Salinas, California
Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

BRUCE CHURCH, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party, and HECTOR DIAZ, Charging Party, and JUAN CASTRO, Charging Party.	)	Case Nos. 79-CE-176-EC 79-CE-87-SAL 79-CE-216-SAL 80-CE-151-EC 80-CE-167-EC 80-CE-192-EC 80-CE-255-EC 80-CE-261-EC 80-CE-284-EC 80-CE-26-SAL 80-CE-26-1-SAL 80-CE-64-SAL 80-CE-168-SAL 80-CE-168-1-SAL 80-CE-168-2-SAL 80-CE-168-3-SAL 80-CE-168-4-SAL 80-CE-168-5-SAL
	)	9 ALRB No. 74

DECISION AND ORDER

On May 12, 1982, Administrative Law Judge (ALJ)[1/] James Wolpman issued the attached Decision in this proceeding. Thereafter, Respondent Bruce Church, Inc. (BCI), General Counsel and Charging Party United Farm Workers of America, AFL-CIO (UFW), timely filed exceptions to the ALJ's Decision and a supporting brief. The above parties all timely filed reply briefs as well.

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

The Board has considered the record[2] and the ALJ's Decision in light of the exceptions and briefs of the parties, and has decided to affirm the ALJ's rulings, findings[3] and conclusions and to adopt his recommended Order, as modified.

From January 1979 through November 1980, BCI and the UFW negotiated toward a collective bargaining agreement but never reached consensus on a contract. These tumultuous 22 months resulted in the employment of virtually every traditional (as well as several unconventional) economic weapon of labor relations. The UFW called a strike very early in the bargaining process (prior to submission of a complete BCI counterproposal) and later began a nationwide boycott of BCI's Red Coach lettuce. BCI responded with the hiring of strike replacements and a publicity campaign to protect its markets for its crops. The UFW picketed BCI's operations and employee residences and violence surrounded the

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[2] BCI chastises the ALJ for refusing to allow "off-the-record discussions" between BCI and the UFW into evidence. The ALJ ordered that evidence regarding the contemporaneous "on-the-record" discussions be striken from the record until the "off-the-record" material was produced, and the Board reversed the ALJ's ruling. We directed that such "off-the-record" discussions could not be ordered produced, leaving it to the parties to offer the evidence. No party, including BCI, offered evidence regarding these "off-the-record" discussions.

[3] Respondent, General Counsel and the UFW have excepted to certain of the ALJ's credibility resolutions. To the extent such resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find the ALJ's resolutions of witness credibility to be supported by that record viewed as a whole. The ALJ's credibility resolutions regarding the testimony of Respondent's chief negotiator and trial counsel are also supported by case law. (Vanderbilt Products, Inc. 129 NLRB 1323 [47 LRRM 1182], enforced (2nd. Cir. 1961) 297 F.2d 833 [49 LRRM 2286].)

picketing. BCI engaged in a continuing letter campaign from Mike Payne (BCI vice-president) to its employees explaining the course of negotiations and proposals on the table. BCI unilaterally implemented contract proposals in July 1979 and again in September 1979.

Into this volatile atmosphere we must tread and assess the motivation of the parties at the bargaining table. We must decide if BCI did, as our ALJ determined, engage in unlawful bad faith negotiations or whether, as our dissenting colleague would have us find, BCI "simply" engaged in "hard bargaining."

The difficulty in this case is not factual (there is little disagreement about the factual circumstances) nor in the applicable legal principles, but rather in the application of the principles to the facts. Section 1155.2 of the Agricultural Labor Relations Act (Act or ALRA) defines good faith bargaining as:

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

This language is drawn from the National Labor Relations Act (NLRA), section 8(d) (29 U.S.C. § 158(d); see § 1148 of the ALRA).

Assessing motivation at the bargaining table is a particularly difficult process. (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829], enforcing (1958) 122 NLRB 23 [43 LRRM 1090].) Some general principles have emerged from the

authorities. In NLRB v. American National Insurance (1952) 343 U.S. 395 (72 S.Ct. 824), the U. S. Supreme Court defined the good faith bargaining obligation of an employer as follows:

> ... to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counterproposals; and to make every reasonable effort to reach an agreement. ... [However, the NLRA] does not encourage a party to engage in fruitless marathon discussions at the expense of a frank statement and support of his position. And it is equally clear that the [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

Id, at 72 S.Ct. 828-829, quoting Houde Engineering Corp. (1934) 1 NLRB (old) 35. This was expanded in NLRB v. Truitt Mfg. Co. (1956) 351 U.S. 149 [76 S.Ct. 753] to include a requirement that negotiating parties hold a genuine belief in the truth of the proposals submitted ("Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims," Id, 76 S.Ct. at 755-6), and in NLRB v. Wooster Div. of Borg-Warner Corp. (1958) 356 U.S. 342 [78 S.Ct. 718] to require good faith bargaining on all issues relating to wages, hours and working conditions, and to forbid the parties to insist on bargaining about items not so related. The Supreme Court directed, however, that the NLRB avoid intervening in the bargaining process either by evaluating the relative merits of the substantive proposals or by restricting the use of "economic muscle" by either party to force acceptance of those proposals.

> The duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union. ... This was the sort of recognition that Congress, in the Wagner Act, wanted extended to labor unions; recognition as the bargaining agent of the employees in

> a process that looked to the ordering of the parties' industrial relationship through the formation of a contract.
>
> But at the same time, Congress was generally not concerned with the substantive terms on which the parties contracted. ... Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. (Id., at 80 S.Ct. 424-427.)

The Supreme Court condemned such intervention into the process by the NLRB, leaving to the parties the choice of responses to economic pressures.

Much of the body of law concerning the duty to bargain in good faith finds its genesis in the seminal article on the subject by Professor Archibald Cox entitled The Duty to Bargain in Good Faith (1958) 71 Harv.L.Rev. 1401. Professor Cox finds four purposes in the enactment of the duty to bargain in good faith, those being: (1) to reduce the number of strikes for union recognition; (2) to redress the inequality of bargaining power by establishing economic power on the side of employees to balance the existing power of employers; (3) to require collective decision making, that is, an employer must look upon labor as an equal partner in determining wages, hours and conditions of employment; and (4) to foster a rational process of persuasion. (Id., at 1407-1409.)

Bad faith in negotiations must generally be inferred from external conduct, such as stalling (Akron Novelty Mfg. Co. (1976) 224 NLRB 998 [93 LRRM 1106]); providing negotiators without authority (Billups W. Petroleum Co. (1968) 169 NLRB 964 [67 LRRM 1323], enforced (5th Cir. 1969) 416 F.2d 1333 [72 LRRM 2687]); shifting positions just as agreement is imminent (American Seating

Co. v. NLRB (5th Cir. 1970) 424 F.2d 106 [73 LRRM 2996], enforcing (1969) 176 NLRB 850 [71 LRRM 1346]); quibbling over standard clauses (Reed & Prince Mfg. Co. (1951) 96 NLRB 850, 855 [28 LRRM 1608], enforced (1st Cir. 1953) 205 F.2d 131 [32 LRRM 2225]); refusing to provide information (Kohler Co. (1960) 128 NLRB 1062, 1073-1074 [46 LRRM 1389], enforced as mod. (D.C. Cir. 1962) 300 F.2d 699 [49 LRRM 2485]; B. F. Diamond Co. Inc. (1967) 163 NLRB 161 [64 LRRM 1333], enforced (5th Cir. 1969) 410 F.2d [71 LRRM 2112]); and rigidly adhering to predictably unacceptable proposals, thereby manifesting a predilection not to reach agreement. (Continental Insurance v. NLRB (2nd Cir. 1974) 495 F.2d 44 [86 LRRM 2003], enforcing (1973) 204 NLRB 1013 [83 LRRM 1416].)

We have adopted the above principles to assess allegations of surface bargaining. In the first 1153(e) charge to reach us, we relied on unilateral changes and the employer's failure to provide information and meaningful counterproposals. (Adam Dairy (1978) 4 ALRB No. 24; see also Perry Farms (1978) 4 ALRB No. 25.)

In O. P. Murphy (1979) 5 ALRB No. 63, we set forth in detail what factors may justify a finding of surface bargaining. Noting that the employer postponed meetings, changed negotiators, failed to present adequate contract proposals, and made predictably unacceptable proposals, we concluded that the employer did not manifest a sincere effort to resolve its differences with the Union:

> While the duty to bargain does not require agreement to any specific proposal, or the making of concessions, ... 'the employer is obligated to make some reasonable effort in some direction to compose his differences with the union.'
> (Id., at p. 10 quoting NLRB v. Reed & Prince Mfg., supra, 205 F.2d at 135.)

(See also Masaji Eto (1980) 6 ALRB No. 20 at p. 15-16; Arakelian Farms (1983) 9 ALRB No. 25. Cf. Kaplan's Fruit & Produce Co. (1980) 6 ALRB No. 36; Pacific Mushroom Farm (1981) 7 ALRB No. 28.)

In a case closer to the issue present here, an employer's "unwavering opposition" to the union's good standing proposals was found not to be based on genuinely held beliefs. (Montebello Rose and Mount Arbor Nursery (1979) 5 ALRB No 64 at p. 22-23.) There the employers opposed good standing because it was unlawful under the NLRA and because they desired to protect their employees from arbitrary action on the part of the UFW. The first rationale was pretextual and the second "demonstrate[d] a failure to accept a basic principle of the ALRA: the certified collective bargaining representative is the exclusive representative of the employees, and the employer may not assume that role." (Id., at p. 15-16; see also AS-H-NE Farms (1980) 6 ALRB No. 9, p. 15-16, where the employer refused to provide information in order to protect the privacy of its employees from union abuse.)

We adopt the ALJ's analysis of the complex variables of this matter, finding that due to certain preconceived notions regarding the role of a bargaining agent, BCI developed such an unreasoning mistrust of the UFW and its intentions that good faith negotiations with the UFW were impossible.[4/]

[4/] The underlying assumption in both Member McCarthy's dissent and BCI's exceptions here is that BCI's employees' exclusive representative, the UFW, cannot be trusted. As the ALJ reiterated frequently in his Decision, BCI had no basis in fact or law to mistrust the UFW. Rather, it was BCI, which, through the exercise of personnel practices designed to eliminate the UFW from effectively representing

(fn. 4 cont. on p. 8)

The bargaining between BCI and the UFW here was essentially the first attempted full-fledged negotiating confrontation between BCI and the UFW following an election where BCI actively supported the Western Conference of Teamsters (WCT). BCI's chief negotiator was its chief advocate at the hearing and a central witness for BCI's case. He was substantially impeached by the ALJ. (See Vanderbilt Products v. NLRB (2d Cir. 1961) 297 F.2d 833 [49 LRRM 2286] for criticism of allowing the chief negotiator and central witness to serve also as the trial attorney.) BCI's other negotiator had previously been the busineses agent for WCT at BCI, and BCI's vice-president had made it abundantly clear that he viewed the UFW as "revolutionary" and not to be trusted. BCI resisted vehemently all articles that would give "control" of the employees to the Union instead of management.[5/] BCI explained its "team"

(fn. 4 cont.)

the work force, camouflaged its bad faith under an assertion of the need to maintain quality control. Rather than making some effort to reach agreement, BCI steadfastly rejected every UFW proposal or compromise on the major items of disagreement and now seeks to justify such intransigence at the bargaining table by generalized and insubstantiated mistrust of the UFW. The ALJ properly rejected BCI's defense.

[5/]Member McCarthy suggests that BCI's uncompromising hostility was justified but offers an incomplete analysis of the evidence in support of his position. For example, he states that Respondent believed that the UFW's good standing proposal (which was subsequently modified by the UFW in an attempt by the UFW to reach some agreement with BCI) could become "a powerful tool for eliminating or intimidating those workers who might resist union directives that would interfere with the performance of their jobs." (Member McCarthy Dissent, p. 26.) No evidence was presented in this matter that would permit the inference that the UFW had in the past or would in the future abuse good standing in this way. Further, the implication in Member McCarthy's Dissenting Opinion and BCI's

(fn. 5 cont. on p. 9.)

concept at a supervisors meeting as meaning the strengthening of the bond between the employer and the employee so as to break or minimize the bond between employee and union.

BCI's justification for its unrelenting opposition to all institutional articles proposed by the Union was its claim that the quality of its product would be adversely affected by the proposals.[6/] BCI feared that the threat of loss of good standing would be used to compel slowdowns and other job actions and argued that claimed deficiencies in the union-run benefit funds would cause disruption by widespread employee dissatisfaction.

We find BCI's fears to be overblown and insincere. Good standing could only pose the claimed serious threat to production if the Union violated the no strike clause. Although the UFW opposed BCI's proposal for strict union liability for wildcat strikes, it was prepared to agree to the standard no strike language.

Administrative problems with the RFK medical plan were subject to the same cure BCI had employed to resolve the problems.

(fn. 5 cont.)

exceptions to the ALJ's Decision is that any compromise with the UFW would result in an immediate drop in the quality of BCI's product. Member McCarthy even goes so far as to suggest, based on evidence not in this record, that compromise between BCI and the UFW would result in the demise of BCI as a profitable entity.

[6/]Although BCI also resisted the "institutional" articles of good standing, Robert F. Kennedy Medical Plan (RFK), Juan de la Cruz Pension Plan (JDLC) and hiring halls in the name of protecting its employees' "dignity", such arguments by an employer "demonstrate a failure to accept a basic principle of the Agricultural Labor Relations Act: the certified collective bargaining representative is the exclusive representative of the employees and the employer may not assume that role." (Montebello Rose & Mount Arbor Nursery (1979) 5 ALRB No. 64.)

with the WGA plan. Contrary to the claims of BCI and Member McCarthy, neither inadequate funding nor inadequate benefits were responsible for BCI's resistance to RFK and JDLC. BCI announced publicly that the RFK fund consisted of six million dollars. BCI's negotiators professed to be uncertain of the benefits available or the existence of clinics under RFK but rejected the Union's revised benefit plan proposed in November of 1980 as being too good to be true. The multi-employer pension act liability which BCI and Member McCarthy claim as justification for opposition to the JDLC pension plan was not even discussed at the table, according to one of BCI's main negotiators. Further, BCI never explained why a pension plan administered by the WGA was more acceptable since the only substantial difference between the two plans was in the administration of the fund, and BCI had agreed to a WCT administered plan in the past.

During the final phases of negotiations, after Jerome Cohen and Ann Smith took over for the UFW and following concessions by the UFW on management prerogatives and economics, BCI countered with illusory changes in its proposals on successorship and hiring, language changes on discharge designed to provoke hostile reaction, and slight movement in health and safety, but even this movement included new provisions that were needlessly harsh. Following a hiatus of over six months, the UFW made another attempt and offered significant movement on the major stumbling blocks, good standing, paid representatives, hiring hall, RFK and JDLC. This proposal was almost immediately and completely rejected.

Based on the entire record, we find ourselves in complete agreement with the ALJ's thorough and painstaking analysis. In

adopting the ALJ's assessment of credibility and the inferences he drew from the hearing and the evidence, we hold that BCI need not agree to the UFW's contract proposals regarding medical, pension or other funds, need not agree to UFW proposals for paid representatives, use of a hiring hall or adoption of certain union security agreements. Rather, we, like the ALJ and for the reasons given in his opinion as well as those reasons stated here, find that BCI violated section 1153(e) and (a) of the ALRA by its failure to make some reasonable effort in some direction to compose its differences with the UFW. We also agree with the ALJ that no makewhole remedy be ordered for this violation of the Act, by BCI, for the period of March 15, 1979, when BCI's bad faith bargaining began, until October 22, 1979. This tempering of our remedial provisions will account for the unlawful bargaining tactics of the UFW which occurred during this time. (Wald Manufacturing Co. Inc. v. NLRB (6th Cir. 1970) 426 F.2d 1328 [74 LRRM 2375], enforcing (1969) 176 NLRB 839 [73 LRRM 1486].)

In adopting completely the ALJ's analysis here, we have specifically considered and rejected the General Counsel's and UFW's exceptions regarding the returning strikers and the portions of the complaint concerning individual employees.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Bruce Church, 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 section 1155.2(a) of the Agricultural Labor Relations Act (Act), with the United Farm Workers of America, AFL-CIO (UFW) as the certified exclusive collective bargaining representative of Respondent's agricultural employees; and, in particular, engaging in surface bargaining or unilaterally changing employees' wages or working conditions.

(b) Discriminating against any of its employees for engaging in any union activity by making any unilateral changes in wages, hours or working conditions.

(c) Failing or refusing to rehire or reinstate, or otherwise discriminating against, any agricultural employee because of his or her union activities.

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

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 bargaining representative of its agricultural employees concerning wages, hours and working conditions and concerning any unilateral changes heretofore made any embody any understandings reached in a signed agreement.

(b) Make whole its present and former agricultural employees, including employees who went on strike before March 9, 1979, in support of contract demands by the UFW, who had not been

permanently replaced as of that date, but not including employees hired before March 9, 1979, as temporary replacements for strikers, or employees hired after March 9, 1979, as replacements for strikers, for any economic losses they suffered as a result of Respondent's failure or refusal to bargain in good faith, said make whole 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 shall extend from March 9, 1979 until February 2, 1981, and thereafter until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse. The economic losses for which an employee who went on strike is to be made whole shall not include wages or benefits for the period from the commencement of the strike to the date such employee unconditionally offered or offers to return to work, but shall include the difference between what such employee would have earned by working for Respondent during the period from March 9, 1979, or such later date as the employee went on strike, to the date of the employee's unconditional offer to return to work, and what the employee would have earned by working during the same period at rates of payment had Respondent been bargaining in good faith, computed in accordance with established Board precedents. (See Admiral Packing Company (1981) 7 ALRB No. 43.) Those who did not go on strike (including employees who did not join the strike and employees who were hired as permanent replacements before March 9) shall be made whole for economic losses they suffered as a result of Respondent's bad faith bargaining during the applicable periods

of their employment with Respondent in accordance with established Board precedent, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55. Employees who joined the strike and then returned to work are to be made whole in the same manner as the above strikers during the period they were on strike and as the above nonstrikers during the period they were working. The amount of makewhole for each employee is to be reduced by the amount which is attributable to the period from March 9 to October 22, 1979.

(c) If the UFW so requests, rescind the unilateral changes in wage rates, health plan, pension plan or any other such unilateral change, determined to be a violation herein, and make whole the affected employees for any economic losses suffered as a result of such unilateral changes in working conditions 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.

(d) Offer to each striker who unconditionally offered to return to work on or after March 9, 1979, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other employment rights or privileges, and reimburse them for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, 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.

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

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

(g) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from March 9, 1979 to February 2, 1981 and thereafter until Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse.

(h) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(i) Provide a copy of the attached Notice, in all appropriate languages, to each agricultural employee hired by Respondent during the 12-month period following the issuance of this Order.

(j) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all

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

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

IT IS FURTHER ORDERED that the certification of the UFW as the exclusive collective bargaining representative of the agricultural employees of Bruce Church, Inc. 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: December 27, 1983

ALFRED H. SONG, Chairman

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

MEMBER CARRILLO, concurring:

I join my colleagues in finding that Respondent has bargained in bad faith, primarily on the strength of circumstantial evidence which shows that Bruce Church, Inc. (BCI) wanted to reach only a contract which would have relegated the United Farm Workers of America, AFL-CIO (UFW or Union) to a position inconsistent with its status as the employees' exclusive bargaining representative. At the same time, I find that the Union, by its own bargaining conduct, did not fulfill its duty to bargain in good faith and that the lack of progress at the negotiations table was as much due to the Union's own failure to seek agreement as it was due to Respondent's lack of good faith.

The most telling circumstantial evidence of Respondent's bad faith is the statement by Mike Payne, BCI's general manager, that the UFW was "revolutionary" and could not be trusted. His "team" concept included the notion that only the employer should

solve its employee problems and that an employee-union bond should be avoided. Payne admitted at hearing, without elaboration, that the Union's Robert F. Kennedy (RFK) medical plan gave the UFW too much power. With such strong and explicit statements of mistrust and resistance, BCI's bargaining conduct is consistent with a predisposition to oppose any UFW proposal which gave the Union any credit for employees' benefits or any meaningful participation in the determination of the employees' terms and conditions of employment.[1/]

[1/] Member McCarthy's dissent is fatally flawed in that it glosses over the most crucial and direct evidence there is in the record of Respondent's true motivation behind its bargaining conduct, i.e., Mike Payne's admission of mistrust of the UFW and intent to resist the UFW's status as the bargaining representative of BCI's employees. Absent such explicit indication of Respondent's true unlawful motivation, I would agree with Member McCarthy that Respondent's bargaining conduct at the table, on its face, would support a finding of hard bargaining as opposed to surface bargaining. However, Payne's statements do exist. Just as I have concluded that the UFW did not fulfill its duty to bargain in good faith for much of the time period in question in this case because it did not have an open mind towards considering and responding to BCI's concerns, I likewise conclude that BCI failed to bargain in good faith because it did not have an open mind towards accepting the UFW as the true bargaining representative of its employees. The fact that BCI made proposals offering significant wages and benefits did not relieve it from considering the UFW's proposals with an open mind and striving to reach a common ground for agreement. BCI foreclosed such good faith bargaining concerning the UFW's proposals by entering negotiations with a pervasive distrust and intent to resist any UFW proposal which would give the UFW any credit or role in determining better employee benefits. I specifically reject Member McCarthy's overzealous attempt to become an advocate of BCI's distrust of the UFW as I find such advocacy to be incompatible with our duty to weigh all the evidence in assessing Respondent's true motivations in its bargaining conduct. Because Member McCarthy overlooks the most compelling evidence of Respondent's bad faith bargaining, I find his dissent to consist of the very kind of uneven treatment for which he so readily condemns the majority and the ALJ.

(Fn. cont. on p. 19.)

While I agree with most of the general statements of law concerning good faith bargaining cited by the majority, I feel some clarification is needed. It was noted that Respondent relentlessly opposed each and every UFW proposal relating to the Union's institutional needs and that its positions on such proposals were fixed and firm, with no room for trade-off or compromise. The fact that an employer opposes all of the union's proposals or takes fixed and firm positions is not sufficient, in and of itself, to warrant a finding of bad faith bargaining.[2/] Instead, the Board must examine the totality of circumstances involving the employer's bargaining conduct, including the reasons for an employer's opposition to the union's proposals and its justification for its own proposals, in order to evaluate whether the employer's positions are consistent with its duty to bargain in good faith and are supported by honest claims sincerely held, or are merely pretexts to avoid reaching a collective bargaining agreement. (See O. P. Murphy (1979) 5 ALRB No. 63.) Negotiations

(Fn. 1. cont.)

I further note that some of BCI's stated concerns were patently disingenuous or unconvincing. For example, BCI argued that the UFW's good standing proposal could induce workers into strikes or other job actions even though the Union was willing to agree to a no-strike clause; BCI objected to the UFW's Juan De La Cruz (JDLC) pension plan because of its portability even though BCI did not explain why it previously accepted a similarly portable pension plan under the Western Conference of Teamsters.

[2/] Were the Board to take complete opposition or fixed and firm positions as sufficient evidence of bad faith, the Board in essence would sit in judgment of the employer's substantive proposals and would require the making of concessions in order to escape a finding of bad faith bargaining, something the Board cannot do. (See Lab. Code § 1155.2(a), see also H. K. Porter Co. v. NLRB (1970) 397 U.S. 99.)

do not occur in a vacuum, and so the examination of the totality of circumstances must include an evaluation of the union's conduct in the bargaining process, including the union's own justification for its proposals, its responses to and attempts to meet the employer's concerns, and its ability or inability to make use of economic weapons. What the union does or does not do is relevant in evaluating the employer's positions. (See Kaplan Fruit and Produce Co. (1980) 6 ALRB No. 36.)

The ALJ and majority fault BCI for not presenting or exploring alternatives. The duty to bargain is mutual and a union must also be willing to seek a common ground for agreement. (See Lab. Code §§ 1155.2(a) and 1154(c).) A union has the same responsibility for exploring alternatives as does the employer. Failure by a union to respond to an employer's stated concerns may show the union's own unwillingness to compromise or accommodate the employer's concerns.

Until Jerry Cohen became the UFW's negotiator and began responding to BCI's concerns and showing movement in the union's proposals, the UFW was not bargaining in good faith. The Union was intent on ignoring the major concerns expressed by Respondent and on not exploring alternatives which could accommodate BCI's concerns. The UFW wanted Respondent to accept, without meaningful discussion, the Union's proposals in the form presented. Just as Respondent violated its duty to bargain in good faith by entering negotiations with a predisposition to resist UFW proposals which affected the Union's bond with its employees, the UFW failed to fulfill its duty to bargain by not keeping

an open mind towards finding agreement with BCI.

The fact that BCI's objections to the Union's institutional proposals were pretextual does not justify the Union's failure to confront the issues directly nor does it render the Employer's objections invalid per se. For example, BCI's unlawful opposition to the UFW does not mean an employer bargaining in good faith cannot, for valid reasons, oppose good standing or try to limit the grounds for discharge.[3/] When concerns are presented by an employer in good faith and not as pretexts for the purpose of frustrating bargaining, the union's duty to bargain in good faith requires that the union consider these concerns and attempt to reach a common ground for agreement by responding and exploring possible alternatives.

Labor Code section 1160.3 provides that the Board may award makewhole for an employer's failure to bargain in good faith when the Board deems "such relief appropriate." No such authority is provided in our statute as a remedy against a union for its bad faith bargaining. Nonetheless we can decline to award makewhole against an employer where the evidence shows that the absence of good faith bargaining was as much attributable

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[3/] The Board cannot compel an employer to make any concessions. As long as the employer's claims are consistent with its duty to accept the union as the employees' exclusive bargaining representative and are honest and sincerely held, and the employer makes a good faith effort to resolve its differences with the union, i.e., bargains in good faith, it may hold firm in its positions. Ultimately in situations such as the good standing clause, where each side, bargaining in good faith, may have firm proposals of its own, the determining factor as to whether either of the parties might make a concession and accept the other's proposal depends on a variety of factors, for example using a proposal as a trade off for other proposals or obtaining concessions through legitimate use of economic weapons.

to the union's conduct as to the employer's bad faith. (Cf. Admiral Packing Co., et al. (1981) 7 ALRB No. 43; see also Kaplan's Fruit and Produce Co. (1980) 6 ALRB No. 36.) In this case, until Jerry Cohen became the union's negotiator, the UFW was as much responsible for the lack of meaningful bargaining as was BCI. Therefore, I agree with the majority that our makewhole remedy should be imposed only after the date Jerry Cohen entered negotiations. This may seem incongruous in light of the fact that since Respondent was not bargaining in good faith, nothing the UFW may have done through good faith bargaining would have achieved agreement with Respondent. Nonetheless, the fact remains that agreement is possible only when both the employer and union bargain in good faith, keep an open mind towards each other and seek to find a common ground. When the union fails to bargain in good faith, it precludes the opportunity for reaching agreement. To impose makewhole against the employer when the union itself precludes the possibility of good faith bargaining would be punitive, and hence inappropriate.

Dated: December 27, 1983

JORGE CARRILLO, Member

MEMBER McCARTHY, Dissenting:

By its action today, the majority has made it unlawful for an agricultural employer to take a bargaining position which places the employer's interest in having a reliable work force above the union's interest in augmenting its institutional strength. Hard bargaining has thus been converted to bad-faith bargaining and union institutional demands have in effect been made sacrosanct.

The majority has been misled by an artfully written Decision of the Administrative Law Judge (ALJ). When the veneer is removed from that Decision, one finds an uneven treatment of important surrounding circumstances, an inconsistent approach to the conduct of the parties, and a series of faulty assumptions. A correct analysis of the case would have shown it to be one in which a strong union and a strong employer each contended for the ability to govern the employer's work force, the union doing so because it had certain institutional concerns

which transcended traditional economic issues, the employer doing so because its competitive edge was attributable to a carefully regulated and motivated work force which could produce a superior product. The ALJ recognized but gave little or no weight to the fact that negotiations were frustrated or hindered by the Union calling a strike at a time when negotiations were less than a month old and the Employer was still in the process of putting its counterproposal on the table; by the Union condoning, if not perpetrating, acts of violence during the strike; by the Union making the Employer its number-one national boycott target; by the Union grossly mischaracterizing the boycott as resulting from a struggle for better wages; and by the Union insisting on an industry-based contract which bore no resemblance to the recently expired agreement between the Union and the Employer. Other basic considerations were also largely ignored by the ALJ: the Employer addressed the Union's institutional concerns with significant offers that would likely have produced a contract in most collective bargaining arenas; the Employer made wage offers which met or exceeded the highest rates in the industry; the Employer's bargaining position was fortified by its ability to weather the strike with only a 20 percent loss of production; and the Employer felt strong enough to avoid making the major concessions which the Union sought in return for dropping its demand for a type of good standing clause which the Employer had always considered out of the question.

The foregoing factors should have led to the conclusion that Respondent was simply engaged in lawful hard bargaining.

Instead, the ALJ concluded that Respondent was engaged in surface bargaining, in violation of section 1153(e) and (a) of the Agricultural Labor Relations Act (Act), because its "predominant motive" in negotiations was "to subordinate the Union/worker relationship to that of management to worker." This he inferred from the totality of Respondent's conduct "both at and away from the bargaining table;" although admitting "that much of it, standing alone or in other contexts, would not in itself establish a refusal to bargain."

The Employer's Position On Union Institutional Demands

In the Employer's view, the items which stood as the greatest impediments to a contract were the demands by the Union for: (1) a good standing clause which would make a worker's continued employment contingent on a host of factors to be determined by the Union; (2) a medical plan (RFK) that did not appear to Respondent to be capable of being sustained at the claimed rates; (3) a social service plan (MLK) whose benefits were uncertain and whose beneficiaries might or might not be Respondent's employees; (4) a multi-employer pension plan (Juan de la Cruz) that was prone to legislative changes unfavorable to the Employer; (5) a hiring hall which presented liability and quality control problems; and (6) a system of paid representatives wherein union representatives would be on the company payroll although engaged in activities that might be inimical to the company's interest. These items were also the principal "institutional" concerns which the ALJ perceived as being reflective of a struggle between the Employer and the Union

for the "allegiance" of the work force.

Respondent was deeply concerned about maintaining its ability to keep the work force dedicated to producing a quality product. To the extent that the Union could exert control over the workers in the performance of their tasks, it could distract them from the dedication to quality that Respondent expected and needed.[1/] Under the Union's good standing proposal, for instance, a worker could be stripped of his or her union membership for any number of reasons and thereby lose his or her employment. This was perceived by the Respondent as a powerful tool for eliminating or intimidating those workers who might resist union directives that would interfere with the performance of their jobs.[2/] A work force subject to such influence could not always be counted on to give highest priority to management directives designed to maintain quality

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[1/] Respondent was acutely aware of how a quality-oriented lettuce producer could quickly run into difficulty after making concessions which give the union greater control over the work force. Sun Harvest, a lettuce industry leader with quality standards similar to Respondent's, signed a precedent shattering contract with the Union in 1979 and later admitted that the contract was seriously interfering with its ability to maintain quality. (See R.T. Vol. 38, pp. 81-87.) (Apparently Sun Harvest has not been able to turn things around. On August 10, 1983, Sun Harvest disclosed that it was going out of business at the end of the year. This was reported subsequently in the San Francisco Chronicle.)

[2/] In light of the violent strike, the residential picketing, and the boycott misrepresentations, discussed infra, Respondent could realistically believe that the good standing clause would not be used by the Union in a benign fashion.

production.[3/] The company's natural desire to avoid that situation in no way derogates from the Union's role as the party to whom the worker should look for obtaining improved wages, benefits, and working conditions. There is nothing inconsistent about being a worker who seeks both to cooperate with his employer in turning out the best possible product and to support his union in its efforts to obtain the best possible contract. To the extent the worker can help the employer to run a more productive enterprise, collective bargaining and other basic union interests will be facilitated.

In a similar vein, the quality-conscious employer can be expected to be very concerned about the conscientiousness and the level of skill of the workers it hires. Here, the Union's hiring hall proposal would have restricted the Employer to hiring those individuals whom the Union in its discretion chose to refer to the Employer. It was the Employer's fear that, under that system, there would be fewer qualified workers to choose from, and again the Employer would be placed in a situation which militates against the effort to maintain a high-quality product.

The ALJ takes Respondent to task for its "unrelenting opposition to each and every UFW proposal aimed at satisfying union institutional needs." The union's institutional demands are construed by the ALJ as "deal[ing] primarily with the strength

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[3/] The effect of this influence is an insidious one. Irrespective of whether there is a no-strike clause, the Employer's ability to govern the work force is eroded because the good standing clause in effect creates a separate and conflicting authority to whom the employee must respond in order to retain his or her job.

of the bond between worker and union." Employer action at the bargaining table which makes it more difficult for the Union to strengthen or solidify that bond is considered by the ALJ to be in derogation of "the right and duty of the union to act as the exclusive representative of workers." The fatal flaw in this reasoning is that, in bargaining over contract proposals, the employer is under no obligation to assist the union in strengthening or solidifying its bond with the workers.[4/] It is no more the responsibility of the company to ensure the institutional viability of the union than it is for the union to be responsible for the commercial viability of the company.

Certainly, it would be a different story if the employer sought to weaken the union and usurp its authority by undermining existing institutional structures and safeguards. That of course is not the case here where the union is bargaining for first-time items, some of which seldom appear in the contracts of unions who have had long and successful bargaining relationships with the same employer. The Union in this case may feel a stronger need for certain institutional items than other unions do, but that does not, as the ALJ implies, place a corresponding duty on the Employer to be more forthcoming as to those items. Even if the Employer's "predominant motive" in negotiations is to keep the Union from gaining institutional strength, that is of no consequence in connection with its good faith bargaining

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[4/] An exception to this might be post-certification access, which the Union might need in order to communicate with the workers about matters related to collective bargaining.

obligation as long as the employer's conduct does not otherwise evidence an intent not to reach agreement.[5/] In point of fact, the Employer here was not only willing to accommodate a major institutional need of the Union by agreeing to good standing based on dues and initiation fees, but also gave strong evidence of a desire to have a contract by offering wages considerably in excess of what the Union sought. Furthermore, the Employer's counterproposals on a medical plan and a pension plan provided benefits comparable to those under the Union proposals. Thus the only thing that made any of the Employer's proposals "predictably unacceptable" (as the ALJ referred to some of them) was that they were in the form desired by the Employer rather than in the form desired by the Union.[6/] Even if the substance of an employer's proposal could be considered "predictably unacceptable," that fact would not justify an inference of bad faith if the proposal does not foreclose future negotiations, unless it is so harsh or patently unreasonable as to frustrate

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[5/]As noted in Pease Co. v. N.L.R.B. (6th Cir. 1981) 666 F.2d 1044, 1049:

> A lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from 'conduct clearly showing an intent not to enter into a contract of any nature.' NLRB v. United Clay Mines, 219 F.2d 120, 125 (6th Cir. 1955).

[6/]Some of the Respondent's proposals had previously been agreed to by the UFW in its initial contract with the company.

agreement. (See Morris, The Developing Labor Law, Vol. I, Ch. 13, p. 587.) The Ninth Circuit has stated,

> We may also assume arguendo that in certain exceptional cases the extreme or bizarre character of a party's proposals may give rise to a persuasive inference that they were made only as a delaying tactic or that they should be viewed as a facade concealing an intention to avoid reaching any agreement .... We believe, however, that such a principle, if accepted at all, must be narrowly restricted. Otherwise, the policy supporting section 8(d)'s provision that the duty to bargain in good faith does not "require the making of a concession" would be undermined if not more.' NLRB v. MacMillan Ring-Free Oil Co., 394 F.2d 26, 29, 68 LRRM 2004 (CA 9, 1968), cert.denied, 393 US 914, 69 LRRM 2481 (1968). See also Taylor Instrument Co., 169 NLRB 162, 67 LRRM 1145 (1968).

Just as the Union had its institutional reasons for not accepting certain of the Employer's counteroffers, the Employer had its own rational managerial reasons for not acceding to certain of the union's demands. The Employer is no more obliged to yield at the bargaining table on account of the Union's unique circumstances than the Union is obliged to yield on account of the Employer's unique circumstances.

The ALJ relies heavily on language from As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9, in support of his central thesis that, "Bargaining with the predominant purpose of subordinating the union/worker relationship to that of management to worker is bargaining in bad faith." He appears to feel that his thesis is well-founded and applicable to the facts of the instant case because the Board stated in As-H-Ne that "however well-intentioned, [the employer] cannot usurp the union's position as the employees' exclusive representative." Unfortunately the ALJ fails to note that the facts which gave rise to that statement do not remotely

resemble the facts of the instant case. In As-H-Ne, the Board was concerned about the fact that "throughout the negotiations period it sought to to retain its role as protector of the employees against the union," and found that "this conduct constituted further evidence of bad faith, based on Respondent's failure to accept the union as the representative of its employees." More specifically, it stated:

> As discussed above, Respondent consistently interjected itself between its employees and the UFW, attempting to assume the role of the employees' "protector." Thus, Respondent refused to provide the UFW with the employees' addresses in order to protect their privacy, argued that money should be given directly to employees rather than placed in benefit funds, asserted that the employees should vote on whether to direct part of their earnings to a pension fund, and bargained directly with employees over wages and working conditions. Respondent's position on union security [he initially opposed a union security clause in any form] is thus revealed to be a continuation of its prior conduct, which constituted a rejection of the UFW as the exclusive collective bargaining representative of its employees. When that position is viewed in light of the many other indicia of bad faith discussed in this Decision, Respondent's bad faith is clear.
> (Id. at pp. 15-16.)

In no significant sense did the Employer in this case attempt to "assume the role of the employees' 'protector,'" and at no time did it fail to accept the Union's status as the representative of its employees, or bargain directly with employees over wages and working conditions. Moreover, unlike the situation in As-H-Ne, there are no other aspects of the Employer's conduct from which bad faith can be inferred and the employer was never opposed to good standing in any and all forms.

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ALJ'S Treatment of Union Conduct

While repeatedly justifying the union position as being based on an institutional concern, the ALJ consistently found fault with the Employer's proposals and deemed it incumbent upon the Employer, in each and every instance of disagreement with the Union, to present or explore alternatives which might be acceptable to the Union. He does not explain why the Union does not bear at least some responsibility in finding an acceptable middle ground once its initial position has been countered.

Equally disturbing is the fact that the ALJ seemingly endorses the Union's insistence on having Respondent sign a contract no less favorable to the Union than the one which another industry leader, Sun Harvest, had recently entered into. Such an agreement would have amounted to a complete rewrite of the contract which the UFW had initially signed with Respondent and which had recently lapsed. Respondent is criticized by the ALJ for wanting to negotiate from the initial contract. He does not explain why it is acceptable for the Union to expect the Employer to accede to a totally new contract of great magnitude and import, while it is unacceptable for the Employer to want to deal from a contract which the Union itself had agreed to for the period just prior to the current negotiations.

Another basic flaw in the ALJ's Decision is its failure to adequately assess the impact of some of the critical surrounding circumstances. The ALJ acknowledges that the UFW launched a strike against Respondent only one month after bargaining had begun and before Respondent had even had a chance

to submit its full counterproposal. He also notes the Union-spawned violence and residential picketing that characterized the strike. As for the boycott, which suddenly began ten months into the negotiating period, the ALJ acknowledges that the Union gave the public a false impression of the reason for the boycott and made other egregious misrepresentations. "Predictably," said the ALJ, "all this generated further hostility at the bargaining table." He also finds that the Union was engaged in bad faith bargaining during seven critical months of the 14-month negotiating period, noting that the Union negotiator's "behavior interjected further unnecessary ill-will into negotiations."[7/]

In spite of all of this, the ALJ incredibly concludes that Respondent had no reason to mistrust the union's motives or methods. He simply focuses on various clauses proposed by the Union and states that the Union had no record of abusing

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[7/] On July 12, 1979, Respondent declared an impasse and implemented its pre-impasse monetary offer in order to remain competitive. The ALJ found the impasse to be spurious because it occurred "in the overall context of bargaining whose predominant motive was to relegate the UFW to a status inconsistent with its function as exclusive bargaining representative." To the contrary I would find that the impasse was genuine, because the parties were at loggerheads over the critical issues, and that it resulted from the stalling tactics which the ALJ himself found that the Union was employing at the time. Moreover, as I explain elsewhere in this Dissent, bad faith bargaining by Respondent did not occur, and therefore cannot be a basis for invalidating an impasse.

Two subsequent unilateral changes occurred during the nearly eight-month break in negotiations that began on February 5, 1980, when both sides admitted that there was no room for movement. The ALJ finds that these implementations came as the result of "continued efforts by Respondent to relegate the UFW to a secondary role." This finding I also reject.

them. It is the totality of the circumstances that determines whether a party has been negotiating in bad faith and makewhole relief should be awarded. Yet the ALJ simply assumes that Respondent's bargaining posture should have been unaffected by the Union's conduct, that Respondent's resistance to union institutional demands should not have stiffened in the wake of surrounding events and circumstances.

The Final State of Negotiations

In August 1980, after a six-and-a-half month hiatus in negotiations, the Union suggested that good standing could be traded for paid representatives, hiring hall, RFK and Juan de la Cruz. But at that point the Union's concept of good standing still allowed for assessments to be made pursuant to rules which did not have to be uniform or uniformly applied. Respondent indicated that its proposals had largely solidified and that good standing was not a trade item. On November 7, 1980, some 22 months after negotiations had begun, the Union suggested that it might, in the right context, offer to accept a good standing clause which would make employment contingent only on payment of dues and initiation fees.[8/] Shortly after that, the parties began off-the-record discussions which neither of the parties offered into evidence at the hearing. As a result, this case must be treated as if negotiations ended, for all

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[8/] This narrowing of the good standing clause by the Union could well have been expected to affect the context in which the Union's offer would be operative.

intents and purposes, when the parties went off the record.[9/]

Even if Respondent could have had an acceptable type of good standing clause by simply acceding to one or more of the other institutional items, there is nothing that makes it incumbent upon an employer, especially one who is in a position to drive a hard bargain, to agree to items of lesser concern in order to obtain relief from a union demand on an item of greater concern. (This is strictly a function of the relative bargaining strengths of the parties.) Respondent had never indicated that an agreement on good standing would make the other issues evaporate. Moreover, in agreeing to do without a broad good standing clause, the Union was not really making a concession since, with respect to that employer, it never had such a clause to give up.

The Majority's Defense of the ALJ's Decision

The majority begins its defense of the ALJ's Decision by giving a brief statement of the legal parameters of the good faith bargaining obligation. It acknowledges that an employer cannot be faulted for maintaining a bargaining position that is based on genuinely held beliefs, citing Montebello Rose and Mount Arbor Nursery (1979) 5 ALRB No. 64. It also notes that:

> While the duty to bargain does not require agreement to any specific proposal, or the making of concessions, ...

[9/]Under the Union's last offer prior to its narrowing of the good standing clause, paid representatives and RFK were to be the price for the good standing clause as then proposed. However, nothing was said about Juan de la Cruz or the hiring hall. There is no reason to believe that, during the off-the-record negotiations, the Union did not also place a price on dropping those demands.

> 'the employer is obliged to make some reasonable effort in some direction to compose his differences with the union.' O.P. Murphy (1979) 5 ALRB No. 63, quoting NLRB v. Reed & Prince Mfg. (4th Cir. 1953) 205 F.2d 131, 134-135.

The majority applies both of the above-stated principles in a wholly unrealistic and distorted manner. It concludes that Respondent's bargaining posture was improperly based on an unfounded mistrust of the UFW and that Respondent failed to make some reasonable effort in some direction to compose its differences with the UFW.

As to the mistrust issue, the majority, like the ALJ, totally ignores the many factors that could lend an employer to reasonably conclude that the UFW would use all means at its disposal to assert control over Respondent's work force.[10/] The Union had condoned or perpetrated numerous threats and acts of violence during the strike at Respondent's operations, including charging into fields occupied by nonstrikers, threatening to beat up nonstriking

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[10/] The majority blinds itself to Respondent's legitimate concerns and attempts to divert attention away from the Union's conduct by attacking Respondent for its "exercise of personnel policies designed to eliminate the UFW from effectively representing the work force . . . ." This statement apparently refers to Respondent's policy of promoting teamwork between the workers and management so as to maintain quality production. The notion that such a policy was adopted for a nefarious purpose rather than for sound business reasons makes no sense and is without foundation in the record. Moreover, it is absurd to believe that effective union representation cannot co-exist with employer-employee teamwork on the job.

In his concurring opinion, Member Carrillo mischaracterizes Respondent's labor relations policy as an attempt to exclude the Union both from the process of solving employee problems and from any meaningful participation in the determination of the employees' terms and conditions of employment. These remarks suffer from the same hyperbole as that found in the above-quoted statement from the majority's opinion. To the extent that either the majority or concurring opinion provides a basis for its statements in this regard, that evidence comes from the testimony of a single witness whose credibility is subject to considerable doubt. (See ALJD, p. 7, fn. 3.)

workers and burn down their homes, destroying personal property, and engaging in residential picketing. Moreover, the Union had proven itself to be an adversary that relied more on its economic weaponry than its negotiating skill. Bargaining had hardly gotten underway before the Union launched its strike. Later, the Union precipitously made Respondent its number one national boycott target. Finally, the Union gave evidence of being motivated more by institutional concerns than by the traditional bread and butter issues upon which agreements turn in nearly all other labor-management settings. Major new benefits, and a salary increase even higher than the Union itself had asked for, were not sufficient to interest the Union in coming to terms. Instead, it held out for having benefit plans which it alone would control and obtaining the means by which hiring and tenure of employees would largely be in the Union's hands. All this adds up to a reasonable belief on Respondent's part that the Union would use whatever leverage the contract afforded to alienate the work force from the Employer and put itself in a position whereby it could directly affect the quality of work performed by the employees.[11/]

[11/] This case stands in sharp contrast to Montebello Rose and Mount Arbor Nursery (1979) 5 ALRB No. 79, cited by the majority as an example of improper employer motivation in opposing a good standing provision. There, the employer opposed good standing because it was unlawful under the NLRA and because they desired to protect their employees from arbitrary action on the part of the UFW. Here the Employer was seeking to protect itself, not its employees, from arbitrary union action.

Respondent's bargaining posture can be placed in proper perspective by considering a recent NLRB case, Carlsen Porsche Audi, Inc. (Feb. 11, 1983) 266 NLRB No. 33, in which the "rock

(Fn. 11. cont. on p.38.

(This belief, however, did not deprive Respondent of a willingness to enter a contract on some other reasonable terms.)

The degree to which one should trust the Union not to misemploy certain of the proposed contractual provisions is a highly subjective matter and the Board has no business substituting its judgment for that of the Employer in that regard. The critical factor is the depth and sincerity of the Employer's belief:

> If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system ... of free collective bargaining. The Government, through

(Fn. 11 cont.)

on which final agreement apparently foundered was the difference between the final proposals regarding union security" and where "each party had a not facially implausible reason for being inflexible and rigid as to the . . . union security proposals." The Board affirmed the ALJ's finding that the employer's motivation in this regard was proper. The following pertinent observations were made by the ALJ in footnote 18 of his Decision:

> The General Counsel argues that Comb's assertions of Respondents' motivation for retention of an open shop clause or at least for provision of a current employee escape clause in any union security clause are inadequate and are therefore evidence of bad faith and show that Respondents did not intend to reach agreement. Irrespective of the merits of Respondents' views of union security, a question not within my province, I find there is a nexus between (1) an employer's belief that strike-breaking employees, who have been the subject of various forms of hostility by the Union or striking employees, might not later wish to join that Union and (2) a desire to avoid obligating those employees to join the Union. While Comb admitted that before the strike, his open shop proposal was "bargaining fodder", I credit the assertion that for Respondents in March 1981 the existence of a group of employees, whom they believed would not wish to be forced to join the Union, was a significant motivating factor in opposing any union security clause without the escape language noted.

> the Board, may not subject the parties to direction either by compulsory arbitration or the mere subtle means of determining that the position is inherently unreasonable, or unfair, or impracticable, or unsound.
> N.L.R.B. v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 231 [45 LRRM 2829].)

Respondent's concern about how the Union might utilize the contract's institutional provisions is no mere window dressing. The entire record in this case tells of an employer who has a deep-seated concern about maintaining its special position in the marketplace and who has a fear of what could happen to its position if it agrees to contractual provisions that could enable the union to undermine the employer's on-the-job governance of the work force. Acting in a manner consistent with those beliefs, the Employer bargained hard with a union that was equally committed to an antithetical set of priorities.[12/]

The second argument which the majority makes in defense of the ALJ's Decision is its assertion that Respondent failed "to make some reasonable effort in some direction to compose his differences with the union." The majority reads that quotation from NLRB v. Reed & Prince Mfg., supra, 205 F.2d 131, as if it meant that regardless of the employer's bargaining strength, and no matter how objectionable certain union demands may be, the employer must make some concessions toward those particular demands in order to demonstrate its good faith. The error in that interpretation is seen from a more complete exposition of the

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[12/]Even where an employer's conduct might have been viewed as surface bargaining, the Board has been reluctant to so hold if the union has been equally intransigent. (Unoco Apparel, Inc. (1974) 208 NLRB 601 [85 LRRM 1169], enforced 508 F.2d 1368 [88 LRRM 2956] (5th Cir. 1975).)

reasoning in Reed & Prince:

> Thus if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all. (Id. at pp. 134, 135.)

The facts of this case bear no resemblance to the situation described in the language preceding the statement upon which the majority relies. Respondent not only reached agreement with the Union in a number of areas, it also offered significant new benefits (such as a medical plan and a pension plan) which the majority itself deemed "substantially similar" to those sought by the Union. Moreover, by the majority's own admission, Respondent had, for several months during negotitions, offered more money than the UFW was proposing. These facts are hardly indicative of an employer "who can find nothing whatever to agree to" and "who makes not a single serious proposal meeting the union at least part way."

Respondent was not required to undertake further movement toward any specified union position; it did not have to yield more ground on institutional issues simply because they may have constituted the Union's highest priority item.[13/] To hold otherwise

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13/ In McCulloch Corp. (1961) 132 NLRB 201, the company took the position from the outset that it would not agree to a union-shop or to a checkoff provision. It never retreated from its refusal

(Fn. 13 cont. on p. 41.)

would be to disregard one of the principal tenets of collective bargaining--that the collective bargaining obligation does not compel either party to agree to a proposal or require the making of a concession. (NLRB v. American Nat'l Insurance Co. (1952) 343 U.S. 395 [30 LRRM 2147].)

For all their protestations to the contrary, the majority is in effect requiring Respondent to make concessions to the Union. Given the majority's conclusion that Respondent refused to make concessions on institutional items because of an unlawful "mistrust" of the Union, such concessions would be the only means by which the Employer could demonstrate that its "mistrust" of the Union was no longer operative. In the meantime, Respondent will be incurring an ongoing makewhole liability that will add further pressure for it to sign a contact on the Union's terms. The majority appears to have forgotten the statement of law which it recently affirmed in D'Arrigo Brothers of California (1983) 9 ALRB No. 51, ALJD, p. 66:

> The content of the terms [in a collective bargaining agreement] is a matter determined by perceptions of the relative economic positions of the parties and not by the legal obligation to bargain.

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(Fn. 13 cont.)

to agree to a union-security clause, although it did not foreclose discussion of the issue. The board affirmed the ALJ's decision wherein he found that the company did not violate section 8(a)(5) of the NLRA (equivalent to § 1153(e) of the ALRA) by taking an adamant stand on this issue. He cited the principle that the Act does not require either party to agree to a proposal or the making of a concession. (Id. at 211.) It should be noted that a union-security clause is among the most basic of union institutional concerns.

Conclusion

In essence, bargaining between the Employer and the Union was a struggle which centered on the power to hire and fire. The hiring hall and the good standing clause would have forced the Employer to share that power with the Union and could have significantly altered the composition and attitude of the work force. Such changes could affect an employer's ability to obtain quality production from its work force. Because of its profound concern for the maintenance of quality, the Employer resisted contract proposals that might bring about such changes. This resistance was naturally intensified by the Union's emphasis on control-oriented items and by the Union's conduct away from the bargaining table.

The Employer here was able to withstand the effects of the strike, but it nonetheless made attractive offers beyond what the parties had agreed to in the previous contract. It did not engage in delaying tactics or other indicia of bad faith. Its concern about loss of ability to orient the work force toward quality production was sincere and tenable. Everything points to the fact that the Employer would have signed a new agreement with the Union if the Union had not insisted on major concessions in the areas where the Employer was convinced that its competitive standing could be easily jeopardized. Thus, in finding the Employer's bargaining position to be unlawful and its movement on union institutional issues to be insufficient, the majority

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has embarked on a drastic and most unfortunate interference in the bargaining process.

Dated: December 27, 1983

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the certified exclusive bargaining agent for our agricultural employees, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Bruce Church, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by failing to bargain in good faith with the UFW, by unilaterally changing our employees' wages, benefits and terms of employment without first bargaining in good faith with the UFW about those changes and by failing to immediately reinstate returning striking employees. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

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

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

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

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

WE WILL NOT make any changes in your wages, benefits or terms of employment without first notifying the UFW and giving them a chance to bargain on your behalf about the proposed changes.

WE WILL, in the future, bargain in good faith with the UFW with the intent and purpose of reaching an agreement. In addition, WE WILL reimburse all workers who were employed at any time during the period from March 9, 1979, to the date we began to bargain in good faith for a contract, for all losses of pay and other economic losses they have sustained as the result of our refusal to bargain with the UFW, plus interest. However, because the Board ruled that the UFW failed to bargain in good faith from March 9, 1979 to October 22, 1979, any losses of pay due to our failure to bargain in good faith during this seven-month period will not be reimbursed.

WE WILL offer to reinstate all striking employees not replaced prior to March 9, 1979, who offered to return to work on March 18, 1980, into their previous jobs or to substantially equivalent jobs, without loss of seniority or other rights or privileges, and WE WILL reimburse them for any loss of pay and other economic losses they incurred because we discharged or failed to hire or rehire them, plus interest.

Dated: BRUCE CHURCH, INC.

By: _____
Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3160.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

BRUCE CHURCH, INC.
(UFW, Hector Diaz & Juan Castro)

9 ALRB No. 74
Case Nos. 79-CE-176-EC, et al.

ALJ DECISION

In 1977, the United Farm Workers of America, AFL-CIO (UFW), was certified as the exclusive representative of all the agricultural employees in the State of California of Bruce Church, Inc. (BCI). The UFW replaced the Western Conference of Teamsters (WCT) who had represented BCI employees since the early 1970's. Negotiations between BCI and the UFW began in January 1978 and in June 1978 the parties extended a WCT/BCI contract through the end of 1978. In 1979, negotiations between BCI and the UFW began in earnest, with the UFW proposing a substantial wage hike (from 40 to 150 percent increases) and new contract proposals drawn from its "master agreement." On February 9, 1979, the UFW declared a strike against BCI. BCI offered counterproposals through March 1979, proposing a 12 percent wage increase for 1979 and 7 percent each year thereafter.

On March 15, 1979, Dolores Huerta took over negotiations for the UFW. Negotiations made little progress, BCI opposing reliquishment of its control over the work force through contract proposals on union operated funds, good standing, hiring hall and paid representatives. In July 1979, BCI unilaterally implemented its wage proposals. In October 1979, the UFW began a nationwide boycott of BCI's Red Coach lettuce.

On October 22, 1979, Jerry Cohen and Ann Smith took over negotiations for the UFW. New proposals were made by the UFW and countered by BCI. Negotiations foundered, and in February 1980, BCI unilaterally implemented its first-year proposals. In March 1980, most of the striking employees offered to return to work. In August 1980, the negotiations began again and the UFW withdrew its good standing proposals but BCI refused to make any reciprocal concessions and negotiations ended.

The ALJ concluded that both BCI and the UFW bargained in bad faith but the UFW began bargaining again in good faith when Cohen and Smith took over in October 1979. Therefore, he ordered makewhole to be assessed against BCI beginning October 22, 1979. He found the strike to have been an unfair labor practice strike from March 9, 1979, when BCI had made its first counterproposal. Therefore, the offer to return, which was unconditional when made on March 18, 1980, obligated BCI to immediately reinstate the returning strikers. The ALJ deferred to compliance the amount of backpay due strikers. No other violations were found.

Fundamentally, the ALJ concluded that BCI's opposition to the UFW's proposals on good standing, pension plan, medical plan, hiring hall, grievance and arbitration, paid representatives, leaves of absence and recognition (the UFW "institutional needs") were not genuinely held by BCI. The ALJ found that BCI would accept a contract only

on a basis that would usurp the Union's position as the employees' exclusive representative. The ALJ based his conclusion on BCI's "team concept" in personnel practices, directed toward the exclusion of the UFW, and BCI's unrelenting opposition to each and every article related to the UFW's institutional needs.

Specifically, the ALJ relied on the following factors to find that BCI did not engage in lawful hard bargaining. While BCI may have some legitimate interest in the relationship between a union and its members, BCI's position overstepped that legitimate interest and attempted to substitute itself, BCI, as the actual representative of the best interests of its work force.

BCI's justification for most of its opposition to the UFW's proposals was that the UFW could not be trusted to fairly perform its function as the exclusive representative. The ALJ found no evidence to support this justification. The UFW had no history of abuse of good standing or the other institutional articles. BCI's objections to the institutional needs were therefore not honestly held but were pretexts for keeping the UFW's role relatively minor.

BOARD DECISION

The Board affirmed the rulings, findings and conclusions of the ALJ. The Board specifically noted that this Decision does not require BCI to agree to any specific UFW proposal, only that BCI make some effort in some direction toward reaching an agreement with the UFW.

CONCURRING OPINION, Member Carrillo

Member Carrillo concurred, finding that at least until Jerry Cohen began bargaining for the Union, the lack of progress at the bargaining table was as much due to the Union's own failure to seek agreement as to Respondent's lack of good faith.

DISSENTING OPINION, Member McCarthy

Member McCarthy would not find that BCI was engaged in bad faith bargaining. He regards the negotiations as a struggle between BCI and the UFW that centered on the power to hire and fire. The UFW's institutional proposals were viewed by BCI as an attempt to place more of that power in the hands of the Union, in which event BCI's diminished ability to govern its work force would result in lower quality production. Such a result would seriously jeopardize BCI's competitive standing, which was based on its reputation for higher quality.

Member McCarthy notes that the conduct of the Union away from the bargaining table gave BCI ample reason to be concerned about provisions the Union was bargaining for and that, despite the fact that BCI was able to resist the Union's strike and boycott, the Employer made attractive proposals that went considerably beyond what the parties had agreed to in their previous contract. The Employer's bargaining position may have frustrated the Union's aim

of securing a contract which increased the Union's control of the work force, but it was not in derogation of the Union's right or ability to effectively represent the workers.

Member McCarthy believes that the Employer would have signed a new agreement with the Union if the Union had not insisted on major concessions in the areas where the Employer was convinced that its competitive standing could be easily jeopardized. The majority's holding (that BCI's bargaining position was unlawful and that its movement on union institutional issues was insufficient) is considered by Member McCarthy to be an improper interference in the bargaining process.

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

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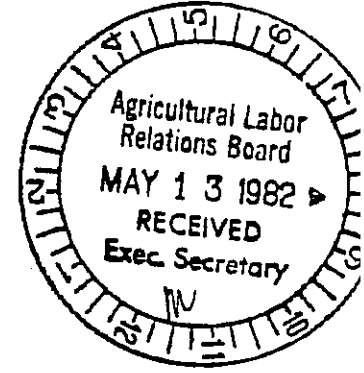

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
BRUCE CHURCH, INC.,	)	Case Nos. 79-CE-87-SAL
	)	79-CE-176-EC
Respondent,	)	79-CE-216-SAL
	)	79-CE-26-SAL
and	)	79-CE-26-1-SAL
	)	80-CE-64-SAL
UNITED FARM WORKERS	)	80-CE-151-EC
OF AMERICA, AFL-CIO,	)	80-CE-167-EC
	)	80-CE-168-SAL
Charging Party,	)	80-CE-168-1-SAL
	)	80-CE-168-2-SAL
and	)	80-CE-168-3-SAL
	)	80-CE-168-4-SAL
HECTOR DIAZ,	)	80-CE-168-5-SAL
	)	80-CE-192-EC
Charging Party,	)	80-CE-255-EC
	)	80-CE-261-EC
and	)	80-CE-284-EC
	)	
JUAN CASTRO,	)	
	)	
Charging Party.	)	
	)	

Appearances:

Warren L. Bachtel and
Antonio Barbosa, El Centro,
for the General Counsel

Kenneth E. Ristau, Jr.,
Dennis A. Gladwell and
William D. Claster of
Gibson, Dunn & Crutcher,
Newport Beach, and
Robert Schuler of
Bruce Church, Inc., Salinas,
for Respondent

Carlos Acala, Keene,
for Charging Party,
United Farm Workers
of America, AFL-CIO

DECISION OF THE ADMINISTRATIVE LAW OFFICER

INDEX

STATEMENT OF THE CASE

James Wolpman, Administrative Law Officer:

Beginning in May 1979, a series of charges were filed culminating in the issuance of a complaint (served July 21, 1979) and an amended complaint (served January 8, 1981) (GC Ex. 1.1 and 1.2). Involved are a variety of allegations of bad faith bargaining and discrimination, all in connection with the negotiations, strike, and eventual recall of strikers which occurred during the period from Winter 1978 through 1980, when the United Farm Workers of America, AFL-CIO (hereafter referred to as "UFW") was bargaining with Bruce Church, Inc. (hereafter referred to as "BCI") for a new collective bargaining agreement.

The case was heard over a period of 46 hearing dates between February 2 and June 15, 1981, in El Centro and Salinas, California. The UFW intervened. All parties were afforded an opportunity to present evidence and to examine and cross-examine witnesses. At the conclusion of the hearing an order was granted permitting further amendments to include additional charges and allegations based on the treatment of certain strikers, the system under which they were recalled, and the discharge of a foreman (GC Ex. 1.42). The Respondent and the General Counsel both filed opening and reply briefs in support of their respective positions.

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

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FINDINGS OF FACT: JURISDICTION

Respondent BCI was, at the time of the events which gave rise to the complaints, a corporation engaged in agriculture in California. I find Respondent to be an agricultural employer within the meaning of section 1140.4(c) of the Act.

Further, the UFW is and was, at the time of the events which gave rise to the complaints, a labor organization representing agricultural employees within the meaning of section 1140.4(f) of the Act, and I so find.

FINDINGS OF FACT: BARGAINING, UNILATERAL CHANGES, AND RECALL

THE BUSINESS OF THE EMPLOYER

BCI is one of the largest lettuce producers in the United States. It is headquartered in Salinas but grows and harvests lettuce, along with several other crops,[1/] in the Salinas, Santa Maria, San Joaquin and Imperial Valleys as well as in parts of Arizona.

The production of lettuce involves a series of operations: land preparation, thinning, cultivation, irrigation and fertilization and, finally, harvesting. Because of climatic differences and planting schedules, these operations are conducted at the different locations at different times of the year. BCI's work force includes a small percentage of employees — primarily tractor drivers and irrigators — who are confined to one location and a much larger percentage — predominately lettuce crews — who

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1. In 2 ALRB No. 38, the Board found that 90% of its land was devoted to the growing of lettuce, with secondary field crops in some of the areas.

work in only one of the production steps and follow the cyclical nature of the seasons, often working in two or more locations during the course of the year. During peak harvest, the company employs 1,500 or more workers.

HISTORY OF LABOR RELATIONS AT BCI

A union election was conducted among BCI field workers in January 1976, but it was not until December 13, 1977, that the UFW was certified as their exclusive bargaining representative. 3 ALRB No. 90. Before that field workers had been represented by the International Brotherhood of Teamsters and covered by a series of collective bargaining agreements extending back to 1970.

Negotiations for the first UFW-BCI contract began in January, 1978, and culminated in the so-called "Bakersfield Agreement" signed June 21, 1978 (GC Ex. 35). Although retroactive to January 1, 1978, it extended forward only six months to December 31, 1978. This gave it a common expiration date with the other UFW agreements in the vegetable industry.

Both in form and content it is modeled on the previous BCI-Teamster agreement. Especially noteworthy is its Union security language. It follows the previous Teamster contract by confining the membership obligation to the payment of dues rather than the more stringent requirement of overall "Good Standing", thus adopting the NLRA standard rather than that permitted under our Act.

Both the short duration of the agreement and its resort to the format and content of the preceding Teamster contract make it difficult to believe that the parties saw it as more than a stopgap. This explains their provision for a 90-day notice of reopening

rather than the typical 60 days. This would allow additional time to negotiate the extensive changes which were anticipated.

Relations between BCI and the UFW prior to the Bakersfield agreement had not been good. The company had favored the Teamsters in the election and then had hired Teamster representative Cecil Almanza as Director of Personnel, a decision which — while certainly permissible — was unlikely to foster cordial relations. Nevertheless, at the conclusion of the Bakersfield negotiations Mike Payne, BCI's Vice President and Manager of Operations, felt that the UFW was "becoming less revolutionary" and that there was hope "We could work out the problems we had and that we could learn to work with each other smoothly." He informed his employees, "The days of hostility and hassel are behind us."

The term of the Bakersfield agreement was, however, not without its problems. In September a wildcat strike involving approximately 300 employees broke out. It was led and inspired by the "Tigreses", a group of female employees whose name comes from their distinctive makeup. They were widely believed to be aligned with low-level BCI supervision and sympathetic toward the Teamsters. During the wildcat, a nasty encounter occurred between the Tigreses and Dolores Huerta of the UFW. This, together with BCI's perceived reluctance to punish strike leaders, displeased the UFW and set the scene for the rabid disagreement which was later to occur when BCI proposed tough no-strike language.

A number of grievances were filed during the term of the Bakersfield agreement: some were settled, some the UFW felt would be better taken up in negotiations; none were referred to arbitration.

The UFW was dissatisfied with BCI's handling of grievances, especially those alleging that BCI had improperly readjusted seniority (see Resp. Ex. 413, 414, 415) and had failed to act to secure dues authorizations (see GC Ex. 278).[2/]

BCI'S ATTITUDE TOWARD COLLECTIVE BARGAINING

Because collective bargaining is, by its very nature, a process in which each participant is careful to reveal only what is to its tactical (and legal) advantage, seldom is it possible to catch a glimpse of underlying attitudes at work. However in late Summer 1978, something happened which was both revealing and prophetic.

The previous year BCI had undertaken a leadership training program for its supervisors. As a follow-up, a number of training sessions were held in July or August, 1978. BCI's Vice-President and Manager of Operations, Mike Payne, spoke at each.

Charles Harrington, a young man who was then an assistant supervisor in the Huron area, described Payne's presentation at the session he attended. Payne began talking about BCI's policy toward unions and workers and used a diagram to illustrate his point. According to Harrington, he drew three circles on the blackboard, labeling one "labor" and another "management". He then drew a line between labor and management to emphasize the importance of building a good relationship with employees. Next he wrote "union" in the third circle and drew a line from the employees to the union,

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2. BCI appears to have lived up to its obligation under the agreement to keep the UFW advised of certain changes in operation. Respondent's Exhibits 418 and 420.

saying, "Now this is what we don't want." He thereupon crossed out the union circle (GC Ex. 221). He then went on to emphasize the "team" concept in bringing employees and management together and said it was BCI's obligation to solve communication problems within its own organizational framework. In concluding his remarks, he said that nothing mentioned during the session was to leave the room.

Payne's version differs. He agrees he drew the three circles, giving them basically the same labels and connecting management to labor (employees) by a line representing the initial channel of communications. But, he says, he then went on to draw lines from management to union and from union to labor to illustrate the lines of communication once a union entered the picture. All of this was done, he says, to emphasize the importance of preventing the breaking or blocking the original line of communications between management and its employees simply because a union had come on the scene, an unwanted outcome he illustrated with a line bisecting his management-employee line (Resp. Ex. 421). He agrees he went on to elaborate his "team" concept — a notion which he described as including both management and employees, but not the union.

While it is possible that Harrington did not have every detail of the presentation correct, I believe him to be a candid witness whose testimony accurately reflects the thrust of Payne's

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remarks.[3] For Payne, industrial relations is a matter of communications. In a successful company employees and managers communicate well; there is "teamwork". If communications — for one reason or another — break down, employees may resort to a union. This means something has gone wrong. Unionization thus becomes the symptom of a malaise, a reminder that communications between management and its employees are not well. The cure comes not so much from building a relationship with the union, but from re-building the bonds between management and employees which have been sundered.[4]

There is an important difference between this concept and the traditional notion of a union as the workers' representative, pitted against a management willing to yield only what it must in order to maintain itself as competitive and profitable. Instead, management and union compete for worker allegiance. And that, more than anything else, was the hallmark of these negotiations. Respondent puts it well when it says that both sides were "after the same pieces of pie." (Resp. Opn. Brief p. 59).

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3. That he had been involved in a previous NLRB proceeding (6 ALRB No. 22) as a result of losing his position at Miranda Mushroom Farm and failed to disclose that termination on his BCI employment application does not overcome my impression of him as a witness who sincerely attempted to be forthright in describing what he heard and saw. The same is true of his eventual termination by BCI because he "wasn't working out."

4. Even Payne's version is revealing. He makes it clear that, even after the union has entered the picture, it is the job of management not only to be receptive to employee needs but to see to it that employees are in a position to address their problems directly to management. It is not enough simply to leave open the door to direct communication; management must go out and do something about it.

That this is an accurate statement of BCI's approach receives additional support not only from Payne's testimony about subsequent events but also from my overall assessment of the man. He testified extensively, affording ample opportunity to assess his credibility and, more importantly, his attitude toward collective bargaining. I found him to be a man of considerable ability, meticulous, careful, and completly committed to his concept of how a business should be run and its employees and unions dealt with. Although he did not participate directly in negotiations, he, together with Ted Taylor, was the architect of BCI's industrial relations policy; Ken Ristau was simply the lawyer/negotiator hired to translate that policy into the stratagem of collective bargaining.

At the time of the training session BCI's relationship with the UFW was better than it had been or would be again, so Payne was speaking of the way he felt about collective bargaining with any union not just with the UFW. Only later, as negotiations unfolded with each side locked into its position, with the strike, the violence and the boycott, did the UFW come to occupy a special status. For him, it reverted to being "revolutionary"; it wanted to overthrow his established concept of the "correct" relationship between management, workers and union. By the time of the hearing — controlled, careful and meticulous though he was — he could not hide what he felt. Antagonism and resentment toward the UFW surfaced not just in occasional thrusts of testimony, but informed his entire demeanor.

INDUSTRY NEGOTIATIONS

The 1979 BCI negotiations did not occur in a vacuum. By securing common expiration dates throughout the vegetable industry, the UFW had prepared the way for a major test of its collective bargaining strength. Even though BCI did not, as the UFW had hoped, join the other vegetable growers in group bargaining, those industry negotiations — described in Admiral Packing Company (1981) 7 ALRB No. 43 — could not help but influence the behavior of the parties in the negotiations here at issue. Involved in these negotiations were vegetable producers constituting a substantial portion of the industry. From them, the UFW was primarily seeking substantial increases in economic benefits while striving to protect the non-economic gains it had secured in earlier master agreements.[5/] Group bargaining began in late November 1978, and continued through February 28, 1979, when the growers declared an impasse and terminated negotiations.

Mike Payne testified that back in 1974 or 1975, BCI, feeling that it had too often been victimized by side agreements and understandings over which it had no control, decided as a matter of overall policy to refrain from involving itself in multi-employer or industry-wide collective bargaining with any of the unions with whom it dealt. Payne explained that, as a corollary to this policy, BCI consciously sought to bargain into its own contracts with those

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5. Since the industry negotiations did not involve true multi-employer bargaining, there was no single master agreement, rather there were a number of agreements substantially idientical in their terms, the benchmark being the 1976-79 Sun Harvest (then known as Interharvest) Agreement (GC Ex. 12).

unions substantive divergencies from their multi-employer counterparts.

UFW-BCI NEGOTIATIONS

There was one overwhelming difference between the industry negotiations and those here at issue: the UFW had already obtained many of its non-economic demands from the other vegetable growers and so could focus on economics. Not so in its dealings with BCI. The Bakersfield agreement had few of the non-economic protections which the UFW had secured in its other agreements. Bargaining could therefore be expected to center around issues of management prerogative, worker security and union involvement. Besides, BCI had the reputation of paying its employees something over the industry standard, so agreement on economics should not prove insurmountable.

Extension of the non-economic gains won elsewhere in the industry was important to the UFW not only because BCI was one of the largest vegetable growers, but also because the failure to secure those protections would serve to undermine its position elsewhere in the industry. This was and remains an especially sensitive area for the UFW because it is committed to more than simply obtaining the decent wage for its members. It believes that to adequately function as the collective bargaining representative for farm workers, a union must be strong enough to temper and confine the areas of management decision making and control which affect workers. In order to become strong enough to accomplish this, the union must have the allegiance of its members. Hence the importance of such "institutional" demands as union security and

union administered medical and pension plans. It can then use that allegiance and institutional power to obtain contracts which protect members by giving them job security, good working conditions, and decent wages and benefits.

David Martinez, the initial spokesperson for the UFW, threw considerable light on these goals when he divided the union's proposals to BCI into three categories. First, there were those which satisfied the union's institutional needs; that is, proposals which, if accepted, secure the allegiance of the work force and guarantee to the union an authoritative role dealing with the effect of management decisions upon workers. Included in this category are recognition, union security, hiring hall, leaves of absence for union business, union administered medical, pension and welfare funds, and provision for union contract administrators paid by the employer (paid reps). A second category dealt with the job security afforded workers. Besides the overall economic package, this category includes effective grievance procedures, restrictions on discipline and discharge, and seniority protection. Finally, there was a third category — management rights. It includes the no-strike clause and a variety of provisions spelling out the retained rights of management — subcontracting, mechanization, new operations, successorship, and so on. By gaining institutional strength, the union may limit the retained rights of management so as to protect and enhance the job security afforded workers.

On the other hand, BCI's goal and the policy it pursued throughout negotiations was to resist vehemently any proposal which it believed would impair the allegiance and control of its work

force. This was very much in line with Payne's overall attitude toward industrial relations (supra, p. 7), an attitude which derived from his assessment of BCI's position in the market. Along with Sun Harvest and Bud Antle, it was one of the country's largest lettuce producers. As such it had chosen to focus on the "quality" sector of the market. This put it in direct competition with Bud Antle whose workers were under Teamster contract. The inability of Sun Harvest to compete for this sector was, according to Payne, due — more than anything else — to the erosion of worker allegiance and control it had suffered at the hands of the UFW. To avoid that peril and maintain the quality of its production BCI sought to strengthen the line of communication between management and employees and encourage them to identify with their employer and see themselves as part of the "team." Over and over in his communications to them and in his testimony at the hearing Payne resorted to the "team" metaphor. The company's announced strategy, therefore, was to bargain away from the Sun Harvest "Master" agreement by resisting provisions which would impair employee allegiance and by insisting on those which would allow it maximum flexibility in the direction of the work force.

Given this clash of basic philosophies, it was inevitable that BCI and the UFW would come to loggerheads over the proposal found in the majority of other UFW vegetable industry contracts making employees subject to discharge for lack of "Good Standing." BCI perceived capitulation to such a requirement as a surrender of the allegiance and control of its work force. As negotiations unfolded, its antagonism towards the Good Standing clause became the

watchword for its opposition to all UFW proposals which would strengthen the union as an institution.

THE REOPENING

On October 6, 1978, Ceasar Chavez wrote to BCI stating the UFW's intention to reopen the Bakersfield agreement and outlining the areas where proposals or changes could be expected (GC Ex. 6). While the letter was more informative than a typical reopening letter, it did not focus on the UFW's institutional concerns, nor did it indicate that the entire format of the agreement was to be redone. It did indicate that a request for information would be forthcoming and asked that negotiations commence as soon as possible. On October 16, 1978, Mike Payne replied in a more formal vein acknowledging the reopening letter and designating Ken Ristau an attorney with the law firm of Gibson, Dunn and Crutcher as the chief employer negotiator (GC Ex. 7).

Between October 16 and December 18, 1978, the UFW neither requested a meeting nor submitted its promised request for information. Finally, David Martinez of the UFW did contact Ken Ristau and they arranged to meet on December 21. The meeting was devoted to a discussion of the format for negotiations. Martinez and Ristau agreed to proceed at the rate of two meetings a week. Because of Christmas and other commitments, the first session was not scheduled until January 10, 1979 — 10 days after the expiration of the Bakersfield agreement. Martinez told Ristau that he hoped to have the union's economic proposal as well as its non-economic proposal ready for the first session. Still no request for information had been delivered to BCI. The 90-day provision for

reopening had not accomplished its purpose; negotiations began much later than they should have.

While BCI had some information indicating that pervasive changes in the Bakersfield agreement would not be sought, I doubt that Ristau and Payne were as surprised as they claimed when they saw the UFW proposal. To an experienced negotiator like Ristau the UFW's commitment to securing its institutional needs and the interim nature of the Bakersfield agreement were too conspicuous to ignore.

SUMMARY OF NEGOTIATIONS

The negotiations which began January 10, 1979, spanned 23 months, lasting until late November 1980, when they finally trailed off into a series of off-the-record meetings. All told, there were about 50 bargaining sessions. For purposes of discussion, they can conveniently be broken into four phases.[6/] During the first, running from January 10 to March 15 and including about 14 sessions, David Martinez was the chief UFW negotiator. During the second, running from March 15 to October 22, 1979, including about 25 sessions, Dolores Huerta was the negotiator. During the third phase, comprising 9 sessions between October 22 and February 5, 1980, when negotiations broke off for seven months, Jerry Cohen was the UFW negotiator. Finally, when negotiations resumed in September and November 1980, three sessions were held, again with Cohen as the negotiator. These culminated in a series of off-the-record meetings in December 1980 and January 1981.

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6. Bearing in mind that good or bad faith must, in the last analysis, "be discerned from the totality of . . . conduct during the entire course of negotiations." Masaji Eto (1980) 6 ALRB No. 20.

Throughout the negotiations Ristau served as chief employer spokesman; he was assisted by Jack Armstrong, BCI's Secretary-Treasurer, and, until his death in April 1980, by Cecil Almanza, BCI's Personnel Director. Besides its lead spokespersons, all of whom were experienced negotiators, the union had a worker negotiating committee.

PHASE I: JANUARY 10 TO MARCH 15, 1979

At the initial session on January 10, the UFW submitted its non-economic proposals (GC Ex. 8); there were thirty articles, all originating in the Sun Harvest "Master" agreement. On January 25 the UFW proposed 17 more articles primarily concerned with economics, together with supplements on classifications, seniority, and Arizona work (GC Ex. 33.1). The opening wage proposal called for large increases.[7/] The January 25 submission, taken together with that of January 10, constituted a complete contract proposal.

Almost as soon as the parties began discussing the proposal, they clashed. BCI wanted to pursue what it described as a "building block" approach in which one or more related provisions, beginning with the least controversial, would be tenatively agreed to, after which another proposal or group of proposals would be

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7. As initially proposed January 25, 1971 and modified February 1, 1979, hourly rates were to go from $3.75 to $5.25 for general labor (43%); from $3.75 to $6.10 for irrigators (63%); from $4.165-$4.60 to $8.35 for equipment operators; ground crew piece rates for cutters and packers would increase from .58 to .72 for boxes of 24 (24%) and from .61 to .89 for boxes of 30 (50%); on the wrap machines the basic rate would go from $3.78 to $6.10 (61%) with packers going from $3.92 to $7.10 (81%), closers from $4.085 to $8.10 (98%) and loaders from $4.085 to $10.30 (152%); the basic piece rate on the wrap machine for boxes of 24 would go from .749 to 1.06 (42%) and for boxes of 30 from .825 to 1.325 (61%); in addition there was to be a quarterly cost of living adjustment.

taken up. David Martinez refused, terming this "package bargaining" suited to late in negotiations after issues had been narrowed and defined. He took the position that he would discuss individual items but would agree to nothing until he saw the entire BCI counterproposal. Until then he was even reluctant to prioritize his demands.

The Strike

Meanwhile on February 9 — a month after negotiations had begun and before BCI had submitted any significant number of counterproposals — the UFW struck.[8/] Although the strike began in the Imperial Valley, it spread with the season to Poston, Huron, Guadalupe and Salinas. Its effect, coming as it did early in negotiations before the issues had narrowed, was to aggravate the already strained relationship at the negotiating table. Martinez offered to step up the pace, even to meet continuously if necessary, but BCI declined.[9/] It continued to operate with replacements and with workers who did not participate in the strike or who later abandoned it. Payne testified that after the initial thrust of the work stoppage BCI was able to continue operations with 75-80% of its normal work complement. This, too, served to deepen the rift with the UFW.

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8. Like negotiations, the strike did not occur in a vacuum; it coincided with strikes called during January and February against most of the other vegetable growers in the Imperial Valley.

9. No meetings at all were held during the week of February 20 because Ristau was representing BCI at the hearing in Case No. 78-CE-141-M and 1-M; the same hearing which had interrupted negotiations earlier during the week of January 15.

BCI's Counterproposals

Beginning on February 8, BCI began submitting counterproposals. They trickled in over a period of 7 meetings until March 9 when, with the submission of BCI's wage proposal, its counterproposal was complete.[10/] It is difficult to understand why the process took so long since BCI adhered to the position that the parties should be working from the Bakersfield agreement and therefore patterned its counterproposals closely on that agreement. More than twenty were drawn verbatim from it. While most were of secondary importance, three (Union Security, Labor Contractors, and New Operations) involved significant issues, substantially at odds with UFW proposals taken from the Sun Harvest "Master" agreement.

Other, more significant counterproposals, though modeled on the Bakersfield agreement, were modified to include additional, more restrictive language. The modifications were aimed at expanding BCI's management prerogatives, at avoiding commitments which would strengthen the bond between workers and their union, and at obtaining concessions which would clarify and strengthen the power of the company vis-a-vis its workers. For instance, the Grievance and Arbitration proposal, by shifting the burden of moving grievances along to the union, by shortening time limits and by confining the scope of arbitration to one grievance at a time, would

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10. BCI proposals were admitted into evidence at various times during the hearing. However, the entire lot — arranged chronologically and by subject matter (indicating changes from proposal to proposal) — is in evidence as Resp. Ex. 335. That exhibit is of considerable assistance in understanding what occurred. References to it are by the Exhibit, the subsection (in parenthesis) and the proposal date.

pare down the number of valid grievances, thus reducing union visibility and involvement in contract administration. The No-Strike clause, by allowing the company a freer hand in disciplining strikers, tightened BCI's control over workers. Other language of the clause, taken in conjunction with the Protection of Rights proposal, restricted the UFW's power to strike or picket to organize the workers of employers engaged in joint ventures with BCI. The proposed Maintenance of Standards clause and Rights of Management clause, by eliminating past practice language ("General Working Conditions") and explicitly recognizing ways in which BCI could alter working conditions served to curtail union restraints on change. The Maintenance of Standards proposal also struck directly at the union's relationship to its members by freezing dues and initiation fees, and went on to upstage the union in its role as intermediary between worker and employer by giving BCI the discretion to award better wages and benefits to individuals of its own chosing. Changes in the work preservation clause increased BCI's subcontracting prerogatives. The zipper clause curtailed the right of the UFW to bargain over changes occurring during the contract term. The Health and Safety clause, by allowing a worker to refuse an order only when it posed a "real danger of death or serious injury," rather than being "actually hazardous to health" represented a retreat from the protection of the Bakersfield contract. These changes could hardly be expected to meet a favorable reception from the UFW. Those dealing with a freeze on dues and initiation fees and with the right to refuse hazardous work were obviously unacceptable.

As a palliative, BCI went beyond the wage offer pending in the industry negotiations and proposed increases amounting to approximately 12% of the first year and 7% in each of the succeeding two years.[11/] There were to be similar increases in the night shift differential and in travel allowances. BCI was willing to establish a pension plan (offering 5¢ per hour) and give an improved medical plan; but it would not agree to UFW administration of either plan.

Finally, there were a few counterproposals which differed materially from those of the Bakersfield agreement: Scope (Article 2), Seniority (Article 4), Discrimination (Article 12), Term (Article 43) and Housing. None represented a retreat from the Bakersfield agreement, but most differed in a number of respects from proposals submitted by the UFW. The most important of these clauses was Seniority.

Discussion of Proposals and Counterproposals

During the first phase of negotiations very little was resolved, but almost everything was discussed. The discussions themselves shed considerable light on the underlying conflict between BCI and the UFW.

1. Union Security. Without question this was the most serious stumbling block to agreement. It haunted the entire negotiations and was discussed four or five times during Martinez' tenure. The right of a union to secure the discharge of a worker who — by strike-breaking or otherwise — betrays his or her allegiance is a formidable mechanism for building a strong, cohesive

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11. At that point employers in the industry were willing to offer no more than 7%. Admiral Packing Company, supra.

union. The UFW, analogizing its situation to that of industrial unions during the era of the Wagner Act, was therefore deeply committed to securing this institutional protection. Whereas BCI saw the clause as a substantial abridgement of its traditional power over its work force. It believed that acquiesence to the UFW's Good Standing proposal would fundamentally alter the balance of power in its dealings with the UFW, thereby weakening Payne's notion of the BCI "team" and jeopardizing the commitment to quality production. BCI had little faith in the restrictions written into the Act which forbid a union from using a good standing clause to deprive members of speech, assembly, voting and membership privileges, but instead believed that the UFW would use the loss of good standing as a threat to force its members to participate in boycotts, marches and political campaigns — all aimed at gaining political and economic ascendancy over BCI and in the industry at large. The dispute therefore was not confined to day-to-day work issues; it reached well into each party's political and philosophical view.

2. Pensions. Prior to the Bakersfield agreement, BCI workers had been under a Teamsters pension plan. The Bakersfield agreement simply deferred the issue by providing for payments to employees in lieu of pension contributions. In these negotiations both sides agreed there should be a pension plan, but they did not then move on to the usual issue of how much the employer should contribute. Instead the battle was waged over whether the fund would be a UFW fund or a BCI fund. The UFW saw its Juan de la Cruz plan as an important mechanism for building worker support and allegiance, while BCI was predictably opposed, arguing that its

"portability" would encourage workers to move from company to company, thereby damaging the BCI "team" and causing deterioration in the quality of production. In other words, the pension issue, like that of Good Standing and like so many other issues in the negotiations, reduced itself to one of institutional allegiance.

3. Medical Plan. Here again the issue was not so much whether there would be a plan or how much it would cost, as it was who would run it. BCI wanted the Western Grower Plan 25 while the UFW wanted its Robert F. Kennedy Plan. The RFK plan had experienced undeniable administrative problems. It was an ambitious undertaking marked by rapid growth. Its clientele was large, they were spread over a wide geographical area, and they had their own unique health characteristics. In pointing out the potential effect of RFK's administrative problems on worker satisfaction and productivity, BCI was on firmer ground than in its criticisms of the Juan de la Cruz pension plan. At bottom though, the issue remained the familiar one of worker allegiance.

4. The Martin Luther King Plan. The purpose of the MLK fund was to provide for the educational and charitable needs of farm workers. While such plans are not unknown to collective bargaining, they are not nearly so familiar as medical and pension funds. When the plan was discussed, there was some reluctance on the part of the UFW to detail or confine the possible uses to which fund monies would be put. This aroused BCI's suspicions. Even after receiving assurances that the monies would be used for BCI workers and their families, it persisted in the fear that funds would find their way outside its work force and into social and political programs with

which it disagreed. Here again there is every indication that BCI believed the UFW would use the fund to divide employee allegiance and promote its own institutional supremacy.

5. Citizens Participation Day. The conflict over CPD was much the same as that over MLK — the difference being that the legal status of CPD was uncertain, and therefore both sides were more tenative in their positions. Because CPD was on its face simply another holiday, the UFW did not feel obligated to provide BCI with information as to the use of monies collected — a position which must have engendered some of the same suspicions which attached to the MLK proposal.

6. Hiring Hall. The hiring hall has been a traditional mechanism by which unions establish and maintain hegemony in the labor market. Unfortunately it has not gone unabused; and, evidently, BCI did not believe that the many legal protections which have grown up to protect against abuse of hiring hall systems were sufficient to outweigh the potential liability of a participating employer. In this regard, Ristau was able to point to litigation in which Pacific Maritime Association had become embroiled as a result of hiring hall abuses by the International Longshore Workers Union. He also argued that BCI's commitment to quality would be hurt if it lost the discretion to pick the most qualified job applicants rather than those who met only the threshold qualification for dispatch.[12/] Unstated, but clearly operable, was the recurring concern over worker allegiance: whether the union or the employer runs the

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12. The length of probation was a related issue over which there was also disagreement.

hiring mechanism has much to do with the applicant's allegiance once hired.[13/]

7. Full Time Representatives/Grievance and Arbitration. The success of a union in gaining and preserving the allegiance of its members has much to do with its success in handling day-to-day problems arising during contract administration. The notion of an employee functioning as a full time union representative while being paid by his employer is far from typical in settings were collective bargaining relationships have not fully matured. So it is not surprising that the UFW's "Paid Rep" proposal met with strong opposition. Not only was BCI concerned about worker allegiance, but it was apprehensive lest paid representatives go beyond traditional contract administration and become involved in wide-ranging economic and political causes — all on BCI's time. These worries were coupled with a basic disagreement over the proper arena for the settlement of grievances. Should they be resolved, as the UFW argued, out in the field among those directly involved; or should they be handled, as BCI contended, away from the heat of the moment by experienced personnel managers and UFW representatives? Each party no doubt felt that it would be more successful on its chosen turf. Again the issue touches that of worker allegiance and control. The same can be said of the other language changes, already described (supra, p. 17-18), which BCI had made in the Bakersfield grievance and arbitration clause: One consequence of

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13. BCI's worry lest the hiring hall destroy job satisfaction by breaking up families who had worked together would be more persuasive had the UFW evidenced a reluctance to solve that problem by fine tuning the seniority and hiring provisions.

their acceptance would be to pare down the number of successful grievances and thereby diminish the role of the UFW in the eyes of the workers.

8. Seniority. In seasonal industries seniority can be a complex and difficult problem to resolve. This is especially true with large scale operations like that of BCI where work is accomplished in different areas of the State at different time of year. Most crews move from area to area but their compositions change. Some members follow the seasons from area to area while others work only one or two areas with their crew and then are supplanted by still other crew members who likewise confine themselves to specific areas. BCI wanted to maintain the cohesiveness of these groupings because, as "teams", they were seen as essential to quality production.[14/] Initially, however, the UFW favored company-wide seniority because it believed that the equities should be with those workers who had, overall, worked longer for BCI. But the use of company-wide seniority creates serious obstacles in reuniting crew members with their crews once they have left or been laid off.

With seniorty — even moreso than with other significant issues in collective bargaining — there is room for compromise. Most seniority systems are hybrids designed to accomodate the conflicting considerations which go into determining who should and who should not work in a given situation. The UFW did indicate some flexability in its position, but during phase I the parties simply

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14. A closely related consideration is the desirability of allowing family members to continue to work together.

did not get far enough down the line in negotiations for the pressures needed to engender accomodation and compromise to take hold.

9. No-Strike/Protection of Rights. BCI sought to tighten the No-Strike clause of the Bakersfield agreement by proposing language which could be used to hold the UFW responsible for wildcat strikes (like the one engaged in by the Tigreses), by allowing itself a freer hand in disciplining strikers, and by forbiding workers from respecting picket lines directed at BCI by other unions. The UFW was opposed to all of these changes and was especially incensed by the one making it responsible for strikes beyond its control.

Language proposed for the No-Strike and the Protection of Rights clauses restricted the UFW's right to use economic pressure against employers with whom BCI was engaged in joint venture or partnership arrangements. This restriction is significant because of the frequency, variety and complexity of legal arrangements under which crops are grown, harvested, and shipped. The UFW (in its Grower-Shipper and Worker Security proposals) was willing to grant protection to such joint ventures only if it was not already engaged in organizational drives or bargaining disputes with BCI's partner; and, in the future, only for the duration of a crop year. But BCI wanted indefinite protection for its joint ventures so long as it did the thinning, hoeing and harvesting work. This is the kind of disagreement which becomes almost impossible to compromise or resolve in a situation where as here, each side suspects the ulterior motives of the other.

10. Management Prerogatives Clauses. A whole family of proposals and counterproposals dealt with the protection of jobs and bargaining rights as methods and means of production changed and fluctuated. Included were the Mechanization clause, the Subcontracting proposals and counterproposals, the New Operations proposal, the Successorship clause, the Management Rights proposal and counterproposal, and the Maintenance of Standards clauses. BCI sought changes from the Bakersfield agreement which either expanded its prerogatives or explicitly delineated previous possibilities, while the UFW sought to address a wide variety of arrangements and contingencies which can have a substantial impact on workers and their union. Given the suspicion and the distrust at the bargaining table, agreement, accomodation or compromise again became impossible, primarily because of the UFW's fear that BCI was looking for ways to slowly destroy its certification.[15/]

11. Wages, Cost of Living Adjustment, and Other Economic Proposals. Although initial wage proposals and counterproposals, including a cost of living adjustment proposed by the UFW, were made during the first phase of negotiations, they did not assume an important role. There were too many other pressing, non-economic issues which needed to be narrowed and resolved before the parties could hone in on wages. The same was true of other economic proposals: Reporting and Standby Pay, Vacations, Hours and

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15. One immediate problem over the method and means of production which received considerable attention during the first phase of negotiations was "4 high loading." Loaders felt unduly put upon by a recent requirement that they stack cartons 6 or 8 high rather than 4 high as had been their previous practice. The UFW proposed that the change be prohibited.

Overtime, and so on.

12. Strike Settlement Agreement. On March 9, a month after the strike began, BCI submitted its Strike Settlement proposal. Its terms were tough; acquiescence would have been tantamount to accepting BCI's victory. But strike settlement is an issue which generally does not ripen until late in negotiations, so the document has to be viewed as more of a show of force than an ultimatum. Nevertheless, it is revealing insofar as it goes beyond the usual scope of such agreements and specifically exempts non-union workers (who for the most part were strike replacements) from the union security clause, thereby moving, once again, into the area of worker allegiance.

13. Other Discussion and Proposals. During the first phase of negotiations three other issues surfaced which, while not the subject of specific proposals and counterproposals, were nevertheless of interest. All were raised by members of the union negotiating committee. Maria Ramos complained that female crew members were being sexually harassed by some foremen. Ristau's response that the company could not outlaw love was facetious; however, when called on the issue, he did indicate that grievances could and should be filed where incidents occurred. Another member of the Committee, Don Raffa, complained of discrimination against his family and against other pro-union crews. The company indicated that these were appropriate areas for grievance, but took the position that Don Raffa's particular complaints were stale. He also raised an instance in which a foreman had taken a disparaging attitude toward his role as grievance representative.

There were a few proposals which, though discussed, did not assume an important role until the next phase of negotiations, among them were Recognition/Scope, Health and Safety, Visitation/Access, and Discipline and Discharge. Likewise, while there appears to have been some discussion of the unsettled grievances left over from the Bakersfield agreement (supra, p. 4-5), little was accomplished and they remained unresolved.

Summary of the First Phase

Almost nothing was resolved during the first phase. Only three trivial clauses — unemployment, income tax and severability — were signed off. Everything else remained open.

What did surface, in proposal after proposal, as a recurring, Protean theme, was the competition between BCI and the UFW for the allegiance and control of the workforce. Each side was so deeply committed to prevailing in this threshold conflict that progress into the usual arena of collective bargaining — economics and traditional management prerogatives — was forestalled and impaired. The phase ended with BCI and the UFW completely at odds, each suspicious and distrustful of the other.

PHASE II: MARCH 15 TO OCTOBER 22, 1979

The second phase of negotiations, with Dolores Huerta replacing David Martinez as spokesperson, was even less productive than the first. Only a few trivial clauses were signed off, while antagonism and distrust grew. The conflict over union security, the Robert F. Kennedy Farm Workers Medical Plan, the Juan de la Cruz Farm Workers Pension Fund, and the Martin Luther King Fund, was by this time so deep-seated that further discussion became pointless.

The other institutional issues involving worker allegiance (Hiring Hall, Paid Rep, and Grievance and Arbitration) were discussed but with little or no progress.

"Impasse" Bargaining

Because negotiations had bogged down over threshhold institutional issues, leaving wages, seniority, health and safety and the other important areas of collective bargaining still open, neither party believed that true impasse had been achieved, so negotiations continued on. The direction they took, however, was not a healthy one. Instead of bargaining toward agreement, a new "logic" emerged — the logic of impasse. BCI began looking for it; the UFW began looking to avoid it. The 25 or so bargaining sessions which ensued are a fine study in the pathology of this sort of negotiating.

That this was indeed what was going on during phase II is evident from the behavior of the parties and the pressures upon them.[16/]

Industry negotiations had terminated February 28, 1979, with the participating growers declaring impasse. At least two (Gourmet Harvesting and C. J. Maggio) and possibly more thereupon instituted unilateral wage increases. See Admiral Packing Company, supra, ALO Decision pp. 45-47. BCI was thus placed in the difficult position of trying to operate with strike replacements while unable to offer competitive wages. Unilateral implementation after

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16. Here the behavior and pressures are described. See infra, p. 70-72, for factual analysis and legal conclusions on this issue.

"impasse" would, of course, be one "solution".

The pressures on the UFW have already been noted. The strike and the breakdown of industry negotiations presented a major test of its institutional strength. It had attempted to make the most of its two weapons — the strike and the consumer boycott — but a number of employers, BCI included, had been able to continue operating with replacements. For strategic purposes the boycott had been restricted to a single grower, Sun Harvest; so — at least until that contract was settled — it was unavailable for use against BCI. It was therefore essential to deprive BCI of any advantage to be gained from unilateral implementation of its wage proposal. That meant avoiding impasse.

The result was an elaborate game of cat and mouse with BCI striving to gain impasse and the UFW working to elude it. In terms of concrete behavior, the situation looked like this: BCI made "fixed and firm" proposals governing the major subjects of collective bargaining especially in the area of wages and other economic benefits. It then demanded early and sometimes immediate responses. It constantly sought to pin down the UFW to definate positions, preferably ones at odds with its proposals. Finally, any UFW behavior — a delayed meeting, a seeming disagreement, a postponed response — which could possibly be characterized as evidencing impasse was so interpreted and then documented in a

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letter or a telegram.[17]/

The UFW, for its part, sought to elude impasse by spending inordinate amounts of time discussing issues of secondary importance and by avoiding confrontations over important issues especially where speedy deadlock was likely. Then too, Huerta moved quickly from issue to issue, often abandoning a subject before there was clear disagreement. She was reluctant to prioritize and slow to counterpropose. Finally, there was her constant tardiness: Part deliberate strategy, part personality trait, part overwork and part negotiation posturing. Each dereliction was carefully documented by BCI. More importantly, her behavior interjected further unnecessary ill-will into negotiations.

For obvious reasons neither side was willing to come out and acknowledge what it was up to. But BCI did show its hand on two occasions (March 22 and April 4) when Personnel Director Almanza, in the course of translating company proposals into Spanish for the UFW Negotiating Committee, actually spoke of the company's desire to go ahead and implement. While these comments would have been innocuous if phrased in terms of implementation once agreement was reached, that was not the context. There was no mention of agreement or settlement. In fact, on the first occasion he spoke of the company's "leaving" (i.e. breaking off negotiations) so changes

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17. The overall flavor of Huerta/Ristau relationship is apparent in their correspondence. See, in chronological order, Resp. Ex. 309; GC Ex. 239; Resp. Exs. 318, 310, 319, 320, 308, 307; GC Ex. 240; Resp. Exs. 306, 321, 322, 323, 324; GC Exs. 226, 227, 228, 229; Resp. Exs. 311, 326,; GC Exs. 242, 243; Resp. Ex. 329 313, 312, 328, 314, 330, 333, 334.

could be made.

The climax came on July 12, 1979, when BCI went ahead with the implementation of its wage proposal. A week later it put into effect its own medical plan and its gas allowance proposal.

These changes were made without forewarning, immediately following the bargaining session of July 11, 1979. At that session BCI had continued to insist on a full response to its May 10 overall proposal, but received instead counterproposals in a limited number of areas and a reduced wage proposal of $4.80 an hour (down from $4.95), all of which it rejected (its pending offer at the time was $4.35/hr.). During the same session BCI provided the UFW with modified proposals on Seniority, Recognition, Discharge and Warning Notice and unsuccessfully insisted upon an immediate response. Although the meeting ended without scheduling a new date, there was no mention — and certainly no agreement — that future meetings would not be held. In fact, as the meeting broke up, Huerta resisted Ristau's attempt to get her to adopt December 1 as the earliest he could expect a response.

The July 12 implementation eased, but did not eliminate, the pressures on BCI to maintain a competitive wage structure. The problem again became acute in August and September when the parties heard that Bud Antle was nearing settlement with the Teamsters and the UFW concluded a contract with Sun Harvest. With its principle competitors paying a base rate of over $5.00 per hour (with concomitant piece rate adjustments), there was again mounting

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pressure to find a way to stay competitive.[18]

Other Factors

While impasse bargaining pervaded Phase II, effecting almost every aspect of negotiations it was not the only factor at work. The strike was still underway, and there were incidents of property damage, residential and mass picketing, threats, and the like. (See discussion, infra p. 55-57). These could not help but color BCI's attitude toward the UFW; especially since there was abundant evidence to suggest that the union had supported or at least been noticably slow to police all but the most reprehensible conduct. Likewise, there were incidents where strikers were threatened, intimidated and even attacked for which the UFW held BCI equally responsible. The company's widespread use of strike replacements, especially its suspected resort to illegal aliens, was another aggravating factor.

In spite of all this, the UFW had not given up hope that real collective bargaining could be revived. And so, despite the impasse bargaining and amid recriminations and distrust, Huerta did attempt reconciliation. She told BCI that the parties desperately needed "to build a relationship", for without mutual trust there could be no meaningful bargaining. She began by proposing a Harmonious Relationship clause:

> The parties agree that arguments and ill feelings have occurred between employees of the company and members of the union. The parties therefore agree to endeavor in good faith to allay any harsh feelings and exercise their best

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18. there is no contention, however, that these pressures reached the level of "business necessity." See Martori Brothers (March 28, 1982) 8 ALRB No. 23 (dissenting opinion).

> efforts to heal any breach in the relationship between the company and the union and their employees and members. The parties together will promote the common objective of peaceful and mutual beneficial relationships. (GC Ex. 49)

BCI's reaction was to offer to accept it in exchange for NLRA Good Standing. Huerta told Ristau that was not a good trade. Ristau and Armstrong then distained the proposal, saying actions, not words, build trust; besides, BCI's Preamble already had "boilerplate" to the same effect.

She took another tact. Asserting that the lack of a decent relationship sprang primarily from BCI's unwillingness to acknowledge the UFW's role as representative of its workers, she characterized the issue as one of "recognition", and began to concentrate on the various recognition proposals (Preamble, Parties, Scope and Recognition). For her "recognition" became a vehicle for raising the underlying conflict over worker allegiance which had surfaced in earlier discussions of Good Standing, Juan de la Cruz, RFK, MLK and so on.

But BCI was unwilling to accord it so exalted a role. It would only agree to spell out the formal recognition to which the UFW was entitled by virtue of its certification. This was embodied in the Scope of Agreement clause and signed off. Huerta persisted, but BCI refused to go beyond the mutual approbations found in its Preamble and insisted that even they be tempered with language recognizing BCI's managerial prerogatives and the UFW's legal and contractual constraints. BCI vehemently resisted those portions of the UFW recognition proposal which touched other areas of collective bargaining: coverage in joint venture situations, bargaining during

the term of the agreement, and non-discrimination. And so despite her efforts, "recogition" failed to become an effective vehicle for raising and resolving the underlying issue of worker allegiance which had poisoned the first phase of negotiations.

Proposals and Counterproposals

Given the skewed logic of impasse bargaining, it is not easy to cut a straight path through the negotiations of phase II. Indeed, to do so is to risk missing the most pronounced phenomena of the period: BCI's pursuit and the UFW's contervailling avoidance of impasse. Nevertheless, consideration of the substantive terms of the proposals and counterproposals does shed some light on the basic conflicts which continued, in one form or another, to plague the negotiations.

1. Summary of Phase II Proposals. After completing its initial submission on March 9, 1979, BCI sought a full response from the UFW. This was not forthcoming. Instead, Huerta submitted over the next nine sessions a dozen or so individual proposals dealing with specific issues and not amounting to a complete response. On May 10, 1979, BCI made a single large submission covering (explicitly or implicitly) most of the issues (GC Ex. 57). It again sought a complete response, and again none was forthcoming. Huerta countered over the next eight sessions with 15 or so specific proposals, some concerned with the same issues she had earlier covered, some on minor subjects and a few dealing with major issues. On June 13, she did present a wage counterproposal ($4.95/hr.) and on July 11, another ($4.80/hr.). At that point — July 12, 1979 — BCI unilaterally implemented its previous wage offer (supra, p. 32).

Until then, it had (besides its May 10 overall proposal) made a number of individual and group submissions, including some on economics; and it continued to do so in August and September. Finally, on October 10, 1979 the UFW submitted a response which, except for the omission of wages, was fairly complete (GC Ex. 234).

2. Health and Safety. More time during phase II was spent on this than any other topic. Because of the variety of ways in which health and safety issues manifest themselves (clean water, toilet facilities, pesticides, protective clothing and equipment, and so on) they afforded Huerta an opportunity to engage in prolonged discussions on an undeniably important bargaining issue unrelated to union institutional and management prerogative issues. Consequently, progress was made. But agreement was not achieved, primarily because BCI feared that the UFW would use the safety committee and the right to refuse hazardous assignments for its own selfish ends. That is why, for example, it insisted that a worker could refuse an order only where there was real danger of death or serious injury (Resp. Ex 335(5), 5/10/79), rather than accepting the Cal OSHA standard of real or apparent hazard to safety or health (GC Ex 56). Once again — and with little direct evidence — BCI took the approach it had taken with Good Standing, Paid Rep, Hiring Hall, and MLK, and assumed the UFW would abuse its power.

On the issues of Family and Camp Housing, the company wanted to continue to avoid questions of adequacy and habitability and to protect its prerogative to close existing units (Resp. Ex 335(5), 5/10/79). In April, Huerta promised a counterproposal in those issues but nothing was forthcoming until October.

3. Paid Rep/Visitations/Grievance and Arbitration/Discharge and Warning Notices/Work Rules. A considerable amount of time was spent discussing the group of proposals and counterproposals concerned with contract administration, grievance handling and disciplinary procedures. BCI was firm in its belief that grievances should initially be taken up with the personnel department, while the UFW insisted that initial discussion between worker and supervisor would help build good relationships.

BCI was willing to move from its original proposal shortening the time limits for grievances, at least to the extent of allowing the limitations period to run from the discovery rather than the occurrence of the event giving rise to the grievance (Resp. Ex. 335(24), 5/10/79). But this concession was overshadowed by a subsequent proposal allowing workers to by-pass their union and present their grievances directly to management (Resp. Ex. 335(24), 9/22/79). Since this is a right provided for in our Act (Labor Code section 1156), as well as in the NLRA (29 USC section 159), seldom is there a felt need to embody it in collective bargaining agreements. That BCI would seek to do so after nine months of negotiations is a good indication of the perseverance of its feeling that the management-worker relationship is primary.

Proposals dealing with the right of union representatives to visit BCI property during contract administration received considerable attention (GC Ex. 50 & 60, Resp. Ex. 335(13), 3/9/79), but no agreement was reached because of BCI's uncorroborated fear that UFW representatives would abuse the right and interfere with

production. The company remained firmly opposed to the related proposal for paid Reps, an arrangement which the UFW saw as essential to its institutional needs.

Disagreements over the Discipline and Discharge consumed a great deal of time and centered on the role of the union steward. While there was some give and take, no agreement was reached, primarily because of BCI's qualms over increased UFW involvement at the early stages of discipline. The UFW did agree without much discussion to BCI's work rules proposal (GC Ex. 236), preferring it and concomitant "just cause" language to BCI's proposal enumerating specific offenses punishable by discharge.

4. Hiring Hall. The UFW demand for a hiring hall for new employees was again raised and discussed. It remained an important institutional issue for the UFW because of its role in building worker allegiance and support. Huerta admitted that in the past there had been problems with UFW hiring halls, but she felt these had been eliminated by dispensing with the requirement that seniority employees be dispatched through the hall. BCI remained firmly opposed, and there was no movement on either side during phase II.

5. Seniority. In response to BCI's Seniority proposals of March 9 and May 10, Huerta revised her Seniority proposal (GC Ex. 58). The new proposal incorporates area and classification concepts proposed by BCI but differs in making seniority easier to acquire, in giving it an important role in promotions, in guaranteeing a period of familiarization, and in limiting employer discretion to determine worker qualifications.

It is unfortunate that Ristau chose summarily to dismiss her proposal as a "cut and paste job" that "didn't make much sense" rather than acknowledging it as a move toward accomodation. Eventually, however, he did modify his proposal to reflect some of the concerns she expressed (Resp. Ex. 335(4) 7/11/79).

6. No-Strike/Grower-Shipper/Protection of Rights/Worker Security. BCI softened its no-strike demands by eliminating UFW responsibility for strikes beyond its control,[19/] but stood by its demands: (1) that it have broad discretion in disciplining workers who violated the no-strike clause and (2) that workers be prohibited from respecting picket lines established by other unions and directed at BCI. In May, it went further and proposed that the UFW forfeit its entire dues checkoff for any violation of the no-strike clause (Resp. Ex. 335(15) 5/10/79). Predictably, the UFW saw this as another encroachment upon the relationship of the union to its members. Its eventual deletion in July[20/] came too late to dissipate that impression.

On the complex issue of the right of the UFW to use economic pressure against growers and shippers with whom BCI was engaged in joint venture or partnership arrangements, the company did eventually generate its own grower-shipper proposal (Resp. Ex. 335(62) 8/8/79). But its last sentence undercuts other language in

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19. At least Ristau assured Huerta that this was so; it is difficult to pinpoint the language change on which he relied.

20. At one point Ristau testified that the suspension of checkoff proposal had been eliminated much earlier (in May). This does not comport either with his subsequent testimony or with the chronology of the proposals and counterproposals. Transcript 30 (93) and Resp. Ex. 335 (15).

the proposal purporting to give BCI and its grower-shippers no more than 12 months of protection from UFW economic pressure (see GC Ex. 232.)[21/]

7. Management Prerogative Clauses. Besides Grower-Shipper there was discussion of a number of other proposals and counterproposals concerned with the effects of changes in the method and means of production — Mechanization, Subcontracting, New Operations, Successor, Labor Contractors, Maintenance of Standards, Management Rights and portions of Recognition. But there was no significant movement on BCI's part, and the same was true of the UFW, for without movement on institutional issues, there was little to dispell its suspicion that the company was simply looking for ways to eventually erode its certification.

The issue of worker allegiance surfaced here with BCI's continued insistence that it be permitted to award better wages and benefits to individuals of its own choosing (Resp. Ex. 335(10) 5/10/79). But BCI did eliminate language in its Maintenance of Standards clause preventing the UFW from increasing its dues for the term of the agreement. (Compare Resp. Ex. 335(10) 3/9/79 and 5/10/79.).

8. Wages and Other Economic Benefits. On May 10, as part of its overall proposal, BCI offered wage increases of approximately 16% in the first year, 7% in the second year and another 7% in the third year, as compared with its earlier proposal of 12%, 7%, and

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21. BCI's Grower-Shipper clause ties into its Protection of Rights proposal; the UFW's ties into its Worker Security proposal. Both are tied into No-Strike language.

7%. Ristau called the offer "fixed and firm".[22] On June 13, the UFW dropped its initial basic hourly rate from $5.25/hr to $4.95/hr, with other hourly and piece rates were subject to similar adjustment (GC Ex. 230).[23] At the same time it reduced the Employer contribution to RFK from 6½% to 6% (GC Ex. 67), to Juan de la Cruz from 6% to 5% (GC Ex. 69), and to MLK from 10¢/hr. to 8¢/hr. (GC Ex. 68). On July 11, it lowered its wage demand to $4.80/hr, again indicating similar adjustment for other hourly and piece rates. It was at this juncture that BCI implemented its May 10 proposal of 16%, which meant that the primary rate for general field and harvest work would be $4.35/hr., 60 cents more than it was paying and 45 cents below what the UFW was asking.

In August the parties heard that Bud Antle had settled with the Teamsters for a figure in the neighborhood of $5.00/hr. with provision for subsequent adjustment. In early September, Sun Harvest settled with the UFW for approximately $5.00/hr. Not long thereafter, the parties heard that Bud Antle's wages had been adjusted up to $5.25/hr. The pressure generated by these settlements manifested itself in BCI's proposal of September 22, 1979, which leapfrogged the existing UFW offer of $4.80/hr and proposed $5.10/hr for general field and harvest work, with similar

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22. At the same time BCI offered an increased gas and travel allowance and additional medical coverage (GC Ex. 335 (36) 5/10/79 and (26) 5/10/79).

23. The UFW originally wanted a one-year contract and hence did not make proposals for the second and third years.

adjustments in other hourly and piece rates (GC Ex. 233.)[24/]

9. Other Proposals. A number of other, less important provisions were either briefly discussed and left unresolved or not discussed at all. The meager list of Articles signed off during phase II is a good indication of its lack of success. Aside from re-signing those agreed to earlier, agreement was reached on only five insignificant articles: Jury Duty and Witness Pay (3/15/79), Records and Pay (6/13/79), Bulletin Boards (6/13/79), Scope (6/20/79), and Work Rules (6/29/79). For the most part these represented concessions by the UFW to the language of the Bakersfield agreement.

Near the end of phase II (October 10), Huerta finally prepared and submitted a response to BCI's proposals (omitting economics) (GC Ex. 234). That proposal would have assumed some importance if matters had continued on the same course. But they did not; a new negotiator came on the scene, and a new response, embodying parts of her October 10 proposal, was soon in preparation. It will be considered as part of phase III.

THE BOYCOTT

Early in 1979 the UFW had commenced a nationwide consumer boycott against lettuce produced by Sun Harvest. The boycott continued until September 1979, when Sun Harvest and the UFW reached agreement on a new three-year contract. A month later on October 5,

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24. At the same time BCI offered further increases in the gas allowance, and night shift differential, a more liberal vacation plan, an additional holiday and a cost of living adjustment (GC Ex. 335 (28)(30)(36)(55)(Addendum A) 9/22/79).

Ted Taylor of BCI received the following telegram:

> Greetings. Your Red Coach lettuce has been selected for an international boycott. Viva la causa. Cesar Chavez. (Resp. Ex. 331.)

The UFW had its boycott machinery well in place, and its campaign was immediately launched. BCI responded in kind.

The letters, handouts and news releases which litter the "boycott trail" are riddled with inaccuracies and over-simplifications, especially on the UFW's part. While some of these can be ascribed to a loose (but effective) communications network, the UFW must take responsibility for much of what was said and written. In its determination to gain sympathy and support, it exaggerated and mischaracterized issues. Its handling of the wage question as well as that of health and safety are particularly disturbing (see infra, p. 58-59).

Predictably, all this generated further hostility at the bargaining table.

PHASE III: OCTOBER 22, 1979 TO FEBRUARY 5, 1980

This period began with Jerry Cohen replacing Delores Huerta as the UFW's chief negotiator. What differentiates it from the previous phase is Cohen's attempt at a different approach. Unfortunately, it did not work, and so, after eight sessions, negotiations were abandoned and did not resume for seven and one-half months.

Cohen's Entry Into The Negotiations

Cohen had been successful in negotiating agreements with some of the other vegetable growers; and so in October 1979, Cesar Chavez called him, explained Huerta's frustration with the BCI

negotiations and asked him to see what he could do. His instructions were to use his own judgment. After talking with Huerta, he and Ann Smith (another UFW negotiator) sat in on the October 22 session. It convinced him that Huerta's clause-by-clause approach would not work. He took Ristau aside and suggested that BCI prepare a new language proposal to which the union would respond with a complete proposal covering both language and economics. Before responding, Ristau demanded, to see the union's total package, including economics. Cohen agreed and a meeting was scheduled for November 14 to present and discuss the new UFW proposal.[25/] This mooted Huerta's October 10 submission.

Cohen hoped to set up a situation in which BCI would be encouraged to trade off union institutional protections for management prerogatives. This meant selecting possible trade-offs and letting BCI know that concessions could be expected in return for movement on its part.

Cohen's style was blunt and to the point. This set it apart from Huerta's evasive, meandering approach. Oddly enough as Phase III wore on, Ristau began to more and more adopt her style. What emerged was the UFW aggressively seeking areas of agreement and concession while BCI avoided them, shifting about, repeating arguments and generally striving to keep things as they were.

The November 14 Proposal (GC Ex. 161)

In submitting his proposal Cohen took care to point out

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25. The flurry of letters and telegrams on this point gives a taste of the Cohen/Ristau relationship. (GC Ex. 156, 157 158, 159, 160.)

that the union was committed to gaining institutional protection but was prepared, in return, to be flexible on economics and on what he termed BCI's institutional concerns, i.e., management prerogatives. He did say, however, that many of his proposals were modeled on settlements already achieved in the industry. He was therefore reluctant to alter these "settlement" principles, but he was willing to negotiate changes in their language. He made it clear that Paid Reps and ALRA Good Standing were of critical importance, and argued that the Board's recent Montebello Rose decision raised serious questions of whether BCI could legally maintain its position on Good Standing.

On economics, he proposed: (1) the Juan de la Cruz pension fund with hourly contributions reduced from 20¢ to 18¢; (2) RFK with the same 6% contribution rate Huerta had earlier proposed; (3) the MLK Fund with contributions reduced from 7¢ to 6¢ per hour; and (4) the apprenticeship fund down from 3¢ to 1¢ per hour. He was willing to defer one of the eight holidays for another year. On wages, he increased the hourly and piece rates for the harvest crews while cutting those of other classifications. The contract term was extended from one to three years in line with agreements elsewhere in the industry.

His noneconomic proposals included a "remote area" exception to the requirement that steward be present when discipline was contemplated. The union would also undertake sole responsibility for the operation of the hiring hall. He gave up some guaranteed hours and proposed a different seniority language (more analogous to the UFW's original proposal). With Mechanization

he indicated that some protection was needed but that various solutions were possible. There were other changes aimed at securing uniformity of administration in UFW contracts, some slightly more restrictive than Huerta's earlier proposals.[26/]

In order to "test the waters" as to BCI's willingness to consider the UFW instituional concerns, Cohen deliberately removed the previous UFW proposals on Subcontracting and Grower-Shipper, telling Ristau that movement on those clauses could be expected in return for movement on UFW institutional protections.

The November 14 proposal contained no major concessions. Its significance lay in its approach, not its content. What it did was "signal" the likelihood of concessions if BCI would display a willingness to reciprocate.

BCI's initial reaction was to characterize the proposal as no proposal at all, but backward movement. It refused to acknowledge the "signal", reiterating that its position was "99.4% there."

Another meeting was scheduled for November 21. When Cohen was unsuccessful in reaching Ristau to continue it for a few days so that its format could be expanded, he called Armstrong. When Ristau found out, he wired Cohen accusing him of deliberately ignoring his position as chief negotiator and of trying to "drag out and frustrate the negotiations." (See GC Exs. 162, 163 and 164). Both accusations were unjustified; they again betray a proclivity to view

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26. In preparing the package, Cohen inadvertently included some articles already signed off. When this was brought to his attention the agreed articles were substituted in.

all UFW conduct in the worst possible light, whether justified or not. The November 21 meeting was held but was instead used as an information session to review the UFW's seniority proposal and discuss health and safety issues.

The next session (December 6) was supposed to last two days but ended in two hours. BCI did not have a counterproposal; instead Ristau began asking questions to "probe" the November 14 UFW proposal. Cohen cut him short, saying the purpose of such probing was to get the UFW bargaining down before the issues had been framed by a BCI counterproposal. He again announced that the UFW was willing to move, but only in response to movement on its institutional demands. He then terminated the meeting,[27/] telling Ristau that if BCI had legitimate questions about the November 14 proposal he would see to it that they were answered before the next session. This was done during a conference call on December 13.

Ristau was the only witness to testify about the call. He has Cohen: (1) stating that the "No Circumvention" clause forbade BCI from lobbying for legislation which would affect the UFW, (2) laughing and indicating that the leave of absence for union business could be used at any time to shut down Sun Harvest, and (3) stating that BCI would not get a better contract than Sun Harvest. While I have no doubt that these areas were touched upon, I have every doubt that Ristau's characterization of Cohen's comments was accurate. Throughout the hearing, Ristau's testimony was very much that of an

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27. Given the context, I do not believe this behavior indicated bad faith. See McFarland Rose Production (1980) 6 ALRB No. 18, footnote 5.

advocate who is unable to separate actual comment from legal characterization. He was also far too quick — both here and throughout negotiations — to view every move by the UFW in the worst possible light, and this colored his testimony. Its effect on negotiations was even more unfortunate.[28/]

BCI'S December 17 Counterproposal (GC Ex. 165)

BCI's counterproposal did not take up Cohen's invitation to recognize the UFW's institutional concerns. The only concession touching on those concerns occurred in Maintenance of Standards: the company's proposal still allowed BCI to go beyond agreed contract benefits but only if it "determines such is necessary because of competition." Retained is the legally unnecessary guarantee that workers be able to go around their bargaining agent to settle grievances. Cohen was correct in asserting that changes in hiring (the UFW could have a hiring hall but BCI was not obligated to use it) and successorship (less protection than where there was no clause) were illusory. BCI must likewise have known that the addition of "gross indecency to another company employee" as a ground for discharge had a provocative tone which could have been avoided by reworking the "just cause" provision.

The two areas where there was movement — the elaboration of health and safety guarantees and the addition of expedited arbitration — were unrelated to Union institutional concerns.

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28. Dolores Huerta is subject to the same criticism. She too testified more as an advocate than a witness, and this must be taken into account in evaluating her testimony about Phase II. Cohen and Martinez I found less ensnarled in their previous roles and more objective in their testimony.

At the next session (December 27) there was further discussion of BCI's counterproposal and further comment on its failure to respond to the Union's institutional needs. Cohen tried offering a five-day probationary period (during which discharge could be effected without recourse to the grievance procedure) in return for movement on Paid Reps and Hiring Hall, but none was forthcoming. Cohen expressed outrage at the portion of BCI's health and safety proposal calling for the immediate discharge of any worker who needlessly removed material from a first aid kit, pointing out that to make theft of a bandaid punishable by discharge was arrogant and insulting.

The Breakdown of Negotiations

Little was accomplished during the last three sessions (January 10, January 27 and February 5, 1980). Cohen suggested a February 10 holiday to commemorate the death of Rufino Contreras and was incensed when Ristau replied that it was not significant enough to induce BCI to pay for a holiday. Other areas of controversy were discussed, and the Union reiterated its belief that BCI was unwilling to accept its status as the representative of workers. Cohen mentioned a letter Mike Payne had written to employees which focused entirely on Good Standing and indicated that, if indeed Good Standing was the only issue, perhaps he could do something about it; but BCI repeated its position that its proposal was "99% there".

The possibility of mediation was suggested by the UFW but was not taken up. Cohen also suggested a meeting between Cesar Chavez and Ted Taylor of BCI, but withdrew his suggestion after speaking with Chavez.

Finally, on February 5, 1980, both sides admitted that there was no room for movement, and the session ended with no future meetings scheduled.

OFFERS TO RETURN TO WORK

A month later, on March 18, 1980, 202 BCI strikers petitioned to return to work. A typical petition read:

> We the undersigned Bruce Church (Classification Code) workers hereby offer to return to work and declare we are available for work upon recall. (GC Ex. 194.)

BCI took the position that the offers were not unconditional because there was no undertaking to abandon the strike. It therefore sent each offeree a letter asking for acknowledgment that the offer was "unconditional" and defining the term. At that point (April 23, 1980), Steven Matchet of the UFW short-circuited the process by notifying BCI that all petitions received by the Company were unconditional offers (GC Ex. 248). BCI thereupon agreed to use the original petitions and began the recall process. Because of the nature of BCI's operation — different classifications, different crews, seasonal shifts, fluctuating employment, and a complicated seniority system — the recall was complex undertaking.[29/]

PHASE IV: SEPTEMBER 23 TO NOVEMBER 25, 1980

This final phase comprises only three meetings; it ended when the parties agreed that future discussions would be off-the-record. Before that happened, Cohen did offer to give up

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29. Evidence and exhibits concerning the recall were extensive, but in view of my recommended disposition of the bargaining charges and effect of that disposition on the legal status of those who offered to return, the process need not be detailed here (infra p. 81-83).

ALRA good standing in return for BCI's acceptance of certain UFW institutional protections. The fate of this concession is uncertain because BCI had not fully responded before the off-the-record discussions began. What did occur "on the record" does, however, shed some light on the underlying attitudes of the parties.

Cohen's Good Standing Proposal

On August 25, 1980, after a six and one-half month hiatus in negotiations, Cohen telephoned Ristau to say that the UFW was willing to trade Good Standing for its other primary institutional concerns — Paid Reps, Hiring Hall, RFK and Juan de la Cruz. A meeting was scheduled for September 23, 1980 to explain and discuss the trade-off.

Cohen began by detailing the considerations which led to the UFW's change of heart. First, the bill which BCI had supported to conform the Good Standing provision of our Act to that of the NLRA was likely to be vetoed by the Governor. Second, improvements had been made in the RFK medical plan. Third, the paid rep system had been working well elsewhere in the vegetable industry. Finally, a federal judge had dismissed the representation petition filed by the Independents for BCI work in Arizona.

After Ann Smith had described the improvements in RFK and Marshall Ganz (of the UFW) had recounted his experience with the Paid Rep program, Cohen orally proposed his trade-off: the UFW would accept NLRA good standing, but workers would be liable for "assessments" as well as dues and initiation fees, and NLRA language requiring such payments to be in accordance with "uniform rules uniformly applied" would be eliminated. In return: (1) BCI would

adopt RFK with a contribution rate of 36 cents per hour the first year and 38 cents thereafter, with an eight hour guarantee for piece rate workers;[30] (2) BCI would agree to two Paid Reps (rather than the four to seven previously proposed); (3) strikers would get their jobs back and have their disciplinary records expunged, and strike-breakers would receive amnesty from UFW internal disciplinary procedures.[31]

Ristau's response was not conciliatory. He said he was glad the UFW had seen that BCI was right all along about Good Standing, but it was not a "trade item". BCI proposals were not there as "bargaining chits"; they were "99% solid". He did, however, want to know more about the improvements in RFK so that he could evaluate the plan, and Cohen agreed to supply the information. The meeting ended with Cohen disappointed at BCI's response to what he believed to be a major concession.

The information the UFW had received from the actuarial firm it had retained was provided, but not before an unnecessarily accusatory telegram from Ristau to Cohen.[32] About the same time, Cohen heard that BCI was closing some of its ranches in the King City area and perhaps others in the Imperial Valley. He telegraphed Ristau protesting the failure of notice and bargaining. (GC Ex 176.)

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30. While 36 cents is more than 6% of the basic wage, comparison with the UFW's previous proposal is difficult because of the range of wages and the operation of piece rates.

31. Since Cohen said nothing of Juan de la Cruz or the Hiring Hall, presumably they were open for negotiation once the initial package was accepted. In this, the UFW demonstrated more flexibility than previously.

32. See GC Ex. 168, 169, 170, 173, 174, 175, 273.

BCI's Response to Cohen's Proposal

The parties met on November 7. BCI's response was not dissimilar to its reaction to the overtures Cohen had made during the third phase of negotiations: it came back with language — on Vacations and Seniority — unrelated to the Union's institutional concerns. In addition, based on conversations with the sponsors of the competing program, it challenged the ability of the new RFK plan to deliver what it promised. The closing of the King City ranches was also discussed. Cohen (after reserving the issue of "decision bargaining") asked about severance pay, retraining and rehire. Ristau was willing to discuss the effects of the closing, indicating that workers would be transferred. He doubted if any jobs would be lost. The matter appears to have been overshadowed by other issues before the parties reached the point of securing precise information or exchanging proposals. Either it was dropped entirely or it became a subject for the off-the-record negotiations. The outcome is unknown. The grower-shipper clause was also discussed, and Cohen was insistant that the UFW not be placed in a position of working against itself.

With no movement forthcoming, Cohen modified the Good Standing portion of his "package": A return to the no-strike provision of the Bakersfield agreement and, along with it, the same Good Standing language found in that agreement; i.e. no provision for union assessments and acceptance of a requirement that payment be based on "uniform rules uniformly applied" (see GC Ex. 35, pp. 5

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and 19).[33/]

Although Cohen spoke of this modification as an approach which could be taken up in ensuing meetings, his direction was clear. Had BCI wished, it could have pursued the matter at once. It chose not to do so.

The Agreement to Go Off-The-Record

The final "on-the-record" session took place November 25, 1980. It was concerned more with a forum for future negotiations, than with their substance.[34/]

Mediation was one possibility; a meeting of the principals was another. The parties finally agreed to a series of confidential off-the-record meetings to be attended by Cohen and Richard and Cesar Chavez of the UFW and by Ristau, Armstrong and Ted Taylor of BCI. The meetings were held, but no attempt was made by any party to introduce evidence of their content. Their outcome is unknown, and no further on-the-record negotiations were held.

FURTHER IMPLEMENTATION OF ECONOMIC PROPOSALS

On February 27, 1980, BCI implemented all of its pending economic proposals (GC Ex. 121). This included not only wages and cost-of-living adjustments, but a medical plan, a pension plan,[35/] call time, standby time, rest periods and lunch breaks, holidays,

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33. The only difference form the Bakersfield agreement would be that the waiver of initiation fees contained in one of its side letters would be eliminated (see GC Ex. 35, p. 70).

34. Cohen did, however, indicate a willingness to yield on the issue of leaves of absence for union business.

35. The record is not clear as to when the BCI retirement plan actually took effect.

overtime, funeral leave, jury duty and witness pay, travel allowances and night shift differentials. Pursuant to this same implementation, on September 1, 1980, BCI put into effect its proposed second year rates and a cost-of-living adjustment.[36]/

CONDUCT AWAY FROM THE BARGAINING TABLE

Most of the events which occurred away from the negotiating table but which bear on the allegations of bad faith bargaining have already been described: the situation in the industry, Payne's comments at the management leadership session in late Summer 1978, the strike, the boycott, the demand for reinstatement, and the ensuing recall. Three others deserve comment.

1. Strike Misconduct

The 1979 lettuce strike was a major undertaking. It involved a large number of workers and spread throughout the state and into parts of Arizona. Almost ever major California vegetable producer was effected. The strike was a long one and the workers who participated suffered considerable hardship. Bargaining was tough and often acrimonious. Many, if not most, of the growers resorted to strike replacements as a means of continuing operations. Strikers believed that many of these "strikebreakers" were illegal aliens.

Little wonder, then, that there were episodes of violence

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36. Two other changes in operations — bulk lettuce harvesting (May 1979) and alien registration numbers check (late 1979) are discussed later (infra, p. 81).

and property damage.[37] Some came from union adherents, others from management supporters. However, because strike misconduct has been raised as a defense, actions directed against BCI, its supervisors and strike replacements are of especial concern. They were subjected to mass picketing; they were forceably prevented from coming and going; damage was done to their vehicles; rocks were thrown; threats were made and workers were intimidated; homes were picketed and residents threatened and frightened. Motel owners whose livelihood depended on providing accomodations for workers were threatened and had their property wrecked because they took in BCI strike replacements.

While union representatives for the most part refrained from direct involvement in serious misconduct — destruction of property in violence to persons — their presence and participation in events where violence and property damage occurred (mass picketing, rock throwing, blocking ingress and egress) and their involvment in events which eventually led to violence, threats and property damage (residential picketing and motel demonstrations) cannot be ignored. At best the UFW failed in its obligation to police the conduct of its adherents; at worst, it created situations which were almost certain to get out-of-hand.[38]

Obviously, the strike misconduct added to the antagonism

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37. The most tragic, of course, was the killing of Rufino Contreras. Even though he was not a BCI striker and was not involved in any strike action directed against BCI, his death did have an impact on the BCI strike.

38. That there was violence on the other side is no answer. Even if proved, it would not excuse UFW misconduct.

and distrust which BCI had come to feel toward the UFW, creating still another hurdle to overcome in negotiations. On the other hand, BCI representatives were experienced negotiators, used to functioning in the difficult, often charged, atmosphere of large-scale collective bargaining. The same is true of BCI's principals. They were not faint-hearted; they knew the strike would be hard-fought and they were prepared for it.

2. BCI Letters to Employees

Over the two year period of negotiations, BCI wrote approximately 30 letters to its employees:[39] 3 during the 3 months of phase I, 8 during the 8 months of phase II, 2 during the 3 months of phase III, 10 during the 7½ month hiatus of negotiations, and 7 during the phase IV and the off-the-record discussions which followed.[40] These letters report on the status of negotiations, comment on company proposals to the UFW, especially the good standing debate, and describe events bearing on the negotiations — the implementation of BCI's proposals, the Arizona petition, strike access, the Bud Antle-Teamster agreement, the Governor's veto of the good standing bill and so on. There are letters critical of the UFW's conduct in negotiations and during the strike, and letters expressing BCI's concern and the UFW's lack of concern for workers' welfare. Company proposals are described in a light most favorable

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39. In chronological order they are GC Exs. 36, 37, 38, 53, 61, 136, 86, 90.2, 137, 92, 96, 139, 105, 113, 140, 118, 141, 142, 143, 144, 124, 145, 146, 125, 147, 148, 149, 150 and 153.

40. It deserves mention that the primary evidence for these communications was working behind picket lines as strike replacements.

to BCI. The BCI "team" is a constant refrain. None of the letters, however suggest that workers repudiate their union or engage in direct bargaining with BCI. Nor do they contain information or proposals not discussed or offered during negotiations.[41/]

3. Communications With the Public

During the strike, and especially during a boycott, both sides undertook what can only be described as massive public relations campaigns. These extended throughout the country — there were even letters to British and Swiss trade unionists — and included lobbying for and against changes in Good Standing provision of the Act, approaches to governmental bodies charged with purchasing, numerous communications with marketing chains, labor organizations and religious communities, flyers, press releases and newspaper interviews. They contain pronouncements on everything from the philosophical dispute over Good Standing, to health and safety, to wages, to alleged violence and misconduct. Oftentimes, for the sake of shock value, complex issues are over-simplified, positions are mischaracterized, and motives are impugned. For BCI, the Good Standing controversy was allowed to overshadow other significant issues concerned with worker allegiance and union institutional protection. The UFW played on public sympathy by misstating facts about health and safety problems and mischaracterizing company positions — at one point going so far as to describe the basic issue as being one of economics. These

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41. There were another 10 or so letters which, though directed to employees, covered time periods prior to negotiations, some extending back to the 1977 election.

misstatements were not confined to UFW support groups over whom there was little control but included information from the union itself.

DISCUSSION AND CONCLUSIONS: BARGAINING, UNILATERAL CHANGES, AND RECALL

INTRODUCTION

Good faith bargaining is defined in Labor Code section 1155.2 as:

> . . .the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

In O. P. Murphy Produce Co., Inc. (1979) 5 ALRB No. 63, the Board explained:

> The duty to bargain in good faith requires the parties ". . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground." NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943). Mere talk is not enough. Although the Act does not require the parties to actually reach agreement, or to agree to any specific provisions, it does require a sincere effort to resolve differences, and " . . . presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." (NLRB v. Insurance Agents' Int'l Union, AFL-CIO 361 U.S. 477, 485, 45 LRRM 2705 (1960).)

See also Montebello Rose, Inc. (1979) 5 ALRB No. 64; McFarland Rose Production (1980) 6 ALRB No. 18.

Hard bargaining and the use of a company's relative economic strength to exert pressure on the union "is of itself not at all inconsistent with the duty of bargaining in good faith." N.L.R.B. v. Insurance Agents' Union (1960) 361 U.S. 477, 490-91. See H.K. Porter Co. v. N.L.R.B. (1970) 397 U.S. 99, 109; South Shore Hospital v. N.L.R.B. (1st Cir. 1980) 630 F.2d 40, 144; Chevron Oil

Co. v. N.L.R.B. (5th Cir. 1971) 442 F.2d 1067, 1073.

> If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system . . . of free collective bargaining. (N.L.R.B. v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 231.)

The proper role of the Board "is to watch over the process, not guarantee the results." N.L.R.B. v. Tomco Communications, Inc. (9th Cir. 1978) 567 F.2d 871, 877. So long as a company is engaged in an honest effort to reach agreement, it may stand fast on an issue. McCourt v. California Sports, Inc. (6th Cir. 1979) 600 F.2d 1193, 1201; Times Herald Printing Co. (1975) 221 NLRB 225, 229. If its bargaining position improves, it may even strengthen and tighten its position. Soule Glass and Glazing Co. v. N.L.R.B. (1st Cir. 1981) 107 LRRM 2781; N.L.R.B. v. Alva Allen Industries, Inc. (8th Cir. 1966) 369 F.2d 310.

But its energies must be exerted toward securing a contract. A company may not — through bargaining or otherwise — set out to destroy the employees' exclusive bargaining representative or to weaken it to a point where it is unable to carry out its duty to represent workers. An employer who approaches the bargaining table unreconciled to his employees selection of a bargaining representative ignores:

> [A] basic principle of the Agricultural Labor Relations Act: the certified collective bargaining representative is the exclusive representative of the employees, and the employer may not assume that role. [To do so] is a rejection of the principle of collective bargaining itself. Conduct reflecting a rejection of the principle of collective bargaining or an underlying purpose to bypass or undermine the union, in the Board's view, manifests the

absence of a genuine desire to compromise differences and to reach agreement in the matter the Act commands. (Montebello Rose Co., Inc. (1979) 5 ALRB No. 64, aff'd 119 Cal.App.3d 1 (1981).) (Emphasis by the Board).

For an employer to take positions inconsistent with the acceptance of the union is unlawful because, "however well intentioned, it cannot usurp the union's position as the employees exclusive representative." As-H-Ne Farms, Inc. (1980) 6 ALRB No. 9; McFarland Rose Production (1980) 6 ALRB No. 18.

The separation of power and function that comes with the selection of a bargaining representative is basic to our system of industrial relations:

> "At the heart of the Act is the basic directive that management recognize the employee representative. This is a crucial, pervasive mandate woven throughout the pattern of the Act and the varying obligations imposed by Congress. In an election context, section 8(a)(1) prevents management interference with the selection of a representative. Section 8(a)(2) prevents the employer from incapacitating the union by substituting its designee as the employee representative. Section 8(a)(3) does not purport to take away management's basic right to hire and fire, but its prohibition draws the line against employment of personnel policies with the purpose or effect of undermining the union.
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> Section 8(a)(5) is of the same fabric. A leading student of American labor policy points out that a key object of the requirement of collective bargaining is that management concede the existence of the employee labor organization. Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1407-09 (1958). As the supreme Court said in N.L.R.B. v. Insurance Agent's International Union, supra at 484-5: 'That purpose [of 8(a)(5)] is the making effective of the duty of management to extend recognition to the union; the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union.'
>
> The basic policy suffuses a variety of section 8(a)(5) cases. The employer is prohibited from making unilateral changes in working conditions during negotiations — even though the terms of employment are thereby improved — lest the union be denigrated in the employees' eyes and its existence, as an inevitable result, imperiled. N.L.R.B. v.

> Crompton-Highland Mills, Inc., 337 U.S. 217 (1949); N.L.R.B. v. Insurance Agents' Internation Union, supra at 485 (dictum). Similarly, issues have been deemed unbargainable (and thus, cannot be insisted upon to the point of impasse) where the effect of incorporating their terms in the agreement would be to deprive the union of its independence and vitality. N.L.R.B. v. Borg-Warner Corp., 356 U.S. 342, 349-50 (1958)." (Steelworkers v. N.L.R.B. (Roanoke Iron and Bridge Works, Inc.) 389 F.2d 295 (D.C. Cir. 1967), cert. denied 391 U.S. 904 (1968).)

An employer "who is loathe to accept the collective bargaining principle . . . and who has no serious desire to reach agreement, except perhaps on a basis which would subvert the Union's bargaining status," bargains in bad faith. "M" System, Inc. (1960) 129 NLRB 526; see American Parts System (1977) 232 NLRB 41, 47-48.

THE ISSUE: BCI's PURPOSE

At issue here is whether BCI engaged in legitimate hard bargaining or instead sought to weaken and usurp the UFW's status as the exclusive representative of its work force.

That is not an easy question to answer. Bargaining is a careful, sophisticated process; rarely is there an admission of a "bad faith" intention. Violations can only be inferred from circumstantial evidence. Continental Insurance Co. v. N.L.R.B. (2nd Cir. 1974) 495 F.2d 44, 86; N.L.R.B. v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131, 139-40, cert. denied 346 U.S. 887 (1953). "[T]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations consitute the raw facts for reaching such a determination." Local 833, UAW v. N.L.R.B. (Kohler Company) (D.C. Cir. 1962) 300 F.2d 699, 706. As the Board said in Masaji Eto (1980) 6 ALRB No. 20:

> The presence or absence of the intent to bargain in

> good faith must be discerned from the totality of the circumstances, including a review of the parties' conduct both at the bargaining table and away from it.

See O. P Murphy Product Co., Inc., supra; Montebello Rose Co., Inc., supra; Akron Novelty Mfg. Co., supra, 224 NLRB at 1001. That being so, no two cases are alike and no one can be fully determinative of another. The concept of good faith bargaining has "meaning only in its application to the particular facts of a particular case." N.L.R.B. v. American National Insurance Co. (1952) 343 U.S. 395, 410. See Borg-Warner Controls (1972) 198 NLRB 726.

Conduct at the Bargaining Table. It is not for the Board "to sit in judgment upon the substantive terms of the parties' bargaining proposals or positions." Admiral Packing Co., et al., 7 ALRB No. 43 (1981); N.L.R.B. v. American National Insurance Co., supra, 343 U.S. at 404.[42/] However, it has been long been settled that the content and context of proposals and counterproposals can be circumstantial evidence from which motive or state of mind may be inferred. N.L.R.B. v. Reed & Prince, supra, 205 F.2d at 134; United Contractors Incorporated (1979) 244 NLRB 72. The evidence is useful, not as an indication of whether a specific proposal is reasonable or unreasonable, but because it may serve to disclose underlying motive, pattern or design. As such it is to be considered in combination with all of the other bargaining behavior, and not as a separate, isolated fragment. Masaji Eto, supra; Abington Nursing Center, (1972) 197 NLRB 781.

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42. To do so would be to compel an employer or a union to agree to substantive contract provisions. H.K. Porter Co. v. N.L.R.B. (1970) 397 U.S. 99.

Etched deep in the BCI-UFW negotiations is one undeniable pattern: unrelenting opposition to each and every UFW proposal aimed at satisfying union institutional needs. The focus of negotiations was not wages, not management prerogatives; it was the institutional allegiance of the work force. Would they be part of the UFW team or the BCI team? This polarity surfaced again and again in discussions of Good Standing (supra, p. 19-20), Juan de la Cruz (supra, p. 20-21), RFK (supra, p. 21), MLK (supra, p. 21-22), Hiring Hall (supra, p. 22-23), Paid Rep (supra, p. 23), and Grievance and Arbitration (supra, p. 17-18, 23-24).

Two aspects of the pattern bear emphasis. First, the UFW's institutional demands were not directly involved with the costs of production (wages and economics); nor were they directly concerned with protecting management's prerogative to change its method and means of production to stay competitive. Rather, they dealt primarily with the strength of the bond between worker and union. While this is an area where management has some legitimate interest because it can have an impact on economics and on management flexibility, it is also an area perilously close to the right and duty of the union to act as the exclusive representative of workers. As such, the possibility of illegitimate motive is of serious concern. Second, there was no room for compromise, trade-off, or accommodation. BCI's opposition was absolute and across the board; its position on each and every institutional demand, fixed and firm. As Ristau told Cohen, "Their positions weren't there as a bargaining

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chit."[43/]

If BCI's unrelenting position on each of the UFW's institutional needs is taken separately and considered in isolation, little can be inferred. But taken together, these separate instances constitute evidence which, along with other circumstances, can support an inference that BCI was bargaining toward a contract which would relegate the UFW to a secondary role inconsistent with its right to act as the exclusive bargaining representative of workers.

Further support for such an inference comes from a consideration of the justifications BCI offered in support of its positions. The one which appeared again and again — in Good Standing, Hiring Hall, Paid Rep, MLK, Visitations, No Strike, Health and Safety — was that the UFW could not be trusted to act legally or responsibly in carrying out its functions as exclusive representative. It would violate the Act by using the Good Standing clause to intimidate workers in the exercise of their freedom of speech and choice; it would involve BCI in discriminatory hiring hall referrals as the ILWU had done with Pacific Maritime Association; it would use the right to refuse unsafe work as an excuse to strike; it would punish BCI by having its representatives interfere with production in the guise of discussing union business;

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43. The only indication of any possible BCI movement on institutional issues came in a brief aside by Ristau to Cohen just as the parties were going off-the-record. It was so qualified that, without corroboration of what actually transpired off the record, it can be given little weight. See infra, p. 73-75, for a discussion of the effect of "going off-the-record" on UFW proposals made just prior to do doing so.

MLK money would be spent on the UFW's political causes, and paid reps would be used to organize for those causes. In other words, BCI did not believe that the UFW would honestly carry out its trust as exclusive bargaining representative. When such a belief becomes — as it was here — pervasive, touching almost every major issue in bargaining, it is once again possible to infer opposition, not just to the specific contract terms, but to the union itself.

Matters, of course, would be different were there firm base in fact for these beliefs. In that case the company would simply be protecting itself from the economic damage which results from labor instability. But the UFW had no record of abusing good standing or visitation, or paid rep, or the safety clause, or MLK. The wildcat strike in 1978 had not been its doing. There had been problems with the hiring hall, but the UFW was willing to change and alter its terms to placate BCI's fears.[44/]

BCI's arguments and objections are, at times, suspect for another reason. In a number of instances, they suggest alternatives which would preserve the union's institutional needs while, at the same time, meeting BCI's concern. Yet, the alternatives were never presented or explored. For example, BCI was worried about its potential liability for a hiring hall violation. That could have been addressed in a hold-harmless clause or even by a bond, but it

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44. This "worst possible case" mentality, was not confined to bargaining proposals; it extended to opposing negotiators as well. Ristau's unjustified accusations that Cohen was deliberately ignoring his position, frustrating negotiations, and misstating their understandings are good examples (supra, p. 44 & 46). Standing alone, they do not mean much: misunderstandings occur and tempers wear thin. Taken together with everything else, they can be symtomatic of a more serious problem.

was not (see GC Ex. 12, Art. 2(E)). The same is true of some of the objections to Paid Reps (their function could have been more precisely defined), MLK (the use of BCI contributions could have been limited), Juan de la Cruz (if ERISA had not been complied with or if its protections were insufficient, proposals directed at those issues could have been formulated). Even BCI's primary worries about Good Standing (worker intimidation, punishment of strikebreakers) could have been addressed by proposals in the clause itself or in the strike settlement agreement.

There is a risk in second guessing negotiators and suggesting methods of accommodation. Nevertheless, it is legitimate to inquire whether the parties have made "a serious attempt to resolve differences and reach a common ground." N.L.R.B. v Insurance Agents International Union, supra, 361 U.S. at 486. Where the failure to seek alternatives comes to assume a pattern, an inference may be drawn. Here, there are a sufficient number of instances, all involving institutional issues, to infer that BCI's reluctance to come forward with alternatives was motivated by a desire to avoid having to yield to the UFW's institutional concerns: i.e., that its objections were a "smoke screen" to conceal a resolve to avoid any concession in this area.

"Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims." N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152 (1959). Ristau was a very experienced negotiator; he was able to come up with a number of objections to the Juan de la Cruz pension fund. But they do not ring true. Arguing that BCI wants to avoid multi-employer pension

plans for the same reason it wants to avoid multi-employer bargaining is disingenuous. The two are different in concept, in scope, and in legal protections afforded. The issue of ERISA qualification could have been solved by making it a condition precedent to acceptance of JDLC; the UFW could not have objected. That leaves "portability". The belief that a multi-employer fund encourages work force turn-over is tenuous. And it is certainly at odds with BCI's earlier committment to the Teamsters (Western Conference) pension fund — one of the most wide-spread in the country.

Objections like these call into question not only on the legitimacy of BCI's position on JDLC, but raise doubts as to whether BCI's positions on other institutional proposals were honestly and sincerely held, or merely window dressing to conceal "a predetermined resolve not to budge from an initial position." N.L.R.B. v. Truitt Mfg. Co., supra at 154 (concurring opinion).

Likewise, the propriety of offering a Successor clause, which gave less than the law provided (supra, p. 48), a Hiring Hall which the company had no obligation to use (supra, p. 48), and a Grower-Shipper clause which gave something in one sentence and took it away in the next (supra, p. 39-40) was dubious, especially when each was presented not as a restatement of a former position, but as a proported compromise.

BCI made other proposals, directed at Union institutional concerns, which go beyond typical collective bargaining language. They include the right of the company to reward selected workers with wages and benefits beyond what the UFW had obtained

(supra, p. 18 & 40), the right of workers to go around their bargaining agent in resolving grievances (supra, p. 37), the forfeiture of checkoff should their be a violation of the no-strike clause (supra, p. 39), and a limit on dues increases during the contract term (supra, p. 18 & 39). The context in which these proposals were made — a struggle over the UFW's demand for basic institutional protections — give them a "salt-in-the-wounds" character. They are the very sort of "predictably unacceptable" proposals which serve to indicate bad faith. See O. P. Murphy Produce Co., Inc., supra; Stuart Radiator Core Mfg. Co., (1968) 173 NLRB 125.[45/]

Three other proposals, though not concerned with the relationship of worker to union, have a similar flavor. One was the "Band Aid" proposal making needless removal of material from a first aid kit punishable by immediate discharge (supra, p. 49); another was the addition of "gross indecency" to a fellow employee to the list of offenses punishable by immediate discharge (supra, p. 48); and the third was strict liability of the UFW for any work stoppage (supra, p. 25). All were in the circumstances of their presentation — predictably unacceptable.

Conduct Away from the Bargaining Table. What went on in negotiations is the logical outcome of the theory of industrial relations which Mike Payne propounded to BCI managers and supervisors at their 1978 leadership training sessions

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45. That two — forfeiture of checkoff and dues limitation — were eventually dropped makes no difference. The mischief was in their presentation, not their persistence.

(supra, p. 5-7). That theory makes the management/worker relationship primary. Unions come on the scene when communications between employer and employee break down. The breakdown is corrected by rebuilding the primary relationship. Union relationships are to be kept secondary; otherwise, they will interfer with the re-establishment of the management/worker "team". This same notion re-surfaces frequently in Payne's letters to workers stressing their membership in the BCI "team" — a team which includes management and workers, but excludes the UFW (supra, p. 6 & 57-58).

Notions of "teamwork" and theories of "communication" have a place in healthy industrial relations, but they cannot be allowed to supplant the primacy of the workers' freely chosen representative. Bargaining with the predominant purpose of subordinating the union/worker relationship to that of management to worker is bargaining in bad faith. And this is so regardless of the employer's good intentions, for "however well intentioned, it cannot usurp the union's position as the employees' exclusive representative." AS-H-NE Farms, Inc., supra.

Impasse Bargaining. Phase II of the negotiations was marked by a phenomenon not found in the other three phases — impasse bargaining in which BCI agressively sought to reach impasse, while the UFW sought to elude it.

That this was indeed what was going on is evident in the conduct of the parties. For its part, BCI began making "fixed and firm" proposals on major bargaining issues and demanding hasty responses. It sought to tie the UFW down to definite positions at

odds with its proposals (e.g., Ristau's summary dismissal of Huerta's seniority proposal, see supra, p. 38-39). And it began to build a written record of every bit of UFW behavior which could possibly be considered as indicative of impasse (see supra, p. 30-31). More revealing were Almanza's statements indicating that this was indeed BCI's purpose (supra, p. 31). Then, too, there was the context of negotiations at the time: Other vegetable growers had already declared impasse and some had gone ahead with implementation (see supra, p. 29). There was real pressure to maintain competitive wages for BCI strike replacements.[46/] The handling of the declaration of impasse is itself revealing. It was done suddenly, without warning, following a bargaining session (July 11, 1979), where proposals had been made which the UFW wanted time to study. The meeting ended without the next session scheduled, but with every indication that one would be set up soon (supra, p. 32). In that context Ristau's (unsuccessful) attempt to have Huerta say that she would have no response until December 1 (almost 5 months away) takes on an ominous caste (see supra, p. 32).

The UFW, for its part, was under similar pressure (see supra, p. 10, 16, 30). As a result, Huerta embarked upon a campaign of obfuscation and delay: coming late to negotiations, avoiding issues, talking others into the ground, dillydallying, jumping from issue to issue with little rhyme or reason, refusing to prioritize, submitting an occasional counterproposal but delaying a

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46. The strength of these pressures was corroborated later (February 27, 1980), when BCI put into effect basic wages of 35¢ an hour over what the UFW was asking at the time in order to stay competitive.

full response (see supra, p. 31).[47/]

The duty to bargain requires "a present intention to find a basis for agreement and a sincere effort . . . to reach a common ground." O. P. Murphy Product Co., Inc., supra, quoting N.L.R.B. v. Montgomery Ward & Co., supra, 133 F.2d at 686. That is the very quality absent from so-called impasse bargaining. BCI wanted deadlock; the UFW wanted delay. Each side, therefore, was bargaining in bad faith.

Under some circumstances union bad faith bargaining can constitute a complete defense to a charge of employer bad faith. This occurs when the union's conduct "remove[s] the possibility of negotiations and precludes the existence of a situation in which the employer's own good faith can be tested. If it cannnot be tested, its absence can hardly be found." Times Publishing Company (1947) 72 NLRB 676, 683; Continental Nut Co. (1972) 195 NLRB 841. Our Board adopted this standard in McFarland Rose Production, supra. The question thus becomes: Did Huerta's conduct make it impossible to test BCI's good or bad faith?

Before Huerta arrived on the scene, much of the conduct giving rise to the inference of employer bad faith had already occurred, and more was to occur after she left. In O. P. Murphy

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47. Ristau testified that, at one point, Huerta admitted that there could be no settlement with BCI until Bud Antle settled with the teamsters. Such an admission is out of character with her sophistication as a negotiator. I believe that while she must have indicated that Bud Antle negotiations were significant, she did not say that there could be no bargaining until they were completed. This is another example of Ristau's failure to separate legal characterization from actual comment (supra, p. 47-48). His failing is not especially significant in this instance since I find that by conduct, if not by words, she did indeed delay negotiations.

Produce Co., Inc., supra, the Board dealt with this issue and quoted Times Publishing:

> Although contemporaneous conduct of a union in connection with bargaining may well be a factor to be considered in determining if an employer has refused to bargain, the Act plainly does not contemplate that a refusal by a union to bargain at one time operates to absolve an employer from obeying the mandate of the Act to bargain collectively on any subsequent occasion. 72 NLRB at 683.

Then, too, the UFW's conduct during Phase II was not autonomous. It came in reaction to BCI's attempt to reach impasse. As such it served to heighten, rather than obscure, what was going on.

For these reasons it cannot override the totality of the circumstances to be weighed. Admiral Packing Company, supra. I conclude, therefore, that it does not constitute a defense. Nevertheless, it is not conduct to be condoned; it has therefore been taken into consideration in framing the equitable remedy of "make-whole" (infra, p. 111-112).

Bargaining During the Later Stages of Negotiations. When Cohen entered the negotiations, impasse bargaining stopped. He made a sincere and forthright attempt to put the negotiations on track. The first thing he did was to set up a situation to communicate or "signal" the UFW's willingness to compromise if BCI would convey a similar willingness. But the signal went ignored, and the company refused to budge.

There are two possible reasons why this happened: (1) BCI would go no further to get the contract it wanted, or (2) BCI had decided that the UFW was a nuisance which, at all costs, must be gotten rid of.

This second possibility goes beyond bargaining with the

predominate motive of relegating the UFW to a secondary role; it contemplates its elimination and destruction as exclusive bargaining representative.

Some factors already described point in this direction. BCI continued to submit and insist upon proposals which were patently unacceptable. It proposed illusory compromises. Then, too, there were the unjustified accusations against Cohen. All arguably looked toward driving the union away from the bargaining table, rather than keeping it there in a subordinate role.

However, there is simply not enough circumstantial evidence to raise these suspicions to the level of legitimate inference. The closest the evidence came was during the final phase when Cohen proposed to drop ALRA Good Standing (in favor of the previous language of the Bakersfield agreement) in return for RFK and Paid Reps.[48/]

This was a major concession; moreover, it was accompanied by a clear signal of the UFW's flexibility on other important institutional issues (Juan de la Cruz and Hiring Hall). BCI's lack of enthusiasm was remarkable. It made some proposals on Vacations and Seniority and asked for more information on RFK.

The persistence of such an attitude would furnish a strong argument that the company had decided to rid itself of the UFW once and for all. But there is no record of such persistence; for, on the heels of Cohen's final concession, the parties agreed to go off the record. General Counsel, in deference to the importance to

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48. The third condition, amnesty, is an ordinary concomitant of strike settlement.

collective bargaining of encouraging such discussions, stayed its hand and did not attempt to adduce evidence of what went on in those sessions. See Kaplan's Fruit & Produce Co. (1980) 6 ALRB No. 36.

Evidence of bargaining to destroy the UFW as the collective bargaining representative of BCI's workers is therefore inconclusive. All that can be said is that BCI's bargaining stance in the later stages of negotiations was a continuation of its earlier strategy aimed at relegating the union to a secondary role.

COMMUNICATIONS TO WORKERS AND TO THE PUBLIC

It is well established that an employer may not use its right of free speech to by-pass the union and destroy its support among employees. See Admiral Packing Company, supra at 19-20 and the cases cited there. There is nothing wrong, however, with an employer carrying its message to the public at large. In that arena, the employer (and the Union) has the full measure of speech guaranteed in the Act and by the Constitution. N.L.R.B. v. Corning Glass Works (1st Cir. 1953) 205 F.2d 422; cf. Thornhill v. Alabama (1940) 310 U.S. 88.

For that reason the letters to employees must be judged apart from communications to the public. The later attack the union's status as bargaining agent and are replete with questionable accusations of misconduct, intimidation and violence. But they are protected.

The letters to workers are more careful and circumspect. They do critize UFW conduct and contrast BCI's concern for workers with the UFW's lack of concern. BCI proposals are given a favorable light, and the BCI "team" is a recurring theme. But none of the

letters contain information or proposals not discussed in negotiations and none come out and suggest repudiation of the UFW and direct bargaining with BCI. As such they fall short of the newspaper advertisements directed to workers in Admiral Packing Company, supra, and the letter and speech to workers in Montebello Rose, Inc., supra. If anything they are tamer than the bulletins permitted in Proctor & Gamble Mfg. Co. (1966) 160 NLRB 334; and see McFarland Rose Production, supra. And they do not run afoul General Electric Co. (1964) 150 NLRB 192, aff'd 418 F.2d 736 (2nd Cir. 1969), cert. denied, 397 U.S. 965, because they do not "seek to persuade the employees to exert pressure on the[ir statutory] representative to submit to the employer." Id. at 195.

UNION MISCONDUCT

In Admiral Packing Company, supra, the Board dealt with the effect of strike and strike-related violence on the employer's duty to bargain:

> It is well established that use of an economic weapon, such as a strike, during negotiations it not inconsistent with the duty to bargain in good faith, N.L.R.B. v. Insurance Agents Int'l. Union, supra, that strike-related violence and picket line misconduct do not demonstrate a lack of desire on a union's part to reach a collective bargaining agreement, Cheney California Lumber Co. v. N.L.R.B. (9th Cir. 1963) 319 F.2d 375, and that an employer's bargaining in bad faith may not be excused by a union's strike or strike-related violence, Robhor Company, Inc. (1936) 1 NLRB 470; Reed and Prince Manufacturing Company (1939) 12 NLRB 944, enforced as modified (1st Cir. 1941 118 F.2d 874, cert. denied (1941) 313 U.S. 595; N.L.R.B. v. Ramona's Mexican Food Products, Inc. (9th Cir. 1975) 531 F.2d 390. In evaluating a party's good or bad faith in negotiations, however, we consider the totality of the circumstances, and that totality does include such factors as the above. Unoco Apparel, Inc. (1974) 208 NLRB 601 enf. (5th Cir. 1975) 508 F.2d 1368.

Only where an employer refuses to meet in response to serious

misconduct and clear union responsibility therefor is the duty to bargain suspended. Admiral Packing Company, supra, at footnote 4.

Here BCI did not refuse to meet and the level of misconduct for which there was union responsibility (see supra, p. 55-57), did not rise above that found to exist in Admiral Packing Company. Therefore union misconduct is no defense.

An issue related to Union misconduct did surface when BCI refused to honor a UFW request to turn over the names of strike replacements for fear of retaliation against them. In the context of this case, especially the residential picketing and the dissemination of names of strike replacements, this refusal was justified. Shell Oil Company v. NLRB (9th Cir. 1972) 457 F.2d 615.[49]

CONCLUSION: BCI's MOTIVE IN NEGOTIATIONS

The concept of exclusive bargaining agent is a — if not "the" — cornerstone of industrial relations in the United States. It necessarily arises out of the recognition that there exists an honest friction between the worker who sells his labor dear, and the employer who, for very good reason, buys it cheap. Notions, like Mike Payne's, of teamwork and communications cannot be allowed to obscure that conflict. An employer may compete for workers allegiance, but it cannot, in the last analysis, effectively represent their interest. That must be done by the workers

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49. The refusal to provide other information was alleged as a basis for a finding of surface bargaining. While there were problems — on both sides — with maintaining the fee flow of information necessary to collective bargaining, these problems are insufficient for an inference of bad faith.

themselves, or, if they band together, by the union they freely select as their exclusive bargaining representative. Once this has occurred, if the employer wants a productive "team" with whom it can "communicate", it must work with the workers' chosen representative through the collective bargaining process. What it cannot do is subvert that process by engaging in bargaining aimed at relegating the union to a secondary role and making the relationship of management to worker primary. To do so is to bargain with the union to sell its birthright as exclusive bargaining representative. Again, that is not to say that concessions cannot be sought by employers in the area of union institutional needs; it is only to say that the predominate motive of an employer in seeking concessions cannot be to subordinate the union/worker relationship to that of management to worker.

Having examined the totality conduct of BCI both at and away from the bargaining table and recognizing that much of it, standing alone or in other contexts, would not in itself establish a refusal to bargain, I conclude that here it does. When an employer's position on union institutional needs is absolute and across the board, without any willingness to compromise or accommodate; when union motives are distrusted and impugned and union abuse is assumed, all without sufficient basis; when alternatives and possibilities are neither presented nor explored; when objections to a critical proposal are insincere and other proposals are sophistical; when proposals are made knowing and expecting their unacceptability; and, finally, when away from the bargaining table key management personnel expound theories

indicating that the union's relationship to management is to be subordinated to that of management to worker, then bad faith bargaining is to be inferred. For these reasons, I conclude that BCI engaged in surface bargaining in violation of sections 1153(e) and, derivatively, 1153(a) of the Act.

UNILATERAL CHANGES IN WAGES AND WORKING CONDITIONS

On July 12, 1979, BCI unilaterally implemented its wage proposal: a week later it put into effect its medical plan and its gas allowance proposal (supra, p. 32). On February 27, 1980, it implemented all of its then pending economic proposals not just wages, but increased medical benefits, call time, standby time, rest periods and lunch breaks, holiday, overtime, funeral leave, jury duty and witness pay, travel allowances and night shift differentials. A pension plan was also instituted; however, its effective date is uncertain. On September 1, 1980, BCI increased wages in accordance with its proposal for second year increases and included a cost of living adjustment. All of these changes were premised on asserted impasses in negotiations.

> Where a genuine impasse exists, an employer is permitted to make unilateral changes in working conditions, including wages, consistent with offers the union has rejected in the prior course of bargaining. Almeida Bus Lines, Inc. (1st Cir. 1964) 333 F.2d 729. The legality of such changes turns on whether the asserted impasse was genuine or spurious: was it a deadlock based on irreconcilable positions conscientiously held, or was it a contrived breakdown of negotiations resulting from one party's manipulation of the bargaining process?
> McFarland Rose Production, supra.

The impasse on July 12 was spurious. It came as the result of "impasse bargaining" in the overall context of bargaining whose predominant motive was to relegate the UFW to a status inconsistent

with its function as exclusive bargaining representative. At the time impasse bargaining began major collective bargaining topics still remained open. See Firch Baking Co. v. N.L.R.B. (2nd Cir. 1973) 479 F.2d 732, cert. denied 414 U.S. 1032 (1973).

> A deadlock in some areas is not sufficient reason for an impasse to be declared it there is still room for movement on major contract items, Schuck Component Systems 230 NLRB 838 (1977); Chambers Manufacturing Corporation 124 NLRB 721 44 LRRM 1477 (1959) enf'd. 278 F.2d 715 (5th Cir. 1960), since furhter negotiations in areas where movement can be made offer the possibility that ways will be discovered to compromise on disagreements which had seemed intractable. Furthermore, "A deadlock caused by a party who refuses to bargain in good faith is not a legally cognizable impasse justifying unilateral conduct." Northland Camps, Inc. 179 NLRB 36 (1969). Ibid.

The "deadlocks" which triggered the February 27 and consequent September 1, 1980 implementations came as the result of continued efforts to relegate the UFW to a secondary role. They cannot, therefore, be used to justify unilateral changes. Montebello Rose, Inc., supra.

BCI made other changes in working conditions during the course of bargaining. In Fall 1980 Cohen learned of the planned closure of ranches in the King City area and possibly in the Imperial Valley as well (supra, p. 52-53). He protested the failure of notice, and the impact of the closure was discussed at the November 7, 1980 bargaining session. But the issue was overshadowed by other problems, and the parties went off the record before necessary information was obtained and discussion was completed. It is not even clear that BCI's plans had gone beyond the point where "decision" bargaining was no longer possible. Given the status of the record, there is insufficient evidence to determine the extent of the bargaining duty (see First National Maintenance Corporation

v. N.L.R.B. (1981) 101 S.Ct. 2573; O. P. Murphy Co., Inc. (1981) 7 ALRB No. 37) and whether it was violated (see Admiral Packing Company, supra).

Likewise the information on bulk lettuce harvesting is too sketchy to determine whether it constituted a bargainable change in operations. Finally, the policy of checking alien registration numbers appears to have been triggered by the UFW's allegations of the use of aliens as strikebreakers. As such, it represents no more than a permissible defensive mechanism in a strike situation.[50] It was not, in these circumstances, a mandatory subject of bargaining.

CHARACTER OF THE STRIKE

BCI's unlawful bargaining strategy came to fruition March 9, 1979, with the submission of the final portions of its counterproposal. At that point the issue of worker allegiance was clearly drawn, UFW proposals were viewed with unjustified distrust, and BCI had indicated that its stance would remain fixed. In other words, the strategy dictated by Payne's theory of industrial relations was firmly in place.

At that point the strike had been underway for a month. Until then, it was an economic strike and strikers were entitled only to the limited reinstatement rights provided for in Seabreeze Berry Farms (1981) 7 ALRB No. 40. After that, BCI's conduct served to prolong the strike by "preventing the development of conditions under which strikers would have returned to work." Admiral Packing

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50. So long, that is, as it was applied with an even hand (see infra p. 105).

Co., supra at p. 26. March 9, 1979, therefore, is an appropriate date for conversion. See Gorman, Basic Text on Labor Law (1976), p. 340. Employees who, subsequent to that date, made unconditional offers to return to work were therefore entitled to reinstatement to their former or equivalent positions even if replacements had been hired. N.L.R.B. v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375. It was not, however, until one year later — March 18, 1980 — that petitions began arriving stating that the signers "hereby offer to return to work" (GC Ex. 194). The employer rejected them as not being "unconditional."

Their language, however, is identical to that found unconditional in Colace Brothers, Inc. (January 7, 1982) 8 ALRB No. 1. The law does not require a worker to use any particular words of art in seeking reinstatement Flatiron Materials Company (1980) 250 NLRB 554, 560. There is nothing in the petitions to indicate that a condition was being imposed.[51/] Absent specific qualifications or disclaimer, one who offers to start work, offers to stop striking. If the employer believes that something else is meant he can ask the workers when they show up. The unwarranted assumption that there might be some condition cannot be used to excuse or delay recall.[52/] Vessey & Company, Inc. (1981) 7 ALRB No. 44.

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51. Oddly enough, the employer's inquiry did elicit some confusing responses. However, they were laid to rest by the union's subsequent communication and so should not be read to taint the original, unqualified offer.

52. This — and not that the employer has a right to delay recall and seek clarification — is the proper reading of Haddon House Food Products, Inc. (1979) 242 NLRB 1057, 1058 and Okla-Inn (1972) 198 NLRB 410, 413.

Since the recall proceeded on the incorrect assumption that the employees who struck were economic strikers, entitled to their jobs only as vacancies arose, rather than unfair labor practice strikers, entitled to immediate recall, BCI's "seniority recall system" (which allowed workers to return only when vacancies occurred) has a basic flaw which the asserted reasonableness of its design and implementation cannot overcome. The legality of the system under section 1153(c) and (a) is thus disposed of without the need to consider its alleged discriminatory design or implementation (GC Ex. 1.42, Order re Amendements to Complaint, Paragraph 6b). N.L.R.B. v. Fleetwood Trailers, Inc., supra. Furthermore no purpose would be served by assuming that the workers were economic strikers and then determining whether BCI's use of new workers and labor contractors after the recall began was a reasonable and necessary procedure based on the complexity of so extensive a recall or on some other business necessity (GC Ex. 1.1, Complaint, Paragraph 7b and c). The argument that complexity and necessity should operate to excuse immediate reinstatement (as distinguished from reinstatement as vacancies occur) is better left to the backpay/compliance stage where it can be weighed along with other evidence. The record here, quite properly, does not allow for the analysis necessary to fix make-whole amounts.

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INDIVIDUAL CLAIMS OF DISCRIMINATION

The complaint, as finally amended, alleges discrimination against a number of returning strikers, as well as the illegal discharge of a sympathetic foreman. General Counsel and the UFW sought to prove not only that each of the individuals was discriminated against because of union activity, but also that the action taken against them was part of an overall plan to rid the company of former strikers. As evidence of this plan and as an indication of overall anti-UFW animus, testimony was introduced concerning comments and incidents which occurred both before and after the negotiations began, some extending as far back as 1975. Before taking up the individual cases one by one, consideration of the general claims of anti-union animus and overall plan or scheme is in order.

ANTI-UNION ANIMUS AND OVERALL SCHEME

Animus. The overall attitude of an employer toward a union and its members can provide a helpful — at times crucial — backdrop against which specific conduct can be evaluated. Abatti Farms, Inc. (1981) 7 ALRB No. 36; Paramount Cap Mfg. Co. v. N.L.R.B. (8th Cir. 1958) 260 F.2d 109, 113. Evidence of BCI's conduct in bargaining, including the unilateral changes and the recall are therefore relevant in determining the legality of its conduct toward specific individuals.

BCI's overall attitude has already been described: If the company is doing its job of building a team by communicating effectively with its employees, a union is unnecessary. Its appearance is a sign that something is wrong with the

management/worker relationship. The relationship must then be re-built, and the union must not be allowed to interfere with that process. When negotiations began, Payne hoped, "the days of hostility and hassel [were] behind us." But the UFW continued to insist on its primacy as exclusive bargaining representative, and, as negotiations wore on, his feelings changed and he came to resent the union as a hostile force to be reckoned with.

But even in the presence of such an attitude, it is dangerous to jump too quickly to the conclusion that specific conduct necessarily involves discrimination. BCI is a large enterprise. Employee problems arise and must be dealt with. Frequently, the action taken has little or nothing to do with union animus; it is dictated by the necessity of running a business. Then, too, BCI was well advised; its bargaining response to the UFW was careful and sophisticated. It did go beyond what was legally permissible in the conduct of negotiations, but it did so with considerable circumspection. Blatant discrimination could only have endangered that bargaining strategy and interfered with BCI's desire to rebuild a relationship with employees. I therefore conclude that its basic stance toward returning strikers was to treat them firmly but fairly: to do them no favors, but to do nothing which would jeopardize the legal position BCI was asserting in negotiations.

That is why the evidence presented by Jesus Ramirez, Don Rafa and Gloria Astroga regarding pre-negotiation conduct is of little help. While it may be of some assistance in dealing with their own subsequent treatment, other, more significant considerations arose during negotiations and re-shaped BCI's overall

outlook. Those considerations counselled against any policy of overt retaliation against strikers. Earlier Board decisions involving BCI of which notice was taken suffer from the same debility.

Antonia Arrellano, the ex-wife of BCI supervisor Tony Arrellano, testified about conversations both before and after the strike which, if accepted, would evidence a deliberate policy of discrimination against "Chavistas". But she was not a credible witness: The anger she felt toward her ex-husband was so palpable and so extreme that I am convinced that she would have said almost anything if she believed it would hurt him, his job or the company for which he worked. Moreover, there was no direct corroboration of her testimony; in fact, almost all of it was denied by her husband and by the other foremen and supervisors involved.

Maria Sanchez testified to anti-union statements made by Cesario Cabrera and Alfonso Guzman. Cabrera denied making the statement attributed to him, and on cross-examination Sanchez qualified the one attributed to Guzman to the point where it may have been no more than an explanation that BCI was unwilling to accept the UFW's then current proposal. Hector Diaz' allegations of comments by Ramon Robledo — a highly placed BCI supervisor — were all denied. Because of problems with the consistency and credibility of Diaz' other testimony (infra, p. 107), I am reluctant to accept them as accurate.

Plan or Scheme. Both the ALRB and the NLRB have long recognized the possibility of "class" discrimination; that is, discrimination directed not at an individual, but at the group to

which he or she belongs. Kawano, Inc. (1978) 4 ALRB No. 104, aff'd (1980) 106 Cal.App. 3rd 937; N.L.R.B. v. Hoosier-Veneer (7th Cir. 1941) 120 F.2d 574. In such cases the General Counsel has the burden of proving: (1) That the alleged discriminatory conduct was directed against an entire group, and (2) that the individual was a member of that group.

There are serious problems with the application of the class discrimination doctrine to the facts of this case. The individual instances, excepting possibly the few dealing with actual strike recall, all involve distinct situations with little in common except the status of the discriminatees as former strikers. An even more serious problem, however, is proof of a plan or scheme. Much of the evidence offered to establish it has already been considered in assessing anti-union animus and found wanting.

It could, in addition, be argued that the design and implementation of the "seniority recall system" discloses such an overall plan. Since that system has already — and for other reasons — been found wanting (supra, p. 81-83), it has not been necessary to determine if it had its origins in a deliberate attempt to punish strikers. Considering it in this light, I cannot find that its design and implementation disclose any illegal plan; rather they indicate BCI's intent to do no more than absolutely necessary to comply with minimal legal standards of recall for economic strikers. That its judgment was incorrect on this and on a number of issues related to recall (e.g., whether the petitions to return to work were unconditional) is not enough to infer an underlying discriminatory motive; for it cannot be said that BCI's judgment of

the legal standards for recall was so far-fetched as to indicate any more than a determination to — under no circumstances — do strikers any favors.[53/]

The other "system" attacked by the General Counsel as discriminatory in its formulation and implementation is the policy, instituted in November 1979, of securing alien green card numbers from each recalled employee and checking them with INS. The system came in response to claims by the UFW that BCI was using illegal aliens as strikebreakers. As such it is a proper defensive mechanism in a strike situation (supra, p. 81). Only if returning strikers were singled out for checking would it run afoul of section 1153(c), but the evidence is woefully inadequate for such a finding.

INDIVIDUAL CASES

To establish a prima facie case of discrimination against an individual employee, the General Counsel must show by a preponderance of the evidence that the employee was engaged in protected activity, that the Respondent had knowledge of such activity, and that there is some connection or causal relationship between the protected activity and the adverse action taken against the employee. Verde Produce Co. (1981) 7 ALRB No. 27; Jackson and Perkins Rose Company (1979) 5 ALRB No. 20. Once a prima facie case has been established, the burden of producing evidence to show it would have reached the same decision absent the employee's protected

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53. Similar problems surround any attempt to use the recall system to prove anti-union animus; at best, it shows a policy of "doing no one any favors", and that is not the same as "getting" former strikers.

activity shifts to the Respondent. Nishi Greenhouse (1981) 7 ALRB No. 18; Wright Line Inc. (1980) 251 NLRB 1083. Should the Respondent carry this burden, the General Counsel must then prove by a preponderance of the evidence that the reasons advanced by the Respondent were not true reasons, but were a pretext for a discrimination; thus, the ultimate burden of proof remains with the General Counsel. Martori Brothers Distributors (March 1, 1982) 8 ALRB No. 18; Texas Department of Community Affairs v. Burdine (1981) 450 U.S. 248.

Here, each of the individual cases (excepting the termination of foreman Hector Diaz) involved treatment afforded returning strikers; so the requirements of union activity and employer knowledge are met. To establish a prima facie case it remains for the General Counsel to prove by a preponderance of the evidence that there exists a causal relationship between the union activity and the adverse action. In those instances where he succeeds, the burden of producing evidence then shifts to the Respondent.

1. Maria Ramos

Testimony. Maria Ramos had been employed at Bruce Church since 1974, primarily as a wrapper. In February 1979 she went out on strike, but returned to work a month later.

Upon her return she was assigned to work in Jose Bravo's crew in Parker, Arizona. She testified that Bravo harassed her by assigning her to cut and pack rather than to wrap and by pressuring her to work harder. She said that Bravo told her that he was acting on orders from Ramon Robledo, the Harvest Crew Coordinator.

Bravo denied the conversation occurred and denied receiving any such orders. Robledo likewise denied instructing Bravo to harass her. Bravo explained that she was reassigned from wrapping to cutting and packing because she complained that the smoke from the wrapping paper bothered her eyes. He also said that he had had no problem with the quality of her work.

Thereafter she was transferred to Hector Diaz' crew. She testified that in January or February 1980, she was active in organizing a work stoppage among the three lettuce machine crews in her division to protest unfair assignment of fields to pick. When Robledo arrived to investigate, she said that she and another women confronted him and received assurances of better treatment.

According to Ramos, a short time later, while she was using one of the bathrooms at the back of the bus parked near the edge of the field, she overheard Robledo tell Diaz to fire her because she was a striker and a Chavista. She also testified that one day when Pedro Vasquez substituted for Diaz, he told her that Robledo had ordered him to give her warnings so that she could be fired. Vasquez denied the conversation.

Diaz testified that, during the work stoppage, Robledo had told him to find a way to give warnings or to fire Ramos. Initially he placed the conversation at the side of one of the machines — approximately 200 feet from the buses where the bathrooms were located. Later he modified his testimony, saying the conversation had occurred away from the machines and approximately 15 feet from one of the buses (see GC Ex. 213). He also testified that, on two subsequent occasions, Robledo asked him how many warnings he had

given to Ramos, and was unhappy when told that none had been given because none were deserved. On the second occasion Diaz claimed that Robledo also instructed him to find reasons to give warnings to three other reinstated strikers: Maria Murillo, and Ramona and Maria Torres (see infra p. 106). His notebook, with arrows placed next to the four women, was produced. He claimed he put arrows there to remind him whom he was to watch. However, he gave no warnings to any of the four. Ramos testified that subsequent to her return she received only one warning, an automatic one for missing work on a Saturday.

Patricio Garcia, a foreman who witnessed the work stoppage, testified that Robledo came to the edge of the field twice that day, but on both occasions Diaz remained at his machine and did not leave it to speak with Robledo. Robledo, too, denied talking to Diaz on the day of the work stoppage or giving him any subsequent instructions to find a means of disciplining Ramos or the other three women.

In October 1980 Ramos took a leave from work in order to rest, planning to rejoin the harvest in Yuma. When it began in November, she went to Robledo. He told her to wait for a letter. When it was not forthcoming she went to see him again and was told that she had been terminated.

Robert Schuler, acting personnel director, testified that the termination was a result of a mistake by the payroll department. Her failure to respond to a late August recall notice in Parker came to its attention just as she was laid off at the end of the season. The payroll clerks mistakenly believed that she had been available

for the August recall and issued a "T-18" termination notice, entailing loss of all seniority, rather than a "T-19" which would only have effected her recall rights at Parker. A similar mistake caused the issuance of another T-18 termination, preventing her recall for the San Joaquin wrap lettuce harvest in April 1981.

Findings and Conclusions. In addition to being a former striker, Ramos served as the union representative for her crew and was involved in the protected work stoppage in January or February 1980. Her activity and sympathies would therefore be well known to BCI.

The allegation that Bravo assigned her to cut and pack, rather than to wrap, is answered by his explanation that she complained of fumes from the wrapping paper. This explanation went undenied and I find no reason to doubt his word.[54/]

Nor do I believe it likely that he would admit to being ordered to discriminate against her. Her claim of pressure and harassment is unspecific as to what was done and to whom, in addition to herself, it was applied. And so, once again, it cannot withstand his clear denial. It may well be that he was a stricter foreman than others for whom she had worked, or that BCI was trying to get all of its foremen to increase their production. Absent evidence clearly indicating that former strikers were singled out for special pressure or harassment, there is no basis for linking the employer's action to her union activity.

Since no immediate action was taken against her as a result

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54. I found him a candid and credible witness; whereas she closely identified herself with the UFW and evidenced some reluctance to answer during cross-examination.

of the work stoppage in January or February 1980 and since she subsequently received no undeserved warning notices from Diaz, the crux of her complaint is the Company's failure to recall her. The explanation given by Robert Schuler was a reasonable one. There is ample evidence to indicate that the recall system was complex enough such that mistakes were to be expected. Robledo was not a good witness and I have some doubts about his conduct and motives, but, given the reasonableness of Schuler's explanation, I cannot — without evidence of a closer nexus between Robledo and the actions of the payroll department in issuing the wrong notices — conclude that her termination was due to her protected and union activities.

2. Gabino Conchas

Testimony. Gabino Conchas is Maria Ramos' husband. He worked for BCI from 1974 until February 1979, when he went on strike. He returned to work a month later.

In November 1979 he went to Yuma with Hector Diaz' crew, and worked there until January 1980 when he became ill. He testified that Diaz gave him a written 15-day leave of absence, after which his wife obtained a written extension for another 15 days. When the harvest returned to Yuma the following season, he contacted Robledo for rehire, but was informed that he had been terminated for overstaying his leave without obtaining a written extension.

Diaz initially testified that he had given Conchas a 30-day leave, and then extended it for another 30 days when Conchas personally returned, looking very ill, and asked for more time.

When recalled to testify the following day, Diaz amended his testimony to conform to that of Conchas. He indicated: (1) that the original leave and the extension were for 15, not 30 days, and (2) that the extension was procured by Ramos, and not Conchas.

BCI had no record on file of an extension of Conchas' leave of absence. Company policy prescribes termination for overstaying a leave unless a written extension is first obtained.

Findings and Conclusion. Conchas' case for discrimination is a weak one. It depends heavily on Diaz' corroboration, but after testifying one way, Diaz came back and amended his testimony to conform to Conchas'. Their testimony that the leave was extended is not supported by company records, and Conchas was unable to produce his copy of the extension he claimed to have received. Given this and given the other problems with Diaz' testimony (infra, p. 107), there is insufficient evidence to make out a prima facie case.

3. Andres, Ramona and Maria Torres

Testimony. Andres and Ramona Torres are husband and wife; Maria is their daughter. Andres began work for BCI in 1966, Ramona in 1974, and Maria in 1972. All went on strike in February 1979 and returned to work in 1980.

Shortly after his return, Andres was transferred to Trinidad Fletes' crew. Comparing Fletes' expectations of the crew with those of Juan De La Paz, the foreman for whom he had worked before the strike, he explained, "We have noticed that we are given more pressure at work. . . Nothing that we do the foreman likes." He received three warning notices for poor work (GC Ex. 263).

Fletes testified that Andres did not perform well as a

packer. Despite the fact that he had been told on a number of occasions to roll the lettuce heads so that they would not be damaged when put into boxes, he failed to do so; hence, the written warnings. Fletes further testified that he had issued no more warnings to his crews after the strike than before. De La Paz testified that prior to the strike when Andres was in his crew, he would occasionally become angry and refuse orders but at other times would do well. De La Paz believes he probably received some warning notices.

Both Ramona and Maria Torres were assigned to work for Hector Diaz when they returned to work after the strike in May 1980. Both felt that Diaz was an easier foreman to work for than "Manuel" for whom they had worked prior to the strike. Neither received any warning notices from Diaz.

Diaz testified that Robledo had instructed him to give them warnings, but that he had refused to do so because their work was adequate.

Findings and Conclusion. Neither Ramona nor Maria were harassed or disciplined by Diaz. Ramona claimed that her most recent foreman harassed his crew by working it harder, but her claim is even more nebulous than that of Ramos against foreman Bravo (supra, p. 92). Clear evidence of disciminatory conduct is therefore absent. Without it there is no prima facie case.

Andres did receive warning notices from foreman Fletes. The question is whether they were warranted. Fletes claims they were; Andres claims they were not. To support his position he brought up his work record under foreman De La Paz prior to the

strike. De La Paz testified that Andres was a good worker, but that he would at times resist orders and may have received warning notices for doing so. Since the failure to follow directions was also Fletes' complaint against Andres, De La Paz' testimony supports Fletes' enough to make it impossible to say that the General Counsel has carried his burden of proving by a preponderance of the evidence a causal link between Andres' union activity and the warning notices he received.

4. Rafael Jacinto ("Don Rafa")

Testimony. Don Rafa had worked for BCI since 1972, primarily as a closer. He wife Concepcion and four of his daughters, Leticia, Theresa, Lupe and Concepcion, were also employed by BCI. He was active in the UFW, handling grievances and serving as a member of the BCI worker negotiating committee. He went on strike in February 1979 and returned October 8, 1980.

In 1978, while working in Marcelino Munoz' crew he was assigned to work as a packer, although he believed he should have been allowed to continue as a closer, an easier job for which he had more experience. He felt that he received unnecessary blame for his work performance, and that all of this was deliberate harassment. He believed two of his daughters had been subjected to similar harassment when they joined his crew in Yuma in 1978. They were wrappers but Munoz alternated them as cutters.

A coworker told him that supervisor Tony Arrellano had ordered Munoz to harass Don Rafa and his family. He testified that when the thinning season ended in 1978, their transfer was delayed and they had problems in finding available positions on existing

crews. After considerable difficulty, he and his family returned to Munoz' crew.

Munoz testified that Don Rafa was moved to the packer position because two closers with more experience in that crew returned to work. Munoz also testified that the assignment of Don Rafa's daughters to alternate wrapping and cutting was the result of a suggestion from Don Rafa himself.

Don Rafa also testified to further harassment in October 1980, when he was recalled to work after the strike. His foreman at the time was Ramon Verdusco; Verdusco's supervisor was Ricardo Montriel. Don Rafa explained that he was wrongly accused of leaving too many heads of lettuce together, of thinning too close or too far, and of falling behind. Eventually, he was given a warning notice, which he says was undeserved. Neither Verdusco or Montriel testified.

Findings and Conclusion. Testimony about incidents involving Don Rafa and his family were originally introduced as background for the bargaining in which he participated. Only much later — at the very end of the hearing — did General Counsel allege that his treatment was an independent violation. Respondent objected to this, as well as to other of the late amendments, because they had been litigated, not as independent violations, but solely as background. Ruling was reserved until the parties had an opportunity in their briefs to address the issues of relation to the complaint and of opportunity to litigate (GC Ex. 1.42, paragraph 8). With Don Rafa I conclude that Respondent's argument is well taken. Had this matter been litigated as an actual violation, Respondent

would obviously have devoted much more attention to the warning notice given him after he returned to work in October 1980, since that was the only conduct occurring within the six month period provided for in section 1160.2. Respondent did not even produce Richardo Montriel or Ramon Verdusco. Instead, testimony was concentrated on earlier incidents which figure — indirectly at least — in the climate of negotiations. General Counsel, because of the late amendment, must take some responsibility for the distortion of emphasis which occurred. I therefore refrain from any findings of conclusions regarding Don Rafa's warning notice and the incidents leading up to it, except to the extent they were specifically described in the bargaining portion of this decision.[55/]

5. Margarita Sanchez

Testimony. Margarita Sanchez began work for BCI in 1974 and continued until February 1979 when she went on strike. She was recalled in October 1980.

Prior to the strike she testified to a conversation with Alfonso Guzman, a company payroll representative in which he disparaged the UFW and Cesar Chavez and told her that BCI wanted to rid itself of the UFW and would never sign a contract.

She testified that, upon her recall in October 1980, her

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55. With respect to the other persons whose inclusion in the complaint was subject to challenge: Gloria Astorga, Gabino Conchas, Margarito Anguiana Navarro, Maria Ramos, Andres Torres and Halario Valle — I find their treatment to have been sufficiently related to the complaint and litigated to allow for proper findings and conclusions of law. Their names are therefore to be included in the complaint as amended. John Elmore, Inc. (1978) 4 ALRB No. 98.

foreman Cesario Cabrera told her that Chavistas would be the first to be fired and that another foreman Paco Garcia took away her UFW button. Hector Diaz testified that Cabrera told him that he did not like Chavistas and would try to fire them.

Cabrera testified that he never spoke with Sanchez or Diaz about the UFW or Chavistas. Garcia testified that he did not take Sanchez' UFW button from her. Nor had he done so from other crew members or told them that they could not wear buttons and insignia.

She also testified that strikers were treated harshly by the company: They were forced to do more work and higher quality was demanded. Furthermore, she testified that union buttons were forbidden and UFW seals and eagles confiscated. She also said that the company issued more warning tickets.

Findings and Conclusion. Sanchez' testimony about BCI's overall attitude toward strikers has already been discussed (supra, p. 86).

Her testimony dealing with harassment suffers from the same debility as that of Maria Ramos (supra, p. 92) and Ramona Torres (supra, p. 95) — it lacks specificity.

The only specific incident is her claim that foreman Garcia took away her union button. Given his clear denial and the lack of evidence corroborating her claim, General Counsel has not carried its burden of proving that discriminatory conduct actually occurred. The same is true of foreman Cabreras' alleged threat that Chavistas would be fired. The only corroboration came from Diaz,

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and his testimony is open to serious question (infra, p. 107).[56/]

6. Guadalupe Arvizo[57/]

Testimony. Guadalupe Arvizo began working for BCI in 1973. She went out on strike in February 1979, petitioned to return in March 1980, and was recalled in September.

In August 1980 she went to the BCI offices and spoke with Maria Almanza (daughter of Cecil Almanza) who at the time was working in the office and acting as a translator. She testified that Almanza asked her if she had been "one of the ones that had been around there with a flag," and, when Arvizo said she was, Almanza told her she would not be rehired. However, on September 18 she received a notice recalling her to work in Huron. She then went to the BCI offices in Salinas and asked whether she would receive transportation from Salinas to Huron. Alfonso (presumably Alfonso Guzman) told her that recalled workers were not entitled to such transportation. She returned the following day and spoke with Almanza who confirmed what she had heard from Alfonso. She made other arrangements and presented herself in Huron for recall. She

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56. Sanchez was terminated from BCI just prior to her testimony. Her termination was the subject of a complaint, hearing and ALO decision in case no. 81-CE-35-EC. Some evidence surrounding her termination was received, but only as background. As such, there is nothing in the record which would lead me to view it differently than the ALO who considered and decided on the legitimacy of the termination.

57. Arvizo was not included by name in the amendment to the complaint sought by the General Counsel at the close of hearing. The possibility of litigating the claims of "others" is, however, provided for (GC Ex. 1.42). Since her situation is related to the other allegations of the complaint and was fully litigated, I have included it in this decision. Highland Ranch and San Clemente Ranch, Ltd. (1979) 5 ALRB No. 54, modified on other grounds, 29 Cal.3d 848.

testified that of the four persons who showed up with recall letters, only she was put to work, while others who had no papers at all were hired.

She further testified that although she was a packer, she was moved to the cutting position which she believed to be a harder job because of the stooping and bending involved.

Her foreman, Rafael Alvarez, explained that she was reassigned to cut because she was too short to reach the boxes and place them on the lettuce machines whose height had been raised. He replaced her with a taller woman. Arvizo admitted that her height did present a problem.

Almanza testified that she had one conversation with Arvizo in August 1980 and that concerned a check that had been sent her. She denied discussing the strike, the UFW or the recall procedure. Their next conversation occurred in September at which time she did no more than refer Arvizo to Guzman who had already left for Huron. Nothing was said about strikers or transportation.

Arvizo also testified that in December 1979, while still on strike, she was driving with her children in the car when BCI bus No. 176 passed her and the driver threw a white marble at her windshield damaging it and frightening her and her family.

Foreman Jose Luis Cardenas, who was driving the bus at the time, testified that its windows were boarded and had plastic over them making it impossible for him to throw anything out. He specifically denied throwing any marbles at her vehicle or at any other.

Findings and Conclusion. There are definate problems with

proving the incidents she alleges. Her testimony that Maria Almanza admitted that strikers would not be recalled was denied. For Almanza to have made so blatant an admission would have been unusual, especially since the recall of strikers was well underway at the time and Arviso herself was recalled soon thereafter. I therefore do not credit her testimony that the threat was made.

Her testimony, standing alone, is insufficient to prove a policy of denying strikers transportation while providing it to other workers on recall or layoff. To compensate for her lack of personal knowledge concerning the treatment of non-strikers, other testimony would be required, and it was not forthcoming.

Her testimony about the unnamed strikers who were refused reemployment in favor of new hires is too nebulous to accept. Without names and records indicating their actual status as "new hires" her testimony cannot be accepted.

Her transfer from picker to cutter was convincingly explained by her foreman and, on cross-examination, she admitted to the problem created by her height. The causal link between assignment and union activity has thus been rebutted.

The incident evolving the marble thrown at her vehicle is a serious one. But, again, without better proof, the General Counsel has not carried his burden of establishing the foreman's actions or BCI's responsibility.

7. Juan Corona Castro

Testimony. Juan Corona Castro began working for BCI in December 1975, as a cutter and packer. In February 1979 he went out on strike, and in March 1980 he petitioned to return to work. In

June he was taken ill and entered the Maricopa County Hospital where he stayed until July 14. He had a hospital social worker call BCI to inform them of his whereabouts. After his discharge from the hospital, he contacted BCI on a number of occasions about returning to work. Eventually, he learned that he had been terminated for failure to respond to a recall letter. In one of his calls to BCI he was told that something might be done about the termination if he would obtain proof of his illness and present it to Noel Carr or Mike Payne. He did take "some pages" he got at the hospital to the company offices where he left them with Alfonso Guzman who was to show them to Carr, but he was never recalled.

Larry Silva who is in charge of payroll testified that proof of illness, including a doctor's certificate, is required before a failure to return when recalled can be excused.

Findings and Conclusion. BCI was certainly entitled to require written proof of illness; what is unexplained is why the records, which Castro claims were provided, did not suffice.

Since Castro was, in any event, entitled to reinstatement as an unfair labor practice striker, the issue is better left to the compliance stage where it can be dealt with in the context of his availability for work during the make-whole period. The current state of the record is simply inadequate for a finding that his status as a striker resulted in a deliberate refusal to reconsider his recall status.

8. Margarito Navarro

Testimony. Navarro had been employed with BCI since 1978. He worked as an irrigator. After being off with an injury, he

joined the strike in February 1979 and offered to return in early 1980. He testified that he was never recalled although other strikers with less seniority were.

Subsequent to his testimony on March 6, 1981, he was recalled (on April 8, 1981) and returned to work (April 14). Robert Schuler testified that he had not been recalled earlier for lack of available work. A notation on an earlier document indicated such a recall was an error.

Findings and Conclusion. I find Schuler's explanation for Navarro's treatment convincing. In any event Navarro alleged no more than a preferance accorded other strikers. This hardly supports a claim of discrimination against him absent proof that the level of his union activity was greater than theirs. There was no such proof.

Again, the damage for which he is entitled to redress is the result, not of any action directed specifically at him, but rather at the failure to afford him the recall status of an unfair practice striker.

9. Halario Valle and Amparo Torres Silva

Testimony. Valle began working for BCI in March 1977, as an irrigator. His foreman was Guadalupe Alonzo. He went out on strike February 1979 and was recalled on May 14, 1980. He lacks legal greencard status.

He testified that there were 9 irrigators prior to the strike buy only six after he was recalled. This meant he was expected to do more work in less time and to cover a greater area.

He testified that before the strike immigration authorities

frequently came looking for illegal aliens. When they did the foreman (Alonzo) would warn him and the other workers and help them hide. After the strike the INS visited much less frequently. He was terminated following an immigration raid in March 1981.

Silva began working for BCI in 1976 as an irrigator. His foreman was Francisco Diaz. He went out on strike in February 1979 and was recalled at the end of February or the beginning of March 1980. He was rehired by a supervisor named Ben. Alonzo was his foreman for about two weeks.

Shortly after returning to work he was called to the office and asked to show his greencard so that the number could be sent to the immigration authorities in San Francisco. Two or three days later, he was informed that the INS was unable to verify the number. Upon request, he allowed the card to be copied and sent to the INS in Los Angeles. A week later he was given a termination notice for not having proper papers. After first talking with Roy Miller, he went to Ben and told him that 80% of the people who work in the crew were illegals. Ben said he would have Roy check this. If it was so, they too would be laid off.

Foreman Alonzo denied that he had warned or helped conceal illegal workers from the authorities; in fact, he denied even knowing that many of his workers were illegals. Other company witnesses gave similar testimony.

Findings and Conclusion. The alien checking procedure has already been discussed and found permissible (supra, p. 81). No connection was proven between the frequency of INS raids, the attitude of foremen toward illegals, and the discharge of former strikers.

That leaves Valle's allegation that after he returned crew members were expected to work harder. To the extent this is true it affects strikers like Silva and Valle no differently than the non-strikers or those who struck then crossed UFW picket lines to return to work like Salvador Davila.

10. Hector Diaz

Testimony. Diaz began working for BCI in 1977 as a foreman. His supervisor was Patricio Garcia who, in turn, answered to Ramon Robledo. He testified that in October 1980 he was called into the office by Operations Manager Noel Carr and terminated because of a reduction in the number of foremen.

Diaz testified that the termination came on the heels of his failure to carry out Robledo's order that he find excuses to give warning notices to Maria Ramos, Maria Murillo and Ramona and Maria Torres, so that Robledo could have them discharged. Robledo first told him to give warnings to Maria Ramos when she was involved in the work stoppage in January or February 1980 (supra, p. 90). Subsequently, he renewed and expanded the order to include the three other women. Maria Ramos and Ramona and Maria Torres all testified that he was a good foreman, lenient with workers; and, according to Diaz, none of the women had given him grounds for issuing warnings.

Robledo denied instructing Diaz to find excuses to issue warning notices and testified that he had been discharged because he was doing the poorest job of all the foremen. Robledo's estimate of his work was confirmed by Patricio Garcia who said that Diaz allowed his crew to waste lettuce, to cut it badly, and to wrap it poorly. His entire crew was disbanded shortly after his termination.

The charge of discrimination Diaz filed with the California Department of Fair Employment and Housing, alleging age discrimination as the reason for his discharge, was introduced in evidence (GC Ex. 215).

Findings and Conclusion. In order to find that Diaz' discharge constitutes a violation of section 1153(a), it must be shown to fall within one of the exceptions to the general rule permitting such discharges at the will of the employer. Ruline Nursery (1981) 7 ALRB No. 21. Here, the applicable exception requires a showing that he was discharged for refusing to engage in activities prescribed by the Act; i.e. disobeying Robledo's orders to find excuses to issue warning notices to the four women. Id. at p. 9-10.[58]

The testimony of Diaz and Robledo are in direct conflict, and both were poor witnesses. Diaz changed his testimony on three crucial issues: (1) The location of his purported conversation with Robledo the day of the work stoppage involving Maria Ramos, (2) the length of the leave of absence he gave to Gabino Conchas, and (3) whether Conchas or Ramos applied for the extention of the leave of absence. Each time the change served to conform his testimony to that of the alleged discriminatee. He also filed a claim with the State declaring under penalty of perjury that he believed age to have been the reason for his discharge. While testifying he appeared very nervous and uneasy. Robledo was a guarded and

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58. The third exception, requiring that discharge be part of an overall plan or scheme, is ruled out by earlier findings (supra, p. 86-88).

reluctant witness. He gave the distinct impression that he was holding information back.

Given the credibility difficulties on both sides it is impossible to entertain anything more than a suspicion that Robledo had ordered Diaz to retaliate against former strikers.[59/] When this suspicion is weighed against the fairly persuasive evidence that Diaz was not an effective foreman, it must be conceded that BCI was entitled to select him as the foreman to be terminated due to the reductions in force. So, applying the Wright Line analysis to the proof here, there is some doubt that a prima facie case has been established; and even if it has, the employer has offered a convincing explanation for taking the action it did.

11. Gloria Astorga

Testimony. Gloria Astorga began working for BCI in November 1973, primarily as a packer and wrapper. She was active in the UFW before the strike and went out on strike in February 1979. She did not petition to return to work because of her fear of retaliation.

She testified that, while working for foreman Julian De La Paz in 1978, she was required to clean buses and cut in front of the lettuce machine, rather than pack or wrap.

De La Paz testified that he never asked her to clean the buses because, before she arrived in his crew, BCI had adopted a policy against such assignments. He also testified that she never

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59. Diaz' notebook containing marks next to the names of those he was to keep an eye on is not especially persuasive in view of the other problems with his testimony. The marks could too easily have been added much later.

complained of her assignment to cut and that in his opinion wrapping is more difficult than cutting.

Antonia Arrellano testified to a number of comments by foremen and supervisors indicating animosity toward her as "a Chavista and a troublemaker."

Findings and Conclusion. De La Paz impressed me as a frank and honest witness and I credit his testimony that he did not assign Astorga to clean the buses and haul the garbage, as well as his testimony that she did not complain when she was assigned to cut.60/

Testimony as to the relative difficulty of harvest tasks indicates that opinions, for the most part, reflect nothing more than the subjective point of view of the particular witness.

Antonia Arrellano's testimony has already been discussed and discredited (supra, p. 86).

Astorga's failure to return to work for fear of retaliation appears to be the only event which occurred within the 1160.2 period, and, in view of the above findings and a lack of any overall scheme of retaliation (supra, p. 86-88), it was unjustified.

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60. Discriminatee Andres Torres' testimony indicates that De La Paz was a fair and capable foreman (supra, p. 99).

SUMMARY

For reasons already stated and summarized (supra, p. 77-79), I have concluded that Respondent engaged in surface bargaining in violation of sections 1153(e) and, derivatively, 1153(a). In addition, by relying on spurious impasses to implement pending proposals (supra, p. 79-80), Respondent violated sections 1153(e) and, derivatively, 1153(a). Moreover, because these illegal unilateral changes discriminated against striking employees for engaging in protected activity, they also violate section 1153(c). Pacific Mushroom Farm (1981) 7 ALRB No. 28. I do not, however, find violations in the closure of the King City and Imperial ranches, in the bulk harvesting of lettuce or in the checking of alien registration numbers (see supra, p. 80-81). Finally, having found the strike to have been converted from an economic to an unfair labor practice strike on March 9, 1979 (supra, pp. 81-83), I conclude that BCI, by treating workers who unconditionally petitioned to return to work as economic strikers subject to recall only as positions became available, violated sections 1153(c) and, derivatively, 1153(a) of the Act.

The remaining allegations of the complaint, as amended both before and at the close of the hearing, have been considered, discussed and found wanting. I recommend that they be dismissed.

During the hearing, Respondent argued that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. sections 1001, et seq., preempted consideration of those aspects of the case involving bargaining over pensions. In response to a motion to strike portions of the complaint, to exclude certain evidence, and

to revoke portions of a subpoena duces tecum, I issued a written ruling denying the motion and explaining the reasons therefore. A copy is attached as Appendix I to this decision.

THE REMEDY

With respect to the violations which have been found, I recommend that Respondent be ordered to cease and desist from its unlawful conduct and take certain affirmative action deemed to effectuate the policies of the Act.

1. With respect to the bargaining violations, Respondent shall be affirmatively directed to meet and bargain collectively in good faith with the UFW, upon its request, and to make its employees whole for their resultant loss of wages and other benefits. Having determined that Respondent's unlawful bargaining strategy was clearly manifest by March 9, 1979 (supra, pp. 81-82), make-whole relief would normally commence on that date. Admiral Packing Company, supra; O. P. Murphy, supra; Montebello Rose Company, supra. However, there exists a consideration here that was not present in those cases; namely, the UFW's unfair bargaining tactics which began shortly thereafter on March 15 and continued until October 22, 1979 when Cohen replaced Huerta as negotiator (supra, pp. 73).

In J. R. Norton Co. the ALRB (1979) 26 Cal.3d 1, 38, the Court recognized the discretionary nature of the "make-whole" remedy, quoting then Secretary of Agriculture and Services Rose Bird's testimony before the Senate Industrial Relations Committee (Hgs. on Sen. Bill No. 1, 3rd Ex. Sess. 1975, May 21, 1975) that: "What the [Act] is doing here [in providing for make-whole] is giving discretion to the Board to give backpay to employees where

there has been bad faith, and I suggest that's an equitable remedy." (Emphasis by the Court). In N. A. Pricola Produce (1981) 7 ALRB No. 49, the Board addressed itself to a situation analogous to the one at hand and said:

> We believe that no remedy, including make-whole should be imposed automatically. Rather, all of the circumstances of the individual case — including the overall conduct of each party, and the probable effect of the remedy on the negotiating process — should be considered before deciding what remedy is most appropriate.

Because the make-whole remedy is "equitable" and "discretionary" in nature, principles similar to those which underly other kinds of equitable relief should be taken into account. It is for this reason that I conclude that the considerations which give rise to the traditional doctrine of "clean hands" apply here. Make-whole relief should be computed as though it would be imposed beginning March 9, 1979, but its imposition should be suspended or tolled during the period from March 9 to October 22, 1979, when the UFW once again began earnestly to seek agreement rather than delay.

This means that, under Admiral Packing Company, BCI employees are to be divided into two categories: (1) those who did not go on strike during the period under consideration, including employees who did not join the strike and continued to work into the period and employees hired before March 9, 1979 as permanent replacements for strikers who continued working into the period; and (2) employees who did strike, but who had not been permanently replaced by March 9, 1979. The first category shall be made whole for the difference, if any, between their actual earnings and what they would have earned at rates established in 1979 contracts at comparable agricultural operations in the same geographic areas.

Employees in the second category shall be made whole for the amount of the difference between what they would have earned it, instead of striking, they had worked from March 9, 1979 under the previous BCI/UFW agreement and what they would have earned by working at rates established in 1979 contracts at comparable agricultural operations in the same geographic areas. Employees who joined the strike and then returned to work are to be made whole in the same manner as the above strikers during the period they were on strike and as the above non-strikers during the period they were working. The amount of make-whole for each such employee is then to be reduced by the amount computed to be attributable to the period from March 9 to October 22, 1979. Except as provided below for the other violations, none of the other categories of employees — strikers for whom permanent replacements were hired before March 9, 1979, employees hired as temporary replacements for strikers before or after March 9, 1979, and employees hired after March 9, 1979 as permanent replacements for strikers — are entitled to make-whole relief.

The make-whole period shall continue until the date BCI commenced (or commences) good faith bargaining which results either in a contract or in a bona fide impasse (O. P. Murphy Produce, supra; Admiral Packing Company, supra) and shall be computed in accordance with the formula set forth in Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24, as modified by Ranch No. I, Inc. (1980) 6

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ALRB No. 89, plus appropriate interest.[61]

2. With respect to the unilateral changes which have been found to violate sections 1153(e), (c) and (a), should the UFW so request, they shall be rescinded; and, in addition, any employees who have suffered economic loss as a result of their implementation shall be reimbursed. Pacific Mushroom Farm, supra. Those entitled to make-whole and the computation of the amounts due shall be in accordance with section 1, above.

3. Finally, those striking employees who unconditionally offered to return to work after March 9, 1979 are entitled to immediate reinstatement and to be made whole for all lost wages and other economic losses from the date their offer was received until their actual reinstatement.[62] Such make-whole to be computed in accordance with J & L Farms (1980) 6 ALRB No. 43. At the compliance stage, Respondent may be able to demonstrate that certain striking employees were permanently replaced prior to March 9, 1979; in which case their reemployment rights are to be determined in accordance with Seabreeze Berry Farms, supra. See Vessey & Company, Inc., supra footnote 3.

4. Because Respondents were responsible for the delay in bargaining, I recommend that the certification of the UFW, as exclusive bargaining agent, be extended for a period of one year

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61. Determination, where necessary, of "permanent" or "temporary" status is to be made in accordance with Seabreeze Dairy Farms (1981) 7 ALRB No. 40. See Admiral Packing Company, supra footnote 8.

62. The reasons behind the tolling of bargaining make-whole does not apply to the make-whole afforded to strikers who sought reinstatement.

from the date on which good faith bargaining commences. Kyutoku Nursery, Inc. (1978) 4 ALRB No. 44; Robert H. Hickam (1978) 4 ALRB No. 73.

5. The other items of remedial relief I recommend as necessary in view of the nature of the violations, Respondents' business, and the conditions among farm workers and in the agricultural industry at large, as set forth in Tex-Cal Land Management Inc. (1977) 3 ALRB No. 14.

Upon the basis of the entire record, the findings of fact, and the conclusions of law, and pursuant to section 1160.3 of the Act, I hereby issue the following recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondent Bruce Church, 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; and, in particular, engaging in surface bargaining or unilaterally changing employees' wages or working conditions.

(b) Discriminating against any of its employees for engaging in any union activity by making any unilateral changes in wages, hours, or working conditions.

(c) Failing or refusing to rehire or reinstate, or otherwise discriminating against, any agricultural employee because of his or her union activities.

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

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

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive bargaining representative of its employees concerning wages, hours and working conditions and concerning any unilateral changes heretofore made and embody any understandings reached in a signed agreement.

(b) Make whole all its agricultural employees, including employees who went on strike before March 9, 1979, in support of contract demands by the UFW, who had not been permanently replaced as of that date, but not including employees hired before March 9, 1979 as temporary replacements for strikers, or employees hired after March 9, 1979, as replacements for strikers, for any economic losses they suffered as a result of Respondent's failure or refusal to bargain in good faith in accordance with the formula set forth in Adam Dairy, dba Rancho Dos Rios (1978) 4 ALRB No. 24 as modified by Ranch No. I, Inc. (1980) 6 ALRB No. 89, plus interest computed at seven percent per annum. The period of said obligation shall extend from March 9, 1979 until the date Respondent commences good faith bargaining with the UFW which results in a contract or bona fide impasse. The economic losses for which an employee who went on strike is to be made whole shall not include wages or benefits for the period from the commencement of the strike to the date such employee unconditionally offered or offers to return to

work, but shall include the difference between what such employee would have earned by working at 1978 rates of payment during the period from March 9, 1979 or such later date as the employee went on strike, to the date of the employee's unconditional offer to return to work, and what the employee would have earned by working during the same period at rates of payment established in 1979 contracts at comparable agricultural operations in the same geographic region. The economic losses for those who did not go on strike (including employees who did not join the strike and employees who were hired as permanent replacements before March 9) shall include the difference between the actual earnings of each such employees and what each would have earned at rates established in 1979 contracts at comparable agricultural operations in the same geographic areas. Employees who joined the strike and then returned to work are to be made whole in the same manner as the above strikers during the period they were on strike and as the above non-strikers during the period they were working. The amount of make-whole for each employee is to be reduced by the amount which is attributable to the period from March 9 to October 22, 1979.

(c) If the UFW so requests, rescind the unilateral changes in wage rates, health plan, pension plan or any other such unilateral change, determined to be a violation herein, and make whole the affected employees for any economic losses suffered as a result of such unilateral changes in working conditions in accordance with categories and computations set forth in (c) above.

(d) Offer to each striker who unconditionally offered to return to work on or after March 9, 1979, full and immediate

reinstatement to their former or substantially equivalent jobs without prejudice to their seniority rights or other employment rights and privileges and reimburse them for any loss of pay and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them upon their unconditional offer made on or after March 9, 1979, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum.

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

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

(g) Post copies of the attached Notice at conspicuous places on its premises for 60 consecutive days, the period and place(s) of posting to be ate languages to all agricultural employees employed at any time from March 9, 1979, to the present.

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

(j) Arrange for a representative of Respondent or the Board to distribute and read the attached Notice in appropriate languages to Respondent's assembled employees on company time. The

reading or readings shall be at such time(s) and place(s) as are specified by the Board's Regional Director and, following each reading, a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice 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 Board's Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps taken to comply with it and, upon request, notify the Regional Director in writing periodically thereafter of further steps taken to comply.

(l) It is further ordered that all allegations of the complaint as amended and ordered amended and not found herein to be in violation of the Act are hereby dismissed.

IT IS FINALLY ORDERED that the certification of the UFW as the exclusive collective bargaining representative of the agricultural employees of Bruce Church, Inc. 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: May 12, 1982

JAMES WOLPMAN
Administrative Law Officer

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro and Salinas offices, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by failing or refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (UFW), since March 9, 1979, and by making certain changes in wages, medical plan, pension plan and other benefits without properly bargaining with the UFW, and also by refusing to reinstate unfair labor practice strikers who offered to return to work on or after March 9, 1979.

The Agricultural Labor Relations Board has told us to send out and post this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

Because this is true, we promise that

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

WE WILL reimburse each of our agricultural employees, including employees who went on strike before March 9, 1979 in support of contract demands by the UFW who had not been permanently replaced as of that date, but not including employees hired before March 9, 1979, as temporary replacements for strikers, or employees hired after March 9, 1979, as replacements for strikers, for any economic losses they suffered as a result of our failure or refusal to bargain in good faith.

WE WILL NOT change your wages, or other benefits without first notifying the UFW, and giving it an opportunity to bargain over the proposed change and WE WILL, upon the UFW's request, rescind the changes in wages, medical plan, pension plan and other benefits that we made, and make our employees whole for any economic losses they suffered as a result of the changes.

WE WILL NOT fail or refuse to rehire or reinstate, or otherwise

discriminate against any employee in regard to his or her employment because he or she has engaged in a lawful strike or otherwise supported the UFW or any other labor organization.

WE WILL offer to reinstate all employees, then on strike, who offered to return to work on or after March 9, 1979, to their previous jobs, or to substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other economic losses they incurred because we discharged or failed to hire or rehire them, plus interest at seven percent per annum.

DATED:

BRUCE CHURCH, INC.

By:_____
(Representative)

If you have any quesitons about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130. Another office is located at 112 Boronda Road, Salinas, California; the telephone number is (408) 443-3161.

DO NOT REMOVE OR MUTILATE.

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the matter of:	)	
	)	
BRUCE CHURCH, INC.,	)	Case Nos. 79-CE-87-SAL et al.
	)	
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

RULING ON MOTION TO STRIKE PORTIONS OF COMPLAINT, TO EXCLUDE CERTAIN EVIDENCE AND TO REVOKE PORTIONS OF SUBPOENA DUCES TECUM

I

As a result of certain unfair labor practice charges filed by the United Farmworkers of America, AFL-CIO (hereafter "UFW") pursuant to the Agricultural Labor Relations Act of the State of California, Cal. Lab. Code Sections 1140 et seq. (hereafter "ALRA"), and after investigation of those charges, a complaint was issued by the General Counsel of the Agricultural Labor Relations Board alleging that the Respondent Bruce Church, Inc. (hereafter "BCI") violated Sections 1153(e) and (a) of the ALRA by refusing to bargain in good faith with the UFW as the duly certified representative of BCI's agricultural employees. Eventually, the complaint was amended and consolidated to include a variety of

acts all of which concern the conduct of BCI during labor negotiations beginning in December, 1978 and continuing to date. The specific allegation of the complaint which underlies this motion is to be found in a portion of Paragraph 6(i) of the First Amended and Consolidated Complaint:

> "On or about July 12, 1979, Respondent or its agents . . . unilaterally increased the Company payment to unit employees' Pension Fund without reaching agreement or impasse with the exclusive representative (the UFW); (and) unilaterally increased the Company's payment to unit employees' Medical Plan without reaching agreement or impasse with the exclusive representative."

At the outset of the hearing on the allegations contained in the complaint, including the above matters, on February 2, 1981, in El Centro, California, the Respondent filed a written motion contending that the above quoted portions of Paragraph 6 intruded into an area which Congress, in enacting the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1001 et. sec. had pre-empted. Consistent with its pre-emption theory, BCI took the position that evidence relating to the pre-empted allegation should be excluded and portions of a subpoena duces tecum seeking information relevant to the allegation should be revoked. Both the General Counsel of the ALRB and the UFW as Intervenor in this proceeding oppose the motion.

II

The issue here is whether Section 514 of ERISA, 29 U.S.C. Section 1144, pre-empts the ALRB from determining whether or not BCI refused to bargain with the UFW in violation of

Cal. Labor Code Section 1153(e), by unilaterally increasing its payments into the BCI Pension and Health & Welfare Plans without either consulting with the UFW or reaching an impasse in negotiations.

III

ERISA clearly includes within its ambit both pension and health & welfare plans of the kind involved here. Sections 3(1), 3(2) and 4(a), 29 U.S.C. Sections 1002(1), 1002(2), 1003 (a). The Act also contains a pre-emption provision. Section 514, 29 U.S.C. Section 1144. The rationale behind that provision is to be found in the Report of the House Education and Labor Committee:

> "Except where plans are not subject to this Act and in certain other enumberated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in liew of burdensome multiple reports." U.S. Code Cong. & Admin. News, 1974, p. 4655.

Resolution of the issue here presented requires a careful analysis of Section 514. The first subparagraph, 514(a), provides, in applicable part.

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

None of the exclusions in Section 514(b) are relevant and the instant plans are not exempt under Section 4(b). The pre-emption test, therefore, would appear to be whether or not the state law in question relates to any employee benefit

plan. "Relate" is a very broad term and could well include the kind of conduct which is the subject of the within complaint. See Standard Oil Co. v. Agsalud, 442 F.Supp. 695 (N.D. Cal. 1977), aff'd 633 F.2d 760 (9th Cir. 1980); Azzaro v. Harnett, 444 F.Supp. 473, aff'd 553 F.2d 93 (2nd Cir. 1976) cert. denied 434 U.S. 824 (1977). But Section 514 does not stop there; it goes on in Subparagraph (c)(2) to define the meaning of "State" as follows:

> "The term 'State' includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title." (emphasis supplied).

This is an odd definition because, after setting out the convential meaning of "State" as including any political subdivision thereof, or any agency or instrumentality of either, it then proceeds to delimit that conventional definition by saying that only those aspects of the "State" which "purport to regulate, directly or indirectly, the terms and conditions of employee benefit plans" are to be considered part of the "State" as that term is used in Section 514.

When such a definition is read back into Section 514(a) it serves to qualify the very broad notion of "relate" by including the requirement that the State law be one which regulates terms and conditions of employee benefit plans. This being so, the question then becomes: Does the ALRA, and specifically Section 1153(e) thereof, purport to regulate the terms and conditions of employee benefit plans?

The answer is "No". Section 1153(e) provides that it is an unfair labor practice:

> "To refuse to bargain collectively in good faith with labor organizations certified pursuant to the provisions of . . . this part."

Bargaining in good faith is defined in Section 1155.2(a) as follows:

> For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representavive 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 party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. (emphasis supplied).

The clear import of that Section is that, while both union and management must strive to reach agreement, the terms and conditions of that agreement are in no manner limited or fixed; indeed there is not even a requirment that agreement be reached. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937); NLRB v. Highland Park Mfg., 110 F.2d 632 (4th Cir. 1940); ALRA, Section 1148.

In short, the duty to bargain does not regulate the terms and conditions of a plan; it is concerned with the process by which a plan comes into being or by which coverage is secured for employees--that process is collective bargaining.

Here BCI is alleged to have failed to engage in bargaining with the UFW before it went ahead and increased the coverage of the plans for bargaining unit employees. Its defense is

that the moment its collective bargaining agreement expired it was immediately required by ERISA to place the employees under its own plan and to maintain that plan in a non-discriminatory manner. While I have some doubt as to whether, when a contract expires, bargaining unit employees who have no plan but who are bargaining for one must immediately be shifted into the employer's plan, that issue need not be addressed here. The problem with BCI's conduct (if indeed there is a problem--evidence has not yet been taken) is not so much that employees were covered, but that prior to coverage or, more specifically, an increase in coverage, BCI did not follow the prescribed rules for communication and bargaining with the UFW. This is a duty independent and apart from the terms, conditions and administration of the plan; a duty which does not serve to regulate or interfere with those terms and conditions.

IV

Section 514 is no model of legislative draftsmanship. The definition of "State" in Section 514(c)(2) is especially unwieldly; but its meaning is plain enough: only those State laws which regulate the terms and conditions of employee benefit plans are pre-empted.

However, even if the clumsiness of the definition provision were enough to make Section 514 ambiguous, the result here would be no different. There are both practical and policy reasons supporting the above interpretation.

As a matter of policy, collective bargaining has come to be recognized as a cherished right of American workingmen and women. See National Labor Relations Act, as amended, 29 U.S.C. Section 151, Findings and Policies. This right has long extended into the area of pensions and health & welfare plans. Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949); W.W. Cross & Co. v. NLRB, 174 F.2d 875 (1st Cir. 1949). While the NLRA does not cover farm workers it is difficult to believe--in the absence of a clear legislative mandate--that these workers were to be deprived of the right to bargain in those areas. There is nothing in the legislative history of ERISA to suggest anything like that. See U.S. Code Cong. & Admin. News, 1974 pp. 4639-5190.

As a practical matter the broad pre-emption theory espoused by RCI--that any State law or decision related to pensions or health & welfare plans is pre-empted--would lead to unwanted and impractical situations in many areas of the law; this being just one.

Take the dissolution of marriages for an example. California State courts have determined that pensions are community property and have repeatedly acted to protect the non-employed spouse's interest in such funds. There is specific State legislation allowing for the joinder of pension funds in family law litigation and providing for State Court orders directed to joined pension funds to make payments directly to the non-employed spouse. Cal. Civil Code Section 4363-

4363.3. This direct involvement of the State Courts with pension administration is much more intrusive that the duty to bargain issue before me.

In the area of age discrimination the California legislature has dealt directly with pension plans in attempting to achieve a workable accomodation between mandatory retirement changes and the level of plan participation required of older employees. Cal. Labor Code Section 1420.15 and Regulations thereunder. Here again the nexus between regulation and plan content is closer that in the bargaining situation.

There are many other examples of actual or potential areas where state laws relate to employee benefit plans where significant state interests are at stake.

V

For the above reasons, Respondent's Motion is denied. This ruling will be incorporated into the record of the hearing upon resumption and be subject to review after the close of the hearing and the issuance of a decision in the same manner as any other ruling.

DATED: February 5, 1980

JAMES WOLPMAN
Administrative Law Officer