STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC. Respondents, and, UNITED FARM WORKERS OF AMERICA, Charging Party.	Case Nos. 2015-CE-006-VIS 2017-CE-003-VIS **DECISION AND RECOMMENDED ORDER ON STIPULATED RECORD**

Appearances:

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DECISION

At issue in these consolidated cases are

- whether during voluntary bargaining and/or during the Mandatory Mediation and Conciliation (MMC) process, Arnaudo Brothers, LP, and Arnaudo Brothers, Inc. (Respondents) failed to bargain in good faith regarding second-year contract wages with Charging Party United Farmworkers of America (UFW) from about November 2014 to April 2015; and

- whether Respondents failed to bargain in good faith with UFW by on or about April 2016, adopting a medical plan without first notifying and bargaining with UFW.

On the record as a whole and after consideration of briefs[1] filed by all parties to this proceeding, the following findings of fact and conclusions of law are made.

Background Factual Findings

Respondents are located in and around Tracy, California including in the San Joaquin Delta where they have traditionally grown and harvested canning tomatoes, asparagus, alfalfa and field corn.[2] Respondents have previously been found to be an agricultural employer[3] within the meaning of Section 1140.4(c) of the Agricultural Labor Relations Act (the Act).[4] Despite the denial in their answer

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[1] The General Counsel's Notice of Additional Legal Authority and Request for Administrative Notice are granted.
[2] Joint Exhibit ("Jt Ex") 2 at Bates Stamp R0074; Jt Ex 7 at Bates Stamp R0111, lines 22-23.
[3] See. e.g., *Arnaudo Brothers LP and Arnaudo Brothers, Inc.,* (1977) 3 ALRB No. 78; *Arnaudo Brothers LP and Arnaudo Brothers, Inc.,* (2014) 40 ALRB No. 3.
[4] Cal Labor Code sec. 1140 et seq.

to complaint herein that they are an agricultural employer, it is found that Respondents constitute an agricultural employer.[5]

The parties agree and it is found that UFW is a labor organization within the meaning of the Act.[6] UFW was certified as the exclusive collective-bargaining representative of Respondents' agricultural employees in San Joaquin County on January 14, 1977.[7]

In 2002, the Act was amended to provide, under certain circumstances, for mediation following certification of a labor organization in order to set the terms of the initial collective-bargaining agreement.[8] The mediation process is known as Mandatory Mediation and Conciliation or MMC.[9] On February 13, 2013, the Board referred UFW and Respondents to the MMC process.[10] The eventual result, set forth in a September 12, 2014 supplemental mediator's report,[11] was a

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[5] The term "agricultural employer" is liberally construed to include corporate growers acting directly or indirectly in relation to an agricultural employee. Although Respondents denied much of the complaint allegation that they were an agricultural employer, they admit in their September 13, 2017 answer that they have their principal place of business in Tracy, California, where they are engaged in growing various agricultural commodities. Sec. 1140.4(a) and (c) of the Act.

[6] In its answer to the complaint, Respondents admit that UFW is a labor organization within the meaning of sec. 1140.4(b) of the Act.

[7] See *Arnaudo Brothers LP, and Arnaudo Brothers, Inc.,* supra, (2014) 40 ALRB No. 3, slip op. at 3; Jt Ex 7, Bates Stamp R0110, lines 10-12.

[8] Sec. 1164 of the Act sets forth the qualifying circumstances for requesting MMC assistance.

[9] The MMC provisions were amended further in 2004 and 2012.

[10] Stipulation ("Stip") 1; Case No. 2013-MMC-001.

[11] Stip 8; Joint Exhibit ("Jt Ex") 2

two-year mediated collective-bargaining agreement in effect from January 1, 2014 to December 31, 2015.[12]

The parties filed for review of the supplemental report.[13] On October 3, 2014, the Board dismissed the petitions for review as "premature" and remanded the case to mediator Matthew Goldberg to determine the second-year contract wages of the mediated contract.[14]

The complaint alleges that thereafter Respondents failed to participate in a telephone call arranged by the mediator or to respond to numerous UFW requests to meet and negotiate.[15] The complaint also alleges that Respondents failed to respond to the UFW's January 13, 2015 proposal of a 4 percent across-the-board wage raise for the second year of the contract and failed to respond to an attempt by the mediator to schedule a further mediation session.[16]

On February 15, 2018, the parties exchanged all exhibits pursuant to an agreement as to their authenticity and admissibility. On February 27, 2018, the parties submitted all factual stipulations relevant to the issues in this case.

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[12] In the initial report of May 13, 2014, the mediator decided the duration of the contract should be one year. See Jt Ex 1. After a June 27, 2014 remand, reported at (2014) 40 ALRB No. 7, (see Stip 6) on September 12, 2014, the mediator's supplemental report added an additional year to the contract duration and ordered the parties to meet and confer about the second-year wage rate. Stip. 8; Jt Ex 2, p. 9, R0080.
[13] Stip 9
[14] Stip 10. *Arnaudo Brothers, LP, and Arnaudo Brothers, Inc.,* (2014), 40 ALRB No. 7, dismissing the petitions for review of the September 12, 2014 mediator report as "premature."
[15] Complaint paragraph ("par") 6.
[16] Complaint par 7.

Finally, the parties waived a hearing and requested a decision on the stipulated record. The stipulation of facts is approved and General Counsel exhibits 1-8 and 11-23 and Joint exhibits 1-7 are admitted. The parties' request for a decision on the stipulated record is also approved.

Alleged Failure to Bargain in Good Faith

Facts

Following the October 3, 2014 remand to mediator Goldberg, the parties' first contact was on November 10, 2014, when mediator Goldberg sent an email to Mario Martinez (Martinez) and Edgar Aguilasocho (Aguilasocho), counsel for UFW, copying Robert Carrol (Carrol), counsel for Respondents. Mediator Goldberg asked if the UFW was still interested in pursuing the remanded matter.[17]

Martinez responded to all "Yes, of course. We need to finalize the terms of the contract between the parties."[18] Mediator Goldberg quickly queried all parties, including Carrol, "Have you spoken to Rob [Carrol]?"[19] There is no record of a response from Carrol.[20]

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[17] Stip 11, GC Ex 5 at Bates Stamp GC0018. The email time was shown as 12:26 p.m.
[18] Stip 12, GC Ex 5 at Bates Stamp GC0018. Martinez' email was sent at 12:40 p.m.
[19] GC Ex 5 GC0017-0018; Mediator Goldberg's query to all parties shows it was sent at 1:11 p.m. The parties agree that these emails are introduced not for the truth of the matters asserted therein. Thus, it is noted that these emails constitute exclusions from the hearsay rule.
[20] The parties also note that a November 10, 2014, 4:14 pm responsive email from Martinez to Mediator Goldberg has not been authenticated. See GC Ex 5, Bates Stamp GC0017: "Lupe has made repeated requests to meet and bargain with Rob over the wage issue, but he has not confirmed any meeting with UFW for the purpose of resolving this issue." Circumstantial

On November 10, 2014, UFW Vice-President Armando Elenes (Elenes) started a separate email string when he sent an email to Carrol: "Hi Rob, Can we arrange a call to resolve the Arnaudo 2nd year wage issues that is pending? Rather resolve voluntarily and save both ourselves a day of mediation."[21] Elenes followed up using his original November 10, 2014, email with another email to Carrol on November 24, 2014, "Hi Rob, Have not heard back from you. We would like to know when we can discuss."[22] On December 1, 2014, Elenes added another email to the string stating, "Hi Rob, Still waiting to hear from you….this is now my 3rd request for a time to discuss and resolve this issue."[23] On December 11, 2014, Elenes added another email to the string to Carrol stating, "This is my 4th request for a response….are you now refusing to negotiate??"[24] There is no record of a response from Carrol to any of these emails.

On January 13, 2015,[25] Carrol and Elenes spoke by telephone. During the conversation, Elenes proposed a 4 percent across-the-board wage increase for the

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evidence does not assist in authentication of this email. Although it appears in a chain of emails, all of them between Mediator Goldberg, Martinez, Carrol, and others, Mediator Goldberg responded to Martinez, GC Ex 5, Bates Stamp GC0017 at 7:32 p.m. on January 21, 2015, stating, "You appear to be correct [that Martinez responded to the 12:26 email of November 10, 2014]. However, I have no record of your last (4:14 pm) email of November 10." Thus, due to lack of authentication, the 4:14 p.m. email of November 10, 2014, apparently sent by Martinez to Mediator Goldberg and Carrol, among other recipients, will not be considered.

[21] Stip 13, GC Ex 1 at Bates Stamp GC0011. This email shows it was sent at 3:56 p.m.

[22] Stip 14, GC Ex 2 at Bates Stamp CG0012. This email shows it was sent at 6:50 p.m.

[23] Stip 15, GC Ex 3 at Bates Stamp GC0013. This email shows it was sent at 11:23 p.m.

[24] Stip 16, GC Ex 4 at Bates Stamp GC0015. This email shows it was sent at 5:47 p.m.

[25] Further dates are in 2015 unless otherwise referenced.

second year of the contract. Carrol told Elenes that he would discuss the proposal with his clients and get back to Elenes.[26]

On January 21, Carrol responded to an email begun earlier that day. He addressed, among others, Elenes, Martinez, and Mediator Goldberg. The subject line stated, "Re: Arnaudo Bros. 2013-MMC-001; request for case status>>." Carrol's response stated:

> HOLA, Colegas, from Day#2 of the long-delayed Ace Tomato MW Hearing here in scenic Modesto, CA. Even though the Union even longer ago (32+ years) clearly disclaimed interest in negotiating for or otherwise engaging in ANY representational (or any other) activities on behalf of bargaining unit, the Company has made a "special appearance" in this proceeding and has NEVER refused to do anything regarding wage rates. Indeed, as I told Mr. Elenes recently, I will meet with the 91 and 85 year-old Company principals at our earliest mutually convenient time to ascertain what hourly rate they would be agreeable to paying to employees returning to work in their annual 9-week asparagus harvest (when they employ a "peak" of approximately 120 folks) likely beginning around March 21st and ending in the last week of May and report back to Mr. Elenes. Saludos a todos, RKC[27]

Following the above January 21 email from Carrol, later that same day, Martinez responded to Carrol's email copying Elenes and Mediator Goldberg, as well as ALRB personnel. Martinez requested, inter alia, that the ALRB order Respondents to meet and bargain within the next 14 days.[28] Later that day,

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[26] Stip 17.
[27] Stip 18, GC Ex 5, Bates Stamp GC0022. This response shows it was sent at 1:39 p.m.
[28] Stip 19, GC Ex 5, Bates Stamp GC0022. This email is shown as sent at 2:18 p.m.

Martinez emailed Carrol and various ALRB representatives including the Board's Acting Executive Secretary (AES), requesting Board intervention immediately.[29]

Also on January 21, the AES of the ALRB sent three emails to the parties. The AES requested that Mediator Goldberg "advise concerning the status of the [remanded] matter." Martinez and Carrol, among others, were copied.[30] Martinez responded, inter alia, "The employer has refused to meet and bargain with the union concerning wage rates." Later, the AES stated, "I will await a status report from the mediator. Any requests concerning next steps should be directed to [the mediator] in the first instance. Thank you."[31] Finally, the AES emailed Martinez, Carrol, the mediator, and others, as follows:[32]

> Labor Code section 1164.3 subdivision (c) appears to contemplate that the mediator will file a report to the Board thus advising the Board of the issues. See also Board regulations, sections 20407 and 20408. The same conclusion can be drawn from the Board's Decision and Order in 40 ALRB No. 9 (see order, at pp. 5-6.) In short, the matter is with the mediator and the parties.
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> If you desire Board intervention at this juncture, please file a motion complying with the Board's regulations that I can transmit to the Board.

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[29] Stip 19, GC Ex 5, Bates Stamp GC0021. This email is shown as sent at 2:37 p.m.
[30] Stip 20, GC Ex 5, Bates Stamp GC0020-GC0023. These emails are shown as sent at 12:15 p.m., 2:22 p.m., and 2:56 p.m.
[31] Stip 20, GC Ex 5, Bates Stamp GC0021. This email was sent at 2:22 p.m.
[32] Stip 20, GC Ex 5, Bates Stamp GC0020. This email was sent at 2:56 p.m.

Following the above emails from the AES, still on January 21, Mediator Goldberg sent an email to the AES and the parties, including Martinez, Elenes, and Carrol, stating, in part, that on November 10, 2014, he sent an email to Martinez asking if the UFW was "still interested in pursuing this matter? If not, please advise." Mediator Goldberg stated that he had heard nothing from the parties since sending that email and he assumed the case had been withdrawn or resolved. Mediator Goldberg advised the parties that if they wanted to proceed, "we should begin to attempt to schedule a convenient date and time."[33]

On the following day, January 22, Mediator Goldberg, via email to Martinez, Carrol, and others, proposed February 23 as the date to proceed.[34] Martinez responded to all on January 24, requesting an earlier date and seeking an Order from the mediator for bargaining to begin within the next 10 calendar days.[35]

Emails continued on January 24, with the mediator letting the parties, including Martinez, Elenes, and Carrol, know that February 23 was his earliest available date.[36] Martinez responded to all on January 24, accepting the February 23 date. Martinez again requested that, in the interim, Respondents be

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[33] Stip 21, GC Ex 5, Bates Stamp, GC0019-GC0020. This email was sent at 3:23 p.m.
[34] Stip 22, GC Ex 6, Bates Stamp, GC0024. This email was sent at 7:01 p.m.
[35] Stip 23, GC Ex 7, Bates Stamp GC0039. This email was sent at 3:32 p.m.
[36] Stip 24, GC Ex 8, Bates Stamp GC0084 at 12:05 p.m., "I just had a cancellation for February 23. Can we schedule a hearing date for then?" Bates Stamp GC0083 at 12:51 p.m., "earliest next available date will be Feb 23."

ordered to meet and bargain within the next 10 calendar days.[37] Carrol responded on January 24 stating, inter alia:

> "[A]t present, the Company attorney is not available on February 23rd (due to preparation for an NLRB RC/ULP case in Fresno), however, if still necessary, will notify our esteemed Mandatory Mediator and the parties should that date open up."[38]

Further, on January 24, Carrol sent a text message to Elenes to tell him that he hoped to get in touch with him about the subject of the wage rates on January 26.[39] Elenes "sent messages" to Carrol to follow up on January 29, February 4, February 11, and March 10 asking for a response to the UFW's wage proposal.[40] There is no record of any response to Elenes from Carrol.

On January 25, Mediator Goldberg advised all parties that, at a minimum, they should confer by telephone as soon as practicable to determine whether they could reach agreement on a 2015 wage rate. Mediator Goldberg also queried whether the UFW had made a demand and whether Respondents had offered a

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[37] Stip 25, GC Ex 8, Bates Stamp GC0083. The email shows it was sent at 1:11 p.m.

[38] Stip 26, GC Ex 8, Bates Stamp GC0082-GC0083. The response indicates it was sent at 2:19 p.m.

[39] Stip 27. No screen shot of the text is contained in the record nor is the exact language of the text included in the stipulation. This comment is not a criticism of the stipulation but is included for clarity as to the extent of the stipulation.

[40] Stip 28. The stipulation does not specify whether these "messages" from Elenes to Carrol were "text messages" or not. The exact language of the "messages" is not included in the stipulation. This comment is not a criticism of the stipulation but is included for clarity as to the extent of the stipulation.

counter proposal.[41] Martinez responded to all that day that, "The union has made a demand but has not received a response from the company."[42]

On March 24, Mediator Goldberg informed the parties that he had contacted Carrol that morning and that Carrol was in the process of verifying with Respondents that he was authorized to speak for them. Mediator Goldberg stated that the parties should schedule a conference call within the next 3 days, i.e., March 25-27.[43] Martinez responded that he was available on 2 of the next 3 days and that Elenes could fill in if needed when Martinez was not available.[44] Elenes stated via email that he was available during each of the next 3 days.[45] There is no record of a response from Carrol.

On March 25, Mediator Goldberg sent an email to Carrol, copying Martinez and Elenes, asking if Carrol was available to discuss that afternoon or the next day.[46] Carrol spoke with Mediator Goldberg who then emailed all parties, including Carrol, Martinez, and Elenes, on March 25 stating that Carrol would be consulting with Respondents on March 26 and the parties should anticipate a call at "around 2:00 p.m. [Carrol] will confirm the exact time as well

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[41] Stip 29, GC Ex 8, Bates Stamp GC0082 and GC0092. This email shows it was sent at 2:04 p.m.
[42] Stip 30, GC Ex 8, Bates Stamp GC0092. This email shows it was sent at 2:23 p.m.
[43] Stip 32. GC Ex 12, Bates Stamp GC0102. This email shows it was sent at 2:20 p.m.
[44] Stip 33, GC Ex 12, Bates Stamp GC0103. This email shows time of sending at 2:46 p.m.
[45] Stip 34, GC Ex 12, Bates Stamp GC0105. This email shows time of sending at 3:31 p.m.
[46] Stip 35, GC Ex 13, Bates Stamp GC0107. This email shows it was sent at 4:17 p.m.

as providing the details for the conference hook-up."[47] Carrol confirmed the conference call for March 26 at 2 p.m. and provided a call-in number and pin.[48]

On March 26, the parties held a conference call with Mediator Goldberg to discuss the subject of the wage rates for the second year of the MMC contract. During the conference call, the UFW and Respondents took positions on wages.[49] After March 26, the UFW and Respondents were unable to reach a voluntary agreement over the wage rates for the second year of the MMC contract.[50]

On April 2, Respondents and the UFW each submitted their respective positions on the wage rates for the second year of the MMC contract to Mediator Goldberg so that he could submit a final MMC report to the Board.[51]

The mediator submitted his final report on April 6, 2015[52] recommending a 4 percent increase and requiring Respondents to pay its agricultural employees all of the wages due to them as a result of the Board's MMC remand.[53] The Board adopted the mediator's findings and recommendations on April 23, 2015.[54] The mediated contract covered the years 2014 and 2015 and expired on

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[47] Stip 35, GC Ex 13, Bates Stamp GC0113. This email shows it was sent at 5:57 p.m.
[48] Stip 36, GC Ex 14, Bates Stamp GC0127. This email shows it was sent at 4:35 p.m. to all.
[49] Stip 37.
[50] Stip 38.
[51] Stip 39; Jt Exs 6 and 7.
[52] Stip 40; Jt Ex 4, Bates Stamp R0096-R0104. Although not included in the stipulation of facts, as recited in the complaint, par 9 and admitted in par 9 of the answer, on April 23, the Board issued its decision in 41 ALRB No. 3, dismissing Respondent's petition for review and giving immediate effect to the Mediator's final report. (Slip op. at 10).
[53] Complaint and answer par 8.
[54] Complaint and answer par 9.

December 31, 2015.[55] Respondent paid the wages established in the mediated contract through December 31, 2015.[56]

Analysis

As the Board has stated,[57]

> It is well-established that both parties in a collective bargaining relationship have mutual obligations to actively participate in the bargaining process. [citation omitted] While the union must institute the bargaining process by initially requesting negotiations, the employer may not passively sit by, forcing the union to continually renew its requests to meet and to proceed with negotiations. The employer also has an affirmative obligation to make arrangements for meetings once the union has initiated the process. Here, at the conclusion of the October 30, 1980, meeting, it was incumbent upon Respondent to respond to the Union's new proposal and thereby permit the Union to decide whether further meetings or new proposals were necessary. Respondent's failure to respond until December 10, when it indicated that it was unlikely that a new contract could be negotiated unless the Union was willing to make new proposals, constitutes evidence that Respondent was not taking its bargaining obligation as seriously as it should have.

During the entire period from November 10, 2014, the date the mediator asked the parties if they wanted to continue the MMC process to March 25, 2015, the date the mediator obtained Carrol's agreement to a conference call on the following day, the parties were covered by the MMC process. The complaint alleges that bad faith bargaining occurred as part of the MMC process, i.e.,

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[55] Complaint and answer par 10.
[56] Complaint and answer par 11.
[57] *Mario Saikhon, Inc.,* (1987) 13 ALRB No. 8, pp. 5-6 (citations and footnotes omitted), cited by the General Counsel and UFW. See also, *O.P. Murphy Co., Inc.,* (1979) 5 ALRB No. 63, pp.3-4, cited by UFW.

during mediator consultations, as well as during voluntary activity, that is, activity set apart from the MMC process.

The voluntary discussions will be treated first. They were initiated by Elenes' emails to Carrol asking if they could bargain the second-year wage rates themselves "to save both ourselves a day of mediation." In all of the contacts, Elenes requested bargaining. The contacts consist of four November/December 2014 emails from Elenes to Carrol, one January 13, 2015 telephone conversation between Elenes and Carrol in which Carrol promised but did not get back to Elenes on his four percent wage increase proposal, and four January/February/March messages from Elenes to Carrol.

There is no evidence that Carrol responded to Elenes' emails, to Elenes' telephone bargaining proposal, or to the four subsequent messages from Elenes. Moreover, during the November 10, 2014 to March 25, 2015 time period, there is no evidence that any agent of Respondents contacted UFW about bargaining or made a counterproposal to the UFW's four percent wage proposal. Thus, during the period from November 10, 2014 to March 25, 2015, Respondent ignored the UFW's requests to bargain.

This course of conduct constitutes bad faith bargaining. The preponderance of the evidence indicates that Respondents did not respond to any efforts of the UFW to negotiate from November 10, 2014 to March 25, 2015. Refusal to

respond to requests to meet at reasonable times for a period of months runs afoul of the duty to bargain in good faith.[58] Refusal to provide a counteroffer to a bargaining proposal is evidence of bad faith.[59] These evasive delaying tactics are inconsistent with the duty to bargain in good faith.[60] Thus, it is found that from November 10, 2014 to March 25, 2015, by delaying bargaining by refusing to respond to phone calls, texts, and a bargaining proposal, Respondent violated section 1153(a) and (e) of the ALRB.

Within the MMC process, the complaint alleges that Respondents' actions in failing to participate in a telephone call attempted by the mediator[61] and failing to respond to an attempt by the mediator to schedule a further mediation session[62] constitute bad faith bargaining. Having found that Respondent bargained in bad faith through its voluntary actions outside the MMC process, the complaint allegations relating solely to MMC conduct might be considered subsumed in the "voluntary" rationale above. However, were analysis of conduct during the MMC

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[58] See, e.g., *First Student, Inc.,* (2018) 366 NLRB No. 13, slip op. at 1 (we affirm the judge's finding that the employer violated the Act by delaying bargaining for two months); ALJD at 22-23; *Fruehauf Trailer Services, Inc.,* (2001) 335 NLRB 393, 393-394 (2001).
[59] *Mario Saikhon, Inc.,* supra; see also *Sumner Peck Ranch, Inc.,* (1981) 10 ALRB No. 24, pp. 9-10 (delays and failure to respond to union requests to meet and failure to offer counterproposals and follow through on agreements to contact the union for further meetings all are indicators of an intention not to reach a contract).
[60] *Robert H. Hickam,* (1979) 4 ALRB No. 73, p. 9 (cited by the General Counsel).
[61] Complaint par 6.
[62] Complaint par 7.

process required, it would be informed by strong policy concerns warranting a finding that the duty to bargain in good faith extends to all parties' actions during the MMC process.

In 2002, the legislature amended the ALRB to add the MMC process "to ensure a more effective collective-bargaining process."[63] "This expression of legislative intent, along with the language of the statute itself, demonstrates that the statute was designed as a mechanism to jump start collective bargaining relationships, where, in specified circumstances, the parties have been unable to reach agreement on their own."[64]

The MMC process of the Act provides for binding mediation under certain circumstances where the parties have been unable to reach a collective-bargaining agreement.[65] In broad terms, if the mediation process does not result in resolution of all issues to the mutual satisfaction of the parties, the mediator certifies that the mediation process has been exhausted.[66] Once this certification issues, the mediator essentially becomes an arbitrator for purposes of determining

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[63] Sec. 1 of SB 1156, one of the component bills of the mandatory mediation law.
[64] *Pickt Sweet Mushroom Farms,* (2003) 29 ALRB No. 3, p. 9
[65] Initially mandatory mediation and conciliation was effective by amendment of the Act on January 1, 2002. This initial mandatory mediation and conciliation provision was further amended effective January 1, 2004, and January 12, 2012. In *Gerawan Farming, Inc.,* (2017) 405 P.3d 1087, 3 Cal. 5th 1118, the California Supreme Court upheld the MMC provisions of the Act.
[66] See Sec. 1164(a)-(c) of the Act.

the actual terms of the collective-bargaining agreement.[67] Through this process of "interest arbitration,"[68] the mediator then issues a report establishing the terms of a collective-bargaining agreement.[69] There is no provision in the MMC statute or regulations that would warrant a finding that is the sole, exclusive avenue for resolving bargaining issues. Moreover, there is no evidence in the MMC statute or regulations which indicates that it is pre-emptive of voluntary negotiations.

The Legislature's explanation for the MMC statute is found in its Preamble. There the Legislature stated:[70]

> The Legislature finds and declares that a need exists for a mediation procedure in order to ensure a more effective collective bargaining process between agricultural employers and agricultural employees, and thereby more fully attain the purposes of the Agricultural Labor Relations Act, ameliorate the working conditions and economic standing of agricultural employees, create stability in the agricultural labor force, and promote California's economic well-being by ensuring stability in its most vital industry.

Thus, to implement this expression of legislative intent, the legislature "creat[ed] a mechanism to jump start negotiations that have not been productive

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[67] *Hess Collection Winery,* (2008) 29 ALRB No. 6, p.7 (Sec. 1164 et seq. create a hybrid mediation/arbitration process).

[68] See, e.g., *Ace Tomato Company, Inc.,* (2012) 38 ALRB No. 6, p. 3 ("MMC is a hybrid mediation/binding interest arbitration process); *San Joaquin Tomato Growers, Inc.* (2011) 37 ALRB No. 5, p. 4 (the MMC provisions "provide for a hybrid mediating/binding interest arbitration process . . . .")

[69] See Sec. 1164 (d) of the Act.

[70] 2002, ch. 1145 §1; See also, D'Arrigo Bros. Co. of California, (2007) 33 ALRB No. 1, pp. 6-7, relying on the Preamble to find legislative intent to "jump start" unproductive negotiations.

for specified periods after certification of the union."[71] The legislature noted that effective collective bargaining was a backdrop to ensure stability in California's "most vital industry." Surely such legislative history visualized that once the parties were encompassed within the MMC process, the precepts of bargaining in good faith would guide their actions.

Not unsurprisingly, however, the parties disagree fundamentally regarding this aspect of analysis of the facts. Without benefit of reference to the duty to bargain in good faith, Respondents argue that while the parties are within the MMC process, the mediator controls all transactions and any delay is attributable to the mediator.

Thus, Respondents view the entire period from November 10, 2014 to April 1, 2015, as encompassed within the MMC process and not properly analyzed under the traditional duty to bargain in good faith. Respondents contend that the parties worked under the auspices of the mediator and it is he who controlled the entire procedure and is responsible for the passage of time. Respondents first note that the mediator mistakenly believed from November 10, 2014, until January 21, 2015, that the parties were not interested in pursuing the MMC process. This mistake accounted for all of the delay until January 21, 2015.

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[71] Id., 33 ALRB No. 1 at p. 6.

It was not until January 24, 2015, that the mediator understood his mistake and proposed a date for mediation. The date proposed, February 23, 2015, was the mediator's first available date. Carrol responded immediately that he was not available.

Thereafter, Respondents note that they were not ordered to bargain with UFW or to provide any additional dates. Rather, the mediator told the parties they should confer by phone to see if they could agree to wages. Although UFW sought Board assistance by asking for an order requiring UFW to bargain, the Board issued an order requiring that a mediation report issue by April 15, 2015. On March 26, the parties conferred by phone but could not reach agreement. The mediator's report issued on April 6.

This argument assumes, then, that the MMC process itself insulates an employer from the duty to bargain in good faith. Respondents do not offer any citation of authority to this effect. In any event, Respondents argue that throughout November 2014 to April 2015, the mediator had full control over the mediation and the mediator did not pursue the matter diligently.

Respondents claim, utilizing this analysis, that the evidence does not indicate that Respondents committed any of the acts alleged in the complaint. They did not fail to respond to a wage proposal [within the MMC process], they did not refuse to participate in a phone conference organized by the mediator, and

they did not refuse to respond to the mediator's request to schedule a mediation session.

The General Counsel and the UFW, on the other hand, argue that the duty to bargain in good faith applies to interactions during the MMC process. The General Counsel asserts, "The Board has made clear that the duty to bargain in good faith continues during the pendency of a MMC Process. (*Gerawan Farming,, Inc.* (2018) 44 ALRB No. 1.)." It is true that in *Gerawan,* the Board agreed that bargaining might proceed on a voluntary basis contemporaneous with MMC proceedings. However, it is not entirely clear that *Gerawan* definitely answers the question framed by the complaint herein: that is, whether there is a statutory duty to bargain in good faith while within the MMC process.

That is because the Board did not definitively hold that the duty to bargain in good faith continues throughout the internal transactions within the MMC process. Rather, the Board rejected Gerawan's argument that the ALJ erred in relying on evidence from the parties' MMC proceedings to support his findings of bad faith. The Board found that because Gerawan failed to identify any evidence from the MMC proceedings which was relied upon by the ALJ to support this argument, there was no merit to Gerawan's argument. Id., 44 ALRB No. 1 at fn. 7. The Board added,

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> Moreover, the ALJ recognized that the unfair labor practice allegations in this case pertain to "voluntary" negotiations that occurred during the 2013 timeframe, using the "voluntary" modifier to refer to those negotiations that took place outside of the context of MMC and without the presence of a mediator. (ALJD, p. 13.) The ALJ further noted that, "[a]part from a few overlapping exhibits, little, if any, evidence was adduced concerning the bargaining that occurred under the auspices of the mediator."

Perhaps, then, *Gerawan* indicates, albeit in dicta, that the duty to bargain in good faith applies during "voluntary" bargaining which occurs at the same time as MMC proceedings. *Gerawan,* however, does not appear to indicate one way or the other whether the duty to bargain in good faith applies to communications within the MMC proceedings. Were it necessary to make such a finding, as indicated above, strong policy considerations would require a finding that parties must comport with the duty to bargain in good faith while engaged in the MMC process.

Thus, within the MMC process, following the Board's October 3, 2014 remand to the mediator, Respondents' counsel did not reply to the mediator's emails of November 10, 2014, which asked all counsel if they were interested in pursuing the remanded matter. Similarly, on January 22, 2015, the mediator proposed February 23 to resolve the second-year wage issue. Although UFW immediately agreed to this mediation date, Carrol stated he was unavailable due to preparation for an unspecified NLRB matter and did not offer anything further.

There can be no doubt that Respondents' actions within the MMC process, evince an attitude of inattention, -- failing for months to respond to emails, delaying promised responses, refusing to commit to meetings requested by the mediator, and in general showing no intention of a desire to negotiate – much less reach agreement on second-year contract wages. Thus, assuming a duty to bargain in good faith applies to the parties during the MMC process, Respondent did not comply with the law.

Alleged Unilateral Change by Implementing Health Plan Without Notice or Opportunity to Bargain

Facts

In approximately April 2016, Respondents offered a medical plan to their agricultural employees for the purpose of complying with the requirements of the Affordable Care Act.[72] The Respondents did not notify the UFW prior to offering the health plan nor did they offer to bargain with the UFW over the health plan that was offered to the employees.[73] Prior to implementing the health plan, Respondents did not offer a medical plan to their employees nor were they required to do so under the terms of the MMC contract.[74]

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[72] Stip 41.
[73] Stip 42.
[74] Stip 43.

Analysis

The complaint alleges that this conduct violates Section 1153(a) and (e).[75] The Act requires that an employer provide notice and bargain, on request, in good faith with the representative of its employees when altering a mandatory subject of bargaining.[76] Unilateral action harms the process of collective bargaining itself and minimizes the influence of organized bargaining by interfering with the right of self-organization, emphasizing to employees that there is no necessity for a bargaining representative.[77]

Employee health care is a mandatory subject of bargaining.[78] It is well established that an employer who is compelled to make changes in terms and conditions of employment in order to comply with the mandates of another statute must nevertheless provide its employees' representative with notice and

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[75] Respondents' brief at p. 10 sets forth a statute of limitations argument based on implementation dates of November 11, 2015 and December 10, 2015. However, the parties' stipulation of facts states that the medical plan was implemented in April 2016. April 2016 is nine months prior to the filing of the charge in Case 2017-CE-003-VIS. Thus, the charge in Case 2017-CE-003-VIS filed on February 7, 2017, is timely for unilateral changes commencing August 7, 2016, a date six months prior to the charge. The health care changes continued into the six-month limitations period. Thus, it is found that the unilateral implementation of health insurance is a continuing violation, that is, a violation that though initially occurring outside the six month limitations period, continued into the six-month period prior to the filing of the charge. *Gourmet Harvesting and Packing Inc.,* (1988) 14 ALRB No. 9, slip op. at pp. 65-66; see also, *King Manor Care Center,* (1992) 308 NLRB 884, 887 (unilateral change in monthly contractual requirement to make welfare payments is continuing violation).

[76] *NLRB v. Katz,* 369 U.S. 736, 738, 743 (1962), finding a violation "in fact" even in the absence of overall bad faith.

[77] *NLRB v. McClatchy Newspapers,* 964 F.2d 1153, 1162 (D.C. Cir. 1992) (Concurrence of Edwards, Circuit Judge).

[78] See, e.g., *Larry Gewde Ford,* 344 NLRB 628 (2005); see also, *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971); *FirstEnergy Generation Corp.,* 358 NLRB 842, 848 (2012).

an opportunity to bargain over the discretionary aspects of the changes.[79] There is no dispute that Respondent failed to notify UFW prior to implementing the health plan. The Affordable Care Act does not insulate Respondents from the duty to bargain. Thus, it is found that Respondents' failure to notify and provide UFW with an opportunity to bargain over the discretionary aspects of the health care plan prior to implementing its health care plan violates the Act.

CONCLUSIONS OF LAW

- By failing to respond to UFW efforts to negotiate from November 2014 through April 2015, Respondents violated the duty to bargain in good faith by unreasonably delaying bargaining in violation of Section 1154(a) and (e) of the Act.

- Were it necessary to make a finding on whether Respondents actions during the MMC process violated the duty to bargain in good faith, it is found that by unreasonably delaying responses to requests to meet, Respondents violated Section 1154(a) and (e) of the Act.

- By failing to provide the UFW notice and opportunity to bargain regarding implementation of employee health care insurance, Respondents violated Section 1154(a) and (e) of the Act.

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[79] *Western Cab Company,* (2017) 365 NLRB No. 78, slip op. at 5-6, noting that the ACA appears to offer flexibility as to how an employer can satisfy the requirements of the ACA. See generally Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) publishing Final Rule amending 26 C.F.R. Parts 1, 54, and 301 (noting different methods to establish that a plan satisfies minimum value and affordability criteria. See also cases cited by UFW: *Watsonville Register-Pajaronian,* 327 NLRB 957, 958-959 (1999) (FLSA overtime provisions do not excuse failure to bargain regarding employee schedules); *Keystone Consolidated Industries, Inc.,* 309 NLRB 294, 297 n. 7, 298 (1992), rev'd on other grounds, 41 F.3d 746 (D.C. Cir. 1994) (ERISA did not excuse refusal to bargain over changes to pension plan).

REMEDY

Having concluded that Respondents violated the Act as alleged in the General Counsel's complaint, they will be ordered to cease and desist from the unlawful conduct and take certain affirmative action to remedy the unlawful conduct.

Respondents will be required to mail signed copies of the attached Notice to Agricultural Employees to all agricultural employees, including FLC workers if employed during the period from November 2014 to April 1, 2015. Respondents will also be required to grant ALRB agents access to work sites where their agricultural employees are employed at mutually arranged times to provide a reading of the attached Notice outside the presence of supervisory personnel. Following the reading, Respondents' agricultural employees must be provided a reasonable period of time in which to ask questions of the ALRB agents about the Notice or about their rights under the Act. The time spent during the reading and the question and answer period shall be compensated by Respondents at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period. In addition, Respondents must post the Notice at its work sites for a period of 60 days during the period of peak employment; provide access during the period to ALRB agents to ensure compliance with this notice posting requirement; and

provide a signed copy of the Notice to each person it hires for work as an agricultural employee during the twelve-month period following the issuance of the ALRB's order in this case.

The General Counsel also proposes that Respondents' supervisory staff be required to attend a training session concerning the rights of agricultural workers under the Act. Given the nature of the violations found here and the fact that there is no evidence that any of Respondents manager and supervisors played any part in the bargaining violations involved here, it is found that this request is unnecessary and bordering on a punitive demand. Accordingly, it is recommended that this remedial request be denied.

Refusal to Bargain in Good Faith

The General Counsel requests a bargaining make whole remedy for the period November 10, 2014 continuing through April 1, 2015. The General Counsel claims that Respondents "have continued to refuse to comply with the Board's MMC Order." The General Counsel avers, however, "It is understood that at some point, [Respondents] implemented at least the MMC contract wage rates."

The General Counsel then requests a remedy requiring implementation of unspecified "retroactive portions of the MMC Contract. . . ." The General Counsel acknowledges that there was no request to enforce the MMC contract

within the 60-day MMC time limit and, thus avers that the MMC Contract is a hollow, unenforceable legal obligation. No authority is cited for this request.

The unfair labor practice found here is bad faith bargaining regarding wage rates. The parties' pleadings establish that "Respondent[s] paid the wages established in the mediated contract through December 31, 2015."[80] Accordingly, no bargaining make whole relief is required for the specific violation at issue. The remedy here can be no broader than the unfair labor practice found. To hold otherwise would unreasonably conflate this unfair labor practice proceeding with the MMC process and would deny due process to those involved. Thus, no bargaining make whole remedy is recommended for the delay in bargaining regarding second-year contract wage rates.

Unilateral Implementation of Health Care Plan

A violation of the Act has been found in unilaterally implementing a health care plan to comply with the Affordable Care Act. There was no insurance prior to Respondents' unilateral action. In this somewhat novel situation, the General Counsel argues that, on request, Respondents rescind the unlawfully implemented health care plan. It is unclear how Respondents could restore the status quo ante – that is, no insurance at all – without depriving employees of

[80] Complaint par. 11 and answer par. 11 admitting complaint allegation, "Respondent paid the wages established in the mediated contract through December 31, 2015."

health insurance and running afoul of the Affordable Care Act. Thus, no rescission order is recommended.[81]

It is recommended that, on request, Respondents be ordered to negotiate with UFW regarding those items of the health insurance plan that allow for discretion or flexibility. As far as a make whole remedy, none appears warranted under the particular facts of this case. Prior to the unilateral change, Respondents did not provide health insurance. It would therefore appear that no employee could have been harmed by the unilateral implementation of health insurance.

On these findings of fact, conclusions of law, and the entire record, the following order is recommended:

ORDER

Pursuant to Labor Code section 1160.3, Respondents Arnaudo Brothers, LP, and Arnaudo Brothers, Inc., their officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Delaying engaging in collective bargaining negotiations by refusing to answer emails, phone calls, and messages requesting bargaining and requesting meeting dates to determine the second-

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[81] See, *Western Cab,* supra, 365 NLRB No. 78, slip op. at 3, "In view of the absence of a request for recission, along with the fact that it is unclear how the Respondents might restore the status quo ante without depriving recently-hired employees of health insurance, we shall not order rescission of the changes."

year wage rates for employees in the following appropriate unit:

All agricultural employees of Arnaudo Brothers, LP, and Arnaudo Brothers, Inc. in San Joaquin County.

(b) Unilaterally implementing a health care plan without notifying the UFW or providing an opportunity to negotiate about such plan.

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

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

(a) Upon request of the Regional Director, sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth below.

(b) Mail signed copies of the attached Notice to the last known address of all agricultural employees it employed, including those employed by farm labor contractors, during the period from November 1, 2014 to April 1, 2015.

(c) Grant ALRB agents access to work sites where the agricultural employees in the above bargaining unit work at mutually arranged times in order to read the attached Notice to them and to answer questions employees may have about their rights under the Act outside the presence of supervisory personnel.

(d) Compensate employees for the time spent during the Notice reading and the following question and answer period at the employees' regular hourly rates, or each employee's average hourly rate based on their piece-rate production during the prior pay period.

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

(f) Provide access during the notice-posting period to ALRB agents to ensure compliance with the notice-posting requirements of this ORDER.

(g) Provide a signed copy of the Notice to each person it hired for work as an agricultural employee during the 12-month period following the issuance of the ALRB's Order in this case.

(h) Notify the Regional Director in writing within thirty (30) days after the date of issuance of this Order of the steps Respondents have taken to comply with the terms and, on request, also notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

DATED: March 29, 2018

Mary Miller Cracraft
Administrative Law Judge
Agricultural Labor Relations Board

NOTICE TO AGRICULTURAL EMPLOYEES

After a stipulated record in which all parties had an opportunity to present evidence, the Agricultural Labor Relations Board (ALRB) found that we violated the Agricultural Labor Relations Act (Act) by failing to bargain in good faith with your representative, the United Farm Workers of America (UFW), as alleged in a complaint issued by the ALRB's General Counsel.

The ALRB has told us to post, publish, and abide by the terms of this Notice. The Act is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join, or help a labor organization or bargaining representative;
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 ALRB;
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 you have these rights, we promise that:

WE WILL NOT engage in collective bargaining with the UFW with no intention of reaching a collective-bargaining agreement for our agricultural employees in San Joaquin County, California.

WE WILL NOT change your wages, hours, or terms and conditions of employment such as health care insurance without first notifying UFW and providing an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of any of the rights set out above.

WE WILL bargain in good faith with UFW.

WE WILL make any members of the bargaining unit whole who were negatively affected by our refusal to bargain with UFW about health care insurance.

DATED: _____ ARNAUDO BROTHERS, LP, and ARNAUDO BROTHERS, INC.

_____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board (ALRB). The nearest ALRB office is located at 1642 W. Walnut Avenue, Visalia, CA 93477, telephone number (559) 627-0995.

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

DO NOT REMORE OR MUTILATE