit.

In view of the foregoing comments, it is concluded that the Company had an obligation under Section 1153(e) of the Act to

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45/It is extremely doubtful that merely bargaining about the effects of a discontinuance decision would produce meaningful results. When the discontinuance decision is made, the employees' injury due to it is more-or-less inevitable, and negotiations then center on ways to possibly ameliorate the injury through recall rights or severance pay, but the negotiations come too late to provide some alternative which might save the employees' jobs in the first place. Thus, the effectiveness of bargaining over what, in reality, is a fait accompli is open to significant question.

advise in advance the UFW of its intention to discontinue the growing of green onions, beets, parsley, and green cabbage and provide a good faith opportunity for the UFW to bargain about that intention. Nor can it be said, as the Company argues, that the UFW "waived" any right it may have had to bargain about the Company's crop discontinuances.

Although the Company cites a number of cases where a union has been held to have waived its right to bargain over an employer's intention to discontinue or terminate a portion of his business,46/ the facts in this case do not establish that the UFW clearly and unequivocally waived its right to bargain. Initially it should be noted that the Company announced its discontinuance by advising the UFW that it "has decided" to discontinue the three crops then in question. Notice was not given to the UFW that the Company was considering such a discontinuance, as was the situation in several of the cases cited in the last footnote. Nor did the UFW wholly ignore the Company's announcement, as it sought an early bargaining meeting in a letter dated approximately two weeks later. The Company, not the UFW, was then largely responsible (even if warranted due to Mr. Powell's travel plans) for the nearly month-long delay before a bargaining session was held. Then, despite the fact that the Company, through Al Caplan, asked the UFW if it had any bargaining proposal to make at the ensuing August 18 negotiating session, the UFW did not disclaim any intention to later submit a proposal, but had, just four days earlier, filed an unfair labor practice charge contesting the Company's unilateral decision to discontinue the crops. Under the foregoing circumstances one cannot conclude that the UFW waived its right in a sufficiently clear and unequivocal manner so as to forgive the Company's obligation to bargain about the crop discontinuance. See Caravell Boat Co., 227 NLRB 1355 (1977); N.L.R.B. v. R. L. Sweet Lumber Co., 515 F.2d 785 (10th Cir. 1975), cert. denied, 423 U.S. 986.

C. The Remedy:

The General Counsel requests by way of remedy for the Company's refusal to bargain over its crop discontinuance that the Company be ordered to restore the work force to the status quo as it existed prior to July 8, 1978, including the payment of backkpay to those piece-rate workers who lost employment as a result of the Company's crop discontinuances. The General Counsel notes that such a remedy would not impose any significant, detrimental damage to the Respondent, as no capital investment would be required, no change in operations would be necessitated, and the Company's existing land continues to provide an opportunity for renewing the discontinued crops--at least until the Respondent bargains about their future discontinuance.

46/E.g., N.L.R.B. v. Soun-Jee Corp., 386 F.2d 379, 56 L.C. ¶20,120 (2nd Cir. 1967); Corpus Engineering Corp., 195 NLRB 595 (1972); St. Louis Coca Cola Bottling Co., 188 NLRB 658 (1971); Larkin Coils, 127 NLRB 1606 (1960).

The far-reaching, costly remedy sought by the General Counsel, however, does not appear well suited to the circumstanc involved in this case. The requested remedy would impose a pote tially substantial back pay obligation on the Company for conduc engaged in at a time when such conduct had not yet been established as unlawful under our Act. The Board itself has never been faced with the bargaining question present in this case and as we have seen, the law is not clear and consistent under the NLPA. In addition, two years have now passed since the unfair labor practice occurred, and to impose both a back pay obligatio and the crop restoration might well jeopardize the Respondent's operations that have taken place in the meantime.

Also of significance to the remedial considerations is the UFW's lagging response to the Company's decision to discontinue its four crops. Although the UFW's conduct cannot be construed as a waiver of its right to bargain over the discontinuances, several features of its response to the Company suggest that the General Counsel's requested remedy would be inequitable and unwarranted. As noted, the UFW took two weeks to respond to the Company's discontinuance announcement, and when it did respo the UFW did not demand bargaining over the Company's decision itself. While it waited for the next bargaining session to be held on August 18 (a delay it did not object to), the UFW made nc precise effort to propose bargaining with the Company over the decision to discontinue the crops. Then, at the August 18 meeting the UFW again failed not only to make any bargaining proposal but to openly make a demand that the Company bargain about its decision to discontinue the four crops. As Mr. Powell noted, as of August 18 sufficient time still existed to have planted the crops in question had the Company changed its decision to discontinue them. After the August 18 meeting, except for the filing of an unfair labor practice charge, the UFW again made no effort to bargain with the Company over its decision to discontinue the crops.47/ Although the Company's discontinuance decision was essentially presented as a final one, the record does not help in determining what might have been the outcome had the UFW timely pursued a demand to bargain about it. Therefore, it does not seem appropriate to place the entire onus on the Respondent by way of a severe, costly remedy, which might have been made unnecessary if a timely demand to bargain had been clearly made.

THE REMEDY

Having concluded that the Respondent violated Section 1153(e) of the Act, and derivatively Section 1153(a), it is necessary to impose certain remedies to correct the unfair labor

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47/It might be noted that, according to Karen Flock, at the August 18 meeting she told Caplan that the UFW felt the Company should have discussed its decision to discontinue the crops before the decision was made. Even if we were to credit Ms. Flock's assertion, which was uncorroborated, it cannot be construed as an overt demand to bargain, but was more in the nature of a passing reflection.

practices involved. As earlier noted, with respect to the Respondent's unlawful refusal to provide relevant bargaining information to the UFW, it is appropriate to employ the "make whole" feature of §1160.3 of the Act, commencing such make-whole remedy as of February 14, 1978, six months prior to the filing of the unfair labor practice charge. This make-whole remedy should continue to exist until the Respondent commences to bargain in good faith and thereafter bargains until reaching an agreement or a bona fide impasse. As for the Respondent's unlawful unilateral wage increase and its unlawful refusal to bargain over the crop discontinuances, the Respondent, as stated in the following Order, will be directed to cease and desist from engaging in such unfair labor practices and to take certain affirmative action. In addition, the Respondent will be directed to publish a Notice to Employees, as attached.

ORDER

Pursuant to Labor Code §1160.3, Respondent, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing to bargain collectively in good faith as defined in Labor Code §1155.2(a) with the UFW as the exclusive representative of its agricultural employees, and, in particular, (1) failing or refusing to provide the UFW with relevant bargaining information requested by the UFW; (2) failing or refusing to bargain in good faith with respect to wage increases for its agricultural employees; and (3) failing or refusing to bargain in good faith with respect to its desire to discontinue the growing of green onions, red beets, parsley, green cabbage, or other significant crop.

(b) In any like or related manner, refusing or failing to bargain in good faith with the UFW as the exclusive representative of its agricultural employees.

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

(a) To provide the UFW with all the relevant bargaining information still not provided as of August 14, 1978, that was requested by the UFW, and to provide, upon further request by the UFW, any other information relevant to bargaining.

(b) Upon request by the UFW, rescind the wage increase given in February, 1979, and any further wage increase unilaterally granted since that time, and bargain collectively with the UFW with respect to such wage increases.

(c) Upon request by the UFW bargain collectively with respect to the discontinuance of green onions, parsley, beets, and green cabbage, and any other significant unilateral crop discontinuances implemented since July, 1978.

(d) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees, and if an understanding is reached, embody such understanding in a signed agreement.

(e) Make whole each employee employed in the appropriate bargaining unit at any time between February 14, 1978, and the date Respondent commences to bargain in good faith and thereafter bargains to a contract or a bona fide impasse, for all losses of pay and other economic losses sustained by each of them as the result of the Respondent's unlawful refusal to provide the UFW its requested information, as such losses have been defined in Adam Dairy, dba Rancho Dos Rios, 4 ALRB No. 24 (1978).

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

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

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

(i) Mail copies of the attached Notice in all appropriate languages, within 30 days after the issuance of this Order, to all employees employed at any time during the 1977-1978 and 1978-1979 harvest seasons.

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

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

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

Dated: July 25, 1980

AGRICULTURAL LABOR RELATIONS BOARD

By _____
David C. Nevins
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing where each side had an opportunity to present evidence, the Agricultural Labor Relations Board found w did not bargain in good faith with the United Farm Workers of America, AFL-CIO, in violation of the law. The Board has told u to post this Notice and to mail it to those who worked during th harvest seasons of 1977-1978 and 1978-1979.

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

5. To decide not to do any of the above things.

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

WE WILL NOT refuse to provide the UFW with the information it needs to bargain on your behalf over working conditions.

WE WILL NOT change your working conditions or discontinue the farming of significant crops without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible, on a collective bargaining contract and we will give back pay to all of our workers who were employed from February 14, 1978, to the date we began to bargain in good faith for our contract, and who suffered any loss of wages or benefits because of our past failure to bargain in good faith.

Dated:

CARDINAL DISTRIBUTING COMPANY

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.