STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

WILLIAM DAL PORTO & SONS, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 81-CE-6-F 81-CE-9-F 81-CE-13-F 81-CE-16-F 81-CE-18-F
	)	9 ALRB No. 4

DECISION AND ORDER

On May 13, 1982, Administrative Law Judge (ALJ)[1/] Marvin J. Brenner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm his rulings, findings, and conclusions as modified herein, and to adopt his recommended Order.[2/]

[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 effective January 30, 1983.)

[2/] We affirm the ALJ's finding that Respondent violated section 1153(a) of the Act by threatening employee Richard Guerrero because, several days earlier, he and a Union organizer met with a co-worker, Ike Cavan, at Cavan's home, which was located on

(fn. 2 cont. on p. 2.)

We affirm the ALJ's conclusion that the totality of Respondent's conduct manifests a failure to bargain in good faith, but in so doing we do not rely upon the ALJ's characterization of Respondent's wage offers as "meager," "insubstantial" and "predictably unacceptable." We reject the ALJ's finding that Respondent's wage offer was constrained by a predetermined amount that Respondent was willing to devote to a combination of wages and fringe benefits. The record reveals that the specified amount was exclusive of Respondent's wage proposals and that subsequent improvement of the wage offer did not affect the level of fringe benefits. In any event, we are unwilling to infer bad faith from wage offers on the basis of their amount where, as here, an employer who is in a relatively strong bargaining position displays some flexibility on economic issues as a whole. However, Respondent's bargaining conduct with respect to the issues of successorship and union security, together with its granting of a unilateral wage increase, does provide sufficient evidence of a failure to bargain in good faith.

(fn. 2 cont.)

Respondent's property. We reject, however, the ALJ's analysis of that incident to the extent that it relies on our Decision in O. P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106, and the standards set forth therein for taking post-certification access to an employer's property. Guerrero's conduct is more appropriately discussed pursuant to our Decision in Sam Andrews' Sons (1982) 8 ALRB No. 87, in which we set forth the right of labor camp residents to receive visitors, and the limited circumstances under which an employer may lawfully restrict such visits. We find Cavan's right to receive visitors in his home analogous to the right of labor camp residents. Respondent's threat to Guerrero therefore constituted a violation of Labor Code section 1153(a), since it tended to interfere with or restrain employees in their right to meet with union representatives at their homes.

ORDER

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

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the United Farm Workers of America, AFL-CIO, (UFW) as the certified exclusive collective bargaining representative of its agricultural employees.

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

(c) Threatening employees with incarceration or any other reprisals because of their union activities.

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

(b) Upon request, meet and bargain in good faith with the UFW as the exclusive bargaining representative of its agricultural employees, regarding the unilateral increase Respondent made in the said employees' wage rates on or about May 27, 1981.

(c) If the UFW so requests, rescind the aforesaid increase Respondent made in its agricultural employees' wage rates on or about May 27, 1981.

(d) Make whole its present and former agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the UFW, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55, the period of said obligation to extend from April 1, 1981, the date of Respondent's first refusal to bargain with the UFW, until October 30, 1981, and continuing thereafter, until such time as Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

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

(f) Sign the Notice to Agricultural Employees attached hereto, and, after its translation by a Board agent into

all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(g) 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.

(h) Provide a copy of the attached Notice to each agricultural employee it hires during the 12-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 during the period from April 1, 1981, until the date on which said Notice is mailed.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on Company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions 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 to compensate them for time lost at this reading and the question-and-answer period.

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

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

Dated: February 10, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JORGE CARRILLO, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a Complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts, the Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO, (UFW) in violation of the law. The Board has told us to post and mail this Notice.

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

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to try to get a contract or to help or protect one another; and
6. 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT make any 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 NOT threaten employees with incarceration or like reprisals because of their union activities.

WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible. In addition, we will reimburse all workers who were employed at any time during the period from April 1, 1981, to the date we begin 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.

Dated: WILLIAM DAL PORTO & SONS, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1685 "E" Street, Fresno, California 93706. The telephone number is (209) 445-5591.

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

DO NOT REMOVE OR MUTILATE

CASE SUMMARY

William Dal Porto & Sons, Inc.

9 ALRB No. 4
Case Nos. 81-CE-6-F
81-CE-9-F
81-CE-13-F
81-CE-16-F
81-CE-18-F

ALJ DECISION

At issue were allegations of failure to bargain in good faith (surface bargaining, unilateral wage increase, failure to provide requested information) and discriminatory conduct (threat and retaliatory transfer). The ALJ found that as: (1) Respondent's wage offers were meager and inadequate, (2) it unreasonably insisted on a nonbinding successorship clause, (3) that it took an adamant and poorly-reasoned position on union security, and (4) that it granted employees an unlawful unilateral wage increase, the totality of the circumstances established that Respondent had failed and refused to bargain in good faith. He found no violation based on the withholding of bargaining information.

Concerning the allegations of discriminatory conduct, the ALJ found that Respondent had unlawfully threatened one of its employees for bringing a union representative onto Respondent's property at night to meet with another employee at his home. While he found Respondent's conduct in that regard was contrary to the post-certification access principles of O. P. Murphy Company, In. (1978) 4 ALRB No. 106, the ALJ perceived the real issue as being the propriety and effect of Respondent's reaction to the access incident. He found the threat to be a violation of section 1153(a) but concluded that Respondent did not transfer the threatened employee for discriminatory reasons.

BOARD DECISION

The Board affirmed the ALJ's conclusion that the totality of Respondent's conduct constituted a failure to bargain in good faith, but indicated that it placed no reliance on the ALJ's characterization of Respondent's wage offers as "meager," "insubstantial" and "predictably unacceptable." The Board stated that it was unwilling to infer bad faith from wage offers on the basis of their amount when, as here, Respondent, who was in a relatively strong bargaining position, did display some flexibility on economic issues. The Board concluded that Respondent violated section 1153(e) by bad faith bargaining as to the issues of successorship and union security, in conjunction with its granting of a unilateral wage increase.

The Board rejected the ALJ's use of post-certification access principles in connection with the Guerrero incident. Noting the

right of labor camp residents to receive visitors in their homes (Sam Andrews' Sons (1982) 8 ALRB No. 87), the Board found that the person Guerrero visited had a similar right and that the threat to Guerrero was therefore an unlawful interference with the employees' right to receive visits from union agents in their homes.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 81-CE-6-F
	)	81-CE-9-F
WILLIAM DAL PORTO & SONS, INC.,	)	81-CE-13-F
	)	81-CE-16-F
Respondent,	)	81-CE-18-F
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

Appearances:

Christopher Waddell
John M. Reece Law Firm
146 West Weber Avenue
Stockton, CA 95202

and

Dante John Nomellini
Nomellini & Grilli
235 East Weber Avenue
P. O. Box 1461
Stockton, CA 95201
for Respondent

Marcos Camacho
United Farm Workers
P. O. Box 30
Keene, CA 93531
for Charging Party

Nicholas F. Reyes
Agricultural Labor Relations Board
1685 E Street, Suite 103
Fresno, CA 93706
for General Counsel

DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

MARVIN J. BRENNER, Administrative Law Officer:

This case was heard by me on September 30, October 1, 2, 5, 6, 7, 9, 28, 29 and 30, 1981. The original Complaint issued on July 15, 1981, was based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter referred to as "Union" or "UFW"). The General Counsel filed an "Amendment to Complaint" on October 8, 1981, during the hearing, which I allowed.

All parties were given a full opportunity to present evidence[1/] and participate in the proceedings. The General Counsel and the Respondent filed briefs after the close of the hearing.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, William Dal Porto and Sons, is engaged in agriculture in San Joaquin County, California, as was admitted by Respondent in its Answer.

Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (hereafter the "Act").

Respondent also admitted in its Answer that the UFW was a labor organization within the meaning of section 1140.4(f) of the

II. The Alleged Unfair Labor Practices

The Complaint raises three areas of alleged violations. First, it charges that Respondent refused to bargain in good faith in violation of Sections 1153(e) and (a) of the Act by: 1) refusing to comply with or unreasonably delaying complying with the UFW's requests for information and 2) engaging in surface bargaining. Second, it alleges that Respondent made a change in its employees' wages and working conditions without negotiating about said changes or their possible effects with the UFW, also in violation of Sections 1153(e) and (a). Finally, the Complaint charges that Respondent discriminated against its employees in order to discourage their support for the UFW in violation of Sections 1153(c) and (a) of the Act.

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1. Hereafter, General Counsel's exhibits will be identified as "G.C. Ex ___"; Respondent's exhibits as "Resp's ___"; and joint exhibits as "Jt. Ex ___". References to the Reporter's Transcript will be noted as "TR. ___, p. ___".

The Repsondent denied it violated the Act in any way and plead as an affirmative defense, inter alia, that it was the UFW that failed and refused to bargain in good faith with it.2/

Respondent admitted in its Answer that the following persons were its agents within the meaning of Sections 1140.4(j) of the Act: William (Bill) Dal Porto and Robert (Bob) Dal Porto.

III. Business Operation

A. The Farm

Respondent's business is a diversified farming operation of approximately 1,227 acres, which includes the farming of tomatoes, sugar beets, alfalfa, safflower, and, in different years, some barley and wheat. It is a closely held corporation in which William S. Dal Porto is the President and his two sons, Bill and Bob serve as Vice President and Secretary-Treasurer respectively and manage the ranch. All three draw salaries from the Company, and Bill and Bob are also the principal shareholders. Bill Dal Porto testified that the family owns an undivided 1/8 interest in the land and that the corporation has a long term lease for the remaining portion that expires in 1987.

The farming operation is on Union Island, close to Tracy, but the Company's office is located out of Bob Dal Porto's private residence. Pat Dal Porto, Bob's wife, keeps the books and is a salaried, part-time employee. She makes out the payroll checks, deducts social security and disability, and keeps track of the outstanding loans owed to the Company by its employees.

B. The Work Force

There are around 11 or 12 employees that work almost full time and are referred to as "steadies". There are others who perform weeding and thinning and are referred to as "general laborers". They commence work around the latter part of May and number around 20-25 at peak. The tomato harvest starts the latter part of August and lasts until the first week in October, and some of the weeders and thinners end up working in that harvest as sorters.

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2. I granted, for lack of evidence, General Counsel's Motion to Strike Respondent's Second Affirmative Defense that the ALRB was discriminatorily enforcing the Act against Respondent in violation of the U.S. Constitution. The General Counsel has also moved to strike certain other of Respondent's affirmative defenses. These motions were taken under advisement and are discussed infra.

C. The Loan Program

Bill Dal Porto testified that he and his brother administer a very informal interest-free loan system in which an employee requests a loan and states how much he/she can afford to pay back weekly. Thereafter, if the loan is approved, Respondent deducts that amount from the weekly paycheck in payment for the indebtedness. Dal Porto further testified that the loans were purely discretionary and that the Dal Portos would decide whether to grant them on a case by case basis.

IV. The Representation Question

A. Facts

The parties stipulated that the ALRB certified the UFW as the exclusive bargaining representative of all agricultural employees of William Dal Porto and Sons in 1 ALRB No. 19 (1975), Case No. 75-RC-14-S. However, in its Answer to the Complaint, filed on July 22, 1981, Respondent alleged, as its Fourth Affirmative Defense, that "Respondent is under no legal duty to bargain" with the UFW.

General Counsel moved to strike the defense,[3/] contending that the presumption of representation had always existed, that there was no evidence to the contrary upon which Respondent could have otherwise based a good faith belief, and that in any event, Respondent never raised the issue during negotiations, only raising it for the first time (which was admitted by Respondent's negotiator, Dante Nomellini, in his testimony) in its Answer to the Complaint.

In response to the Motion to Strike, counsel for Respondent, Mr. Waddell, stated:

> Finally, with respect to the fourth affirmative defense, — this is purely a legal issue, as we envision it. We never relied on this in our bargaining with the UFW. It's something, just because of the time — the time lag between the time of certification and the time when these unfairs were filed, we want, again, to preserve to possibly argue at a later time. I — we did not envision this to be a major point of contention at this hearing. It's something again, we want to preserve for a later time. (TR. 2, pp. 3-4.)

During the hearing the UFW negotiator, Art Rodriguez, testified that at the very first meeting of the parties on April 1, 1981, in response to a question from him as to whether or not there

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3. I reserved judgment on this Motion until after the matter had been briefed by the parties.

were any problems, Nomellini specifically stated that though these were representation issues with some of the other companies on whose behalf he was negotiating,[4] there was no question of Respondent's recognition of the UFW as the bargaining agent for its employees and in fact, mentioned that it was the steady employees — the irrigators and the tractor drivers — that were the ones who had maintained all along a strong interest in the Union.

Nomellini confirmed this testimony when he testified, ". . . I told them we recognized the Union as the bargaining representative and that we had no problem with the recognition clause." (TR. 8, p. 84.) However, he also testified that in his opinion the certification had expired 3 or 4 years before but that he chose not to refuse to bargain on that basis because he did not want to expose his client to an unfair labor practice charge.

B. Ruling

The Fourth Affirmative Defense is stricken as having no evidentiary basis in the record. Moreover, had Respondent refused to bargain on the grounds of the expiration of the certification period, its position would be untenable as a matter of law. The issues Respondent raises have been disposed of in Montebello Rose Co. (1981) 119 Cal.App.3d 1 and in Kaplan's Fruit and Produce Co., Inc. (1977) 3 ALRB No. 28.[5] As recently stated by the ALRB in Montebello Rose Co. (1982) 8 ALRB No. 3 (at footnote 4):

> The employer's continuing duty to bargain with the certified union is related to the continuing desire of the employees to be represented. However, the employees may exercise their free choice after the certification year through a decertification or rival union petition for an election. The employer may not assume, as Respondent did here, that a majority of the employees no longer support the union since no election indicating such loss of support has ever been held and its results certified. On the contrary, Respondent's refusal to bargain simply because the certification year elapsed denies the continuing validity of the employees' most recent expression of free choice and attempts to nullify that choice.

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4. At the parties' first negotiating session the status of negotiations at several of the other companies Nomellini was representing was also discussed.

5. Respondent's attempt, citing no precedent, to distinguish these two cases on the grounds that the Union's conduct herein (alleging the prolonging of negotiations, changing negotiators, and generally bad faith negotiating (Resp.'s Brief at p. 49)), even if true, would not in and of itself be evidence of a lack of majority support for the Union. Instead, it might be evidence only of the Union's bad faith during bargaining, which Respondent has already alleged in its First Affirmative Defense.

V. The Negotiating History

This case analyzes the bargaining between these parties from April 1 until October 21, 1981.[6] Actually, bargaining had commenced on this property much earlier — January 27, 1976 — but had numerous interruptions and changes in negotiators. The last session prior to April of 1981 apparently had been held on August 22, 1979.

A. The Meetings

April 1, 1981[7] Meeting

The UFW was represented at negotiations mainly by Art Rodriguez, the overall UFW director for the region.[8] Respondent's negotiator was Dante Nomellini, an attorney. This meeting, as well as the others, was held at Nomellini's law offices in Stockton, California. As this was Rodriguez' initial involvement with Respondent's negotiations, the first session was used to review the prior history of collective bargaining at Respondent's (as well as the status of several of the other companies Nomellini was representing) since there had been such a long gap in the meetings. Despite the seemingly endless drift of the prior negotiations, several agreements had been reached. (G.C. Ex 2.) In fact, Rodriguez testified that when the Union decided to recommence negotiations, it looked to Respondent first because more negotiating progress had been made with it than with other companies in the area. However, there still were a number of important open articles; e.g., language items such as successorship, union security, credit union withholding and access, and several pay issues. A short review of the substantive differences between the parties on these articles follows.

Successorship — Respondent's position throughout was that having a successorship clause would make the company less valuable upon sale so it wanted it to be clear that any labor contract would not be binding upon a successor. In that way, the collective bargaining agreement would have no impact whatsoever upon a sale should one occur. Nomellini testified that it was his legal understanding that without a clear non-binding successorship clause, the contract might nevertheless be held (by the ALRB or an

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6. Although Joint Exhibit 1 reflects the last negotiating session to be September 18, there was one additional session, that of October 21.

7. Unless otherwise noted, all dates refer to 1981.

8. There was no Union Negotiating Committee, as such, though there were individual members, employed by Respondent, who showed up at negotiating sessions from time to time.

arbitrator) to survive a sale and to therefore still be binding upon a successor.

Respondent's position was discussed during this initial session, as well as most of the remaining ones. Nomellini told Rodriguez that he was not aware of any attempt to sell the business during 1981 and that Respondent had no present intention to sell. When asked by Rodriguez why he wanted a non-binding clause, Nomellini testified that he responded, ". . . we don't know whether or not we're going to sell, we want to keep the option open." (TR. 8, p. 108.)

Nomellini also testified that it was not Respondent's intent to affect the bargaining rights of the Union in the event of a sale but that if the possibility of successorship existed, it would definitely dilute the value of the property should there be such a sale. Nomellini told Rodriguez that Respondent's language only dealt with the contract being binding on a successor but that if it did "rub off" on the representation question, it would be a simple matter for the Union to petition for a new election with the successor and resolve the problem that way.

Union Security - Still on the table from prior sessions was the Union's proposal for dues checkoff in which two percent (2%) was automatically deducted from the wage earnings of the member and forwarded to the Union. The Union also wanted Respondent to distribute its authorization cards.

Respondent was, from the outset, opposed to dues checkoff not on philosophical grounds but because it felt it would amount to an additional bookkeeping cost. By this Respondent meant that it wanted the Union to pay its bookkeeper, Pat Dal Porto, for the time it would take her to do the checkoff. Since she earned $100 per month, Respondent intended for the Union to be responsible for whatever percentage of time was spent on checkoff.

Respondent also opposed passing out authorization cards because it felt that was Union business and could be done by a Union steward. Finally, Respondent was not inclined towards the Union's proposed five-day waiting period before a worker must become a member of the UFW and wanted a seven-day period. Respondent argued that five days made no sense since Respondent had payroll periods for seasonal workers of seven days and twice monthly for steadies.

Credit Union Withholding — Here the Union had wanted a checkoff for those workers who were interested in getting loans through its own credit union. Under the proposal on the table, Respondent was to automatically deduct from the employee's pay check a portion of the loan owed and forward same to the UFW.[9/] Rodriguez

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9. Rodriguez testified that the UFW Credit Union was a separate entity from the labor organization, federally insured, with its own bylaws and eligibility requirements.

testified that one of the reasons the Union was very keen on this article was because it was aware of the fact that some workers were already getting loans from Respondent and felt that this would be a good substitution for that practice in that there was no guarantee that Respondent would continue the practice once the contract was signed. Further, Rodriguez felt this proposal would be acceptable to Respondent because it would apply only to the steadies, and Respondent already had the bookkeeper administering its own loan system.

Respondent opposed this proposal, again because of the bookkeeping expense, and its position did not change during negotiations. Nomellini testified that Respondent regarded this proposal as being costly: "We have an obvious limitation on bookkeeping capability with our present bookkeeper, being Bob Dal Porto's wife, and there is a cost involved in handling that, that maybe would involve getting a professional bookkeeper to do it, and normal headaches you run into . . ." (TR. 8, p. 31.)

Nomellini also believed the Union's loans would apply to all employees. When asked what was the differences between credit union withholding and Respondent's loan system, he stated that although Respondent's present system encompassed the deduction of wages to repay loans, it was discretionary and limited to steadies.

Access — Rodriguez testified that in his mind the starting point was the post-certification access granted by the ALRB in the O. P. Murphy case.[10/] The Union had previously submitted an article on post-certification access, but Respondent wanted to limit to one or two the number of Union representatives, and it wanted a hold-harmless clause, stating that Respondent would in no way be liable for any injury sustained by the Union representative during the time he was on Company property.

Rodriguez responded to this position by stating that it was his belief that so long as there was no interference with Company operations, there should not be a limit on the number of Union representatives.

Vacation — For those employees with 3 or more years seniority, the Union wanted 5% of benefits and two weeks off; for those with less than 3 years, 2% and a qualifying work time of 1,000 hours.

Respondent's position was that those employees with one year seniority would receive one week's vacation, 2% would be provided to them in terms of the benefits, and they would have to have a thousand hours work in the previous year in order to qualify; and those workers with more than one year's seniority would still receive only the 2% and would also have to have a thousand hours in the previous year in order to qualify, but they would be provided

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10. O. P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106.

with two weeks vacation.

Holidays — The Union wanted Good Friday (falling during Respondent's thinning and hoeing season), Labor Day (falling during Respondent's tomato harvest), Christmas and New Years.

Respondent offered only Christmas and New Years, but Rodriguez argued that this was meaningless since no workers, aside from a few steadies, were employed during that time. Nomellini testified that Respondent wanted Christmas and New Year's, which were not significant economically to the Company, so that at least it would give the Union two holidays to start with.

Citizenship Participation Day (hereafter CPD) — According to Rodriguez, Nomellini stated Respondent did not want it in the contract and would not even respond to the proposal. Nomellini testified that although listed as a separate article, Respondent regarded it as just another holiday.

Robert F. Kennedy Medical Plan (hereafter RFK) — The Union and Respondent had previously agreed upon a medical plan, and this article had been signed off. However, the Union requested that Respondent take another look at a new proposal because since the last negotiating session, the Union had changed its program completely. Now it was offering 3 different plans, each one distinguished by the type of services provided and by the amount of money contributed by the employer for each hour that the employee worked. The Union asked the employer to re-open negotiations on this article in light of the fact that the rate of the medical plan agreed to no longer existed. (The amount that had been previously agreed to was 20½ cents maximum while the lowest present Union medical plan then effective had been raised to 22 cents.) When asked if the Union was reneging on its previous agreement, Rodriguez testified that he stated, "No", that he would stand on his previous agreement, only that he wanted to provide Respondent with new information in terms of what the current medical plan consisted of and see if something else could be worked out.

Juan de la Cruz (hereafter pension plan) — Respondent opposed the plan because it argued that not enough of its employees would qualify to receive the benefits, that it was concerned about the solvency of the plan itself, and that it did not want to be held liable in the event the plan ultimately failed to pay benefits.

Rodriguez countered that the plan operated like any other, was regulated by the federal statute, and was federally insured.

Martin Luther King (hereafter MLK) — According to Rodriguez, Nomellini made it clear that he was not going to be offering anything on it. Nomellini testified that MLK was something that the Company thought was of a questionable value in terms of any real benefit to the employees, that it was an economic item, meaning that it would cost Respondent money, and that Respondent would rather place the money into wages; but that if the Union wanted to

take it out of the wages and put it into MLK, Respondent was willing to discuss it.

Wages and Cost of Living — Neither party made its opening wage proposal at this early session. The prior negotiation had left wages were very much in dispute. As to the cost of living, Respondent was opposed to this provision (and remained opposed throughout negotiations) arguing that inflation protection would be integrated into Respondent's wage offer.

Duration — Respondent wanted a contract of 3 years ending around December of 1983, as that date would conincide with other contracts in the area; Respondent also wanted to avoid any conflict with its regular harvest period.

The Union, on the other hand, didn't want to enter into a 3-year agreement because, owing to inflation, it could not be sure what the cost of living would be the following 2 years of the contract.

April 8 Meeting

The main occurrence of this session was that Respondent offered its first wage proposal (G.C. Ex 6). Nomellini testified that Respondent's wage offers were always offered to the Union on the basis of "what we think we can get labor for and continue to operate satisfactorily." (TR. 8, p. 98.) And he felt Respondent's offers were comparable to what was being paid in the area.

It is worthy of note that Respondent's general labor rate then in existence was $3.35 per hour, and Respondent proposed that effective May 30 (the approximate starting date of the thinning and hoeing season), it be raised to $3.50.

April 15 Meeting

At this session the Union offered two package proposals on union security, credit union withholding, successorship and right of access to company property. (G.C. Ex 7.) Most of the discussion focussed on these proposals, especially successorship.

Successorship — Aware of Respondent's opposition to successorship, the Union deleted its previous proposal which contained language "binding" the successor and substituted the following clause

> Company agrees that it will not sell, transfer, or assign it (sic) operations for the purpose of circumventing this agreement. Sales, transfers or assignments for valid business reasons or purposes which have as one of their results the nulification of this agreement shall not constitute nor be construed to be a violation of this agreement.

By this article, the parties seek to define contractual rights and do not waive any statutory rights.

Respondent rejected this proposal because it was afraid that without a specific non-binding clause, statutory or case law could still make it binding. But to assure the Union that a sale would not be made strictly for the purpose of avoiding the Union, Nomellini reminded Rodriguez of his (Nomellini's) initial proposal on the issue which stated:

> This agreement shall not in any way be binding upon the successors, administrators, executors and assigns of the parties hereto. Company agrees that it will not sell, transfer, or assign its operation for the purpose of circumventing this agreement. Sales, transfers or assignments for valid business reasons or purposes which have as one of their results the nullification of this agreement shall not constitute nor be construed to be a violation of this provision. (G.C. Ex 3.)

The Union caucussed, returned and agreed to delete the second paragraph of its proposal concerning the defining of contractual rights and the non-waiver of statutory rights.

Respondent then tried to clarify its position and reconcile it with what it thought was the Union's by proposing the following additional language to its earlier proposal (new language underlined):

> This agreement shall not in any way be binding upon the successors, administrators, executors, and assigns of the parties hereto <u>except in those cases where the sale, transfer or assignment is for the sole purpose of circumventing this agreement.</u> (Jt. Ex 2B,[11]/ p. 50.)

Nomellini told Rodriguez that the "Recognition" article (G.C. Ex 2, Article I, Section B) would allow the Union to arbitrate if it felt a sale had been made to circumvent the agreement. Nomellini testified that the words "sole purpose of circumventing" was intended to mean that if there was a legitimate business purpose that the arbitrator would find to support the transaction, then the contract would not bind the successor.

Rodriguez argued that any agreement containing the "non-binding" language would nullify any possible favorable result from an arbitrator because there would be virtually nothing left to arbitrate. An arbitrator would note that the Union agreed not to

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11. Many of the negotiation sessions herein were tape recorded. The parties agreed that said tapes, with the exception of the meetings on April 1, August 18, September 18, and October 21, would be transcribed, given a joint exhibit number, and entered into the record by stipulation.

bind a successor in the case of any sale for any business reason and would conclude that any such right had been expressly waived.

Union Security — The Union agreed with Respondent's position that an employee should not be required to become a member of the Union for seven days.

Credit Union Withholding — The Union proposed that deductions be made by Respondent on a monthly (as opposed to weekly) basis. In arguing for this clause, Rodriguez pointed out that in reality, it would apply only to the steady employees because only they would qualify under the Union's plan; and seasonal workers had not received loans in the past.

Respondent again rejected the provision on the grounds of the added work load for the bookkeeper.

Access — The parties reached agreement on access when the Union acceded to Respondent's demands by agreeing to limit the number of Union representatives that could be on Respondent's property to two, and by negotiating a hold-harmless agreement in a side letter (G.C. Ex 8). Rodriguez testified that this was the first time he had ever negotiated such a clause.

Wages — The Union made two wage proposals, its first since bargaining commenced on April 1 (G.C. Ex 7). Its latter one proposed a general labor rate of $3.95.

In addition to the packages, the Union lessened its demands on vacation, RFK, funeral leave, and dropped MLK from its proposal.

Nomellini rejected the Union's proposals, stated that he doubted he could improve his previous offer of April 8 and said it had been based on the availability of labor and what Respondent could obtain labor for in the area.

April 20 Meeting

Nomellini stated that the gas allowance[12/] and bonuses would be discontinued upon the signing of a contract because those benefits were to be integrated into Respondent's proposals. (Jt. Ex

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12. Bill Dal Porto testified that in late 1979 during a gas shortage his employees came to him and complained that their hours didn't coincide with the hours that the service stations were opened and they were unable to get gas so that he and his brother, Bob, decided that they would provide free gas to the steadies — approximately one tankfull per employee per week — until, supposedly, the situation improved. This benefit, however, continued up until the present time. Dal Porto claimed the gas benefit was a discretionary practice and that he could take it away anytime he desired.

2c, pp. 69-70.) Nomellini provided a verbal[13] response to the Union's wage proposal of April 15, by adding a nickel across the board in the second and third year to its earlier proposal of April 8. (G.C. Ex 6.)

Dissatisfied with Respondent's wage offer, Rodriguez inquired whether Nomellini had any further response, to which the latter replied that what he had offered was all he was authorized to do at that point. Rodriguez questioned whether Rodriguez had sufficient authority to really negotiate a contract.

Cesar Chavez had made an appearance at this session and personally presented a three-year contract package to Respondent. (G.C. Ex 9.) Union negotiators represented to Respondent that they felt there were sufficient economics in this proposal that would provide the employees with benefits over three years and would also compensate for the loss of the gas allowance and bonus. Although some of the key articles from the April 15 proposal were merely re-submitted (union security, credit union withholding, leave of absence, vacation, holiday), there were some new features, as follows:

Pension — The Union dropped its proposal in the first year entirely and suggested 15 cents per hour in the second and third years.

Respondent again rejected the concept of pension on the same grounds it had before — that there were not enough employees that would be eligible to receive benefits and its doubts about the stability of the plan.

MLK — Likewise, the first year was deleted and the Union proposed 5 cents in the second and third years. Respondent continued to oppose this concept on the same grounds as before.

RFK — Respondent, agreeing to reopen this provision, offered 22 cents in the first and second year and up to 26 cents in the third years. (G.C. Ex 12). Nomellini testified that Respondent agreed to the Union's request to reopen this article in order to facilitate the reaching of a contract.

The Union accepted Respondent's proposal in the first year of 22 cents but wanted 38 cents in the second year and maintenance of benefits in the third.[14]

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13. The parties stipulated that G.C. Exhs. 13, 14 and 15 reflected Respondent's verbal proposal of April 20.

14. "Maintenance of benefits" is a program by which the Union attempts to maintain the level of benefits even though medical costs may go up. Under the plan, the employer agrees to pay any additional medical costs, should they arise, to maintain the agreed-to level of medical care.

Following a recess, the Union accepted Respodnent's proposal of 22 cents for the first and second years. As to the third year, the Union again suggested a maintenance of benefits clause. (G.C. EX 10.).

Union Security — A lively discussion ensued regarding this provision. Rodriguez pointed out that under Respondent's proposal, the Union would be required to send numerous representatives to the fields searching for employees in order to collect their dues, and argued that this would be an undesirable result from Respondent's viewpoint since it had been insisting upon a limitation on the number of Union representatives who could participate in post-certification access. The UFW also contended that if, in its attempt to collect dues, it were unsuccessful in locating certain individuals, it might have to notify Respondent to discharge them, thus disrupting the continuity of the work force. Furthermore, Rodriguez told Nomellini that there were 250 UFW contracts, including some at smaller operations than Respondent's, and that he was not aware of any that did not contain a checkoff provision. Finally, Rodriguez argued that Respondent was already making deductions in the form of social security, federal income tax, and disability.

Respondent again rejected this proposal. Nomellini stated that there was a "feeling on the part of the employer that that's union business that should be handled by the union and not the company." (Jt. Ex 2c, p. 79); and he also repeated his previous reason — the bookkeeping expense. Nomellini admitted on cross-examination that he made no attempt to ascertain what the cost to Respondent for the additional service would be: "We never knew what that cost would be and I still don't know what that cost would be." (TR. 9, p. 10). Furthermore, when asked how much Mrs. Dal Porto was paid, he testified that it was his understanding that she was paid $100.00 a month, but that he had never verified that from any record. Nomellini also testified that he did not recall having knowledge of her salary prior to April or May of 1981 when he was complaining about the bookkeeping expenses that would arise out of the Union's proposals. Moreover, Nomellini testified that he really did not know the employment status of Mrs. Dal Porto — whether she was treated as an independent contractor or as an employee. Finally, Nomellini testified he made no attempt to determine what it would cost to obtain outside bookkeeping.

The Union's second proposal (G.C. Ex 10) accepted the principle that the Union representative would collect the dues[15/] (and initiation fees and assessments) but with no loss of pay. However, Nomellini's position was that Respondent should not have to pay for the Union representative's collecting dues during working hours.

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15. Rodriguez testified he was unaware of any UFW contract which called for the Union's collecting the dues directly from the employees.

The Union withdrew its demand that Respondent furnish to its employees the dues authorization forms for signature and accepted responsibility for distributing the forms[16/] but reinstated its checkoff proposal.

Successorship — In its second proposal (G.C. Ex 10), the Union made what it considered to be a major concession in trying to come to an agreement. It suggested that the successorship article be omitted altogether; and that by so doing that party would retain whatever statutory rights it may have possessed.

Nomellini testified that he recognized that this was a real attempt by the Union to reach an agreement; but nevertheless, he rejected the idea because Respondent was still insisting on a specific clause that provided that the contract would be non-binding on the successor. It was his view that if the Union's withdrawal of the Article meant it was agreeing the contract would not be binding, why should it object to stating so explicitly in the agreement. It was Nomellini's view that even the absence of successorship language could still result in the contract being held to be binding upon the successor by the ALRB or an arbitrator.

Nomellini stated at the bargaining table:

> . . . Now our attitude is this. For the employer to sell the ranch or sell the farming operation, with the union contract, in this area and in this day and age, is like selling it with the plague. In other words, it would have a lower value in our opinion than it would have without being bound to the contract. We think that we can avoid that devaluation and the union could petition for another election if the same workers were picked up in the successor organization; you could go ahead and organize, those workers, and if they're the same ones it's basically an easy function . . . . (Jt. Ex 2C, p. 82).

Credit Union Withholding — Rodriguez again pointed out these loans would only apply to the 10 or 11 steady employees and that in view of the fact that Respondent had already been performing bookkeeping services on the loans that it currently provided to the majority of these steadies, any added imposition on the bookkeeper's time would only have a negligible effect. But Nomellini again rejected the proposal on the same grounds that it had the checkoff.

Cost of Living — The Union re-submitted its proposal of January 26, 1979; however, it suggested the adjustment be made yearly instead of quarterly so that the Company would have additional use of the money over a longer period. The Union regarded this as a definite economic savings for Respondent.

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16. Nomellini had proposed that the Union representative distribute the forms but that the Union pay for the time. The Union rejected this.

Wages — In its second proposal, (G.C. Ex 10), the Union dropped in every category from its earlier proposal of that day (G.C. Ex 9). General labor was now proposed at $3.75 in the first year.

According to Rodriguez, after Respondent rejected this second proposal outright and failed to make any significant changes in its position, the Union again caucussed and came back with a third proposal (G.C. Ex 11). The Union represented to Respondent that this proposal was significantly different from the others in that it was only a one year package.

The Union accepted Respondent's proposals on RFK (for one year), and agreed to delete funeral leave, pension, MLK, cost of living, credit union withholding, CPD, and Christmas and New Years as holidays (leaving only Labor Day) from the contract. Its wage proposal was below its last one year proposal of April 15, 1981 (G.C. Ex 7). General labor was $3.85 as opposed to $3.95.

Vacation — The Union also modified its vacation offer in its third proposal. The Union argued that it needed to compensate the employees for their impending loss of the Company bonuses ranging from $100 - $400 per year. To equalize for this loss, it had earlier formulated its vacation proposals on a percentage basis. Previously, (April 1) it had asked for 2% for employees with less than three years seniority and 5% for employees with more than three years. Now it proposed a straight 4% for all employees having worked 1,000 hours in the previous year.17/

Respondent rejected this third proposal of the UFW in its entirety and stood on its prior offer. It accused the Union of coming in with an inflated proposal at the beginning, making reductions within its proposal to show movement, when in fact all it had done was to start too high in the first place. According to Rodriguez, Nomellini never contended that Respondent could not pay the rates being demanded — only that it was proposing the prevailing rate and that Respondent could obtain general labor in the area for the wages and medical benefits then being offered by it.

Rodriguez took strong issue with this contention. He testified that he reviewed several UFW contracts in the area; e.g., the Klein Ranch (G.C. Ex 49), Joseph Calderon (G.C. Ex 50), Montpelier Orchards Management Co. (G.C. Ex 51) and Bacchus Farms

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17. Thus, if an employee earned $10,000 for the year, his vacation pay would be 4% of that or $400.00. This would not mean he would take the money in lieu of a vacation; he might additionally be provided a two-week vacation (though a vacation for non-steadies was not very likely). Thus, the $400 was intended to represent the bonus which Respondent indicated it would withdraw upon the signing of the contract.

(G.C. Ex 52),[18] and that he based his April 15 proposal on them. He also testified he specifically mentioned to Nomellini that he should look at the Klein (and Rilco) contracts.

Nomellini denied that the Klein Ranch was a typical representative of an agricultural operation in the area because the owner was farming his own land while most of the other farms were tenant operated. Besides, Nomellini argued, the Klein Ranch was looked upon as a corporate type of operation as opposed to a "dirt farmer" type, such as Respondent's.

Following this session, on April 28, Nomellini wrote Rodriguez that Respondent's position was the same as presented on April 20 and that barring a change in the Union's position, negotiations were at an impasse, ". . . it would appear that our negotiations are unfortunately at impasse." (G.C. Ex 16). Nevertheless, Nomellini testified that when UFW negotiator Luciano Crespo called and wanted to schedule another meeting, he agreed to it.

May 4 Meeting

Nothing was said by Nomellini about the supposed impasse he had raised in his letter.

There was a lengthy discussion regarding the gas allowance. Nomellini told Rodriguez that this benefit was originally in response to the long gas lines, and that it "lingered" on thereafter; but that in any event "we'll certainly negotiate it." (Jt. Ex 2D, p. 120). In addition, Nomellini informed Rodriguez that Respondent had no records on the amount of gas being used each week.

According to Rodriguez, this was a major problem for Union negotiators because Respondent had announced it intended to discontinue the gas benefit, whatever its value, upon the signing of a new contract; and the lack of information about the cost of the benefit made it difficult for the Union to formulate its economic proposals or to analyze those of Respondent. However, Rodriguez was able to approximate the value of the gas benefit.[19] Utilizing a wage analysis summary he had prepared (G.C. Ex 44), Rodriguez attempted to ascertain the percentage increase to employees, in

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18. Only the general labor rates from these contracts were admitted into evidence. Klein showed a general labor rate of $3.85 as of February 22, 1981; Calderon was at $4.10 effective December 2, 1980; Montpelier Orchards was $4.40 on January 1, 1981; and the rate at Bacchus Farms was $3.70 on January 22, 1981.

19. The gas allowance figure was based upon information received from the employees themselves since Respondent had not provided that information. The Union based its computation upon approximately 15 gallons of gas per week at around $1.30 per gallon or approximately a $20.00 benefit per week per each steady worker.

terms of the total wage and benefit package, based upon Respondent's last proposal of April 20. He testified that he discovered and made known to Nomellini at this session that under the proposal Respondent currently had on the table, some of the steadies would, in reality, be earning less money than they were receiving before a union contract; others would receive only a small percentage increase.20/

The only other topic discussed at this meeting was the Ike Cavan incident, infra, regarding the Union's right of access to workers' homes located on Respondent's property.

Towards the end of the meeting, Nomellini stated that since he thought negotiations were again at an impasse, a mediator should be brought in for the parties' next session. Rodriguez testified that he responded that it was too early for a mediator because there were too many open issues and still significant gaps between the parties. In addition, he argued that the Union was still getting information on benefits in order to better prepare its proposals.

May 13 Meeting

Most of this meeting was spent discussing wages. Nomellini stated that he had had a chance to compute out the total cost of the contract and provided Rodriguez with a copy of his analysis. (G.C. Ex 19). Nomellini told Rodriguez that he agreed with the latter's representation at the previous meeting that, given the discontinuance of the gas and bonus, some workers would be receiving less or would receive an insubstantial increase under Respondent's proposal than under present21/ rates. But Nomellini argued that when the medical benefit, which applied to all employees and not just steadies, was considered, the total additional cost to Respondent was $5,589.15 under a Union contract and that was what Respondent intended to "buy" the contract for. ". . . I don't know how you might reallocate it, the $5,000, but I mean its costing us $5,000. If you want that money to go to different people, you know we can talk about that." (Jt. Ex 2E, p. 202).

Rodriguez told Nomellini that he understood Respondent's position that in terms of the overall contract, when the medical cost was considered, Respondent would be paying more; but that in terms of actual pay, employees were still being asked to take home less than before the Union contract.

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20. The computation was based on Respondent's wage and vacation offer, offset by the loss of the gas allowance and bonus.

21. Nomellini also used the Union formula of $20 of gas per week per steady.

May 27 Meeting

This was a short meeting. Nomellini again suggested that a mediator be utilized because he felt he had made his best offer.

Rodriguez asked if the Union could review the Respondent's profit and loss statements based upon what Rodriguez insisted was the Company's opposition to the Union's economic proposals and its failure to move from its prior position of April 20. Nomellini again reiterated that it was not Respondent's position that it could not afford the cost of Union's proposals.

Much of the meeting was devoted to discussing Richard Guerrero's complaints, infra, about his layoff.

June 15 Meeting

The Union presented a new package proposal (G.C. Ex 22) which changed its position from April 20 in the following particulars:

Successorship — Rodriguez was aware that Nomellini had represented the Klein Ranch in its negotiations which had resulted in a contract that included a successorship clause. Rodriguez included the exact same language of that contract[22/] in his current proposal.

Nomellini rejected the proposal. When asked by the ALO why the Klein language was unacceptable, he replied:

> Klein Ranch is a trust, a testamentary trust, and the ranch is the principal asset of the trust, and the likelihood of there being a sale of that asset is very remote, they're very well off financially, and it's not a significant factor there, . . . whereas . . . the Dal Porto's are basically tenant farmers. They have a small interest in the land ownership itself but they are tenant farmers. In the likelihood of their either not being able to continue to lease the land, which they are now farming, or the likelihood of going out of business (sic) is much greater because they are working on a smaller amount of the gross proceeds than would be an owner who's farming his own land. (TR. 8, pp. 55-56).

Pension — The Union accepted Respondent's position (for the first two years) but proposed a 15 cent per hour rate to be applied in the third year only.

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22. The Klein contract made the agreement binding upon the successor and provided further that "[B]y this Article, the parties seek to define contractual rights and do not waive any statutory rights." (G.C. Ex 49).

RFK — The Union again accepted Respondent's rates for the first two years (22 cents) and a maintenance of benefits provisions for the last year.

Wages — The Union re-submitted its third wage proposal (for one year) of April 20 (G.C. Ex 11) with a wage reopener for the second and third year.

Nomellini rejected the Union package; its position on the central items had not changed. But Respondent also modified its position on some of the articles:

RFK — Respondent increased its offer in the third year to 28 cents.

Holidays — Respondent indicated it would recognize Labor Day as a paid holiday.

Duration — Respondent proposed a termination date of November 1 instead of December 1 on the three year contract.

June 30 Meeting

The meeting became very acrimonious when Union negotiators denounced the action taken by Respondent in raising the general labor rate for weeders and thinners to $3.50 per hour from $3.35 (See section, infra, entitled "The Unilateral Raise"). A long discussion ensued over this subject matter.

Thereafter, Respondent offered its first wage proposal (G.C. Ex 24)[23] since April 20 (G.C. Ex 15). The purpose of this proposal, however, was not to raise wages — Respondent stood on its prior offers of April 20 and April 8 (G.C. Ex 6) — but to give notice of Respondent's intent to implement the proposed April 20 increase for the steadies[24] retroactive to May 30, while at the same time immediately discontinuing the gas allowance and bonus. (Previously, Respondent's position had been that these benefits would not be discontinued until the effective date of a new labor agreement.)

Rodriguez rejected this proposal on two grounds: first, that Respondent was not adequately compensating the steady workers for the loss of the gas, and in some cases the steady would be actually receiving less; and second, so far as the weeders and

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23. The document itself acknowledged that ". . . weeders and thinners have been receiving the customary area general labor rate of $3.50 per hour since (the start of the season) . . ."

24. G.C. Ex 24 made clear that wage rates for thinners and weeders would not be raised in that they had already been given a raise.

thinners were concerned, they were receiving no increases beyond the 15 cents that Respondent began paying them unilaterally at the start of their season.

At this point, Respondent re-offered the wage schedule of April 20 retroactive to May 30.

There were other proposals made by Respondent, as well.

Successorship — Respondent submitted a written proposal (G.C. Ex 25) which, in effect, codified what its position had been all along. Its proposal stated:

> This Agreement shall not in any way be binding upon the successors, administrators, executors and assigns of the parties hereto. The parties hereto desire to waive all rights to bind successors to the extent permitted by law.

This proposal evoked a long discussion. First, Rodriguez tried to ascertain what was meant by "to the extent permitted by law." Nomellini had previously contended and reiterated the argument that the language of the "Recognition" clause that had been agreed to by the parties (G.C. Ex 2, Article I, Section B) would provide an adequate basis for arbitration in the event of a sale for improper purposes on the part of Respondent.

Rodriguez concluded, however, that by agreeing to the language of "extent permitted by law," he would deprive the Union of any real right to complain either to an arbitrator, the ALRB, or a court regarding the survivability of the contract upon sale. Rodriguez suggested that Repsondent again consider the Union's previous proposals (G.C. Exs 10 and 11) which permitted each party to retain whatever statutory rights it might have while at the same time omitting the successorship article from the contract. As to whether the contract would be binding on the successor, Rodriguez told Nomellini that it would depend.

Nomellini countered that under his proposal it would be clear contractually that a successor would not be bound unless the law so required.

Vacation — Respondent changed its position and agreed to a 4% payment (from 2%) to employees with five years or more service who had worked 1000 hours in the previous year. Respondent also was able to identify the steadies who would qualify for the 4%. Nomellini testified that as a result of upping the vacation benefit, he withdrew his agreement to Labor Day as a holiday.

Pensions — Respondent made its first proposal on the pension and offered 5 cents per hour in each year.

July 8 Meeting

The Union presented a new package proposal (G.C. Ex 27, p. 4) in which most wage categories were reduced 5 cents from the June 15 offer. (G.C. Ex 22).[25] General labor, however, remained at $3.85.

This proposal was rejected. Nomellini admitted to Rodriguez that Respondent had not raised its wage proposal since April 20, but he argued that he had upped the medical, offered money for a pension plan, and improved the vacation benefit. Also, acknowledging that some workers still would receive less under the vacation proposal than with the bonus, Nomellini told Rodriguez that at least its vacation was certain whereas the bonus was always subject to Respondent's discretion.

Union negotiators again attempted to get from Nomellini a definite dollar amount representing the conversion of the gas allowance into wages so that the figures could be viewed more accurately in relation to Respondent's wage proposal. Nomellini was unable to do so, but asserted that the gas allowance was purely discretionary on the part of Respondent anyway.

Other matters discussed were:

RFK — The Union offered to accept 22 cents on all three years of the contract except that if medical costs had gone up by the time of the second and third years, Respondent's contributions would be negotiated solely on a maintenance of benefits basis.

Vacation — Respondent bettered its offer and proposed to pay 4% to those employees with three years or more seniority who had worked at least 1000 hours in the prior calendar year and 2% to those with one year of prior service who worked 1000 hours.

Supervisors — Actually, most of the meeting was taken up discussing this subject matter. The essential question was whether employee Blas Ruiz was a supervisor or was performing bargaining unit work in the thinning crew. To cover the Ruiz situation, Respondent offered a proposal on supervisors (G.C. Ex 27).

July 16 Meeting[26]

Javier Sandoval represented the Union; Rodriguez was not present.

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25. The Union withdrew its proposal for general labor foreman. It argued that the savings thereby realized by Respondent could be utilized in other ways such as augmenting wages or paying any increased bookkeeping costs associated with a checkoff system.

26. There was no testimony regarding this session or the following one, July 17. Instead, the parties chose to submit copies of transcriptions of the actual taped sessions; e.g., July 16, Jt. Ex 2J, G.C. Ex 47; July 17, Jt. Ex 2K, G.C. Ex 48.

Respondent made a new three year wage proposal (G.C. Ex 29) increasing rates, generally around 25 cents, (except for general labor), which would become effective August 1 instead of November 1.

It was a short meeting characterized largely by a rehashing of old positions. Nomellini stated that Respondent had offered its best position, and stated: "We're not prepared to make any further movement." (Jt. Ex 2J, p. 197; G.C. Ex 47). Sandoval pointed out that Repsondent was still not offering a wage increase for general labor because the $3.50 offered was the initial wage for 1981. Nomellini did not disagree but emphasized that Respondent was offering the employees a medical and pension plan.

July 17 Meeting

This was also a short meeting. Nomellini requested a response from Sandoval regarding the elimination of the gas practice and the implementation of new wage rates effective August 1. Sandoval rejected the proposal and told Nomellini that the gas and other benefits should remain in effect until an agreement was negotiated. The discussion then became heated and emotional with each side accusing the other of bad faith bargaining.

On July 22 Nomellini wrote the UFW (G.C. Ex 32) that Respondent proposed to implement the wage rates set forth in said correspondence on August 1 and that the gas allowance would be thereby discontinued.27/ Nomellini represented that the wage increases would compensate for the loss of the value of the gasoline.

July 28 Meeting

There were actually two sessions on July 28, one in the morning and the other in the evening. These sessions resulted in agreement on vacations, supervisors, and holidays (G.C. Ex 34), the first resolution of issues in quite a while.28/ According to Rodriguez, the remaining open areas at this point were succesorship, union security, RFK, pension, duration,29/ and, of course, wages.30/

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27. The rates contained in General Counsel Exhibit 32 were exactly the same as those proposed on July 16 in General Counsel Exhibit 29 except that the latter proposal contained more categories and was for a three year contract.

28. Apparently, there were concessions on both sides on supervisors and vacations. On holidays, the UFW accepted Respondent's offer of two holidays, Christmas and New Years.

29. The Union accepted the Respondent's position on pension and duration later at this session, infra.

30. Up to this time the Union had dropped MLK, CPD, credit union withholding, and cost of living but had asked that Respondent take the resultant savings and place it into increased wages.

Rodriguez testified that he was very much encouraged by the agreements that were reached and that he offered two new proposals (G.C. Ex 35 at the morning session and G.C. Ex 36 in the evening) which he thought would bring the parties much closer to a contact.

Wages — In the evening proposal, some (but not all) rates were reduced from the July 8 proposal, which had been a one year agreement. Here, the proposal was for three years, including a reduction in general labor in the first year from $3.85 to $3.75, its lowest point. A comparison of the first year rates reveals that except for tractor driver II (5 cents higher in Company's proposal) and irrigator (5 cents higher in Union's proposal), the Union's proposed rates (G.C. Ex 36) were exactly the same as those proposed in the Nomellini letter (G.C. Ex 32), with the important exception that Nomellini had not offered any increase for general labor. The parties were far apart here, Respondent sticking with its 15 cent increase of May 21 to $3.50 and the Union at $3.75, its latest proposal.

At this session, Respondent verbally offered a raise to the weeders and thinners in the 1982 season (to begin In May)[31] of 20 cents, up to $3.70 and offered the remaining workers around a 25 cent increase, which Nomellini said he considered their customary raise, to begin on August 1, 1982.

When the Union rejected this, Nomellini again proposed that the Union adopt what he had proposed in his July 22 letter; i.e., that the gas practice be discontinued and that the wage scale set forth therein be effectuated. The Union turned this down on the grounds that it was its position that all benefits should continue until an agreement was finally reached on the remaining issues.[32]

The Union made some new proposals:

RFK — The Union abandoned its concept of maintenance of benefits and put in specific totals for the second and the third year, up 2 cents to 24 cents for the second year and 31 cents for the third year. Rodriguez explained the increase was necessary because he spoke to his medical plan administrator who was able to figure out a specific rate sufficient to maintain the benefits.

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31. Nomellini told Rodriguez that he recognized that the August 1, 1982 date of raise for general labor would have "kind of postponed a normal increase" so that was why he moved the date up to the start of the season. (Jt. Ex 2L, p. 249).

32. Rodriguez testified that he always regarded the Nomellini letter (G.C. Ex 32) as a Company proposal and that there was no indication from Nomellini during the July 28 negotiating session that these rates would in fact be implemented or the gas allowance discontinued prior to a full agreement.

Respondent likewise revised its position and proposed the Klein contract provisions -- 22 cents in the first two years and 31 cents in the third.

Successorship -- The Union returned to an earlier position (away from the Klein language) and offered to omit the article entirely, but Respondent still insisted on a specific non-binding clause.

Pension -- The Union accepted Respondent's position made at the June 15 session. (5 cents per hour for all three years.)

Duration -- Rodriguez testified that he offered that the contract run between August 1, 1981 -- November 1, 1983, thereby accepting Respondent's position on duration.

Nomellini rejected the Union's proposals and, at the conclusion of the meeting, indicated that with the exception of possibly some further discussions on successorship, Respondent had presented its "best offer" and the Union could "take it or leave it." (Jt. Ex 2L, p. 299).

July 28 was the last meeting attended by Rodriguez. On September 16, he was elected a member of the Union's Executive Board and on the same date informed Nomellini that he was no longer going to be involved with negotiations and that Luciano Crespo, Director of the Union's Livingston Field Office, would be taking over (G.C. Ex 43). Crespo and Sandoval handled future meetings. There were, in fact, three subsequent sessions, August 18, September 18, and October 21, of which there is little evidence in the record[33/] nor are there any exhibits reflecting any transcriptions of the tape recorded sessions.

B. Analysis and Conclusion

The Agricultural Labor Relations Act defines bargaining in good faith in section 1155.2 as follows:

> 1155.(a) For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable time and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either

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33. There is testimony from Nomellini that on October 21 he tried to settle successorship by placing Respondent's non-binding language into a letter of understanding, while at the same time making it clear that such language would not "rub off" on the Union's bargaining rights.

party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This language is the same as section 8(d) of the National Labor Relations Act (hereafter NLRA). Thus, it is proper to refer to decisions of the National Labor Relations Board (hereafter NLRB) as a guide to deciding the present case.[34]

It has been held that the statutory duty to "bargain collectively in good faith" imposes the obligation to "meet . . . and confer in good faith" with a view towards the ultimate negotiation and execution of an agreement. To be sure, the Act "does not require either party to agree to a proposal or require the making of a concession." (N.L.R.B. v. National Shoes, Inc. (2d Cir. 1953) 208 F.2d 688, 691.) On the other hand, an employer's failure to do little more than reject a union's demands is: "indicative of a failure to comply with the statutory requirement to bargain in good faith." (N.L.R.B. v. Century Cement Mfg. Co., Inc. (1953) 208 F.2d 84, 86.) Thus, it is clear that ". . . the employer is obliged to make some reasonable effort in some direction to compose his differences with the union." (N.L.R.B. v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131, 135, 32 LRRM 2225, cert. den., 346 U.S. 887, cited in O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, review den. by Ct. App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980.) In other words, what is required is:

> . . . something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground . . . . Collective bargaining then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. . . . (citations omitted). (N.L.R.B. v. Insurance Agents' International (1960) 361 U.S. 477, 4 L.Ed 2d 454, 462, 80 S.Ct. 419. See also Masaji Eto, et al. v. Agricultural Labor Relations Board (1981) 175 Cal.Rptr. 792.)

And Mr. Justice Frankfurther, concurring in part and dissenting in part, in N.L.R.B. v. Truitt Mfg. Co. (1956) 351 U.S. 149, 100 L.Ed 1029, 1033, 38 LRRM 1014 (1956) stated:

> These sections obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. 'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position. But it is not necessarily

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34. See Labor Code section 1148.

> incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

The fact is direct evidence of an intent to frustrate the bargaining process will rarely be found. As a result, a party's intent can only be discerned by reviewing the totality of its conduct. (N.L.R.B. v. Reed & Prince Mfg. Co., supra; B. F. Diamond Construction Company (1967) 163 NLRB 161, 64 LRRM 1333, enf'd, 410 F.2d 462 (5th Cir. 1969), cert. den., 396 U.S. 835 (1969); O. P. Murphy Produce Co., Inc., supra; As-H-Ne Farms(1980) 6 ALRB No. 9, review den. by Ct. App., 5th Dist., October 16, 1980, hg. den., November 12, 1980.)

> . . . the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union. (N.L.R.B. v. Reed & Prince Mfg. Co., supra, 32 LRRM at 2227.)

Necessarily, the final determination must rest upon inferences drawn from circumstantial evidence; it involves reaching conclusions from conduct as to whether particular actions of a respondent were motivated by the desire to negotiate the best bargain possible for itself or were motivated instead by a desire to frustrate negotiations. (Columbia Tribune Publishing Co. (1973) 201 NLRB 538, 552; Queen Mary Restaurants v. N.L.R.B. (9th Cir. 1977) 560 F.2d 403.) One conclusion results in the finding of a violation; the other that Respondent merely engaged in permissible hard bargaining. "Specific conduct which, standing alone, may not amount to a per se failure to bargain in good faith may, when considered with all the other evidence, support an inference of bad faith." (Masaji Eto dba Eto Farms, et al. (1980) 6 ALRB No. 20, enf'd in relevant part by 5th Appellate District, July 27, 1981, hg. denied on November 16, 1981; Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, enf'd in 119 Cal.App.3d 1 (1981), hg. denied on August 7, 1981.) On the other hand, some action standing alone might clearly manifest an absence of good faith, but when taken in the total context of the parties' relationship does not support such an inference. (Deblin Mfg. Corp. (1974) 208 NLRB 392, 399; Western Outdoor Advertising Company (1968) 170 NLRB 1395, 1396-97.)

This case raises the important question of how to separate tough negotiating from bad faith surface bargaining. The question is always hard to answer because "surface bargaining, by definition,

may look like hard bargaining, and is therefore difficult to detect and harder to prove." (K-Mart Corp. v. N.L.R.B. (9th Cir. 1980) 626 F.2d 704, 105 LRRM 2431.)

There is no simple formula to ascertain true motive. Each case must rest upon its own facts.

> At the outset we note that no case involving an allegation of surface bargaining presents an easy issue to decide. We fully recognize that such cases present problems of great complexity and ordinarily, as is the present case, are not solvable by pointing to one or two instances during bargaining as proving an allegation that one of the parties was not bargaining in good faith. In fact, no two cases are alike and none can be determinative precedent for another, as good faith 'can have meaning only in its application to the particular facts of a particular case.' N.L.R.B. v. American National Insurance Co., 343 U.S. 395, 410. It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof required by law. (footnote omitted). (Borg-Warner Controls (1972) 198 NLRB 726.)

With these rules in mind, it is appropriate to commence a study of the bargaining history between these two parties to determine their true intention towards each other judged from the totality of their conduct.

To begin with, it is important to note that though these parties had agreed on many articles (most of them before the current round of negotiations commencing on April 1), three main areas of disagreement continually doomed the process to ultimate failure — wages, successorship, and union security. Each will be analyzed below. Initially, however, it should be pointed out that under current labor law, if bad faith bargaining is shown to have occurred over these mandatory subjects, it is sufficient to find a violation of Section 1153(e). In fact, it has been held that bad faith may be found as to only a single issue of mandatory bargaining and that in such a case a finding of an unfair labor practice will result in spite of good faith on all other issues and a willingness to reach an overall agreement. (United Steelworkers of America v. N.L.R.B. (Roanoke Iron & Bridge Works (D.C. Cir. 1967) 390 F.2d 846, cert. denied (1968) 391 U.S. 904 (employer's refusal to grant dues checkoff).)

1. Wages

One of the major roadblocks was Respondent's unwillingness to make a serious economic proposal fully integrating into its wage proposal adequate monies to compensate its employees for the impending loss of their gas and bonus benefits. A review of the bargaining history, particularly April until the middle of July, indicates that Respondent's proposals were simply not addressing the Union's concern over the net loss Respondent's employees would be

suffering by the withdrawal of these benefits.

Respondent's disinclination to compensate workers for this loss was supposedly motivated by its view that said benefits were entirely discretionary with it and had not become a part of the employees' fixed working conditions. This position enabled Respondent to appear to be offering a generous raise in wages while, in reality, the employees were being offered less pay than before. In fact, assuming arguendo that the gas allowance and bonus program were part of the existing working conditions, even Nomellini had to admit that under some of his proposals certain workers would actually be receiving less than under the current salary structure.

Similarly, Nomellini acknowledged (at the July 8 session) that his vacation proposal still was less than employees currently were receiving under the bonus but justified that by maintaining that at least the vacation would no longer be completely discretionary with Respondent.

Because placing employees in a worse position than if they had no contract at all is evidence of bad faith, Continental Ins. Co. v. N.L.R.B. 495 F.2d 44 (2d Cir. 1974), it is essential to analyze the validity of Respondent's position on the discretionary nature of its gas allowance and bonus program.

Respondent concludes (but does not really cite facts or precedent to support its conclusion) that the gas practice and bonus were discretionary with it and presumably could be discontinued at its whim. This being the case, it presumably argues that these benefits cannot be used in analyzing whether its wage offers were reasonable or adequately compensated its employees for their future loss.

I disagree. These practices had been in existence for a sufficient amount of time at Repsondent's so that steady workers had come to rely on them as being a part of their overall working conditions on the ranch. To discontinue them would be the equivalent of cutting the wage rate.

The NLRB has "consistently construed 'wages' broadly enough to include emoluments of value supplementary to actual wage rates that accrue to an employee from his employment relationship." Morris, "Developing Labor Law", p. 401 (1971). See also, N.L.R.B. v. Local 2265 317 F.2d 269 270 (6th, Cir. 1963); Inland Steel Co., 77 NLRB 1, enf'd 170 F.2d 247, (7th Cir. 1947), cert. den., 366 U.S. 960 (1949); Seafarer's Local 772 v. N.L.R.B. (D.C. Cir. 1978), 99 L.R.R.M. 2903.

It requires no additional analysis that, gives the cost of automobile fuel, free gasoline was indeed an "emolument of value." The same is no less true of the yearly bonus. And had Respondent ceased to provide same, Respondent would have deprived its employees of a benefit it had engaged in previous years. Accordingly, the Union was entitled to base its contract proposals upon a formula

which included the gas practice and bonus as part of the overall wage and benefit structure.

Moreover, any claim that these benefits were discretionary was waived by Respondent by its subsequent conduct at the bargaining table. During negotiations, Nomellini, after discovering late the existence of the gas practice, acted as if it and the bonus were a part of Respondent's conditions of employment. He placed a value on these benefits, and, wanting to eliminate them,35/ bargained accordingly, even using the Union's own cost figures and basic formula. At the May 4 negotiating session he told Rodriguez, referring to the gas benefit, "we'll certainly negotiate it." (Jt. Ex. 2D, p. 120). And his correspondence reflected this as well. (G.C. Ex. 32). Nomellini also attempted to make wage offers to compensate for the loss of the benefit. In fact, Nomellini testified that during negotiations he tried to get the Union's agreement to a change in conditions; i.e., to discontinue the gas practice and that his ultimate position, expressed at the July 28 session, was that the gas practice would not be discontinued (and it was not) until negotiations on the question were concluded.

Finally, Nomellini did not refuse to provide fringe benefit information relating to the gas and bonus on the grounds that same was discretionary with Respondent and therefore, not relevant. (G.C. Ex. 44).

Respondent's attempts to convince me that I should not view the gas and bonus as existing benefits when I consider its economic proposals are not persuasive.

In fact, Respondent's position that the gas allowance and bonus were discretionary benefits was only one of the reasons wages were kept at the forefront as one of the major problems separating the parties. There were other reasons, as well. As early as April 15, Nomellini maintained he doubted he could improve his economic offer in that it was based upon the availability of labor and what Respondent thought it would normally have to pay to get same in the area. Though this was an attempt to excuse Respondent's low wage offers, it cannot be doubted that said offers would have to be classified as meager. For example, its offer of April 20 (G.C. Ex. 15) only increased wages 5 cents in the second and third year but made no changes in the first year from its previous offer of April 8 (G.C. Ex. 6).

At the June 30 meeting, Respondent made its first written proposal (G.C. Ex. 24) since its announcement of its intent to discontinue the gas and bonus benefits. (It was also its first

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35. Nomellini testified that the first attempt Repsondent ever made to discontinue the gas practice that had existed since 1979 was made only after the start of the current period of negotiations in April of 1981.

since April 20). This proposal was supposed to compensate the steadies for the intended loss of those benefits, but instead, Respondent's proposed wage rates were virtually the same as those offers of April 20. (Compare G.C. Ex. 24 with G.C. Ex. 15).

It was not until July 16 that Respondent offered an increase for the steadies (25 cents). Respondent's explanations for the delay was that it would have liked to have raised steadies at the time it raised general labor (May 30) but the steadies were still receiving the gas allowance.36/

While it is true, as pointed out by Respondent (Resp's Brief, pp 42-43), that the parties were proposing the same first year wage rate for steadies as of July 28, (compare G.C. Exs. 29, 32 and 36),37/, there was still significant disagreement on two other related issues: 1) what the rates should be for the second and third years; and 2) what the general labor rate ought to be. As of the latter, while the UFW was making its lowest offer to date, $3.75, Respondent was offering not a penny more than the $3.50 rate which was its initial offer of April 8, 1981 (G.C. Ex. 6) and also the level to which its employees had been unilaterally raised on May 30, infra. Nomellini explained that general laborers were not offered a wage increase because they had just received their customary raise (15 cents) on May 30. But rather than help justify Repsondent's actions, (or lack of action) Nomellini's argument raises the inference that it was Respondent's very strategy to increase the thinners' and weeders' wages so as to be able to argue that they weren't entitled to any further compensation because they had just been given a raise. In this way, Respondent could make it through the 1981 season without having to make any further compensation to its general laborers.

Furthermore, Respondent's $5,000 figure was not likely to be changed so long as Respondent believed that its proposed wage rates were at the same level of what other farmers in the area, almost exclusively non-Union operations, were paying.

Another reason for the wage dispute was the fact that Respondent had apparently placed a cap of around $5,500 on any contract with the Union, over which it was not willing to go. Included within this figure was what it concluded it would have to pay for the medical, vacation, pension, etc. although these amounts would, of course, not appear on the employee's paycheck. Thus, offers of benefits in other areas automatically justified the lack

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36. Originally, Respondent's position was that gas and bonus would not be discontinued until after an agreement was reached. Later, it decided it wanted to terminate those benefits as soon as possible.

37. There were a few categories mentioned in G.C. Ex. 29 that do not appear in G.C. Ex. 32 or 36.

of progress on wages so that Nomellini could admit (at the July 8 session) that he had not raised his wage offer one cent from April 20 yet justify it on the ground that improvements were made on vacation, medical, and pension.38/

Viewing the totality of Respondent's conduct and especially considering its unwillingness to make adequate compensation offers for the loss of the gas and bonus benefits, I find Respondent's wage offers to be insubstantial. And this is true even if one gives credence to Respondent's argument that all it wanted was to pay the going wage. In fact, the evidence suggested that Respondent's proposals were below that of other growers in the area (G.C. Exs. 49-52, inclusive). Making meager wage proposals (especially when compared to what other growers were paying in the larger community) is a relevant factor to consider in determining whether surface bargaining occurred. As the 9th Circuit very recently pointed out:

> We agree with the ALJ's characterization of the wage proposals as "meager". In an age of double digit inflation, an offer of little or no wage increase is an effort to decrease wages. The ALJ could infer that the company was not bargaining seriously. K-Mart Corp. v. N.L.R.B., supra 626 F.2d 704 (9th Cir. 1980).

No reasonable explanation was put forward why Respondent's wage offers were below those of these other growers in the same market, and as has been shown, Respondent was not pleading poverty.

Moreover, Respondent failed to support its own conclusion that it was offering the going rate for available labor by neglecting to put forth evidence of the wage rates of other growers in the area.

I further find that Respondent's low wage offers were predictably unacceptable to the UFW. The NLRB has found surface bargaining when the employer proposed predictably unacceptable terms which it knew the union would reject, particularly where its wage offers merely maintained the status quo. Clear Pine Mouldings, Inc. 238 NLRB No. 13, 99 LRRM 1221 (1978), aff'd, 632 F.2d 721, 105 LRRM 2132 (9th Cir. 1980); Stuart Radiator Core Mfg. Co. 173 NLRB 125, 69 LRRM 1243 (1968). This is also true under the ALRA. O.P. Murphy Produce Co., Inc., supra, 5 ALRB No. 63 (1979), rev. denied by 1st Appellate District, Division 4, November 10, 1980, hg. denied on December 10, 1980. This is because "[r]igid adherence to proposals which are predictably unacceptable to a union may indicate predetermination not to reach an agreement, or a desire to produce a

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38. This is not to say, of course, that such an approach is evidence of bad faith in other circumstances. It is just that these facts here, coupled with the complications arising from gas and bonus benefit discontinuances plus the unilateral increase, infra, suggest that Respondent did not intend to reach an agreement.

stalemate. . . ." Gulf State Canners 224 NLRB 1566, 1575, 93 LRRM 1425 (1976).

In contrast to Respondent, the Union often sought wage compromises or came up with creative approaches, only to have same rejected outright. At the April 20 meeting, the UFW submitted three wage proposals, and duration was proposed for both one and three year periods. At the June 15 meeting, the UFW proposed a three year contract with a reopener for wages only in the second and third years.

Beginning at $3.95 on April 15 (G.C. Ex. 9), the UFW regularly brought its general labor rates down to a low of $3.75 on July 28 (G.C. Ex. 36). Other wage categories were reduced on April 20, July 8, and July 28.

Besides wages, the Union's approach to its other proposals was also flexible. The Union dropped MLK, CPD, credit union withholding, cost of living and lessened demands in vacation, RFK, funeral leave and for certain holidays. On July 8, the UFW accepted Respondent's position on pension and duration.

This flexibility and willingness to compromise was greeted, instead by Respondent with ferquent rejection without any real attempt to explain or minimize the differences. Such an approach is inconsistent with a bona fide desire to reach an agreement. As-H-Ne Farms, supra, 6 ALRB No. 9 (1980), rev. denied, 5th Appellate District, October 16, 1980, hg. denied, November 12, 1980, citing Akron Novelty Mfg. Co. 224 NLRB 998, 93 LRRM 1106 (1976).

In the later stages of bargaining, Respondent imporved its proposals on vacations, supervisors, holidays, RFK, and made its first offer on pension. As mentioned, as of July 28, its first year rate for steadies paralleled that of the UFW. Although these belated movements on the part of Respondent are, of course, praiseworthy, I can give it little credit in view of the lateness and incompleteness of the offer, the overall pattern of bad faith I find herein, and the unilateral raise, infra.

2. Successorship

At the outset, it should be pointed out that there appears to be some confusion as to the nature of the successorship question to be decided here. In order to properly focus on the real issue in the case, it seems to me that a good starting point would be to briefly discuss those questions which I do not regard as being at issue. For example, this case is not about whether the UFW was being asked to waive its right to be notified of or to bargain with Respondent over the effects of the latter's decision, should it have occurred, to sell the property in question to another party. It retains that right. (Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3d 848.) Furthermore, this case is not about a successor's obligations under the ALRA, upon purchasing and undertaking a farming operation from a predecessor organization, to

recognize and bargain with a labor organization certified on said predecessor's property. Such successor may or may not have such an obligation depending on the circumstances. (San Clemente Ranch Ltd. v. Agricultural Labor Relations Board (1981) 29 Cal.3d 874, 176 Cal.Rptr. 768.) Neither of these two holdings, however, address the questions of whether the terms of a collective bargaining agreement are binding upon a successor or whether a predecessor's insistence to the point of impasse on a provision containing non-binding successorship language is evidence of surface bargaining. These issues have not yet been decided by the ALRB, but they form the core of the contractual language dispute in the present matter.

a.) The Survivability of the Labor Agreement

Although the ALRB has not been called upon to decide the precise issue of whether a successor must accept the predecessor's labor contract, federal courts have dealt with the question. Under current NLRB standards, a successor acquiring a unionized company may be obligated to bargain with the predecessor's union, but the successor will not be required against its will to assume the predecessor's labor contract. In the lead case of N.L.R.B. v. Burns Int'l Security Services, Inc., 406 U.S. 272, 80 LRRM 2225 (1972), the U.S. Supreme Court found in the NLRA a strong policy favoring the voluntary establishment of contractual terms by bargaining between the new parties, free of the government's imposition of a previous contract. The Court held:

> . . . A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm . . ." (80 LRRM at 2229.)

Thus, the Court downplayed the loss to employees of benefits occasioned by the new business acquisition and placed preeminent emphasis upon the need of employers to freely transfer and rearrange resources in an effort to revitalize ailing businesses. (R. Gorman, "Basic Text on Labor Law" (1976), p. 124.) Of course, both the successor and the union are free to renegotiate working conditions, with the economic power available to each of the new entities determining the content of the new agreement rather than strictly the terms of the old contract. Id.

b.) Bargaining Over a Successorhip Clause

Provisions in labor agreements containing express clauses making the contract binding on successors are commonly referred to as "successorship clauses". Although such a contract provision

often states that a successor "shall be bound" to the contract, said provision does not in and of itself, in fact, legally bind any non-contracting successor, absent any conduct on its part to assume the obligations of said contract. Instead, the clause has two purposes: 1) it provides evidence of the contracting parties' intent regarding the effects of changes in the ownership of the business (See, Detroit Local Joint Exec. Bd. v. Howard Johnson Co. (6th Cir. 1973) 482 F.2d 489, 493, fn. 9, rev'd on other grounds, Howard Johnson v. Detroit Local Joint Executive Board (1974) 417 U.S. 249); and 2) more significantly, it may provide the legal basis for an injunction or a suit for breach of contract against a predecessor who failes to obtain the successor's express agreement to abide by the agreement.[39] (Severson & Willcoxon, "Successorship under Howard Johnson: Short Order Justice for Employees", 64 Cal.L.Rev. 795, 797, fn. 11, I Industrial Relations Law Journal 118, 120 (1976).) Thus, the successorship clause represents a promise by the predecessor that it will obtain from any purchaser of the business an express agreement to abide by the labor contract then in force. Should the predecessor fail to obtain such a pledge and thereby breach the agreement, the union could attempt to enjoin the sale or seek damages against the predecessor for this breach. (National Maritime Union v. Commerce Tankers Corp. (S.D. N.Y. 1971) 325 F.Supp. 360, vacated on other grounds, 457 F.2d 1127 (2d Cir. 1972).)

Successorship clauses are, of course, like any other contractual provision, negotiable between the parties. This leads to the question of whether bargaining over such a clause is a mandatory or permissive subject of bargaining. Mandatory provisions lawfully regulate wages, hours and other conditions of the relationship between employer and employees, and both parties must bargain in good faith about such provisions. Either party may insist on its position to the point of impasse and may use economic forces at its disposal (strikes, lockouts, etc.) to support its point. (N.L.R.B. v. Wooster Div. of Borg-Warner Corp. (1958) 356 U.S. 342.) A permissive subject, on the other hand, is a contractual provision other than wages, hours and working conditions and is lawful only if voluntarily incorporated into the collective bargaining agreement. Neither party is obligated to discuss the subject matter nor insist to impasse on its incorporation into the contract. Id.

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39. Under federal law, such contracts may be enforceable under Section 301 of the Labor Management Relations Act (29 U.S.C., Sec. 185(a)) which grants courts jurisdiction to entertain "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." Section 1165(a) of the ALRA provides in similar language that "[s]uits for violation of contracts between an agricultural employer and an agricultural labor organization representing agricultural employees . . . may be brought in any superior court having jurisdiction of the parties . . . ."

In the present case, the question comes down to whether the subject matter under consideration here — language in a collective bargaining agreement which expresses an intent to either bind or not to bind a successor — is to be viewed as a "term or condition of employment" so as to be considered a mandatory subject of bargaining.

It has been held under federal labor law that a successorship clause is a mandatory subject of bargaining. In United Mine Workers (Lone Star Steel Company) (1977) 231 NLRB 573, 96 LRRM 1083, modified on other grounds in 639 F.2d 545, 104 LRRM 3144 (10th Cir. 1980), the NLRB found that a successor's assumption of any collective bargaining agreement:

> . . . would be vital to the protection of Starlight (the predecessor) employees' previously negotiated wages and working conditions, as it is clear that the general rules governing successorship guarantee neither employees' wages nor their jobs. In view of the foregoing, we agree that the Union's insistence upon including in any agreement reached a provision which would assure the survivial of the fruits of collective bargaining, in the event Lone Star thereafter should dispose of the Starlight mine, is not violative of the Act, as agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership.
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> * * *
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> . . . It is clear that this clause serves to protect the jobs and work standards of bargaining unit employees at the Starlight mine by removing economic incentives which might otherwise encourage Lone Stone to transfer such work to other mines under its control. . . ." (96 LRRM at 1087)40/

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40. In footnote 13, the national Board distinguished N.L.R.B. v. Burns International Security Service, supra, with the following comment:

> That case is inapposite here, however, inasmuch as it dealt with the question of whether a successor's freedom was restricted by operation of law (i.e., whether a successor was automatically bound to the terms of a preexisting agreement), whereas the issue herein is whether voluntary restrictions upon the freedom of the predecessor (the seller) may be insisted upon by a union. We are not considering or passing upon the issues of whether a union may lawfully act to compel compliance with such a provision or whether a successor employer would be bound by the terms of such an agreement.

Other cases have likewise supported this proposition. (United Mine Workers of America, Local 1854 (1978) 238 NLRB 1583; Local 1115, Hospital Employees (1980) 248 NLRB 1234; Amax Coal Co. v. N.L.R.B. (3rd Cir. 1980) 614 F.2d 872, 103 LRRM 2482.)

Thus, it is clear that in successorship situations, the employees' interests usually concern protection of job and other benefits already achieved under the current contract the union has negotiated with the present employer. Certainly, these interests are imperiled if a successor does not assume this old contract upon its acquisition of the business. In this sense, the survivability of the contract upon sale affects working conditions in the same way as future job security could be affected by an employer's subcontracting, shutdown, or going out of business. And, of course, it is now well settled that regardless of whether the employer is obligated to bargain about these kinds of decisions, it must bargain about the effects or impact of those decisions, e.g., severance pay, retraining, transfer to other company jobs or locations, vacation pay, seniority, and pension. (R. Gorman, supra, "Basic Text on Labor Law" (1976), p. 499. See Fibreboard Paper Prods. Corp. (1964) 379 U.S. 203; Highland Ranch v. A.L.R.B., supra.)

Likewise, it would seem that in a successorship situation the employer's interest might very well lie in the negotiation of certain contractual protections either limiting or eliminating some of the potential obligations that could flow from the language of a typical successorship clause should a sale actually take place. As the employees' interests, as mentioned, may be affected if a successor does not assume the old contract, an employer's interests may also be affected should it be required, prior to a sale, to seek the successor's agreement to assume the obligations of that same contract.

It is for these reasons that I shall follow federal precedent[41/] and find that the question of whether to have a successorship clause or to have a non-binding successorship clause is a mandatory subject of bargaining.

c.) Respondent's Defenses to Surface Bargaining Allegations on the Successorship Question

Although an employer is entitled to bargain over a non-binding successorship provision, it must not do so in a manner which insures that a contract between the parties will never be reached. Such conduct might be indicative of a failure to comply with the statutory requirement to bargain in good faith and would be unlawful under the Act.

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41. Section 1148 of the ALRA states: "The board shall follow applicable precedents of the National Labor Relations Act, as amended."

(1) Defense of need for non-binding language in order to counteract any adverse ALRB, arbitral or court decision.

In this case we are not presented with the usual situation where the parties may have been driven to impasse over the union's demand that a successorship clause should be included in the labor agreement. Quite the contrary, the Union here abandoned this demand during negotiations.[42] Instead, we have the opposite side of that coin where it is the employer who is adamant that the agreement should contain certain language pertaining to successorship.

However, as mentioned above, under current labor law standards, a successor is not required against its will[43] to assume the predecessor's labor contract. (N.L.R.B. v. Burns Int'l Security Services, Inc., supra.) Thus, in effect, Respondent here was holding up the contract over a right it already possessed under the law. Adhereing to an untenable legal position during negotiations is inconsistent with the obligation to bargain in good faith. (Queen Mary Restaurant Corp. v. N.L.R.B., supra, (9th Cir. 1977) 560 F.2d 403.) But Respondent argues that since the ALRB has not yet addressed this issue, it cannot be trusted to follow federal precedent and that Respondent only wanted to protect itself against such a happening by explicit language. Nomellini testified that his understanding of the law was (assuming successorship was found) that with a "Recognition" article in the agreement, the ALRB would more than likely find that the contract was binding upon the successor.[44]

I find this belief too speculative to be given validity. It assumes the occurrence of a variety of factors, one built on top of the other. Respondent's theory assumes there would be a purchaser during the 1 or 3 years of the labor agreement, that such a purchaser would ultimately be found to be a true legal

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42. The reality is that a successorship clause, dealing as it does only with future contingencies, is often merely a "bargaining chip" that the union will often, as it did here, forego in order to obtain concessions in areas of more immediate concern to it, such as wages and working conditions.

43. Of course, a successor, even without a successorship clause, could find itself bound to follow the predecessor's contract by expressly or impliedly agreeing to assume that obligation.

44. In fact, distrust of the ALRB to follow the law lies at the core of Respondent's position. It argues: "There is no guarantee that when the ALRB is faced with the issue (whether a successor is bound to the substantive terms of a labor agreement entered into with the predecessor) they (sic) will necessarily follow the applicable federal law in rendering its decision. (Resp's Brief, p. 36.)

successor,45/ that if so, the labor law established in Burns — that a labor contract does not survive — would be found not to apply under the ALRA, and finally, that as a result of the successorship clause, a lower purchase price for the property was paid; i.e., that a correlation could be established between the existence of such a provision and a delcine in the value of the property.

Of course, there have been exceptions to Burns, primarily in the area of compelling a successor to arbitrate under the previous ocntract. (John Wiley & Sons Inc. v. Livingston (1964) 376 U.S. 543.46/) But such a result would occur only under special circumstances, which Respondent could at best merely speculate upon; e.g., where the successor purchased substantially all the assets, hired most of the employees, carried on the same business under the same trade name, and assumed all the contracts of the predecessor except the collective bargaining agreement. (Wackenhut Corp. v. Plant Guard Workers Union (9th Cir. 1964) 332 F.2d 954.) Those cases involving suits to enforce arbitration clauses in the successorship context are dependent, naturally, upon what the successor does with the business so that ". . . new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances. . . ." (United Steelworkers v. Reliance Universal Inc. (3d Cir. 1964) 335 F.2d 891, 895.)

As a practical matter, Repsondent's speculative fear that the ALRB would not follow Burns could have received legal protection in another manner. Viewing this matter as any other cost of doing business, Respondent could have proposed to the Union that the latter indemnify it for any lower cost received for its property owing to the existence of the labor contract. The Union should be able to determine the appropriate trade-off. Alternatively, the purchase agreement could include an indemnification agreement whereby Respondent agreed to reimburse the successor for specified additional liabilities arising out of the eventuality of the ALRB's

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45. The opinions of the major successorship cases including Wiley, infra, Burns, supra, and Golden State Bottling Co. v. N.L.R.B. (1973) 414 U.S. 168, indicate the Supreme Court's willingness to weigh competing interests in formulating rules governing successorship liability once the successor has voluntarily hired some or most of his predecessor's employees. But there is no weighing of interests concerning the successor's right not to hire those employees in the first place. (Howard Johnson Co. v. Detroit Local Joint Executive Board, supra, (1974) 417 U.S. 249. Severson & Willcoxon, supra, pp. 141-143.) Thus, in Howard Johnson, the Court refused to order arbitration even though the predecessor's contract was by its own terms binding upon the successor because said successor had not rehired a majority of the predecessor's workforce.

46. The Supreme Court decided Burns after John Wiley but did not overrule it.

(or arbitrator's or court's) finding that the contract, in whole or part, survived. (Severson & Willcoxon, supra, p. 151.) Though the valuation problem would be difficult to set forth, it could be accomplished. Id. And of course, this reimbursement could be charged to the Union per previous agreement. Finally, Respondent could contract with a successor that the purchase price be reduced, liquidated damages be awarded, or the agreement be cancelled in the event its labor agreement was imposed on the successor through the ALRB, arbitral or judicial action. (Herman & Zenor, "Agricultural Labor and California Land Transactions" (1978) 53 State Bar Journal 48.)

(2) Defense of need for non-binding language because of correlation between the value of the property and the alleged lower purchase price.

One of Respondent's major arguments as to why it had to hang tough on its non-binding successorship language was based on the premise that selling a business with a union contract was, as Nomellini put it, "like selling it with a plague." This premise assumes that the existence of a labor agreement would automatically impede the possibility of sale to a would-be purchaser unless same could be assured that said agreement would not be binding on it. This premise may be of dubious merit because it is not clear that any obvious correlation exists between the imposition of successorship liability and the merger and acquisition rate. Though one might have expected that the impact of Wiley's, imposition on the successor of the obligation to arbitrate under the prior collective bargaining agreement would have been a cut back in the total number of mergers and acquisitions, quite the opposite is apparently true. (Severson & Willcoxon, supra, fn. 153 (1976).) Said article concluded that "at the very least, it can be said that the exact magnitude of the restriction of capital flow and the attendant debilitating effect on the market are highly conjectural and may in fact be minimal . . . ." Id.

In fact, the certainty of the imposition of the predecessor's contract ". . . may encourage the transfer of capital. . . . The new employer would be assured of the predictability of labor costs and would be guaranteed that no strike, other type of economic unrest or drawn out court litigation will occur. . . ." (Henry, "Is There Arbitration After Burns: The Resurrection of John Wiley & Sons, (1978) 31 Vand. L. Rev. 249, 295.) This idea was given judicial support by Judge Leventhal in his concurring opinion in IAM v. N.L.R.B. (D.C. Cir. 1969) 414 F.2d 1135, 71 LRRM 2150, cert. denied, 396 U.S. 889, 90 S. Ct. 174 (1969):

> [Successorship] is a multifacited concept that, properly applied, may permit and even facilitate orderly transfers of capital and assets that take due account of appropriate interest of employees and thus by providing transitions with a minimum of disruption may advance the cause of industrial peace. (71 LRRM at 2153.)

In any event, Respondent offered no evidence that agricultural land transfers had been in any way affected by the possibility that the ALRB might impose successorship liability.

Furthermore, I fail to appreciate Respondent's argument (Resp's Brief, p. 39) that the dimunition in price on the sale of the ranch if the purchaser were bound to the labor agreement would have more of an impact upon the Dal Portos, who own only a 1/8 undivided interest in the land, than on "owner-operated" farms that have successor clauses, such as the Klein Ranch. I should think the contrary would be true. The Dal Portos, with their 1/8 interest, stand to lose proportionately less than such other owners, assuming arguendo that there were evidence to support Respondent's dimunition of purchase price theory. It seems to me that Respondent would have less interest in the necessity for the non-binding successorship language than would an owner-operated business.

Finally, Nomellini's insistence on this clause to the point of completely bogging down negotiations also served to breed suspicion and further frustrated the process, as Rodriguez, quite naturally, began to suspect that indeed, Respondent was contemplating a sale in the very near future and was unwilling to tell the UFW about it. This fear, of course, could have only been accentuated by Nomellini's reference to selling a business under a union contract as being "like selling it with a plague."

D. Overview

Respondent's position that it needed non-binding successorship language in order to protect its sale price in the event of a subsequent purchase remained basically unchanged throughout negotiations. Even when it added a proviso (on April 15) that the contract might be binding on the successor, it limited it to the situation where such a sale was "for the sole purpose of circumventing the agreement." This clause would apparently operate only where a sale took place in which there was not one single, legitimate business reason for it, certainly a rare occurrence. If an arbitrator found one valid business reason, the contract could not bind the successor. Thus, the proviso really gave the Union no additional rights and Respondent's non-binding language remained intact. Similarly, Respondent's change (June 30) to the effect that the parties waive all rights to bind successors except "to the extent permitted by law," whatever that was supposed to mean, retained in the prior paragraph the basic non-binding language, and again added nothing to the agreement. Respondent's offer (October 21) to place the non-binding language in a letter of understanding hardly constituted a substantive proposal aimed at reaching an agreement — it merely transferred the disputed language from one section of the agreement to another. A review of this record convinces me that it was Respondent's rigidity and unwillingness to compromise in any fashion — its inability to make "some reasonable effort in some direction to compose . . . differences with the union." N.L.R.B. v. Reed & Prince Mfg. Co., supra — which was responsible for the failure of negotiations over successorship.

I likewise find that Respondent's successorship proposal offered terms it knew to be unacceptable to the Union and which the Union would reject. (O.P. Murphy Produce Co., Inc., supra; Clear Pine Moulding, Inc., supra.) Although he NLRB will not ordinarily be permitted to infer bad faith from the parties' substantive proposals at the bargaining table, a violation may be found where the proposals are so obviously objectionable to the other party (and normally well out of line with the terms which are customary in the industry) that it is fair to infer that the object of the proposal was to disrupt negotiation. (R. Gorman, supra, p. 506.)

Respondent's intransigence is to be contrasted with the flexibility of the Union. The UFW modified its successorship position (twice) on April 15 by deleting its own specific language binding the successor. On April 20 it made an important concession by proposing to delete successorship entirely from the agreement so that there would be no reference to it whatsoever. On June 15 it offered the Klein Ranch language, a contract Nomellini had negotiated. On July 28 it again offered to delete the article in its entirety. In each case, the Union's offers at compromise were summarily rejected, and no meaningful counterproposals were made by Respondent.

For all the foregoing reasons, I find Respondent' conduct to have stood in the way of reaching an agrement and unreasonable in the circumstances, especially in view of the fact that the premise of its position could only have become a reality upon the occurrence of a number of yet to be realized contingencies. I further find Respondent's vague apprehensions to have been unjustified and its unchanging negotiating posture on this issue to be evidence of surface bargaining.

3. Union Security/Credit Union Withholding

It is evident that bargaining over union security is a mandatory subject of bargaining, and an employer may not refuse to discuss the question. (N.L.R.B. v. Andrew Jergens Co. (9th Cir. 1949) 175 F.2d 130, 24 LRRM 2096, cert. denied, 338 U.S. 827 (1949).) Bargaining over the inclusion of a dues checkoff provision is clearly permitted. (N.L.R.B. v. Reed & Prince Mfg. Co., supra.) A company's continuous rejection of the union's demand for a dues checkoff, which was deemed essential to the continued existence of the union but costless to the employer, was a violation of Section 8(a)(5) of the NLRA. (United Steelworkers v. N.L.R.B. (H.K. Porter Co.) (1965) 153 NLRB 1370, enf'd, (D.C. Cir. 1966) 363 F.2d 272, 62 LRRM 2204, cert. denied, (1966) 385 U.S. 851, 63 LRRM 2236.) The Court held that the lack of a business justification was evidence of the employer's objective to undermine the union and destroy negotiations.

Respondent here consistently remained opposed to the Union proposals on union security and credit union withholding, not on philosophical grounds but because of what it regarded would be an added unacceptable bookkeeping expense. Yet, Respondent never made clear why this expense was intolerable to it except for vague

references to higher costs and Mrs. Dal Porto's unwillingness to do more work.[47] In fact, Nomellini never even attempted to ascertain what additional costs would be involved in the performance of those alleged greater duties, never contacted an outside bookkeeping firm for its estimate, and never presented time estimates the added accounting computations would supposedly take.

Respondent's reasons for so acting are particularly suspect in view of the fact that it was already making deductions on employees' paychecks for social security, federal income tax, and disability; the added workload would have been minimal at best. Patently improbable justifications for a bargaining position will support an inference that the position is not being maintained in good faith. (Queen Mary Restaurant Corp. v. N.L.R.B., supra.)

In addition, it is certain that Respondent would have known that dues checkoff was of vital interest to the UFW, as it is to any labor organization, yet would have required, as mentioned, a small effort of a routine nature from it.[48]

This case closely parallels the situation in Montebello Rose Co., Inc., supra, where the ALRB found that a company's unwillingness to bargain over a dues checkoff provision because of the supposed cost effect was pretextual and evidence of surface bargaining where no serious effort to estimate the amount of additional work required was made. The Board said:

> Thus, Respondents insisted that they would not accept a dues checkoff provision because of the added clerical burden without having made any effort to determine what the burden would be. Respondent's arbitrary and unyielding rejection of the UFW"s dues checkoff proposal is thus revealed not as an honestly held concern, but as a method by which to frustrate negotiations and avoid signing a contract. (5 ALRB No. 64 at pp. 23-24.)

Respondent, while admitting it made no cost analysis (Resp's Brief, p. 31), would distinguish Montebello from the case at bar on the grounds that in the latter there was no flat refusal to bargain over dues checkoff and alternatives were suggested; e.g., Respondent would perform a checkoff but demand reimbursement from the Union or that a Union steward could collect the dues so long as Respondent was compensated for the time it took him to perform

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47. At one point (July 28), Nomellini also argued, as a further reason for denying checkoff, that workers might complain to Respondent that money was being taken out of their paychecks.

48. We are, after all, merely discussing a checkoff system basically affecting 11 or 12 steady workers with a thinning crew in May for around 8 weeks (assuming the employee worked for Respondent for more than 7 days) and tomato harvesters in the fall for a shorter period.

this function. These "compromises" are similar to a company's offering its employees a 25 cent raise per hour if the union pays for it. The real point is, however, that Respondent frustrated negotiations by consistently opposing, as a cost item, a dues checkoff system without ever seriously determining what that cost actually would be so that there could be meaningful negotiations over it. Respondent's proposals may have had some relevance had it made any effort to ascertain what its actual cost of checkoff, that it kept referring to, would have been.

I believe that the principle enunciated in Montebello applies here, and I shall follow it. See also, Alba Waldensian, Inc. (1967) 167 NLRB 695, 66 LRRM 1145, enf'd (4th Cir. 1968) 404 F.2d 1370, 69 LRRM 2882, where the Board found unconvincing the employer's refusal to check off union dues from the wages of consenting employees when that refusal was based on (1) the psychological factor involved when the employee did not receive all of his pay; and (2) a company "policy" against making deductions from its employees' paychecks.

As to credit uinon withholding, Respondent refused to consider this proposal, again supposedly because of the bookkeeping expense, despite the fact that Respondent already maintained a payroll deduction system for its own Company administered loans and despite the Union's assurances that in all likelihood only the steadies would qualify for the Union loans.

On the other hand, while Respondent's position remained predetermined and inflexible, the Union moved at various times to accommodate Respondent's problems with union security in general and the bookkeeping matter in particular. At the April 15 session, it agreed to accept Respondent's position that employees need not become members of the Union until the 7th (as opposed to 5th) day. On April 20 it offered to collect the dues, initiation fees and assessments and at the same meeting also withdrew its demand that Respondent furnish to the employees the dues authorization forms for signature, thereby accepting responsiblity itself for their distribution.

In summary, I find Respondent's rejection of the UFW's proposals to be unreasonable; its insistence on its own proposal could be said to constitute the making of predictably unacceptable offers to the Union. In either case, it is evidence of Respondent's lack of interest in reaching an agreement.

C. The UFW's Alleged Refusal to Bargain in Good Faith

A labor organization's bad faith bargaining may be an affirmative defense to a refusal to bargain allegation against an employer. (Montebello Rose Co., supra, citing Continential Nat Co., (1972) 195 NLRB 841, 79 LRRM 1575; Times Publishing Company (1947) 72 NLRB 676, 19 LLRM 1199; McFarland Rose Production (1980) 6 ALRB No. 18.)

Respondent argues that the UFW was guilty of bad faith bargaining. Its arguments are totally unconvincing and do not require lengthy discussion. First, it argues (Resp's Brief, p. 49) that Ricardo Guerrero provoked the access issue that became the basis for an unfair labor practice charge, infra, and that this conduct was evidence of the UFW's bad faith. I have found, infra, Respondent guilty of this allegation. Even had I not, Guerrero's activity was not necessarily incompatable with the Union's desire to reach an agreement. (N.L.R.B. v. Insurance Agents' Union (1960) 361 U.S. 477, 45 LRRM 2705.)

Respondent next argues (Resp's Brief, p. 50) that the UFW never gave Nomellini its written analysis (G.C. Ex. 44) of its gas allowance formula. Aside from the fact that there is insufficient proof that Nomellini ever requested this information in order to make his economic proposals, the truth is that the UFW freely disclosed to Respondent verbally the mathematical basis upon which its gas allowance figure was based. It was, of course, in its interest to do so. Nomellini, instead of coming up with his own figures, eventually adopted the Union's formula.

Finally, citing no authority for the proposition, Respondent argues (Resp's Brief, p. 52) that a refusal to meet with a mediator is evidence of bad faith. I disagree. It simply cannot be concluded that a party's desire to continue to negotiate with the other side, where there is still plenty of room to negotiate on major issues, without the services of a mediator, whose presence is not required by law, is evidence of bad faith. A decision not to use a mediator under such circumstances does not mean the party is not interested in reaching an agrement.

I have reviewed Respondent's other arguments on this issue and do not find them persuasive.

Viewed from the totality, the UFW's conduct here did not constitute bad faith bargaining. The UFW did not fail or refuse to bargain in good faith, and it was not the cause of the parties' inability to reach an agrement. The evidence as a whole shows that the UFW desired and worked towards a contract, and the Respondent did not. There is no evidence that if the UFW had acted as Respondent contends it should have, Respondent's bargaining strategy would have been any different. (McFarland Rose Production, supra.)

E. Conclusion

As in any situation in which surface bargaining is alleged, the totality of the circumstances must be considered. As stated by the Board in McFarland Rose Production, supra, at p. 24:

> In order to prove bad-faith bargaining, the General Counsel need not introduce evidence of bad faith for every single meeting between the parties. A finding of surface bargaining is dependent not upon evidence of specific unlawful acts every time the parties meet, but, instead,

upon a pattern or course of unlawful conduct which precludes the attainment of agreement or genuine impasse between the parties.

The totality of conduct may include specific unlawful acts away from the bargaining table such as unilateral changes in wages, as I have found, infra. Such violations of the Act raise a presumption of bad faith bargaining. (Masaji Eto dba Eto Farms, et al., supra; Montebello Rose Co., Inc., supra.)

Under the totality of circumstances, I find Respondent to have engaged in surface bargaining and will recommend to the Board that it be found in violation of Sections 1153(e) and (a) of the Act.

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VI. The Unilateral Raise

A. Facts

Rodriguez testified that at the May 13 session, Nomellini told him that normally around that time period Respondent would implement a wage increase for its weeders and thinners, that it wanted to do the same thing this year, that it was considering raising wages from $3.35 to $3.50, and that he wanted to talk with the Union about it.

Nomellini testified that when he first brought up the subject of the raise at this meeting, Rodriguez stated that he would consider it but did not object to it; and that he (Nomellini) thereupon told Rodriguez that Respondent intended to implement a wage rate of $3.50 at the start of the season in about a week.

A review of the tapes from this session reveals the following conversation:

> Nomellini: . . . We are getting to the point where we're going to be starting weeding and thinning crews at some point. And we think that a — you know, an increase in the wage level would be in order, regardless of whether or not we sign a — you know, a contract.
>
> * * *
>
> And what we're thinking about is starting the people off at $3.50, which is versus the $3.35 that was in application for general labor at the end of last year. I don't know what the union's position is, but . . . traditionally there's been some wage increase . . .
>
> * * *
>
> . . . I don't know what your position is on it, but we'd like to do it through you, with your consent, if possible, you know.
>
> Rodriguez: Okay, well, why don't we look at that too then in addition to looking at what you already gave us.
>
> Nomellini: Yeah. We've got some of these things that kind of are traditional . . . and there's always kind of an awkward state when we're there where we don't have agreement on the total contract. But I know the union would like to see the workers get as much benefit as possible. (Jt. Ex 2E, pp. 206-207.)

Nomellini acknowledged in his testimony thatat the following meeting, May 27, wages were not discussed and that he did not mention to Union representatives that general labor was then

being paid at $3.50[49] which was the amount reflected in Respondent's wage proposal then on the table.[50] In fact, Nomellini testified that there was no discussion about the raise for the weeders and thinners until the June 30 meeting when Rodriguez brought it up. However, the tapes indicate the subject matter was mentioned by Rodriguez at the June 15 session:

> Rodriguez: . . . previously, you had mentioned at one of the meetings a raise for the workers, but you've never discussed that since then.
>
> Nomellini: Well we're waiting for your response.
>
> * * *
>
> . . . you would be agreeable then to a raise in the wages? You have no objections?
>
> Rodriguez: We'd like to know in terms of what it is that you're talking about.
>
> Nomellini: Okay . . . (Jt. Ex 2G, pp. 271-272.)

Rodriguez testified that just prior to the June 30 session a member of the Union Committee learned for the first time that the weeding and thinning crew was being paid $3.50 per hour.[51] Rodriguez also testified that he was very upset when he found out about the increase because his proposals were based upon the understanding that the general laborers were receiving $3.35 an hour and that Respondent was offering a 15 cent increase. He testified he accused Respondent of making a unilateral change and implementing a wage increase without the prior consent of the Union for such an action.

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49. The parties stipulated that weeding and thinning commenced on May 21, and the first checks at the $3.50 new rate were written on May 27, the end of the first payroll period. (G.C. Ex 4.)

50. It will be recalled that in its latest wage offer, April 20 (G.C. Ex. 15), Respondent had proposed a $3.50 rate for general labor to be paid effective May 30. Nomellini testified that if the parties had signed an agreement on May 27, the weeders and thinners would not have received any additional wage increase because they had already received their raise on May 21.

51. There was some confusion at first as to when the $3.50 had been effected because one of Respondent's employees had a payroll stub showing that sum having been paid as of April 11. The pay stub was given to Nomellini who said he didn't think any weeding work was going on at that time but that he would check into it and report back. Rodriguez testified that Nomellini later explained that the April 11 date had been a clerical error.

As can be seen from the tape recording of this session, when confronted by these accusations, Nomellini acknowledged that indeed general labor had started at $3.50 an hour, but argued that the Union was aware that Respondent was going to raise the wages:

> Nomellini: Thinners . . . were started at $3.50 an hour.
>
> Rodriguez: That was never made known to us here at the table . . .
>
> Nomellini: Well, we went in and gave you the proposal that showed that effective . . . May 30, we wanted to go to 3.50 and . . . there are customary raises that occur in agriculture in this area. (Jt. Ex 2H, p. 52.)

Nomellini further testified that the $3.50 for general labor was first proposed on April 8 (G.C. Ex 6), was Respondent's proposal as of April 20 (G.C. Ex 15), and that the amount proposed remained the same until the season started. According to Nomellini, his proposals had a starting day of May 30 because that was when he thought the season for weeders and thinners was supposed to start.

Nomellini also testified that the $3.50 reflected what was thought to be the going rate in the area and that Respondent would have paid that amount regardless of whether there was a Union on the property.

William Dal Porto testified that hoeing and thinning began on May 21 and that he instituted a wage increase of 15 cents to $3.50 because he knew what the prevailing wages were having talked to his neighbors and finding out more or less what was being paid. He also testified it was his custom to see what his neighbors were paying first, before implementing any raises. Dal Porto testified that the decision to raise the wages was made some time before the start of the thinning and hoeing period, possibly a couple of weeks before, but he wasn't sure.

B. Analysis and Conclusion

It has long been established under federal labor law that an employer commits a violation of Section 8(a)(5) of the National Labor Relations Act (NLRA counterpart to Section 1153(e) of the Act) by making unilateral changes in wages or working conditions. This is because such conduct circumvents the duty to negotiate, thereby frustrating the objectives of labor policy just as much as a flat refusal to bargain would (N.L.R.B. v. Katz (1962) 369 U.S. 736, [82 S.Ct. 1107, 8 L.Ed.2d 230, 50 LRRM 2177].) In fact, a unilateral grant of a wage increase is so inimical to the collective bargaining process that it constitutes an independent violation of the National Labor Relations Act, regardless of whether any showing of subjective bad faith is made. (Id.; N.L.R.B. v. Consolidated Rendering Co. (2d Cir. 1967) 386 F.2d 699.) Such conduct clearly tends to bypass, undermine, and discredit the union as the exclusive bargaining representative of the employer's employees. (Continental Insurance

Co. v. N.L.R.B. (2d Cir. 1974) 495 F.2d 44.)

It is a violation of the Agricultural Labor Relations Act, as well. Such unilateral change is a per se violation and violates the duty to bargain because it eliminates even the possibility of meaningful union input of ideas and alternative suggestions. (Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36.) Subjective bad faith need not be established to prove such a violation. (O. P. Murphy Produce Co., Inc., supra, (1979) 5 ALRB No. 63, review den. by Ct.App., 1st Dist., Div. 4, November 10, 1980, hg. den., December 10, 1980; N.A. Pricola Produce (1981) 7 ALRB No. 49.)

However, there are limited exceptions to the general rule which permit unilateral changes despite the existence of a duty to bargain where: 1) the parties have bargained to impasse; 2) the union has consented to the change and thereby waived its right to demand bargaining over the subject; or 3) the employer's change is consistent with a long-standing past practice to the extent that the failure to effectuate same could result in a charge that respondent failed to bargain in good faith. This latter situation is known as maintaining the "dynamic status quo." (N.L.R.B. v. Katz, supra; N.L.R.B. v. Landis Tool Co. (3rd Cir. 1952) 193 F.2d 279 [29 LRRM 2255].) In Katz, the Court indicated that unilateral wage changes that in effect were merely a continuation of the status quo would not be an unfair labor practice. However, the wage increase must be an automatic one and not involve any measure of discretion. Thus, there must be credible evidence of such a past practice or other proper business purpose. If the employer grants regular wage increases or other benefits, it "carries a heavy burden of proving that such adjustments of wages . . . are purely automatic and pursuant to definite guidelines." (N.L.R.B. v. Allis Chalmers Corp. (5th Cir. 1979) 601 F.2d 870, 875 [102 LRRM 2194].)

There can be little doubt that Respondent proposed on April 20 (G.C. Ex 15) a $3.50 rate for general labor to be effective on May 30 (around the start of the weeding and thinning season), that on May 13 Nomellini told Rodriguez that he felt an increase from $3.35 to $3.50 was in order, that " . . . we'd like to do it through you, with your consent, if possible, . . .", that Rodriguez replied he would consider it, and that on May 21, one week later, Respondent began to pay its weeders and thinners $3.50 per hour without the Union's consent.

Respondent does not even pretend to argue that any bargaining took place over the raise. Instead, it contends the Union waived its right to bargain over the matter apparently by refusing to object to the wage increase before it was implemented. (Resp's Brief, p. 26). This argument is based on the rather faulty premise that bargaining was not really necessary over the issue at all, that Respondent gave the Union the opportunity to consent to the raise anyway (over a short period of time), but that the Union never specifically objected. (Resp's Brief, p. 28.) Underlying this position is the belief that so long as Respondent informed the Union of its plan, it could pretty well raise wages at its own

leisure.

This position is not tenable. By deciding to consider Respondent's proposed change, the Union did not agree to its implementation or waive its right to bargain over the subject matter. It is clear that Rodriguez merely told Nomellini he would take a look at his proposal and left the matter at that. In fact, the increase came so fast (one week later) that the Union did not have much opportunity to take any position at all on its institution. What is evident is that there was absolutely no negotiation over the increase, and the Union did not consent to it. Even silence (over a long period) on a bargaining issue does not constitute a voluntary waiver unless the evidence of intentional waiver is clear and unequivocal. (Kaplan's Fruit and Produce Company (1980) 6 ALRB No. 36, citing Caravelle Boat Company (1977) 227 NLRB 1353 [95 LRRM 1003].) In any event, waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed. (Masaji Eto d/b/a Eto Farms, et al. (1980) 6 ALRB No. 20, enf'd in relevant part in Masaji Eto, et al. v. A.L.R.B. by Ct.App., 5th Dist., July 27, 1981, hg. den., November 16, 1981.)

Respondent's second argument is that the wage increase was consistent with a traditional business policy of regularly increasing wages in the same amount around this time, thus placing its action within the N.L.R.B. v. Katz, supra, exception. However, this contention will not withstand careful scrutiny. Although weeders and thinners were often raised in May, the records reflect that in 1978 there was a 25 cent raise, in 1979 none at all, and in 1980 a raise of 25 cents. None of the raises were for 15 cents. (Resp's Ex 15.) Moreover, Bill Dal Porto testified that customarily, before implimenting any wage increase, he would always check to see what his neighbors were paying. The $3.50 reflected what he thought to be the going rate and was not automatic. It is clear that Respondent's wage increase policy was left open to its own discretion. (See, N. A. Pricola Produce, supra.)

As stated by the Board in Kaplan's Fruit and Produce Company, supra:

> Respondent's exceptions contend that the increases are legal because they follow a "well established company policy of granting certain increases at specific times." The increases, it is argued, represent the maintenance of a "dynamic status quo", not a change in conditions . . . While this is an exception to the general rule, the Katz case specifically distinguishes between automatic increases which are fixed in amount and timing by company policy and increases which are discretionary . . . (Citations omitted.)

I do not believe Respondent's wage hikes were automatic. They were not always given; and when they were, their amounts differed, showing a wide latitude of discretion on the part of

Respondent. Consideration of the increase here, coupled with the manner of its implementation compels the conclusion that Respondent unilaterally instituted an unlawful wage increase in the midst of negotiations and without the consent of the Union. I find that Respondent was under a duty to bargain regarding its unilateral increase to its weeders and thinners in May of 1981 and shall recommend to the Board that Respondent be found in violation of Section 1153(e) and derivatively Section 1153(a) of the Act.

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VII. Requests for Information

A. Facts

At the first session on April 1, Rodriguez requested information on the benefits, including all fringes, received by Respondent's employees; he also requested payroll information on hours worked and wage rates.

At the next session, April 8, Nomellini provided many of those records, including records of Company granted loans and a box containing individual payroll records, which satisfied Rodriguez' request. (Jt. Ex. 2B.) At the same time, Rodriguez asked for job classification material and renewed his request for information on benefits and fringes, as well as any other type of gratuity the employees may have been receiving. Specifically, he asked for the names of employees that were being paid bonuses and in what amounts.

Rodriguez testified that at the following meeting, April 15, Nomellini gave him supposedly a complete list of employees (all steadies) who had been receiving bonuses and the amount of the bonus. However, the Union had just learned of the existence of the gas allowance benefit through a worker in attendance at the negotiating session; yet, Nomellini had not provided this information before nor mentioned it during negotiations up to this point. According to Rodriguez, Nomellini replied that he was completely unaware of the gas practice and had no idea that it was in effect at Repsondent's but that he would inquire. Rodriguez told Nomellini what he understood the benefit to be and specifically asked him for further information as to how the system worked.

Nomellini did not have any information about the gas practice at the next session on April 20, but he did present Rodriguez with the job classification information he had previously requested.

On May 4, the Union provided Nomellini with information on the gas allowance it had by showing him a list of 7 employees who had received the benefit. The Union also gave him a formula that it intended to use to try to estimate the monetary gain to the employees so that said sum could be included in the Union's economic proposals.52/ Nomellini again was unable to provide any information about the practice because he represented that Respondent had no records on the amount of gas being used each week. He was able to confirm, however, that the practice started sometime in 1979.

Rodriguez told Nomellini that as a result of the general lack of information provided, he was required to submit two

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52. As referred to previously, the Union calculated that the workers were receiving a tankful of gas a week and approximated such benefit to be $20 based on the average amount of gallons and the then existing price of gas.

proposals on April 15 and three more on April 20 without the proper informational base. According to Rodriguez, Nomellini apologized stating that he just couldn't obtain the information requested but that he would try to do better. He placed most of the blame on Mrs. Dal Porto for being unable to come up with financial records, if there were any.

Rodriguez was also unhappy about another matter and complained that he had received either no information or incomplete information on job classifications, hours worked, and wage rates, and that the information on fringes and bonuses was incomplete. For example, Rodriguez had discovered that 3 employees had not been included on the April 15 Nomellini list of employees receiving bonuses.

Nomellini acknowledged this discrepancy and explained that the three individuals' records had not been at the Company's offices when the original bonus information was compiled but had been taken to the accountant's offices for preparation of tax returns.

This response satisfied Rodriguez. He testified that he felt he had received all the relevant information on this subject and made no further request of Nomellini. He also testified the Union's proposals did not change based on the additional information on bonuses supplied by Respondent.

One other problem, however, surfaced. Rodriguez had just learned from some of Respondent's workers that several years before (in 1974), there had been a pension plan in operation. As this information had not previously been provided, Nomellini was asked about it but replied that he had no knowledge about such a plan and would check it out.

However, this information had not been provided at the next session, May 13, and Rodriguez asked for it again. Nomellini stated he would get in touch with the accountant and report back as soon as possible.

The information was provided on May 18. Rodriguez testified that Nomellini supplied him with the names of all individuals qualifying under the 1974 plan[53/] (G.C. Ex 21) and that this information satisfied the Union's request.

At the June 15 meeting the Union requested the names and addresses of the thinning crew because it had discovered that

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53. There were three persons qualifying, Pasqual Milan, Ike Cavan, and Cesario Ramos. As of Septmeber 10, 1979, Milan had a balance (including interest) of $907.05, Cavan of $892.81, and Ramos of $1,093.43. Nomellini testified that the pension plan terminated in 1974. By that he meant that there were no contributions being made to it any longer and that contributions already there remained until each qualifying employee became eligible for payment.

thinning had already started. Rodriguez at first testified that it took quite a while for him to receive the information but later testified he received the lists (G.C. Ex 23) later that same week.

On June 30, the names of additional thinners were also given to the Union (G.C. Ex 26), but the Union requested an updated weekly list[54] for the whole season because of the turnover. Nomellini indicated he would contact Pat Dal Porto about this request.

Once again, the Union asked for information on the gas practice. According to Rodriguez, Nomellini stated that he recognized that he had not been able to give the information in a timely fashion but that he had had problems obtaining it from Mrs. Dal Porto.

Finally, one additional Union request was made. In response to Respondent's vacation proposal of a 4% benefit for employees with 1,000 hours in the previous 5 years, the Union requested information as to who the eligible employees would be.

Rodriguez testified that he still had not received an updated list of thinners at the next session, July 8, because Nomellini stated he had not been able to contact Pat Dal Porto because she was on vacation. Likewise, the vacation eligibility information was not available, though Rodriguez admitted he had a pretty good idea of who was eligible.

At the July 16 session, Nomellini told Sandoval that he would indeed provide him with a list of new workers for each payroll period but that he didn't have those recrods because they were at the accountant's office. (Jt. Ex 2J; G.C. Ex 47.)

As to the gas allowance, Rodriguez testified that the Union never received any records of the gas utilized in that Nomellini ultimately claimed that Respondent had no idea how much gas was being used owing to the fact that it kept no records.

Nomellini testified that it was his view that the Union was provided with all the information that it asked for and that was in existence. He admitted that some was provided later than requested, but he felt that Respondent made every reasonable attempt to timely comply.

With respect to the gas practice, Nomellini testified that he had first learned about it at the negotiating session of April 15 and for that reason had not previously provided this information to the Union as one of the Company provided fringe benefits. Nomellini testified that he told Rodriguez he would check with the Dal Portos, and on April 20 informed Rodriguez that the Union's understanding of

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54. General Counsel Exhibit 23 was only for the week ending June 26.

the practice was indeed correct. He also testified that as of the end of April, the Union had all the information on the gas allowance that was available, that it was aware Respondent did not know how many gallons were even involved, that Respondent, in fact, took not meter readings nor kept records, and that both the Union and Respondent knew they were simply dealing with estimates, at best.

B. Analysis and Conclusions

The principles of law underlying this issue are well settled. The duty to bargain in good faith may be violated by an employer's refusal to furnish information relevant and reasonably necessary to the union's ability to carry out the negotiation or administration of a collective bargaining agreement. (Detroit Edison Co. v. N.L.R.B. (1979)440 U.S 301, 303 [99 S.Ct. 1123, 1125, 59 L.Ed2d 333]; N.L.R.B. v. Acme Industrial Co. (1967) 385 U.S 432, 435-36 [87 S.Ct. 565, 567-68, 17 L.Ed2d 495]; N.L.R.B. v. Truitt Manufacturing Co. (1956) 351 U.S 149, 152 [76 S.Ct. 753, 755, 100 L.Ed 1027]; N.L.R.B. v. Associated General Contractors (9th Cir. 1980) 633 F.2d 766 [105 LRRM 2912], cert. den., 107 LRRM 2631 (1981); Masaji Eto dba Eto Farms, et al., supra; Kawano, Inc. (1981) 7 ALRB No. 16.)

Satisfaction of Respondent's obligation requires not only that the information by provided but that it be supplied with reasonable promptness. (B. F. Diamond Construction Company (1967) 163 NLRB 161, enf'd (5th Cir. 1968) 410 F.2d 462, cert. den. (1969) 396 U.S. 835; Kawano, Inc., supra.) Late submission is not sufficient where diligent efforts to furnish the information in a timely fashion have not been made. (General Electric Company (1964) 150 NLRB 192, 261.)

On the other hand, an employer will not be required to furnish information which is not available to it. (Korn Industries, Inc. v. N.L.R.B. (4th Cir. 1967) 389 F.2d 117.)

In my view, except for minor discrepancies and short delays, all of the information requested was provided within a reasonable time. Information on payroll, hours worked, job classification, Company loans, bonuses, and names of workers in the thinning crew[55] was relinquished within a relatively short time. A

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55. When Respondent, with little delay, turned over a list of the thinners, pursuant to a Union request on June 15, the Union also demanded a weekly updated list. The record does not reveal whether such a list was provided, but Nomellini indicated he had no problem in submitting the information. I find the record insufficient for me to conclude that Respondent violated the Act. Likewise, there is a lack of adequate proof that Respondent violated the Act with respect to the vacation eligibility information requested, especially since Rodriguez testified that he knew fairly well who the eligibles were anyway.

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short delay may be reasonable, if justified. (Partee Flooring Mill (1954) 107 NLRB 1177 [33 LRRM 1342]. See also, United Engines, Inc. (1976) 222 NLRB No. 9 [91 LRRM 1208 (where an employer was held not to be guilty of an unreasonable delay when it provided most of the information within a month of the request)].) When questions were raised as to three employees missing from the list of bonus recipients or about a former Company pension plan that had terminated in 1974, Respondent quickly supplied the necessary information and gave explanations for its condu t.

This brings us to the question of the gas allowance. There can be no question that it was relevant in that Nomellini had made it clear when he submitted his April 8 contract proposal that any fringes or benefits employees had been receiving would be discontinued once there was a contract; and he later made it clear that this included the gas allowance. And certainly, a negotiator's lack of knowledge of an existing company practice is no excuse.

On the other hand, it should be recognized that once Nomellini was informed of it, he quickly confirmed the practice, and attempted to obtain accurate figures on the amount of gas allocated, only to conclude at the May 4 session (less than 3 weeks after Rodriguez brought the matter to his attention on April 15) that Respondent simply kept no records of the amount of gas being used each week. Nomellini continued his efforts to get more information on this subject, but to no avail. Ultimately, in his negotiations over the value of the benefit, he utilized the Union's formula and accepted its figures.

I conclude that on this matter, as well as the others discussed above, Respondent made reasonable efforts to comply with the Union's requests and did respond with reasonable promptness and diligence. (Pacific Mushroom Farm, a division of Campbell Soup Co. (1981) 7 ALRB No. 28.)

I recommend the dismissal of this allegation.

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VIII. The Alleged Threats and Discrimination

A. Threat and Intimidation of Ricardo Guerrero and Pascual Milan[56]

1. Facts

a. Incident of April 1981 involving Ike Cavan

Richard Guerrero, an employee of Respondent since 1968, was[57] one of the steady employees. He worked as an irrigator and tractor driver and also operated the tomato harvester. He testified about an April, 1981 incident in which he and UFW organizer, Luciano Crespo, went around 8:00 p.m. to visit the home of Guerrero's co-worker, Ike Cavan, located on Respondent's property. Guerrero testified that their purpose in seeing Cavan was to tell him about the next union meeting, as well as to discuss other union matters in that Cavan had previously requested to be so informed. Guerrero testified that they met with Cavan for around 45 minutes.[58]

According to Guerrero, one or two days thereafter he was working as a sugar beet irrigator along with another worker, Pascual Milan,[59] when around 5:00 p.m. he observed Bill and Bob Dal Porto, 300 feet away, speaking with Cavan. Spotting Guerrero, the Dal Portos got into their pickup and hurriedly drove along the dirt edge of the field towards where Guerrero and Milan were, both seated in the company jeep, Guerrero on the passenger side. According to Guerrero, both of the Dal Portos walked rapidly over to the jeep and stood close to there he was seated, whereupon Bob Dal Porto, moving his forefinger up and down and obviously angry stated: "Goddamn, son of a bitch. Who told you to come with the union to my property? — Don't you know that I can put you in jail? And now you pay me back my money."[60] (TR. 5, p. 23.) Guerrero also testified that later Bob Dal Porto further remarked, "If I see you next time with the union here, I will put you in the jail." (TR. 5, p. 26.)

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56. At the prehearing conference, General Counsel amended paragraph 8 of the Complaint to allege that both Guerrero and Milan were threatened by Respondent's alleged acts.

57. At the time of the hearing, Guerrero was no longer an employee, having quit around the beginning of October.

58. Cavan became incapacitated because of a stroke subsequent to these events and was unable to testify.

59. Milan also did not testify. Shortly after this incident he quit his job and, at the time of the hearing was said to be living in Mexico.

60. As has been shown, Respondent offered its steady employees non-interest loans usually upon request. Guerrero had taken out such a loan. (G.C. Ex 53.)

Guerrero also testified that Bill Dal Porto told him, "Ricardo, be careful next time with the Union."[61] (TR. 5, p. 36.)

According to Guerrero, he tried to speak but Bob Dal Porto wouldn't let him, telling him to "shut up." (TR. 5, p. 26.)

Finally, Guerrero testified he had been a member of the UFW since 1968 and had distributed union leaflets both around the time of the union election in 1975 and afterwards. During 1981 he also attended 6 negotiation sessions on behalf of the UFW, May 4, May 13, May 27, July 8, July 16 and August 18. (G.C. Ex 5.)[62]

Bill Dal Porto also testified, as a witness for Respondent, about the Cavan incident; and his description of the event did not differ basically from Guerrero's. Dal Porto testified that he and his brother, Bob, were informed by Cavan that Guerrero and a Union organizer had come to his house the previous night to talk to him. After finishing speaking with Cavan, the Dal Portos observed Guerrero sitting in a jeep with Milan across the field. After ascertaining that neither Guerrero nor Crespo had received permission to come ont the ranch to speak with any employees as, according to Dal Porto, the Union had in the past, and also knowing that Guerrero was a day employee and had no authority to be on Company property at night, the Dal Portos decided to speak to Guerrero about it immediately. Approaching the jeep, Bill Dal Porto testified that his brother, swearing, told Guerrero that he knew better than that, that he wasn't supposed to come on the ranch and bring Union people, that there was an agreement with the Union that representatives were not to enter without prior permission, and that "if he trespassed again they were going to — we would put him in jail." (TR. 6, p. 7.) Bill Dal Porto also admitted telling Guerrero virtually the same thing as his brother. According to Dal Porto, Guerrero did not speak; he "just hung his head and didn't say anything." (TR. 6, p. 8.)

b. The Alleged Agreement with the Union

Nomellini testified that Respondent and the Union had an arrangement going back to 1976 with several UFW negotiators that the Union would not enter Company property without first notifying

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61. The alleged remarks by Bill and Bob Dal Porto were both made in English. Guerrero demonstrated during the hearing that he was able to understand and speak a great deal of English.

62. Guerrero's union activity is not at issue. Bill Dal Porto admitted knowing that Guerrero was an active union supporter and testified that he knew about Guerrero's union support probably as early as 1972 or 1973 and also remembered that Guerrero was active in the organizational campaign.

it.[63] Nomellini stated that Respondent viewed it as a liability problem (though it had insurance) and feared personal injuries could result when Union representatives went on Company property. It was Respondent's position that normally it would not give consent to such entry because the Union had other adequate means of communication with the workers it represented. However, there were exceptions in unusual circumstances; and in reality, according to Nomellini, Respondent was often quite liberal in giving permission to enter when requested.

Nomellini further testified that the Union had always honored this agreement and had never attempted to take access prior to the Cavan incident without first notifying Respondent of its intent.[64]

It was Nomellini's view that the Union changed its position after the Cavan incident and began to assert that it no longer had to notify the company of when it desired to take access. As a result, Respondent, according to Nomellini, hardened its stand and actually refused access on one occasion. But eventually, Respondent accepted the idea that UFW requests should almost always be granted[65] so long as some kind of notice was given; and in fact, the UFW thereafter took frequent access.[66]

B. Discrimination Against Guerrero by Transfer to the Night Shift

1. Facts

Guerrero testified that as a result of the Cavan incident, he was discriminated against by transfer to the night shift. According to his testimony, prior to the incident he had worked as an irrigator during the day shift since 1968, his year of hire,

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63. Bill Dal Porto testified that the Unon would indicate the time and date, usually calling the morning of the expected visit. Usually, no more than two representatives came either at the morning break or at lunch, but one came during the evening hours.

64. However, Nomellini admitted that prior to the Guerrero incident, there had been no UFW request for access for at least 19 months.

65. Nomellini testified that he only became aware of the O. P. Murphy post-certification access concept after the Cavan incident and during negotiations; and that as a consequence his attitude changed, and Respondent thereafter consented to every UFW request for access.

66. Bill Dal Porto testified that after the April Cavan incident, the Union did not request access again until after the commencement of the weeding and thinning season, sometime after May 21.

except for a 1-2 week period in 1977. During March and April of 1981, he worked for as much as 11½ hours per day, sometimes 7 days a week. However, shortly after the incident, sometime in May and about one week following the departure of Pasqual Milan, his shift was changed to night by Bob Dal Porto. Guerrero testified that this meant he had considerably less working time and, of course, smaller earnings. Guerrero also testified that he worked the night shift (with 2 other persons) from May through September, except for layoffs, until the irrigation stopped and it was time for him to move on to his next job as tractor driver in the tomato harvest.

Guerrero admitted that after Milan left, Lupe Beltran, Guerrero's senior, took Milan's place as head (or lead day irrigator, and that he (Guerrrero) was assigned Beltran's old position on the night shift.[67]

Guerrero testified that although he was paid for an 11½ hour shift when he worked either night or day, he did not work every night and sometimes would only work twice a week whereas in the past he worked steady as an irrigator. Similarly, whereas in prior years he was assigned other duties when work slackened, this was not done in 1981. Guerrero regarded himself as a "jack of all trades" who frequently moved from job to job. The previous spring and summer of 1980 he testified he had done daytime irrigation mainly, but that he also worked on the tractor and caterpillar. During 1981, Guerrero claimed that when irrigation work lessened, Respondent could have assigned him to discing and using the caterpillar and tractor as that was work he had been assigned to in previous years — only now it was being done by co-workers, Valentin Gutierrez and Danny Hernandez, both of whom were junior to him. According to Guerrero, there were three large areas of about a hundred acres which would have to be disked and levelled and that he though Hernandez and Gutierrez had been assigned these tasks. Guerrero admitted, however, that though he could do discing with the tractor, he could not do cultivator work[68] and that Hernandez could do both. Because he was working nights, Gutierrez testified that he could not be sure whether Hernandez did any work that he could have done (such as discing) but that he thought Hernandez disked for at least one week after the Cavan incident.

In the case of Gutierrez, Guerrero also acknowledged that he could drive machines that Guerrero was unable to.

Guerrero sustained at least 3 occupational inquiries in 1981 while irrigating; e.g., May 5 (injury unknown) (G.C. Ex 11); June 6 (dropping a post on his foot) (G.C. Ex 12); and July 20

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67. Beltran had been doing night shift duties ever since he commenced working for Respondent sometime in 1968.

68. Cultivator work is driving a machine that has shovels or discs that are used to remove weeds that are growing too close to the tomato plants.

(lifing a pipe) (G.C. Ex 13). He testified he did not take any time off when his foot was injured but that when he hurt his back lifting the pipe, he didn't go to work but could not remember how many days he lost. He also testified he lost some work due to sickness after the Cavan incident, but he again could not recall how much. Finally, Guerrero testified he took a day off during this period to settle a personal problem.

Bill Dal Porto testified on behalf of Respondent that Milan had been the head day irrigator. When Milan left, he had to be replaced with someone who could manage the water and pumps and knew how to set the gates. It was necessary to move Beltran to days because he had the necessary experience to perform lead daytime duties, which Guerrero could not.

Specifically, according to Dal Porto, Guerrero did not know how to operate the bypass system for the pumps or how many turns to put on the various gates that would be required to maintain the water at a proper level, all largely daytime functions of the head irrigator.

Moreover, though he had never served as a head irrigator before, Dal Porto testified he believed Guerrero was the only qualified one for the night job because he could handle the valves, and siphons, could change the water, knew which fields Respondent wanted irrigated, and had more experience than the two others under Guerrero who were fairly new.

Dal Porto further testified that Guerrero complained about the change from day to night probably a day or two after he started working nights and stated it was hard for him to get around because of his size; but Dal Porto told him that he knew the ranch and was the only one the Company had for the night position.

Dal Porto also testified that while day irrigators do have more work to perform because all the heavy labor goes on at that time — making ditches, digging drains, etc. — while night irrigators engaged in more of a maintenance program — changing the water and watching that it didn't overflow or get too low —, both shifts earned the same salary, 11½ hours pay per shift. Dal Porto denied that there were less days available for night shift employees than for day shift. According to him, once irrigators started the water, it had to be maintained and watched day and night. Likewise, generally speaking, when there was no work for the night irrigators, there was no work for the day irrigators either. Thus, though it was true that there was less irrigation work in 1981 than in 1980, Dal Porto testified that this would have been true for both night and day shift employees. Dal Porto acknowledged that there was a period of time — probably in late May and June after Guerrero was moved to the night irrigator position — when there was no irrigation work being done at all; but he further testified that none of the irrigators, day or night, except the head day irrigator, Beltran, would have been working during this period.

Furthermore, Dal Porto pointed out, as a reason for Guerrero's layoff, the fact that the crop pattern changed in 1981. Referring to maps of the ranch (G.C. Exs 8 and 9), Dal Porto testified that at least 79 acres (Fields 26 and 29) that had sugar beets and tomatoes respectively in 1980 grew safflower in 1981, a crop which required no irrigation. Using 6 irrigations per field as the standard, Dal Porto calculated that in 1981 there would have been 492 fewer hours of irrigation work available. Dal Porto also addressed the question of why, if Guerrero performed less work as an irrigator in 1981 and was laid off for a short time, he was not offered work as a tractor driver, which he had performed in the past, to fill in those gaps of time. According to Dal Porto, Guerrero's skills were limited to general tractor work. Guerrero worked well at discing, but what he had difficulty doing was planting tomatoes or sugar beets which required close cultivating (use of the cultivator), running an incorporator, (similar to a rotor tiller which sprayed herbicides and weed killers into the ground and was mounted on the back of a tractor), or running the backhoe, motor grader or forklift. Therefore, Dal Porto concluded that Guerrero's talents allowed him to do ground preparation — discing — but that once a field was planted, there would be no tractor work available that would require discing, except perhaps along the rows or between roads and ditches around the levees, but this would entail very little work. It was for these reasons, according to Dal Porto, that around March of 1981, before irrigation began in earnest, that ground preparation was started and Guerrero did some of that on a limited basis; but that after he became a night irrigator, except for about a week in the land preparation of corn, there was very little tractor work available that Guerrero could do.

As regards the corn, it was, according to Dal Porto, the last crop planted at the ranch in 1981 that involved any land preparation; e.g., discing or plowing, work that Guerrero could perform.

John Taylor Fertilizers is a company utilized by growers in the Stockton area to plant and fertilize crops. Hugh Jory, a pest control salesman with that company, corroborated Dal Porto's testimony by testifying that corn was the last crop planted at Respondent's in 1981. He testified that after the corn planting and fertilizing, there was no other ground preparation for any of the other crops, at least so far as the work of his company was concerned.

Furthermore, Jory testified that he oversaw the 1981 corn plainting and that it was completed at Respondent's prior to May 23 (Resp's Ex 4), that there was ground preparation (discing and sometimes land planing) performed by Respondent's employees 2-3 days prior to the actual corn planting — the point where his company would get involved — and that said land preparation would therefore have been finished around May 20 or 21.

Dal Porto admitted that during the days Guerrero was laid off in May, Hernandez and Gutierrez were close cultivating sugar beets and tomatoes and using the incorporator and that another employee, Cesario Valles, was putting in ditches and drains and running the back hoe. Dal Porto also testified that though there was tractor work in June and possibly July, again it was close cultivating and incorporator work that Guerrero could not do.69/

Valentin Gutierrez, a steady employee who worked as a tractor driver, testified as a rebuttal witness on behalf of General Counsel. He testified that during the first three weeks of May, he observed Danny Hernandez discing corn fields and preparing rows. He further testified that he himself worked during the week of May 16 - May 23 discing the land in preparation for corn but was laid off the following week. During the week in which he was off, while fishing on a levee close to the ranch, Gutierrez testified he observed Hernandez discing with a large "different kind" of a tractor.

Gutierrez also testified that following his recall and during the first two weeks of June he was assigned (during daytime) the duties of discing in order to prepare the land for corn; and that after the corn was planted, during this same period, he continued to disc in order to ready the land for sugar beets and in fact, finished a field that Hernandez had been discing. He also testified he observed Hernandez discing during this June 1 - June 15 period, as well.

C. Analysis and Conclusions of Law

1. Threat to Guerrero and Milan

Respondent defends this charge on the grounds that Guerrero was a day shift employee and had no right to be on the premises at night, that Crespo was an outsider, and that neither person gave any notice of the Union's visits, in violation of the prior understanding.

To begin with, it is doubtful that the Union would be bound by a "practice" of notification to Respondent not utilized for 19 months. Second, Nomellini's ignorance of the O. P. Murphy post-certification access concept hardly aids the defense and can add no justification to the Dal Portos' conduct.

In O. P. Murphy Produce Co., Inc. (1978) 4 ALRB No. 106, the ALRB recognized the need of union representatives to engage in post-certification access based upon the right and duty of the

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69. The subject of Guerrero's complaints about lack of work was brought to the attention of Nomellini by Rodriguez at the May 27 negotiating session. Nomellini checked with Bob Dal Porto and reported back to Rodriguez that there was no work being done that Guerrero could perform. The subject was not raised again by Rodriguez.

exclusive representatives to bargain collectively on behalf of all the employees it represents. The Board stated:

> As the certified union is the agent and representative of all the employees in the bargaining unit, it is essential that it have access to, and communications with, the unit employees during the course of contract negotiations, in order to determine their wishes with respect to contract terms and proposals, to obtain current information about their working conditions, to form and consult with an employee negotiating committee, and to keep them advised of progress and developments in the negotiations. Reasonable access and adequate communications between the employees and their bargaining agent is just as essential to meaningful collective bargaining negotiations as is contact and communications between the employer and its attorney, or other bargaining representatives.

Further, during the post-certification period the union is not limited to the access rules which govern pre-certification access but is instead allowed access at reasonable times and places as necessary to fulfill its bargaining duties. Id.

Third, while Guerrero and Crespo may not have followed precisely the suggested notice procedures outlined in O. P. Murphy, and even assuming arguendo that there was an active agreement of notice before Union visits at Respondent's place of business, it does not follow that their violation would justify the severe reaction of Respondent's principals to the event. This is especially true where there is no evidence that Guerrero's and Crespo's visit to Cavan was anything but peaceful and orderly.

The question here is not whether access was proper or could have been lawfully denied but rather the appropriateness of Bob and Bill Dal Porto's reaction and subsequent conduct towards their employees upon their hearing of the access incident. This being the real issue, it is now appropriate to consider the question of whether the statement made by Bob and Bill Dal Porto to Guerrero and Milan constituted a threat in violation of the Act.

Respondent defends the charge on the grounds that Bill and Bob Dal Porto were simply angry at the trespass and that their remarks did not reflect an anti-union animus. In fact, Respondent even argues that Bill Dal Porto warned Guerrero not to trespass again but that his remarks made no connection with the Union. (Resp's Brief, pp. 7 & 10.) We do not have to reach this distinction, if such it be, because there is not factual basis for such a difference in the record. Bill Dal Porto clearly testified that his brother told Guerrero, inter alia, that he " . . . wasn't supposed to come on the ranch and bring Union people . . ." and that he (Bill Dal Porto) reiterated the same thing (TR. 6, p. 7). There could hardly be any doubt in Guerrero's mind of the connection between his Union activity and the threat of jail.

It is clear that a threat to put someone in jail for legitimate union access purposes, like a threat to call the sheriff, constitutes an unfair labor practice. (D'Arrigo Brothers Co. (1977) 3 ALRB No. 31; Coachella Imperial Distributors (1979) 5 ALRB No. 73. Threatening an employee with dire future consequences for his exercise of protected rights is a violation of the Act. Hemet Wholesale (1977) 3 ALRB No. 47, review den. by Ct.App., Fourth Dist., Div. 2, Sept. 14, 1977.)

Finally, Respondent would demand direct evidence that employee Milan was subjectively threatened by the remark; but of course, this is not the test. "The test . . . for whether an employer's statements constitute an unlawful interference and/or threat is not the employee's reaction but whether the statements would reasonably tend to interfere with or restrain employees in the exercise of their rights guaranteed by the Act." (Jack Brothers and McBurney, Inc. (1978) 4 ALRB No. 18. See also, Rod McLellan Co. (1977) 3 ALRB No. 71.)

I recommend that Respondent be found to be in violation of Section 1153(a) of the Act.

2. Transfer to the Night Shift

It is clear that the reassignment of a worker from one type of job to another less desirable one, if motivated by anti-union animus, is a violation of Sections 1153(c) and (a) of the Act. (Kawano, Inc. (1977) 3 ALRB No. 54.) On the other hand, changes in working conditions, if supported by a valid business justification, are not a violation. (Sam Andrews' Sons (1979) 5 ALRB No. 68.) The hard questions are, of course, those where a "dual-motive" may have been involved in an employer's actions; i.e., where conduct was motivated by both legitimate business reasons and because of the employee's protected concerted or union activities. The standard to be employed for determining this question is now established. Both the California Supreme Court and the ALRB have approved the Wright Line standard and applied same to all ALRB proceedings. Martori Brothers Distributors v. A.L.R.B. (1981) 29 Cal.3d 721; Nishi Greenhouse (1981) 7 ALRB No. 18. See also, Verde Produce Company (1981) 7 ALRB No. 27.) Wright Line, Inc. (1980) 251 NLRB 250 [105 LRRM 1169] was an effort by the NLRB to establish a clear standard for placing the burden of proof and determining causality in cases alleging violations of Section 8(a)(3) and 8(a)(1) (equivalent to Sections 1153(c) and Sections 1153(a) of the ALRA) of the NLRA. In Wright Line, the NLRB held:

> Thus, . . . we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to

demonstrate that the same action would have taken place even in the absence of the protected conduct. (105 LRRM at pp. 1174-1175.)

Applying these standards to the facts of the Guerrero situation, it must be said that the General Counsel has raised a strong inferences of discrimination in view of the relatively short period between the Cavan incident and the reassignment. Still, I remain unconvinced that the General Counsel has carried his burden of proof and made a prima facie showing that protected conduct was a motivating factor in Respondent's decision to transfer Guerrero to the night shift or in the fact that he may have received less work in 1981. In order to establish a prima facie case of a "(c)" violation, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in union activity, that Respondent had knowledge of such activity, and that there was some connection or causal relationship between the union activity and the employer's conduct complained of. (Jackson and Perkins Rose Co. (1979) 5 ALRB No. 20.)

Here, although it is clear Guerrero was engaged in union activity and there is no question but that Respondent had knowledge of it, I find missing the necessary nexus between said activity and the transfer or the amount of work performed in 1981. Guerrero for years had been active in Union matters, as Bill Dal Porto readily admitted. General Counsel would have me speculate solely based upon the Cavan incident, that Guerrero, as punishment, was transferred to the position of head night shift irrigator. I do not feel justified in making such a conclusion here.

Mere suspicion of unlawful motive is not substantial evidence; an unlawful or discriminatory purpose is not to be lightly inferred. (Florida Steel Corp. v. N.L.R.B. (5th Cir. 1979) 587 F.2d 735; Lu-Ette Farms, Inc. (1977) 3 ALRB No. 38.)

Ordinarily, a finding that the General Counsel has not established a prima facie case of discrimination means that it is not necessary to consider Respondent's proferred business justification. However, even assuming arguendo that the prima facie case was made, I find that Respondent would have sustained its burden of demonstrating that "the same action would have taken place even in the absence of the protected conduct."

The critical fact that convinces me that Guerrero was not reassigned duties for discriminatory reasons is the resignation of Pasqual Milan. Milan was senior to Lupe Beltran who was senior to Guerrero. When Milan departed, it was essential that a new lead day irrigator be found as a replacement. In terms of seniority as well as experience, the logical choice was Beltran, and the General

Counsel has not shown otherwise.[70] When Beltran gave up his lead night shift position, Respondent was again faced with the problem of filling that position, as well. Again, in terms of seniority and experience, Respondent's choice seems reasonable and non-discriminatory.

As the Board said in Rod McLellan Co. (1977) 3 ALRB No. 71:

> . . . an employer has a fundamental right to assign duties and arrange work schedules in accordance with its best judgment. Absent contractual restrictions, the time, place and manner of employment are employer decisions. It is not within our province to disturb such employer decisions absent proof that the assignment was intended to inhibit the exercise of section 1152 rights or that the adverse effect of the change on employee rights outweighed the employer's business justifications.

Although an inference has been drawn that the transfer, coming as it did so soon after the Cavan incident, was for discriminatory reasons, such inference must be discounted in view of the business necessity for said transfer occasioned by the resignation of Milan.

3. Less Work in 1981 that in 1980

The General Counsel also contends that Guerrero received fewer hours of work in 1981 (particularly in May) than in other years for discriminatory reasons. Specifically, it is alleged that land preparation work was performed by other workers; e.g., Danny Hernandez and Valentin Guitierrez, when same should have been performed, as in prior years, by Guerrero.

Payroll records were introducted into evidence covering May 15, 1981, through July 31, 1981 comparing the hours worked by Guerrero,[71] with those of Hernandez and Gutierrez. However, the key time period was the two weeks ending May 30[72] because it was

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70. Dal Porto testified that Guerrero admitted to him that he didn't want to take the responsibility for setting the pumps and gates. This was not denied by Guerrero on redirect. I credit the testimony.

71. There are some inconsequential discrepancies in Guerrero's payroll records between what he was paid, according to Respondent's check records (G.C. Ex 54) and what he reported on his weekly time card. (G.C. Ex 5A.)

72. The General Counsel would also contend that Guerrero worked less than the others between June 1 through June 15 but here the number of hours separating the three employees (Guerrero, 121 hours; Gutierrez, 136 hours; Hernandez, 154 hours) is insignificant. (See G.C. Exhs 54 & 56; Resp's 18.)

during this time frame that Guerrero's work was significantly reduced from 167 hours on May 15 to 75 hours on May 30[73] (G.C. Ex 54) while Hernandez was working 145 hours and Gutierrez 69½ (G.C. Exs 54 & 56; Resp's 18).[74] (This was also the time period — May 27 — when the issue of Guerrero's lack of work was raised by Rodriguez during the negotiating session.

Bill Dal Porto claims that the reason Guerrero worked less time during this time frame[75] was because of a general layoff due to a lack of irrigation work and the fact that there was no alternative tractor work available that Guerrero could perform. I credit this testimony. Dal Porto's demeanor impressed me. Just as he testified honestly about what occurred during the Ike Cavan incident, I believe he is to be credited here. I believe him when he testified (uncontradicted by Guerrero) that Guerrero's abilities were limited to the general skills of land preparation such as discing and land planing, and that during the time Guerrero was not employed full time as an irrigator, it was the more complicated tractor work — use of the cultivator and incorporator — that was being performed.

The thrust of this testimony was corroborated by Jory, whom I also credit, who testified that the ground preparation for the corn, the last crop planted in 1981, would have been around May 20. The conclusion is that after May 20, the available tractor work at Respondent's was not of such nature that Guerrero could have handled it.

In contract to Respondent's two witnesses, General Counsel's were much less reliable. Guerrero's testimony was confusing, and he seemed unable to answer simple questions. He could not indicate with any degree of certainty when and how many days he lost because others were doing his work or how many days he was off work because of injury, illness or personal matters. Gutierrez' ability to recall accurately dates and crops planted was discredited on cross-examination. He testified at one point that he only worked the last week of May, next testified he worked three weeks but could not remember which ones they were, and then

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73. In fact, Guerrero did not work at all between May 19 and May 28, returning to work on May 29 (Resp's 3).

74. As can be seen from the above figures, payroll records reflect that Gutierrez worked less total hours than Guerrero during this period and was also laid off for approximately the same amount of time, May 21 through May 27 inclusive (Resp's Ex 3).

75. It is important to note that the 1980 records likewise show a slackening off of available work for Guerrero during this same payroll period. (G.C. Ex 55.) In fact, the records show only 28 hours less in 1981 than 1980 for this period or less than a three-day difference.

testified he worked the first three weeks. He testified that May was the normal corn planting time; but then, contrary to his direct testimony, testified he could not be sure when the corn was planted. He testified he disced fields in June for the preparation of sugar beets, then later indicated he was not sure if any beets were planted after June 1. He also testified he wasn't sure Hernandez was discing beets, as testified to on direct, during this early June period. Finally, he testified that the day he was fishing and saw Hernandez was the only day he saw him in May and that that could have been May 21 instead of the last week in May, as he had earlier testified. His testimony was totally unconvincing.

I recommend that the allegations relating to Guerrero's discriminatory transfer to the night shift and subsequent loss of work time be dismissed.

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IX. The Remedy

Having found that Respondent, William Dal Porto & Sons, Inc. failed and refused to bargain in good faith in violation of sections 1153(a) and (e) of the Act, I shall, pursuant to the provisions of section 1160.3, recommend that Respondent be ordered to meet with the UFW, upon request; to bargain in good faith; to refrain from unilaterally changing employees' wages or working conditions; and to make whole its agricultural employees for the loss of wages and other economic benefits they incurred as a result of Respondent's unlawful conduct, plus interest thereon.

Because Respondent manifested a continuing pattern of illicit conduct, I shall recommend that the make-whole remedy commence on April 1, 1981, the date upon which Respondent engaged in conduct which, in view of the totality of the circumstances, first constituted an unlawful failure and refusal to bargain in good faith and continue until such time as Respondent commences to bargain in good faith with the UFW and thereafter bargains to contract or impasse.

I shall recommend dismissal of the Complaint with respect to all allegations thereof in which the Respondent has been found not to have violated the Act.

Upon the entire record, the findings of fact and conclusions of law set forth above, I issue the following:

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, Respondent, William Dal Porto & Sons, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), with the UFW, as the certified exclusive collective bargaining representative of Respondent's agricultural employees;

(b) Changing any of its agricultural employees' wages or any other terms or conditions of their employment without first notifying and affording the United Farm Workers of America, AFL-CIO, a reasonable opportunity to bargain with Respondent concerning such change(s).

(c) Threatening employees with incarceration or like reprisals because of their union activities;

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

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

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

(b) Upon request, meet and bargain in good faith with the UFW regarding the past unilateral changes in wage rates.

(c) Make whole all agricultural employees employed by Respondent in the appropriate bargaining unit at any time between April 1, 1981 to 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 plus interest and other economic losses sustained by them as the result of Respondent's refusal to bargain.

(d) 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 to the aforementioned employees under the terms of this Order.

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

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

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

(h) Mail copies of the attached Notice in all appropriate languages, within thirty days after issuance of this Order, to all agricultural employees referred to in Paragraph 2(b) above.

(i) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent 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 employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for

time lost at this reading and the question-and-answer period.

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

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

IT IS FURTHER ORDERED that the allegations of the Complaint with respect to which no violation of the Act was proved are dismissed.

DATED: May 13, 1982

Marvin J. Brenner

MARVIN J. BRENNER
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Fresno Office, the General Counsel of the Agricultural Labor Relations Board issued a Complaint which alleged that we had violated the law. After a hearing at which each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we failed and refused to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW) in violation of the law. The Board has told us to post and mail this Notice. We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law which gives you and all farm workers in California these rights:

1. To organize yourselves;

2. To form, join, or help unions;

3. To vote in a secret ballot election to decide whether you want a union to represent you;

4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;

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

6. 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 do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT make any 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 NOT threaten employees with incarceration or like reprisals because of their union activities.

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WE WILL in the future bargain in good faith with the UFW with the intent and purpose of reaching an agreement, if possible. In addition, we will reimburse all workers who were employed at any time during the period from April 1, 1981 to the date we begin 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.

DATED:

WILLIAM DAL PORTO & SONS, INC.

By: _____
Representative Title

If you have any questions about your rights as farm workers or this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 1685 "E" Street, Fresno, California 93706. The telephone number is (209) 445-5591.

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

DO NOT REMOVE OR MUTILATE