STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

PAUL W. BERTUCCIO, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-140-SAL 79-CE-196-SAL 79-CE-380-SAL 80-CE-55-SAL 9 ALRB No. 61 (8 ALRB No. 101)

SUPPLEMENTAL DECISION AND ORDER

On December 29, 1982, we issued our Decision and Order in this case, Paul W. Bertuccio (1982) 8 ALRB No. 101 (Bertuccio). In that Decision, with Member McCarthy dissenting, we found, inter alia, that Respondent violated Labor Code section 1153(e) and (a)[1/] when it failed to notify and give the United Farm Workers of America, AFL-CIO, (UFW) an opportunity to bargain over Respondent's decision to sell its 1979 early garlic crop to Vessey Foods for seed. Respondent sought review of our Decision and Order in the Court of Appeal, challenging, inter alia, our findings and conclusions regarding the sale of the 1979 early garlic crop.

On June 17, 1983, we issued our Decision and Order in Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36 (Cardinal Distributing). In Cardinal Distributing we found that:

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

> [G]enerally, a decision by management regarding what crop to grow or discontinue is not subject to the collective-bargaining process. Although such managerial decisions may substantially affect conditions of employment, we do not impose a mandatory duty to bargain about such decisions.
> (Id. at pp. 5, 6.)

In light of our Decision in Cardinal Distributing and the possible conflict with our ruling in Bertuccio, we submitted a motion to the Court of Appeal, First Appellate District, Division Five, to remand Bertuccio for the limited purpose of reconsidering our findings and conclusions regarding Respondent's decision to sell its early garlic crop for seed rather than harvest it for market. On August 26, 1983, the Court of Appeal granted our motion and remanded Bertuccio, for our reconsideration.[2/]

We requested that the parties submit briefs on the issue of whether, in light of our Decision in Cardinal Distributing, Respondent's decision to sell the early garlic for seed constituted a violation of section 1153(e) and (a). The parties were specifically requested to address the issue of whether the sale of the garlic constituted a decision to subcontract out bargaining unit work. Respondent and Charging Party each timely filed a brief;[3/] General Counsel did not file a brief or express a position on the issue.

[2/] Our findings and conclusion regarding Respondent's failure or refusal to bargain with the UFW about the effects of its decision to sell the early garlic for seed are not before us.

[3/] On October 3, 1983, the Charging Party requested leave to file a response to Respondent's brief; Respondent opposed this request. Charging Party's request is hereby denied.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the briefs, and we have decided to reverse our Decision and Order in Bertuccio regarding the decision to sell the early garlic.

In 1979, Respondent planted approximately 60 acres of garlic, consisting of 40 acres of early garlic and 20 acres of late garlic. Respondent planted the garlic with the intent of harvesting it for the fresh market.[4/] The early garlic turned out to be "beautiful garlic." A representative of Vessey Foods inspected Respondent's early garlic and spoke to Paul Bertuccio about buying it for seed. In June 1979, Respondent agreed to sell the 40 acres of early garlic to Vessey Foods for seed. Pursuant to the sales agreement, Vessey Foods' employees harvested the early garlic in late July or early August. The harvesting method for seed garlic differs somewhat from the harvesting method for fresh market garlic; seed garlic harvesting is less labor-intensive.

Respondent gave no reason for selling the garlic for seed rather than selling it for fresh market as it had originally intended. The agreement was apparently reached to accommodate Vessey Foods, which was short of seed garlic, and did not represent any particular economic need on Respondent's part nor was it a decision by Respondent to get out of the garlic business.

In this case we must determine whether, in light of

[4/] In the past, Respondent sold the harvested garlic to Vessey Foods, who in turn sold it on the fresh market. Apparently, Respondent intended to do the same in 1979 when it planted the garlic.

our decision in Cardinal Distributing, Respondent's decision to sell its early garlic for seed rather than for the fresh market was subject to the collective bargaining process. We hold that such a decision lies at the core of entrepreneurial control and therefore is not subject to the collective bargaining process.

The Agricultural Labor Relations Act (Act) requires that when agricultural employees are represented by a certified bargaining representative, an employer must bargain over terms and conditions of employment that becomes available as a result of its decision to be in business. This vests in the bargaining representative the status of an equal partner in negotiating what those terms and conditions of employment shall be. However, the Act does not vest in the bargaining representative the right to become an equal partner in deciding whether the business should exist at all nor in determining the nature or scope of the business. Thus, no bargaining is required of an employer over its decision to go out of business (see Textile Workers v. Darlington Mfg. Co. (1965) 380 U.S. 263 [58 LRRM 2657] nor, absent evidence of an intent to discriminate because of union support, over whether to partially close its business. (See First National Maintenance (1981) 452 U.S. 666 [107 LRRM 2705].) Similarly, in Cardinal Distributing, we held that a decision as to what crop to grow or discontinue is akin to a decision whether to be in business at all. Such decisions lie at the core of entrepreneurial control because they pertain to the basic right of management to weigh factors such as profit and risk of loss and to decide whether, and to what extent, to be in business.

The sale of a crop may be based upon any number of factors normally pertinent only to management, such as an opportunity for a sale, market conditions, profits resulting from the sale, recoupment of its investment, avoidance of risk of loss, production costs, etc. A decision to sell a crop therefore involves aspects of decision-making that pertain to management's right to be in business and to maintain entrepreneurial control of its business. A sale of a crop divests the employer of all interest in that crop and to that extent terminates that portion of its business.

Decisions regarding the complete or partial closing of a business, what crops to grow, and the sale of crops will very often have a direct and very substantial impact on the availability of employment. A union, as the bargaining representative of the employees, has a legitimate interest in perserving jobs, whenever possible. It does not, however, follow that such interest justifies imposing a requirement to bargain over decisions concerning the sale of a crop. The union cannot, in effect, force an employer to remain in business against its will in the name of preserving jobs. For similar reasons neither can the union foreclose the sale of a crop and the termination of that portion of the business. Only when the employer in reality does not terminate its interest in the crop, for example, when it merely subcontracts out the work to be done, retaining an interest in the crop even after its sale or disposition and some control over the availability of work, so as to be able to bargain over who shall perform the work, does it have a duty

to notify and afford the union an opportunity to bargain about its decision.

Decisions which have an adverse impact on the availability of work to the bargaining unit or effect the terms and conditions of employment are unlawful if motivated by antiunion animus.[5/] Agricultural employers who attempt to undermine or discourage union activity or support by selling crops and reducing the availability of work violate section 1153(c) and (a). A possible remedy to such a section 1153(c) violation, in addition to backpay, may be a restoration of the status quo ante. (See Frudden Produce, Inc. (1982) 8 ALRB No. 42; Ruline Nursery (1982) 8 ALRB No. 8.) However, the record in this case is devoid of any evidence that Respondent's decision to sell the garlic for seed was motivated by antiunion animus, and we therefore find that Respondent's decision was not motivated by antiunion animus.

SUPPLEMENTAL ORDER

Accordingly, we find that Respondent did not violate section 1153(e) and (a) by its failure to notify and afford the

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[5/] But see Textile Workers Union v. Darlington Mfg. Co., supra, 380 U.S. 263, where closure of entire business, even if motivated by antiunion animus, was found not to violate the National Labor Relations Act.

UFW an opportunity to bargain about its decision to sell its 1979 early garlic crop to Vessey Foods for seed, and we hereby dismiss that portion of the complaint.

Dated: October 24, 1983

ALFRED H. SONG, Chairman

JORGE CARRILLO, Member

MEMBER McCARTHY, Concurring:

I agree with both the reasoning and the result of the majority opinion. However, I am concerned about the fact that, in giving examples of the kinds of management decisions which do not require bargaining, the majority fails to include decisions to expand or contract the acreage devoted to a particular crop. A decision of that type can have a substantial impact on the continued availability of employment, especially if it involves a reduction in the planting of a highly labor intensive crop. Nevertheless, bargaining would not be required in that situation because the decision is essentially no different than the selling of an entire crop before it is harvested or the partial closure of business, actions which the majority readily concedes as being at the core of entrepreneurial control.

Reducing the acreage of one type of crop in favor of another is a frequent occurrence in agriculture and is no more amenable to bargaining than other managerial decisions that relate

to the question of whether, and to what extent, to be in business. Of course, as with other decisions which the majority would not subject to bargaining, we assume that the decision to reduce certain acreage is not motivated by antiunion animus. (If it is so motivated, implementation of the decision would be unlawful irrespective of whether bargaining had taken place.) Neither am I speaking of acreage changes which involve subcontracting of work that would otherwise have been performed by the grower's existing work force. (See First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666, 101 S.Ct. 2573; Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203, 85 S.Ct. 398.)

As qualified above, a decision to change the acreage devoted to a particular crop is no more appropriate for regulation by this Board than is the decision to sell off a growing crop or the decision to eliminate a crop from the planting schedule. The majority should have stated that crop acreage changes are not among the managerial acts which require decision bargaining.

Dated: October 24, 1983

JOHN P. McCARTHY, Member

MEMBER WALDIE, Dissenting:

I would affirm the Board's original decision at 8 ALRB No. 101 for the reasons stated in that Decision.

Moreover, the majority here ignores its own analysis in Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36 by failing to find the Bertuccio-Vessey early garlic transaction to be, in part, a subcontract of unit work. Respondent in this case decided to sell its early garlic crop for seed rather than the fresh market. This change had the following consequences: the garlic was sold to Vessey, rather than Respondent's regular garlic buyer; it was harvested earlier and by a slightly different method (no hand-topping of the garlic); and it was harvested by Vessey, rather than Respondent. In my view, Respondent's decision to subcontract the harvest of the seed garlic to Vessey is separable from the other consequences of the change and was subject to decision bargaining, despite the fact that Vessey ultimately purchased the garlic. I can see little distinction between this transaction and the

majority's analysis of the sugar beet transaction in Cardinal. In each case, the employer's crop was harvested by an outside party, as part of a larger marketing arrangement, and caused a loss of work to unit employees. Even under the majority's own theory, a violation should be found in the instant case.

Dated: October 24, 1983

JEROME R. WALDIE, Member

MEMBER HENNING, dissenting:

I dissent. Like Member Waldie, I believe the Board's original Decision in this case regarding Respondent's failure to bargain with its employees' representative about its decision to sell the early garlic crop was correct, for the reasons the Board stated in its opinion.

As I pointed out in my dissent in Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36, it is illusory to believe that simple, predictable results will flow from a categorical approach to cases involving changes in the manner an agricultural business is conducted which will adversely affect employees. The conflicting positions the parties have taken in their briefs here, which are reflected in the conflict between the majority opinion and Member Waldie's dissent, illustrate the weakness of that approach. Disagreement over whether Respondent's decision to sell the early garlic crop should or should not be characterized as a decision to subcontract is not surprising;

like many transactions in this industry, the one at issue here has certain features that are characteristic of subcontracting arrangements and other features that are not. The resulting debate about the proper definition of subcontracting may yield a certain intellectual enjoyment (like that which medieval logicians apparently found in their dry and inconclusive disputations) but it does not help us decide cases in a manner suited to the actual facts and interests involved. This is precisely why the National Labor Relations Board (NLRB) in Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178 [111 LRRM 1354] wisely stated that in deciding whether a decision should have been submitted to negotiations:

> ...it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's action involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying at "the very core of entrepreneurial control" the decision will not fall within the scope of the Employer's mandatory bargaining obligation. A determination of the suitability to collective bargaining, of course, requires a case-by-case analysis of such factors as the nature of the Employer's business before and after the action taken, the extent of capital expenditures, the bases for the action and, in general, the ability of the Union to engage in meaningful bargaining in view of the Employer's situation and objectives. [Footnote] (111 LRRM at 1356-1357.)

The majority here refers to the analytical framework set forth in Bob's Big Boy but fails to apply it. Instead of analysis, it proceeds by mere assertion, baldly decreeing that "[a] decision

to sell a crop ... involves aspects of decision-making that pertain to management's right to be in business and to have ('entrepreneurial') control of its business...." Thus are the particular facts of this case rendered irrelevant to the process of adjudication.

Until this Board returns to the functional, case-by-case approach urged by the NLRB and actually analyzes the factors enumerated in Bob's Big Boy, our decisions in this area will lack the realism that alone should merit for them the parties' acceptance and respect.

Dated: October 24, 1983

PATRICK W. HENNING, Member

CASE SUMMARY

PAUL W. BERTUCCIO

9 ALRB No. 61
(8 ALRB No. 101)
Case Nos. 79-CE-140-SAL
79-CE-196-SAL
79-CE-380-SAL
80-CE-55-SAL

SUPPLEMENTAL BOARD DECISION

The Court of Appeal remanded this case, 8 ALRB No. 101, to the Board for the limited purpose of reconsidering our findings and conclusions regarding Respondent's decision to sell its 1979 early garlic crop for seed rather than to harvest it for market. In light of its Decision in Cardinal Distributing Company, Inc. (1983) 9 ALRB No. 36, the Board reversed its finding in 8 ALRB No. 101 and found that Respondent did not violate Labor Code sections 1153(e) and (a) when it failed to notify and afford the UFW an opportunity to bargain about its decision to sell its 1979 early garlic crop. A decision to sell a crop lies at the core of entrepreneurial control and therefore is not subject to the collective bargaining process.

CONCURRENCE AND DISSENTS

Member McCarthy concurred, but would include crop acreage changes in the managerial acts which require decision bargaining.

Member Waldie would affirm the Board's original Decision in 8 ALRB No. 101 for the reasons stated in that Decision. Additionally, he would treat Respondent's decision to subcontract the harvesting of the garlic for seed separately from the decision to sell the garlic.

Member Henning dissented, stating that in his opinion the Board's original Decision in this case was correct, and that the categorical approach taken by the majority is less suited to cases involving decision-bargaining issues than the case-by-case analysis of particular facts which the NLRB established in Bob's Big Boy Family Restaurants (1982) 264 NLRB No. 178 [111 LRRM 1354].

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