Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: D'ARRIGO BROS. CO. OF CALIFORNIA, **Respondent,** **and** UNITED FARM WORKERS OF AMERICA, AFL-CIO, **Charging Party.**	)	Case Nos.: 00-CE-5-SAL 01-CE-16-SAL 02-CE-14-SAL 04-CE-18-SAL 04-CE-18-1-SAL 32 ALRB No. 1 (May 31, 2006)

DECISION AND ORDER

Introduction and Procedural History

This matter is based on charges filed by the United Farm Workers of America, AFL-CIO (UFW or Charging Party) alleging that D'Arrigo Brothers Company of California (Respondent or D'Arrigo) violated section 1153(a) and (e) of the Agricultural Labor Relations Act (ALRA or Act) by refusing to furnish information requested for representational purposes, and by engaging in unlawful surface bargaining. [1]

[1] The Agricultural Labor Relations Act (ALRA) is found at California Labor Code section 1140 et seq.

Following an unfair labor practice hearing held in April and May 2005, Administrative Law Judge (ALJ) Doug Gallop issued the attached recommended decision and order finding that Respondent had violated the Act by failing to respond to an information request made by the UFW on March 20, 2001 (01-CE-16-SAL), by failing to respond to several items of a multi-item request made by the UFW on November 4, 2003 (04-CE-18-SAL, 04-CE-18-1-SAL), and by engaging in surface bargaining during the statutory period, with the latter violation continuing to date (00-CE-5-SAL). The ALJ dismissed an allegation that the Respondent failed to respond to an information request made on January 7, 2002 (02-CE-14-SAL), and also found no violations with respect to Respondent's failure to provide information on several items of the multi-item request mentioned above (04-CE-18-SAL, 04-CE-18-1-SAL). The ALJ's recommended order provides for a makewhole remedy to compensate employees for the delays in obtaining the benefits of collective bargaining caused by the employer's failure to bargain in good faith.

Following the issuance of the ALJ's decision, the Respondent, General Counsel (GC), and UFW all timely filed exceptions to the ALJ's decision and order. Following the filing of exceptions, all parties filed briefs answering the opposing parties' exceptions. On January 3, 2006, Respondent filed a request with the Executive Secretary (ES) of the Agricultural Labor Relations Board (ALRB or Board) to file reply briefs to the GC's and UFW's answering briefs, and at the same time filed motions to strike all or portions of the GC's and UFW's answering

briefs. The ES denied the Respondent's request to file reply briefs and the Respondent appealed his ruling to the Board.

On February 2, 2006, the Board issued an order denying Respondent's appeal of the ES ruling denying permission to file replies to the answering briefs (Administrative Order No. 2006-1). In its order, the Board indicated that it would address the merits of the Respondent's motions to strike all or portions of the GC's and UFW's answering briefs in its final decision and order in this matter. The Respondent's motions are discussed immediately below.

The Board has considered the record and ALJ's recommended decision in light of the exceptions and briefs of the parties, and has decided to affirm the ALJ's rulings, findings and conclusions except where modified or otherwise noted in this Decision.

ANALYSIS AND DISCUSSION

A. Analysis and Discussion of Respondent's January 3, 2006 Motions to Strike:

1. Motion to Strike Portions of UFW's Answering Brief:

On January 3, 2006, Respondent filed motions to strike all or part of the GC's and UFW's briefs answering Respondent's exceptions to the decision of the ALJ. Respondent argues that portions of the UFW's answering brief must be stricken because it raises matters not included in Respondent's exceptions and, thus, does not further the UFW's legal position regarding the exceptions.

Respondent relies chiefly on two authorities for this proposition.[2] First, Respondent cites Board regulation 20282, subdivision (d), which states that "no matter not included in the exceptions filed with the board may thereafter be raised by any party before the board." [3] Respondent also cites *Bud Antle, Inc.* (1992) 18 ALRB No. 6, fn. 2, where the Board struck portions of Antle's brief because it failed to further Antle's legal position constituting "nothing more than a rancorous assault on the integrity and processes of the General Counsel, ALJ, and the Board."

The clear meaning of the cited portion of Regulation 20282 is that parties may not argue against findings and conclusions of the ALJ to which exceptions have not been filed. For example, if the UFW, in responding to the exceptions, tried to bolster its arguments with evidence the ALJ found unpersuasive or with discredited testimony, that would be improper. An examination of portions of the brief to which Respondent objects reveals no such impropriety. Rather, the UFW has cited findings of the ALJ, other than the ones that are the focus of Respondent's exceptions, in an attempt to bolster the ALJ's ultimate conclusions or render the exceptions irrelevant. While in some instances such an approach may not be as effective in countering the exceptions as a more

[2] Respondent also cites National Labor Relations Board (NLRB) cases, but it has long been established that section 1148 of the ALRA does not require that the ALRB follow procedural precedents of the NLRB. In any event, those cases do not stand for the principles urged by Respondent but, rather, are consistent with the analysis provided.

[3] The Board's regulations are codified at California Code of Regulations, Title 8, section 20100 et. seq.

focused response might be, that goes to the persuasiveness of the arguments, not their propriety.

It is Respondent's view that because portions of the UFW's brief fail to directly respond to Respondent's exceptions, those portions fail to "further the UFW's legal position," and are thus subject to being stricken under *Bud Antle, Inc.*, *supra*, 18 ALRB No. 6. But that is based on a misreading of *Antle* that ignores its context. In that case, the Board struck portions of a brief in support of exceptions that were both insulting to the Board and unrelated to the merits of the exceptions. The Board did not strike portions of the brief because it found them to be ineffective, unpersuasive, or unresponsive to opposing arguments. Instead, it was the lack of decorum and professionalism that warranted the striking of the offending portions of the brief.

In sum, we find nothing in the UFW's answering brief that is properly the subject of a motion to strike. To the extent that the UFW's approach fails to effectively respond to the exceptions, this goes to the merits of its arguments, not their propriety. Therefore, Respondent's motion to strike the UFW's answering brief is DENIED.

2. D'Arrigo's Motion to Strike General Counsel's Answering Brief and/or Portions Thereof:

In its motion to strike the General Counsel's brief, or portions thereof, Respondent reiterates the arguments made with regard to the UFW's brief. However, there are two additional arguments proffered. First, Respondent argues

that the GC's brief, which appears to be, at least in part, a "cut and paste" version of its post-hearing brief, so utterly fails to respond specifically to the exceptions that it should be stricken in its entirety. In addition, Respondent argues that the brief should be stricken because it admittedly fails to respond to all of the exceptions.

As explained above, there is no requirement that an answering brief specifically track the exceptions, nor any prohibition on citing other evidence or findings not discussed in the exceptions that seek to render the exceptions meritless or irrelevant. Nor is there any requirement that an answering brief respond to each exception. Rather, all of these considerations go to the weight to be given to the brief, not to its propriety. In these respects, Respondent's motion is misdirected, if not frivolous.

Second, Respondent argues that the GC has violated Regulation 20282, subdivision (d) by offering arguments in favor of findings and conclusions that were contrary to those of the ALJ, despite the GC not having filed exceptions to those findings and conclusions. As noted above, this is a way in which a responding party could, indeed, violate the regulation. Respondent cites two specific instances where it believes the GC has argued contrary to findings to which no one has excepted, one relating to whether D'Arrigo's Huron operations are part of the bargaining unit and the other relating to D'Arrigo's response to the UFW's November 4, 2003 information request.

In light of conflicting claims and the failure of both parties to file a unit clarification petition, the ALJ declined to decide whether the Huron operations are part of the bargaining unit. He nonetheless found that information requests regarding those operations were relevant and that Respondent violated its duty to bargain by failing to provide the information. In responding to Respondent's exception to the failure to provide information violation, the GC included arguments in favor of finding the Huron operation to be in the bargaining unit, and in favor of finding that Respondent's refusal to bargain over those employees evidenced bad faith. While Respondent erroneously states that the ALJ found the Huron operation not to be part of the unit, it is nonetheless true that the GC argues as if Huron was included in the unit, and that this is contrary to the ALJ's refusal to make such a finding. Having not excepted to this refusal, the GC's response instead should have focused on supporting the ALJ's conclusion that the failure to provide information was unlawful regardless of whether the Huron operations are included in the bargaining unit.[4]

The ALJ found that Respondent unlawfully failed to provide some of the information in the UFW's November 4, 2003 information request, but found several aspects of Respondent's response to be justified. Respondent asserts that the GC, in its response to Respondent's exceptions, has argued contrary to the ALJ's findings by asserting that Respondent's response to the information request

[4] The UFW also did not except to the ALJ's refusal to decide if the Huron operation is included in the bargaining unit.

was unlawful in essentially all respects. A review of the GC's answering brief does reveal that the GC's discussion of the November 4, 2003 information request does not differentiate those aspects of Respondent's response that were found to be unlawful, but instead discusses the response generally as if it were unlawful in its entirety. However, this is permissible, as the GC has filed exceptions on each of those aspects of Respondent's response the ALJ found to be lawful. Therefore, this aspect of the motion to strike is without merit.

The motion to strike all or portions of the GC's answering brief is DENIED, with the exception of the portion of the brief that argues, contrary to the ALJ's refusal to decide the question and on which no exceptions have been filed, that the Huron operations are included in the bargaining unit. Accordingly, we have disregarded that portion of the answering brief.

B. Analysis and Discussion of ALJ Decision and the Exceptions of the Parties:

1. Respondent's Exceptions to the Decision of the ALJ:

a. General Discussion:

The Respondent introduces its brief in support of its exceptions by characterizing the ALJ's decision as being "result-oriented and devoid of any thoughtful analysis or objective fact-finding," and by stating that the ALJ showed improper bias and a negative attitude toward the Respondent during the hearing. We find no support in the record for this serious accusation, and note at the outset

of this discussion that this sort of inflammatory rhetoric does nothing to further Respondent's legal arguments.

Many of the Respondent's 56 exceptions take issue with the ALJ's findings of fact. An examination of the record reveals that some of the Respondent's disagreements were on extremely minor points which are inconsequential to the outcome of this decision, and such exceptions border on being frivolous. Exceptions falling into this category are dismissed without further comment.

A large number of the Respondent's exceptions take issue with the way the ALJ summarized the changes in the parties' contract proposals on pages 10-26 of his decision. In footnote 12 on page 20 of his decision, the ALJ notes that he attempted to set forth what appear to be the changes based on the language in the proposals themselves. We have compared each proposal to the summaries in the ALJ's decision and find that the ALJ's findings are free of prejudicial error. Where differences exist, they are inconsequential, and even in the few instances where Respondent is technically correct, upholding the exceptions on these minor points would make no difference in the outcome of the Board's decision.[5]

[5] An example of one such inconsequential difference is as follows: Respondent, in its exception 39, disagrees with the ALJ's description of the changes to the medical/health insurance article in its February 2, 2000 proposal. The ALJ's decision describes the article as allowing Respondent to "choose a new [insurance] plan" in the event of premium increases. The Respondent correctly points out that the proposed language actually indicates that the Respondent would be allowed to request a "redesigned" plan from the current insurance provider in the event of an increase.

b. The ALJ's credibility determinations:

Several of the Respondent's exceptions were based on its disagreement with the ALJ's credibility determinations. It is well-established that the Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. An examination of the record provides that the ALJ's credibility determinations are supported by the record, and we find no reason to overrule them.

c. Exceptions to the ALJ's findings with respect to the November 4, 2003 information request- employee social security numbers:

Respondent argues that the employee social security numbers that were requested as part of the multi-item request on November 4, 2003 were confidential, not necessarily relevant, and that it wasn't required to turn them over. The ALJ found that current precedent required that the social security numbers be turned over, citing both ALRB and NLRB cases that had found them to be the type of data necessary and relevant to collective bargaining. (ALJ Decision (ALJD) at

pages 35-36, citing *Andy Johnson Co. Inc.* (1977) 230 NLRB 308; *As-H-Ne Farms* (1980) 6 ALRB No 9.)

A review of recent NLRB case law indicates that the NLRB has changed course in this area. NLRB cases since the early 1990's have held that social security numbers requested by unions are not presumptively relevant, and that the unions must therefore demonstrate the relevance of such information before the employer is required to provide them. (*Bookbinder's Seafood House, Inc.* (2004) 341 NLRB No. 7; *Pontiac Osteopathic Hospital d/b/a POH Medical Center* (2000) 331 NLRB 451; *Dexter Fastener Technologies* (1996) 321 NLRB 612; *Maple View Manor* (1996) 320 NLRB 1149; *Sea-Jet Trucking* (1991) 304 NLRB 67.)

The Union's November 4, 2003 letter (General Counsel exhibit 70) containing the request for the social security numbers does not present a specific reason for the data except to say that the information requested generally will assist the union in representing bargaining unit employees and preparing contract proposals. Rivera explained during the hearing that the UFW uses social security numbers to prevent confusing members with the same names, and uses social security numbers as the ID numbers for the UFW medical and pension plans (TR: 1923). However, the record contains no specific testimony or documentary evidence that showed that Rivera previously had informed D'Arrigo's bargaining representatives of this justification for requesting the social security numbers.

Therefore, though sufficient justification for future requests for social security numbers was provided at the hearing, we find that the Respondent's failure to produce the employee social security numbers during the period at issue here did not violate the Act.

d. Exceptions to the ALJ's findings with respect to the surface bargaining charge:

Surface bargaining occurs where the employer (or union) goes through the motions of collective bargaining negotiations, but in fact lacks the requisite good faith intent to reach agreement. In order to evaluate an allegation of surface bargaining, the Board must examine the totality of the party's conduct, both at and away from the bargaining table, to determine if the party undertook negotiations with a bona fide intent to reach agreement, or whether the conduct was designed to frustrate agreement. (*Paul W. Bertuccio* (1984) 10 ALRB No. 16; *Akron Novelty Mfg* (1976) 224 NLRB 998.) Because direct evidence of the intent to frustrate bargaining will rarely be found, the Board's final determination comes from the inferences it draws from circumstantial evidence. (*Mario Saikhon, Inc.* (1987) 13 ALRB No. 8.) Specific conduct, which standing alone may not amount to a failure to bargain in good faith, may support an inference of bad faith when considered with all other evidence. (*Mario Saikhon*, *supra*, ALJ Dec. at page 47.)

The NLRB and ALRB have long recognized that it can be difficult to separate hard bargaining from surface bargaining when analyzing a bad faith bargaining case. While parties are not required to agree to proposals offered by

the other side, they must make reasonable efforts to resolve differences. (*Mario Saikhon, supra, 13 ALRB No. 8; NLRB v. Truitt Manufacturing Co.* (1956) 351 U.S. 149.)

Respondent argues that the ALJ should not have found its interim wage adjustments were indicative of bad faith bargaining because they were economically necessary, generally accepted by the UFW, or were part of the negotiation process. While there was no finding that the wage adjustments themselves were unlawful, it was D'Arrigo's pattern of implementing increases greater than it was willing to offer in subsequent contract proposals that the ALJ found disturbing. We find this pattern disturbing as well.

The wage rates in the Respondent's February 2, 2000 proposal were the same as those contained in its December 12, 1998, April 8, 1999, and July 19, 1999 proposals. The Respondent proposed that the wage rates remain the same for the duration of the contract. In the meantime, several of the interim wage adjustments Respondent implemented paid selected workers significantly higher rates than those contained in the proposals, and Respondent fails to explain the discrepancy. For example, on April 13, 1999, Respondent notified the UFW of changes in the wage rates of Salinas Production workers. These rates were much higher than the rates for the same positions included in the April 8, 1999 proposal. Similarly, the Brawley Production workers received raises pursuant to an October 1999 notification from Respondent, but the February 2, 2000 proposal doesn't reflect these higher rates.

Respondent's exceptions focus on the lawfulness and necessity of its wage changes, which were not found to be unlawful, but do not address why its later contract proposals simultaneously sought to freeze wages at lower rates. It is reasonable to infer from this kind of unexplained regressive bargaining that Respondent was merely giving the appearance of bargaining with no intention of reaching agreement. In *K Mart Corp. v. NLRB* (9th Cir.1980) 626 F.2d 704, the court found that "an offer of little or no wage increase is [effectively] an effort to decrease wages**,"** and it was proper to infer from the company's "meager" wage proposals that the company was not bargaining seriously.

Respondent takes issue with the ALJ's conclusion that Respondent's continued payment of the insurance premium increases and its practice of not restricting its overtime or funeral leave policies while making contrary proposals during bargaining, showed by its conduct that it wished to exclude the UFW from representational authority over economic issues. Respondent argues that it could not have changed its medical plan, overtime or funeral policies unilaterally because the UFW would have filed a ULP.

The Respondent's exceptions are misplaced. Respondent's payment of insurance premium increases and its practice of not restricting its overtime or funeral leave policies is another example of Respondent's pattern of proposing less at the bargaining table while clearly being willing to give more on its own. Although Respondent explains why it felt it had to maintain its practices in these

areas, it fails to explain why its simultaneous proposals in these areas sought concessions.

Respondent argues that the ALJ improperly concluded that its February 2, 2000 proposal was made in bad faith, and contends that contrary to the ALJ's findings, the economic grounds Respondent gave for the changes made in this proposal were not a pretext. Respondent cites NLRA authority holding that where economic conditions have changed, regressive proposals do not necessarily indicate bad faith bargaining (*Chicago Local No. 458-3M v. NLRB* (D.C. Cir. 2000) 206 F. 3d 22, 32-34; *U.S. Ecology Corp.* (2000) 331 NLRB 223, 225-226.)

While Respondent is correct that generally speaking, regressive proposals do not necessarily indicate bad faith, in the instant case, the ALJ did not credit Respondent's contention that the regressive economic proposals were needed to off set the increases in the insurance premiums. We find the record supports the ALJ's conclusion that the economic grounds offered for the changes in overtime and funeral leave provisions in the February 2, 2000 proposal were a pretext. Good-faith bargaining necessarily requires that claims made by either bargaining party should be honest. Patently improbable justifications for a bargaining position will support an inference that the position is not being maintained in good faith. (*Queen Mary Restaurants Corp. v. NLRB* (9th Cir. 1977) 560 F.2d 403.)

Respondent further argues that taking a hard line position is not itself inconsistent with good faith bargaining (citing *NLRB v. Insurance Agents'*

Union (1960) 361 U.S. 477, 490-491). Moreover, Respondent argues, it is not the Board's role to guarantee the results of collective bargaining or compel concessions or otherwise sit in judgment. (citing *Admiral Packing Company* (1981) 7 ALRB No. 43, quoting *NLRB v. Tomco Communications* (9th Cir. 1978) 567 F. 2d 871, 877; *Vessey & Company, Inc.* (1987) 13 ALRB No. 17.)

While Respondent is correct that "neither the Board nor the courts should sit in judgment on the substantive terms offered by parties negotiating in good faith," there is ample authority that "sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to." (*NLRB v. Wright Motors, Inc.* (7th Cir. 1979) 603 F 2d 604, citing as examples, *NLRB v. Holmes Tuttle Broadway Ford, Inc.* (9th Cir. 1972) 465 F.2d 717, 719*; Vanderbilt Products, Inc. v. NLRB* (2d Cir. 1961) 297 F.2d 833; *NLRB v. Reed & Prince Manufacturing Co.* (1st Cir. 1953) 205 F.2d 131.) The context and content of proposals can be circumstantial evidence of bad faith, and this evidence is useful "not as an indication of whether a specific proposal is reasonable or unreasonable, but because it may serve to disclose the underlying motive, pattern or design." (*Bruce Church, Inc.* (1983) 9 ALRB No. 74, ALJD at p.63.)

In *NLRB v. Tomco Communications, supra*, 567 F. 2d 871, the NLRB found contract proposals provided ample support for its finding of bad faith bargaining, concluding that "Respondent's proposals clearly show[ed] that this employer was engaging in a typical shell game, giving with one hand and taking

away with the other." Similarly, in the instant case, the content of Respondent's proposals evidences an approach on Respondent's part that is inconsistent with a good faith effort to reach agreement, and when viewed in context with the totality of Respondent's conduct, supports the conclusion that Respondent engaged in surface bargaining.

The Respondent argues that the ALJ completely relied on evidence prior to the limitations period to support his finding of surface bargaining and that this was impermissible. (citing *NLRB v. MacMillan Ring-Free Oil Co.*, (9th Cir. 1968), 394 F.2d 26; *Local Lodge No. 1424 v. NLRB* (1960) 362 U.S. 411.)

In *NLRB v. MacMillan Ring-Free Oil Co,* the court overturned the NLRB's finding of a violation because the NLRB did not provide substantial evidence of the employer's bad faith from within the six-month limitation period. The court held that standing alone, the evidence of misconduct during the statutory period was "plainly insufficient" to support the Board's conclusion that the company violated the Act. However, it is well-settled that "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices… earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." (*NLRB v. MacMillan Ring-Free Oil Co, supra,* 394 F. 2d 26, citing *International Ass'n of Machinists v. NLRB* (1960) 362 U.S. 411 [emphasis added].)

The ALJ's decision does contain a lengthy discussion of proposals exchanged outside the statutory period; [6] however, the record supports the ALJ's finding that the Respondent's February 2, 2000 proposal, in and of itself, was evidence of bad faith bargaining, as was its later conduct regarding requests for information. The ALJ's discussion of similar conduct occurring before the limitations period was properly used to shed light on the true motivations behind the February 2, 2000 proposal and establish a pattern of bad faith.

e. The appropriate length of the makewhole period:

Respondent argues that should the Board find that the remedy of makewhole is appropriate, the makewhole award period should be cut off as of April 11, 2000, the date of the last negotiation session, because Respondent claims the UFW didn't request bargaining again after April 2000.

When the record establishes that an employer has engaged in surface bargaining, the ALRA provides for the remedy of bargaining makewhole to compensate employees for the delays in obtaining the benefits of a collective bargaining agreement unless the employer can show no agreement would have been reached even absent its bad faith conduct (*Robert Meyer d/b/a/ Meyer Tomatoes* (1991) 17 ALRB No. 17.) The makewhole remedy is appropriately awarded from the date six months prior to the filing of the surface bargaining charge, and continues to apply until the Respondent has shown to have commenced good faith bargaining. (*Mario Saikhon* (1987) 13 ALRB No. 8.)

[6] The charge was filed July 28, 2000.

In this matter, the makewhole period commenced January 28, 2000. Although UFW representatives cut off bargaining after April 2000, the record supports the conclusion that they did so because Respondent had given them every reason to believe further bargaining was going to be futile. Nevertheless, the UFW did make additional gestures such as the November 2003 information request and the May 25, 2004 proposal. The Respondent has been found to have committed additional bargaining related ULPs in conjunction with the November 2003 information request, so the record supports the inference that the pattern of bad faith bargaining is ongoing. We therefore adopt the ALJ's recommended order finding the makewhole remedy to extend from the period beginning January 28, 2000 until the date on which Respondent commences bargaining in good faith with the UFW.

2. UFW's and General Counsel's Exceptions to the Decision of the ALJ:

a. The delay in providing wage data in response to the November 4, 2003 information request:

The ALJ found that Respondent's delay of over two months in providing wage data in response to the UFW's November 4, 2003 information request delay was arguably inexcusable given Respondent's other obstinate conduct, but he went on to conclude that it was a close issue, and since Respondent had already been found to have violated the Act for similar conduct, it would be cumulative to reach a decision on this aspect of the case.

The General Counsel takes issue with the ALJ's finding that the fact that the Respondent provided the wage data in two separate documents was not an undue burden on the UFW, and with his failure to reach a decision on the two month delay. [7] While we affirm the ALJ's conclusion that it was not a violation for Respondent to provide the wage data in two separate documents, and we agree that the question of whether the delay in providing the wage rates was a violation is a close one, upon a closer look at the record, we find there is support for concluding that the delay was inexcusable and therefore amounts to a violation.

UFW negotiator Jorge Rivera (Rivera) made a request on November 4, 2003 to D'Arrigo's chief negotiator Geoffrey Gega (Gega) for a comprehensive list of pay rates for all job classifications (both hourly and piece rate). Gega testified that during the November 4, 2003 meeting he initially told Rivera that the wage rate information had previously been provided to the Union in proposals and change letters, but that he then asked Rivera whether it would satisfy the Union if the wage rates were contained in a particular proposal or letter and the employer produced that. Rivera stated that this would be sufficient (TR: 2129-30).

On December 15, 2003, UFW negotiator Efren Barajas (Barajas) sent Gega a letter saying that the Union still had not received any response at all to the November 4 request (General Counsel exhibit 71). On December 26, 2003 Gega sent Barajas a letter saying that they were in the process of compiling the information the Union had requested but that it was still not complete. Gega

[7] The UFW did not file an exception to this portion of the ALJ's decision.

stated in this letter that his understanding was that Barajas was out of the country until early January and that the information would be provided after he returned. The letter also informed Barajas that at the November 4 meeting Gega asked why the Union was requesting comprehensive wage rates again and that Barajas and Rivera said they'd get back to him on this (General Counsel exhibit 76).

On January 8, and January 12, 2004 D'Arrigo provided partial responses to items in the request other than the comprehensive wage rates (General Counsel exhibits 72 and 73). On January 14, 2004 Rivera sent a letter to Gega explaining that the Union wanted a list of comprehensive wage rates again because it had been over three years since the last meeting, and that there had been numerous changes in hourly wages and piece rates since then (General Counsel exhibit 75). On January 15, 2004 Gega sent a letter to Barajas advising him that the current rates of pay were the same as stated in the Employer's February 2, 2000 proposal with the exceptions of the rates included in an attachment entitled "wage rates—2004" (General Counsel exhibit 74).

It is well-settled that "an unreasonable delay in furnishing information is as much a violation of the Act as a refusal to furnish the information at all." (*United States Postal Service*, 2004 NLRB LEXIS 396, citing *United States Postal Service* (2000) 332 NLRB 635, 640; *Valley Inventory Service* (1989) 295 NLRB 1163, 1166.) In *Allegheny Power* (2003) 339 NLRB No. 77, the NLRB held that when determining whether an employer has unlawfully delayed in responding to an information request, it will consider ". . . the totality of

the circumstances surrounding the incident." The NLRB further has held that while the concept of unreasonable delay is not susceptible to a per se rule "what is required, by the employer, is a good faith effort to respond to the request as promptly as circumstances allow." (citing *Good Life Beverage Co.* (1993) 312 NLRB 1060, 1062.) Further, in evaluating the promptness of the employer's response, the NLRB will consider ". . . the complexity and extent of information sought, its availability, and the difficulty in retrieving the information." (*Allegheny Power, supra,* 339 NLRB No. 77; citing *Samaritan Medical Center* (1995) 319 NLRB 392, 398.)

Respondent claims that the request was made just before the Thanksgiving holiday and that this contributed to the delay; however, Thanksgiving, which fell on November 27 in 2003, was still three and a half weeks away at the time the request was made. Although this was a portion of a multi-item request, the wage rate request was a simple, uncomplicated item, and at the meeting on November 4, Respondent indicated that it already had the wage rate information in an existing proposal or letter. The information consisted only of rates included in Respondent's contract proposal from February 2000, and a six page supplement of 2004 rates.

In addition, Respondent fails to explain why it was only after a follow up letter from the UFW six weeks after the initial request was made that Respondent made any attempt to communicate with the UFW about the status of the request. It is clear from Respondent's December 26 letter that it had made

very little progress on compiling the information. Moreover, Gega disingenuously claims in the December 26 letter that he had been waiting for the Union's response about why it was requesting comprehensive wage rates before he responded to the request, contrary to his representation at the November 4 meeting that the respondent would produce the information. The inconsistency between Gega's own testimony about how the parties agreed to handle the request for wage data during the November 4 meeting and his December 26 letter evidences bad faith dilatory tactics.

We therefore find that Respondent's delay in providing the wage data in response to the November 4, 2003 request was inexcusable under the circumstances and amounts to a separate violation of the Act.

b. Failure to provide employee telephone numbers requested on November 4, 2003:

The General Counsel and UFW argue that in light of testimony to the contrary, the ALJ improperly accepted Respondent's testimony that the Employer did not maintain employee telephone numbers, and the failure to provide them violated the Act. Respondent argues that there was no evidence that it maintained employee phone numbers in its central personnel information system and this appears to be supported by the record. However, we find that Respondent's claim that the information was not readily available was insufficient to satisfy the duty to provide it, because this obligation requires a reasonably

diligent effort to obtain the requested data. (*Cardinal Distributing Co. v. ALRB* (1984)159 Cal. App. 3d 758, 768, citing *John S. Swift Co*. (1959) 124 NLRB 394.)

Gega testified that he did actually inquire about the numbers to D'Arrigo's in-house labor relations manager, but believed that it would have been unreasonable to have had to ask individual supervisors/foremen about the numbers. We disagree. While *Korn Industries, Inc. v. NLRB* (4th Cir. 1967) 389 F. 2d 117, 123 held that information which did not exist need not be provided, that situation does not present itself here. The record supports the conclusion that the supervisors and foremen had the numbers, and Respondent's representatives made insufficient efforts to obtain the requested data from them. We therefore overturn the ALJ on this issue, and find that Respondent violated the Act by not providing the employee telephone numbers.

c. Failure to provide employee job classifications requested on November 4, 2003:

The ALJ credited the testimony of James Manassero (advisor to D'Arrigo's vice president of the Salinas district) that Respondent didn't maintain job classifications because employees are not paid by what job classification they are in, but by another system depending on whether they are on a harvesting crew or not (TR: 2544). Therefore, the ALJ found that the failure to provide the requested employee job classifications did not violate the Act. The General Counsel excepted to this conclusion.

As stated previously, the Board will not overrule the ALJ's non-demeanor based credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. We find such a conflict exists with respect to Manassero's testimony on this issue, as it is inherently implausible in light of documentary evidence in the record. The hourly earnings summary that was provided as an attachment to Respondent's January 15, 2004 letter to Barajas (General Counsel exhibit 74) shows a break down of total hours worked in numerous individual job classifications as well as the total earnings for those hours. It is reasonable to infer that Respondent would not have been able to create this document if it did not have a record of which job classifications individual employees were assigned to. In article 32.2 of the Respondent's February 2, 2000 proposal (General Counsel exhibit 18), Respondent proposes that for job classifications with wage ranges, the Company has sole discretion to establish individual wage rates for particular employees in those classifications. In addition, the Union Security clause in the Respondent's September 23, 1998 proposal (General Counsel exhibit 4) included an agreement to furnish workers' job classifications within 30 days of the execution of the contract (article 3.4).

It is reasonable for the Board to infer that the Respondent did indeed have job classifications available, and we find that the failure to provide employees' job classifications in response to the November 4, 2003 request violated the Act.

d. Farm Labor Contractor Financial Information requested on November 4, 2003:

The Union requested farm labor contractor (FLC) financial information (copies of any agreements and compensation paid to the FLCs) as part of the November 4, 2003 information request. The ALJ found no violation for failing to provide this information. [8] Although the ALJ found the Respondent's bare assertion that this information was confidential was an insufficient defense, he was persuaded by federal case law directing the NLRB to consider this sort of information irrelevant unless the employer has raised costs as a reason for subcontracting. (citing *General Electric Company v. NLRB* (7th Cir. 1990) 916 F.2d 1163; *Western Massachusetts Electric Company, et al. v. NLRB* (1st Cir. 1978) 573 F.2d 101.)

The key issue in the above NLRB cases was whether the information related to a mandatory subject of bargaining, and therefore presumptively relevant. In *Western Massachusetts Electric Co., supra,* (where the union had sought information on the costs of subcontracting), the court emphasized that "just as a union cannot compel an employer to bargain over subjects that fall outside the ambit of wages, hours and other terms and conditions of employment, it cannot bootstrap a demand for information relating these non-mandatory matters by its unilateral assertion of interest." In *General Electric Co. v. NLRB, supra,* the court

[8] The ALJ found that the information about the terms and conditions of farm labor contractors employees' work (i.e. the number of workers employed by FLCs and their wages) was presumptively relevant and subject to disclosure because under Section 1140.4 (c) of the ALRA the employees of a FLC are considered to be the employees of the employer who engages the FLC, and therefore part of the bargaining unit.

overturned the Board's order requiring the employer to turn over subcontractor cost information because the record in that case did not support the Board's conclusion that subcontracting costs were sufficiently in issue between the parties. Under the NLRA, because contractors' employees are not in the bargaining unit, the issue of labor costs must first have been raised for the information to become presumptively relevant.

These cases are distinguishable because under Section 1140.4 (c) of the ALRA, FLC employees are in the bargaining unit. The compensation paid to the labor contractor is just as much an element of unit labor costs as the wages paid to the FLC's employees. Since the cost of the contract is an element of the cost of labor paid out to members of the unit, it is presumptively relevant. We therefore find that the Respondent is required to produce all information on labor costs including compensation paid to the FLCs. To the extent written agreements between Respondent and the FLCs include language addressing the terms and conditions of the FLC employees' employment, that information must be provided as well. It is appropriate for Respondent to redact any contract provisions not dealing with labor costs or the terms and conditions of employment before providing copies of the agreements to the Union.

ORDER

Pursuant to Labor Code section 1160.3, Respondent, D'Arrigo Bros. Co. of California, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to bargain 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 (Union) as the certified collective bargaining representative of its agricultural employees in the bargaining unit certified by the Board in Case No. 75-RC-14-M.

(b) Failing or refusing to provide the Union with requested information that is relevant and necessary to carrying out its duties as the collective bargaining representative of the unit employees.

(c) In any like 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 Union as the certified bargaining representative of the employees in the certified bargaining unit concerning wages, hours, working conditions and other terms of employment; and, if agreement is reached, embody such terms in a contract.

(b) Furnish the Union with the information it requested, but has been found to have been improperly withheld.

(c) Make whole its agricultural employees for all losses of pay and other economic losses they have suffered as a result of Respondent's failure and refusal to bargain in good faith with the Union, such makewhole amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5. The makewhole period shall extend from January 28, 2000 until the date on which Respondent commences good faith bargaining.

(d) In order to facilitate the determination of bargaining makewhole, for the period beginning January 28, 2000, preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amounts of bargaining make whole and interest due under the terms of this Order. Upon request of the Regional Director, payroll records shall be provided in electronic form if they are customarily maintained in that form.

(e) Sign the attached Notice to Agricultural Employees and, after its translation by a Board agent into appropriate languages,

reproduce sufficient copies in each language for the purposes set forth below.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its premises, for 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. Pursuant to the authority granted under Labor Code section 1151(a), give agents of the Board access to its premises to confirm the posting of the Notice.

(g) Arrange for a representative of Respondent or Board agents to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, on company time, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agents 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 non-hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after this Order becomes final, or when directed by the Regional Director, to all agricultural employees employed by Respondent at any time during the period January 28, 2000 to January 28, 2001, at their last known addresses.

(i) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the date this Order becomes final.

(j) Notify the Regional Director in writing, within thirty days after the date this Order becomes final, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically thereafter in writing of further actions taken to comply with the terms of this Order.

3. The remaining allegations in the Fifth Amended Consolidated Complaint are hereby dismissed.

Dated: May 31, 2006

IRENE RAYMUNDO, Chair

GENEVIEVE A. SHIROMA, Member

CATHRYN RIVERA-HERNANDEZ, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (Union), and by refusing to furnish the Union with requested information.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations 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 fail or refuse to bargain in good faith with the Union as the certified bargaining representative, or provide it with information relevant to the exercise of its representational duties.

WE WILL NOT in any other manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

WE WILL make our employees in the bargaining unit whole for all losses in pay and other economic losses they have suffered as the result of our failure and refusal to bargain in good faith with the Union.

WE WILL, upon request, bargain in good faith with the Union, and provide it with requested information necessary in the performance of its representational duties.

DATED: _____

D'ARRIGO BROS. CO. OF CALIFORNIA
By: _____
(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

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

D'ARRIGO BROS. CO. OF CALIFORNIA
(United Farm Workers of America, AFL-CIO)

Case No. 00-CE-5-SAL, et al.
32 ALRB No. 1

Background:
This matter is based on charges filed by the United Farm Workers of America, AFL-CIO (UFW) alleging that D'Arrigo Brothers Company of California (Respondent or D'Arrigo) violated section 1153(a) and (e) of the Agricultural Labor Relations Act (ALRA or Act) by refusing to furnish information requested for representational purposes, and by engaging in unlawful surface bargaining.

ALJ Decision:
The ALJ found that Respondent had violated the Act by failing to respond to an information request made by the UFW on March 20, 2001, by failing to respond to three items of a six item request made by the UFW on November 4, 2003, and by engaging in surface bargaining during the statutory period, with the latter violation continuing to date. The ALJ dismissed an allegation that the Respondent failed to respond to an information request made on January 7, 2002. The ALJ ordered a makewhole remedy to compensate for the delays in obtaining the benefits of collective bargaining caused by the employer's failure to bargain in good faith.

Board Decision and Order:
Respondent filed a motion to strike all or portions of the GC's and UFW's answering briefs for failure to respond to Respondent's exceptions and for arguing against findings of the ALJ to which no exceptions had been filed. The Board denied the motions, except to the extent the GC argued that the Huron operations were included in the bargaining unit, as no party filed exceptions to the ALJ's refusal to make a finding on that issue. Therefore, the Board disregarded that portion of the GC's answering brief.

The Board found that the record supported the ALJ's conclusion that the Respondent had engaged in surface bargaining during the statutory period. The Board agreed with the ALJ that Respondent's pattern of paying the employees more than it was willing to offer in subsequent contract proposals was strong evidence that Respondent was merely going through the motions of bargaining with no intention of reaching agreement.

The Board agreed with the ALJ that the proffered grounds for regressive provisions in Respondent's February 2, 2000 contract proposal were a pretext, and that the proposal was made in bad faith. The Board concluded that Respondent's

proposals evidenced an approach to bargaining that was inconsistent with a good faith effort to reach agreement, and when viewed in context with the totality of Respondent's conduct, supported the conclusion that Respondent engaged in surface bargaining.

The Board rejected the Respondent's argument that the ALJ impermissibly relied on evidence prior to the statute of limitations period to support his finding of surface bargaining. The Board found that the ALJ's discussion of prior similar conduct was properly used to shed light on conduct occurring within the limitations period.

The Board found, contrary to the ALJ, that the Respondent's failure to provide employee telephone numbers and job classifications in response to the November 4, 2003 information request did violate the Act. The Board also found that the Respondent's two month delay in providing wage data in response to the November 4, 2003 request amounted to a violation of the Act.

The Board overturned the ALJ's finding that the Respondent's failure to provide information on the costs of farm labor contracts did not violate the Act. The Board reasoned that this information was an element of unit labor costs, and thus was presumptively relevant. The Board ordered that Respondent produce all information on labor costs, including compensation paid to the farm labor contractors, and further ordered that to the extent written agreements between Respondent and the labor contractors included language addressing the terms and conditions of the labor contractors' employees' employment, that Respondent provide that information as well.

The Board found contrary to the ALJ that Respondent's refusal to provide employee social security numbers did not violate the Act. The Board followed recent NLRB authority holding that social security numbers requested by unions are not presumptively relevant, and therefore unions must therefore demonstrate the relevance of such information before the employer is required to provide them.

The Board adopted the ALJ's recommended order finding the makewhole remedy to extend from the period beginning January 28, 2000 until the date on which Respondent commences bargaining in good faith with the UFW.

***

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	**Case Nos.** 00-CE-5-SAL
	)	01-CE-16-SAL
D'ARRIGO BROS. CO. OF CALIFORNIA,	)	02-CE-14-SAL
a California Corporation,	)	04-CE-18-SAL
	)	04-CE-18-1-SAL
Respondent,	)	
	)	
and	)	
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	

Appearances:

Darcy Griffin-Bondurant
Marcos Camacho, A Law Corporation
Keene, California
For the Charging Party

Regina Silva and Geoffrey F. Gega
Cook Brown, LLP
Santa Ana, California
For Respondent

Marvin J. Brenner
Salinas ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I heard this unfair labor practice case at Salinas, California on 14 hearing days in April and May 2005. The Charging Party, United Farm Workers of America, AFL-CIO (hereinafter Union) filed charges alleging that D'Arrigo Brothers Company of California (hereinafter Respondent) violated section 1153(a) and (e) of the Agricultural Labor Relations Act (hereinafter Act) by refusing to furnish requested information for representational purposes, and by engaging in unlawful surface bargaining. The Union has intervened in these proceedings. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint, which has been amended five times, alleging said violations. Respondent filed answers to the complaints, denying the commission of unfair labor practices and alleging affirmative defenses. After the hearing, the parties filed briefs, postmarked October 3, 2005, which have been duly considered.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and oral arguments made by counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The jurisdictional facts are not in dispute. Respondent, a California corporation with its main offices in Salinas, is an agricultural employer within the meaning of section 1140.4(c) of the Act. The Union is a labor organization within the meaning of section 1140.4(f). Respondent admits the filing and service of the charges on the dates set forth in the Fifth Consolidated Amended Complaint (hereinafter complaint).

Background

The Union was certified as the exclusive collective bargaining representative of Respondent's agricultural employees in the Salinas Valley and Brawley, California, with listed exclusions, in 1977 (Case 75-RM-14-M). The Union was also certified as the representative of Respondent's agricultural employees who were employed in Fresno and Tulare Counties, and under the supervision of Respondent's Reedley District No. 3, with listed exclusions, in 1978 (Case 75-RC-88-F). Although Respondent entered into at least one collective bargaining agreement with the Union prior to these certifications, they have not reached any agreements in the decades thereafter. Respondent currently is a party to contracts covering California operations with the Teamsters and United Food and Commercial Workers. These are much smaller units than the Salinas/Brawley unit.

Respondent's Reedley operation primarily produced grapes and tree fruits. At the time of the certifications, Respondent did not operate in Huron. The Huron operation, located in Fresno County, commenced in the 1980's, and produces lettuce, also a major commodity at Respondent's Salinas operations. That operation was never "under the supervision" of Reedley District #3. Attorney Geoffrey F. Gega has been Respondent's chief negotiator with the Union since 1980. He testified that over the years, the parties unsuccessfully negotiated for a collective bargaining agreement covering the Reedley employees, and he never raised the subject of the Huron employees, based on his belief they were not covered by the certification in Case No. 75-RC-88-F. Since the Union's negotiators never sought unit inclusion for the Huron employees during these

negotiations, Gega thought the Union shared this position. Neither the Union, nor Respondent has filed a unit clarification petition with respect to the Huron employees.

The Reedley operation was discontinued in 1995. Pursuant to closure effects bargaining requested by the Union, the parties arrived at an agreement, under which about half the Reedley agricultural workers were paid $100.00 each in severance pay. Gega and Jorge Rivera, the Union's negotiator in that agreement, testified that no mention was made of the Huron employees during those negotiations. As part of the agreement, however, the Union and Respondent agreed that all collective bargaining obligations of Respondent under the Fresno/Tulare certification were terminated.

The parties have negotiated through the years concerning the Salinas/Brawley bargaining unit. Following a hiatus in bargaining in 1994, David M. Villarino, the Union's negotiator at the time, requested that bargaining resume, in early 1998. Villarino was shortly thereafter replaced by Efren Barajas, who was the Union's chief negotiator through about 30 meetings ending in the spring of 2000. Barajas and Gega testified extensively at the hearing and with noted exceptions, Gega is credited where conflicts exist.[1]

[1] Both Gega and Barajas were not in the least bit candid as witnesses. Gega had to be repeatedly questioned and pinned down before he would admit almost anything conceivably detrimental to Respondent's case. Even then, he would predictably insert a qualifier or modifier designed to soften the impact of the admission, or would later modify his testimony. With respect to Barajas, who at no time was particularly responsive to the questions posed, he became agitated and almost totally evasive when the questioner even began to enter an area Barajas would have preferred not to discuss. Fortunately, both were constrained, to a large extent, by the parties' bargaining notes and the other documentary evidence presented. On the less controversial matters, Gega was better supported by the documentary evidence, including the bargaining notes. On some controverted issues, Gega was corroborated by Respondent's other witnesses, who were considerably more credible than either Gega or Barajas.

The Information Requests

March 20, 2001

Negotiations between the Union and Respondent broke off in April 2000. At the Union's request, the parties met again on March 20, 2001. At the meeting, Barajas verbally, and then in writing requested Respondent provide the wage rates for all job classifications in the Salinas, Brawley and Huron operations. Barajas told Gega he wanted the information because he was planning to present a new contract proposal.[2] Respondent has refused to comply with this request on the bases that the Union already has this information for the bargaining unit employees in Salinas and Brawley, and the request is irrelevant for the Huron employees, because the Union does not represent them. Respondent further denies that it has one document listing all of this information. Respondent did, however, offer to respond to any questions the Union might have concerning specified wage rates.

The last time Respondent had produced a list of the wage rates for Salinas/Brawley was in its contract proposal of February 2, 2000. At least since 1997, and probably throughout the collective bargaining relationship, Respondent has provided the Union with numerous notices of "interim wage adjustments" for the Salinas, Brawley and Huron employees, as well as notices of other planned actions, such as subcontracting agricultural work. The record, primarily evidence introduced by Respondent, further shows that the Union does not always receive communications from Respondent.

[2] In this case, Barajas is credited over Gega's contention that Barajas said he might possibly present a new wage proposal. It took repeated inquiries before Gega would acknowledge any such statement by Barajas, and his qualifier is considered sugar coating.

Gega testified that the Huron notices were given because Respondent later planned to implement similar changes in Salinas/Brawley. While Gega did not explain how all of the Huron notices affected Salinas/Brawley, his testimony shows that he understands the interrelationships between the operations. Gega further testified that Barajas also claimed the Union represents the Huron employees, and this is why he thought Barajas wanted the Huron wage information. Gega also testified he did not understand why the Union wanted this information, because it had dropped its demand to represent the Huron employees during the 1998-2000 negotiations.[3]

January 7, 2002

On December 31, 2001, Gega sent a letter to Barajas stating that due to an increase in the minimum wage laws, the wages for a few job classifications would have to be increased. By letter dated January 7, 2002, Barajas asked Gega to specify the job classifications affected. Gega provided the information in a letter sent by certified mail on February 4, 2002. The Union did not receive the letter, and Gega did not initially check to confirm that the return receipt card had been received by his office.

After waiting almost four months, and without any further inquiry, the Union filed the charge in Case No. 02-CE-14-SAL, contending Respondent had refused to provide

[3] The Union, commencing with its June 1998 proposal, alternately contended that it represented the Huron employees based on the Reedley (noting Huron is in Fresno County) and Salinas/Brawley (alleging Respondent conceded the issue by providing notices concerning changes in the Huron operation) certifications, until it dropped the demand on November 2, 1999. The Union reinserted Huron employees as part of the bargaining unit it its proposal of May 25, 2004. Gega has alternately contended that Huron employees were never contemplated as being covered by the Reedley certification, and that the closure agreement terminated the Union's right to represent those employees. Gega further testified that the Huron employees are not covered under the geographical description of the Salinas/Brawley certification, and that by giving notice of employment decisions in Huron, he was not conceding the Union's representation status there. In the absence of a unit clarification petition, the undersigned is unwilling to side with any party in this dispute, or to consider the adherence to or shifting of positions thereon to show unlawful conduct.

the requested information. The charge does not describe the January 7 information request, and was served at Respondent's office, not at Gega's law firm. On July 10, 2002, more than two months after the charge was served on Respondent, Gega sent a letter to Barajas asking what information had not been produced. After a series of letters between the Union's representatives and Gega, Gega sent the February 4 letter again, on September 4, 2002.

November 4, 2003

At the Union's request, the parties met again on November 4, 2003, the first meeting since March 20, 2001. Jorge Rivera replaced Barajas as the Union's chief negotiator, although Barajas was present. At the meeting, the Union made the following information request:

> 1. A list of all bargaining unit employees separate [sic] by each area (1. Salinas Valley 2. Huron 3. Imperial Valley) including the names, dates of hire, job classification, home address, home telephone number and Social Security number;
>
> 2. A comprehensive list of the rates of pay for all job classifications (hourly and piece rate);
>
> 3. For each hourly paid classification: total hours worked and total gross earnings paid in each year 2002 and 2003 to date;
>
> 4. For each piece-rate category: total hours worked, total piece-rate units produced and total gross earnings paid in each year 2002 and 2003 to date;
>
> 5. A copy of the summary description of the employer's current medical plan for bargaining unit employees, the eligibility requirements and the total cost for medical plan premiums paid by the employer in each of the past three years;
>
> 6. If farm labor contractors have been used within the past three years,

> provide the name and license number of each labor contractor, the dates and operation for which each labor contractor was used, the number of workers employed by each labor contractor for each operation, the compensation paid to the labor contractor for each operation and the compensation paid to the field workers. Also provide a copy of any written agreements made with such labor contractors.

At the meeting the Union made the following additional information request:

> Current overtime policy paid to all hourly and piece rate classifications. Hourly guarantee for each piece rate classification.

Gega testified that in view of the purportedly burdensome nature of the information request, and flippant, vulgar comments by Rivera during the meeting, he did not consider it to have been made in good faith, but was instead a mechanism for establishing another unfair labor practice charge. Rivera credibly testified he made the information request in contemplation of submitting a new contract proposal. At the meeting, and/or in subsequent correspondence, Gega took positions on each information request. He again refused to provide any information concerning Huron employees, based on the same considerations noted above.

With respect to the other employees covered by Item 1, Respondent provided the names, hire dates and addresses of Salinas/Brawley employees, on January 8, 2004.[4] Gega contended that Respondent does not maintain job classification information for its employees, and was corroborated by Respondent's other witnesses. Gega testified that Respondent does not maintain employee telephone numbers, although his testimony was somewhat conflicting on this subject. Gega's testimony was also somewhat muddled as

[4] In the period between the November 4, 2003 meeting and this response, Barajas and Gega had exchanged letters, Barajas asking why no information had been provided, and Gega responding that he was awaiting a response from the Union concerning the relevance of some of the information requests and other matters he had raised at the meeting.

to whom he checked with on this. Nevertheless, Gega will be given the benefit of a doubt and credited to the extent that he was not informed that employee telephone numbers are maintained, prior to responding to the information request. Credible testimony by an employee witness, however, established that at least some supervisors maintain telephone lists of their crews for recall purposes. Gega refused to disclose employee social security numbers based on privacy grounds.

With respect to the Salinas/Brawley employees, on January 15, 2004, Gega, in response to Item 2, provided the Union with a list of Respondent's wage rates for 2004, and stated that any job classification not contained therein was being paid at the rate set forth in Respondent's February 2, 2000 proposal. In the same communication, Gega responded to Items 3, 4, 5 and the overtime policy request added at the meeting with what information he contended was available to Respondent.

On January 12, 2004, in response to Item 6, Gega provided the names, license numbers and operations performed by Respondent's labor contractors in 2001, 2002 and 2003. Respondent has refused to provide any of the other labor contractor information, citing confidentiality, but giving no details on this. Gega further testified that he refused to furnish the information because the request was far more extensive than prior information requests concerning contractors by the Union, and the Union's prior acquiescence to the unlimited use of contractors during negotiations. Gega, however, admitted that Rivera later told him, when submitting a contract proposal which again limited the use of contractors, that the Union wanted to see how extensively Respondent

was using such contractors, and if the use was not extensive, it might change its proposal in that area.

The Alleged Surface Bargaining

Although the charge in Case No. 00-CE-5-SAL was filed on July 28, 2000, most of the testimony and documentary evidence presented by General Counsel predated the six-month period prior to the filing of the charge, as "background." As noted above, David Villarino initiated the 1998 negotiations, but was soon replaced by Barajas. In June 1998, the Union presented a proposal.[5] In summary, it sought:

1. Coverage for Salinas, Brawley and Huron employees, under the Salinas/Brawley certification.
2. Respondent's obligation to inform employees concerning the contract, to not interfere with internal Union affairs and to not enter into individual contracts with bargaining unit workers.
3. Coverage of the agreement in other states, if Respondent commenced such operations.
4. Assignability of the contract to successor employers.
5. Exclusion of supervisors from the unit.
6. Union shop, with mandatory membership or fee-payer status after five days of employment.
7. Nondiscrimination in hiring, including no anti-union discrimination.

[5] Gega contends this was the first Union proposal since 1992, while Barajas believes he submitted an earlier proposal in 1998. Gega is probably correct on this point, and in the end, it makes no difference in which of them is right in analyzing the facts. Gega testified that Barajas was involved in the 1992-1994 negotiations, while Barajas denied this. Irrespective of Barajas' involvement, the 1992 proposal stands as the Union's position as of that time.

8. Union hiring hall.

9. Company seniority by geographic region, to govern layoffs and recall.

10. Two weeks' written notice for recall.

11. Posting of promotional opportunities with seniority governing among minimally qualified applicants.

12. No strike/no lockout provision.

13. Three-step grievance procedure, culminating in arbitration. Grievances to be conducted on working time, without loss of pay for grievant and representative. Joint selection of arbitrator and sharing of arbitrator's fees.

14. Just cause for discipline and discharge. Written notice to the Union of discipline or discharge. Three-month expiration of disciplinary notices for use in future discipline.

15. Guaranteed personal leaves of absence for up to 30 days, without pay.

16. Guaranteed leaves of absence without pay for Union work or illness/injury up to two years.

17. Paid funeral leave of three days, and unpaid emergency and parental leave.

18. Respondent's obligation to comply with health and safety laws, to provide safety equipment and maintain adequate medical and first aid services. Transportation for medical services when injured or ill on the job.

19. Management rights over any practice not modified by the agreement.

20. Adequate toilet and water facilities.

21. Union access to workers when necessary, and Union bulletin boards.

22. Overtime pay after eight hours in a day, 48-hour week, or Sunday work for piece rate workers; nine hours in a day, 54-hour week or Sunday work for hourly workers. Overtime to be voluntary and offered by seniority.

23. Statutory lunch and break periods.

24. Waiting and reporting time pay.

25. Vacation pay for employees with at least 500 hours of work, increased by company seniority.

26. Five paid holidays.

27. Robert F. Kennedy Medical Plan. Contributions at $1.185/hour worked.

28. Juan De La Cruz Pension Plan. Contributions at $.25 per hour worked.

29. A wage increase, for most unit members, of 10%, for two years.

When asked to evaluate this proposal, Gega claimed it did not address management rights, but as noted above, the proposal reserved to management all subjects not covered by the agreement. Gega further claimed the Union's economic demands were high, in some cases higher than its 1992 proposal. Most notably, the pension fund contributions increased from $.10/hour to $.25/hour. Gega, however, admitted that the non-economic proposals were not unlike those he has received from unions in other negotiations.

After discussing the Union's proposal,[6] and also dealing with some of Respondent's other issues, one of which concerned the wage rate for a new operation and

[6] Gega's unchallenged testimony establishes that the parties generally met for four-hour negotiating sessions, and thoroughly discussed the proposals, although on a few occasions, Gega had to cut the meetings short to catch flights home.

led to a strike by some of Respondent's employees, Respondent presented its first proposal since 1994, on September 23, 1998.[7] In summary, Respondent's proposal provided:

1. That the agreement was non-assignable.
2. Contract coverage for Salinas and Brawley, but not Huron employees. A detailed list of non-statutory exclusions, which may or may not fall within other bargaining units, followed by the statement that only employees defined as being in the bargaining unit would be covered by the agreement, even if others were legally considered agricultural employees.
3. Exclusion from the unit and contract of subcontractor employees.
4. Mandatory Union membership or fee-payer status after 30 days. Respondent agreed to furnish the Union with the names, addresses, social security numbers and job classifications of unit employees.
5. Hiring within the sole authority of Respondent.
6. Crew seniority for layoffs and recalls, except for short-term layoffs and temporary or special skills assignments, which would be in Respondent's sole discretion.
7. Loss of seniority for a variety of reasons.
8. Written notice to employees of the anticipated recall date, at the time of the layoff.

[7] While some time had passed before Respondent submitted its first proposal, the evidence shows that the Union wanted a thorough discussion of its proposal, Respondent had a pressing need to discuss the wage proposal for the new operation, the parties had to deal with the strike, and then agreed to a 30-day moratorium on negotiations. Respondent extracted concessions from the Union after the strike, in exchange for not permanently replacing the striking employees.

9. Three-step grievance/arbitration procedure. Discipline for "cause" instead of "just cause." Seniority employees could grieve discipline and discharge decisions. Respondent agreed to maintain its current disciplinary policies. Joint selection of arbitrator and division of costs of arbitration. The arbitrator, however, was excluded from determining a number of listed issues, any item in the management rights clause or any allegation of unlawful discrimination.
10. An obligation by the Union to discourage members from appealing any arbitration award or seeking any other relief for disputes arising under the contract, the Union to reimburse Respondent for any settlement or judgment obtained by the employee outside arbitration.
11. A management rights clause reserving, to Respondent's discretion, inter alia, the rights "to determine work week, work hours, meal periods, rest periods, and work pace; to grant or deny employees' leaves of absence or other excused absences, and to what extent; to determine when overtime shall be worked and to require employees to do it; to determine performance levels and levels of quality and workmanship; to hire, discipline, and fire employees; to subcontract all or part of any operation; to engage labor contractors, custom harvesters, or other contract labor to accomplish any work, whether or not said work was historically and/or currently performed by the Company by bargaining unit employees; to lay off or reassign employees; . . . the degree to which supervisors perform bargaining unit work; and the right to make all decisions which are necessary to the efficient and/or economical operation of its business. 9.3 The exercise of any of the above

rights by the Company shall not be subject to the grievance procedure or arbitration. 9.4 Except as expressly provided elsewhere in this Agreement, the exercise of any of the above rights by the Company shall not be subject to collective bargaining by the union and union waives the right to further bargaining thereon."

12. A no-strike clause, reserving litigation rights to Respondent for violations, but providing no reciprocal no-lockout clause. No grievance or arbitration for employees alleged to have violated this clause.
13. Access limited to one Union representative. No access to company buses.
14. No arbitration for health or safety violations. Employees subject to discipline for safety violations. The Union would be responsible for ensuring employees comply with safety rules.
15. One Union bulletin board in Salinas and Brawley.
16. Non-discrimination clause omitted union membership. No arbitration of discrimination claims.
17. Four paid holidays (one less than current practice).
18. New health plan to be announced.
19. Reporting time pay, with several exceptions, including inclement weather and breakdown of machinery.
20. Statutory unpaid meal and rest periods.

21. Weekday overtime pay after eight hours for some employees, more for others. Overtime pay for all hours on Sundays, reduced hours on Saturdays. Overtime mandatory and no provision for seniority in assigning overtime.

22. Anniversary bonus based on a minimum of 700 hours worked.

23. Most favored nations clause to Respondent's benefit.

24. Union leave of absence for one employee. Otherwise, Respondent would determine whether to grant leaves of absence. If it granted such leaves, they would be by company seniority. Funeral, maternity and other specific leaves.

25. Alcohol and drug testing. Leaves of absence for rehabilitation.

26. Unlimited right for Respondent to enter into grower-shipper contracts, including bargaining unit work.

27. Savings clause preserving reminder of the agreement.

28. Wage freeze for three years. (No pension.)

29. Waiver of bargaining, including a waiver by the Union to inspect or receive copies of any company documents, records or information.

Respondent's economic proposals were below current practice in two respects- vacation days and anniversary bonus. Respondent did not move to its economic status quo until its proposal of April 6, 1999, when it moved to that point. With one exception, Respondent never improved (and in fact decreased) its economic package thereafter. The only reason given to the Union for the three-year wage freeze proposal was that Respondent's wages were competitive.

Respondent's non-economic proposals reflected its largely or entirely unwritten current practices, other than those on union security, grievance/arbitration, no strike clause, union bulletin board, union leave of absence, most favored nations, savings clause, waiver of bargaining and duration of agreement.[8] Generally, Respondent's rationale for adherence to its current practices was that they were successful.

The Union was particularly interested in company/classification seniority, a wage increase, medical coverage with no or minimal employee contributions, a standard grievance procedure and job protection against subcontracting and grower/shipper agreements. With respect to the last two items, Barajas admitted that the Union has negotiated two contracts allowing unlimited subcontracting, and excluding subcontractor employees from the bargaining unit and contract coverage. He further testified regretting this, because one of the employers subsequently subcontracted out the entire bargaining unit.

The most notable issue negotiated outside a contract was the "new" health care plan. As it turned out, the plan was under the same carrier, but with some differences in coverage. The Union originally proposed a different carrier, but when Respondent advised it that premiums were going to rise substantially and an agreement was essential, the Union accepted the plan, reserving the right to continue bargaining on the issue.

Thereafter, Respondent consistently proposed that employees would either pay for any premium increases, or Respondent would have the right to select a new plan. In

[8] As described above, several of these latter clauses offered less than the Union, by custom or law, would be entitled to, or reasonably expect. Examples of this include the standard of cause, instead of just cause for discipline, the limitation of Union access to only one representative, the waiver of information requests, waiver of representation rights for unit employees, and reimbursement for employee judgments or awards.

practice, on several occasions, premiums have since risen dramatically, and in each case, Respondent has paid for them. Gega testified that Respondent did this because the Union would not have agreed to anything else. This testimony is specifically discredited as an ex-post facto rationalization. Gega is well aware that Respondent could have bargained to impasse on this issue, or negotiated another plan with the Union. Rather, it is apparent that Respondent intended to continue providing health care coverage for the unit employees, at its expense, irrespective of the Union's agreement to a contract.

The Union's proposal of October 7, 1998 contained, inter alia, the following changes:

1. Reduced the obligations of employer article.
2. Deleted Respondent's obligation to recognize the Union in other states.
3. Union rather than Respondent responsible for dues checkoff authorizations.
4. Deleted the Union hiring hall.[9]
5. Exempted skilled jobs from classification seniority.
6. Extended the effect of prior warnings from three to six months.
7. Deleted Union leave and reduced some other leaves of absence.
8. Permitted subcontracting where unit employees do not have the skills, or in emergency situations.
9. Reduced overtime for irrigators.
10. Reduced vacation pay and provided for more hours to qualify.

[9] The undersigned does not agree with Respondent that Article 3.11 of the proposal retained a hiring hall. Respondent also argues that some of the other changes were not really concessions, because the Union had taken similar positions prior to 1998.

11. Reduced pension fund contributions to $.15/hour.

At the October 7, 1998 meeting, Barajas added a 5% wage increase for the second year of the contract, prompting an angry response from Gega. Gega was also upset that the Union had not responded to several of Respondent's proposals of September 23, 1998. Barajas offered to draft counterproposals at the meeting, but Gega refused, stating Respondent did not want to wait for this. Barajas subsequently sent Gega the counterproposals, prompting a letter again protesting the increased wage demand, and the failure of the Union to have the counterproposals ready at the meeting.[10] During the discussion of this proposal, Gega stated Respondent did not consider the Huron operation to be part of the Salinas/Brawley certification.

The Union made a proposal on November 9, 1998, containing, inter alia, the following changes from the October 7 proposal:

1. Growers and shippers clause limited to non-bargaining unit work.
2. Indemnification by the Union for damages arising out of enforcement of union security clause.
3. Agreement that the grievance/arbitration procedure would be the exclusive remedy for violations of the agreement. Proposal that much of the grievance/arbitration language from Respondent's contract with the Teamsters be used. (Rejected by Respondent.)
4. Alcohol and drug testing permitted.

[10] As noted above, while the Union did not respond to each management rights demand by Respondent, it did set forth what it was willing to accept, and generally reserved to management what it did not propose to modify.

5. Deleted notice of discharges to the Union.[11]

6. Deleted time limits for which prior discipline may be used.

7. Deleted entire working conditions article, except general requirement that the employer comply with health and safety laws.

8. Deleted no-discrimination article.

9. Most favored nations clause to the benefit of the Union.

10. Adopted company language for meal periods, rest periods, reporting and standby time, including no reporting or standby time caused by bad weather.

11. Waiver of bargaining article.

Contrary to Respondent's argument, with the exception of item 9, all of these changes constituted concessions.[12]

Respondent's next proposal, tendered on December 2, 1998, was significantly regressive. This proposal deleted most the language on discipline and discharge, including the right of seniority employees to grieve discipline and discharge,[13] and its offer to maintain current disciplinary practices. It also removed its offers to provide the Union with the names, addresses, social security numbers and job classifications of employees, and to terminate the effect of prior discipline after six months. The proposal added a job classification to the list of excluded employees. In addition, Respondent

[11] Without support from the witnesses' testimony, Respondent contends that by deleting this article, the Union was proposing that prior discipline could never be used in future disciplinary cases. Said interpretation is rejected.
[12] Respondent, in its brief, engages in a detailed analysis of the Union's proposals. In its interpretations, Respondent minimizes or negates the concessionary nature of virtually all the changes. The undersigned has attempted to set forth what appear to be the changes based on the language in the proposals. Respondent's arguments would be more convincing if they established that the Union took the positions it bases the interpretations on at the bargaining table.
[13] Respondent contends that other provisions in this proposal still placed discharges, but not lesser discipline, within the grievance/arbitration clause. At best, the proposal presents an inconsistency.

offered a different health plan by its current carrier, but reserved the right to unilaterally change health care coverage during the life of the agreement. The proposal contained no substantial concessions.

In subsequent proposals, Respondent made a few non-economic concessions to the Union. Barajas testified that these changes were inconsequential or cosmetic, and an examination of them confirms his description. The slight movement by Respondent on two articles, union security and access, is notable because, contrary to his practice, Gega entered into tentative agreements on those articles.

Gega also refused to accept "piecemeal" proposals from the Union on specific issues, insisting that it present proposals for a full contract. Nevertheless, although Gega refused to accept the characterization, Respondent, on numerous occasions, has presented piecemeal proposals to the Union throughout the period 1997-2000, and thereafter, if not throughout the parties' collective bargaining relationship. Most of these have consisted of "tentative wage adjustments" for unit employees, including wage increases, the setting of wage rates for new operations and minimum wage increases. Although Respondent's witnesses estimated that the wage increases only affected eight or ten percent of the unit employees, some of the increases were substantial. The Union did not oppose any of these wage adjustments. On one occasion, however, Barajas protested this practice, instead of negotiating a contractual wage increase. Gega replied that if the Union opposed the increase, Respondent would withdraw it.

The Union submitted a proposal on February 10, 1999, in response to

Respondent's proposal of February 2, 2000. It offered the following changes from the Union's November 9 proposal[14]

1. Minor concessions in the seniority proposal.
2. Telephone and bulletin board notice of resumption of work instead of written notice.
3. Adopted more of Respondent's grievance procedure language.
4. Reduced hours to qualify for anniversary bonuses for Brawley employees.

Other than item 4, the changes represented concessions.

The Union made another proposal on March 17, 1999. The Union accepted Respondent's anniversary bonus proposal, other than proposing reduced eligibility hours for Brawley employees, accepted Respondent's medical plan, with enhanced benefits, and reduced its wage demand to 6% in the first year, 4% in the second.

After Respondent's April 8, 1999 proposal, which agreed to pay for its health plan carrier's premium increase, but would have employees pay any future increases, or allow it to change the plan for the remainder of the agreement, the Union submitted another proposal, on April 28. The proposal, inter alia, included concessions in the recognition, union security, hiring, senoirity, grievance/arbiration, recall procedure, access, health and safety, health plan paid holidays, funeral leave, waiver of bargaining and no-strike clauses. Respondent contends that all of these concessions were insignificant.

[14] Prior to this proposal, Respondent and the Union agreed to Respondent's interim health plan with Respondent paying higher premiums. The Union continued proposing its health care plan, for a time.

Respondent's July 19, 1999 proposal contained only minor changes, and prompted Barajas, in effect, to accuse it of surface bargaining. Nevertheless, the Union submitted a "package proposal" e.g. accept or reject it in its entirety, on August 24. This proposal, inter alia, contained the following concessions from the Union's proposal of April 28:

1. Dropped its pension plan proposal.
2. Accepted most of Respondent's recognition clause, other than the exclusion of agricultural employees. During discussion of the Union's proposal, the Union dropped inclusion of the Huron employees under the contract.
3. Increased the number of days employees had to work before joining the Union to 20.
4. Dropped its demand that employees be given notice of recall date, if given an approximate recall date when laid off (essentially Respondent's proposal).
5. Agreed to discourage employees from seeking other relief for arbitrated issues, and to render null and void any grievance settlement or arbitration award where the employee sought other relief.
6. Adopted Respondent's no strike clause, including deleting the Union's proposed no lockout clause, and removed employee violations of the no strike clause from the grievance/arbitration procedure.
7. Adopted Respondent's health care plan, with maintenance of benefits.
8. Adopted much of Respondent's leave of absence proposal.

9. Reduced its wage demand to 4% for hourly and piece rate workers, with a guarantee at or near the minimum wage for piece rate workers, for a one-year contract.

Respondent rejected the Union's proposal as a package and, other than the tentative agreements on access and union security, did not agree to anything else when the parties discussed the proposal on a non-package basis. Even though Respondent did not submit a counterproposal, the Union offered the following proposal on November 2, 1999:

1. Accepted Respondent's July 19, 1999 proposals on parties to agreement, recognition, hiring, seniority, no strike clause, health and safety, bulletin board, modifications, no discrimination, holidays, reporting and standby time, meal periods, rest periods, transportation, leave of absence, funeral leave, alcohol and drugs, growers & shippers, savings clause and waiver of bargaining.
2. Retained its just cause language for discipline and discharge.
3. Accepted Respondent's management's right clause, except to limit subcontracting to work historically contracted out by Respondent, and to slightly limit Respondent's authority over transfers.
4. Accepted Respondent's medical plan proposal, except that Respondent would pay up to $15 in increased monthly premiums over the second and third year of the contract, and to allow workers to opt out if premiums increased beyond that. (In fact, premiums increased far more than this.)

5. Accepted Respondent's overtime proposal, except three job classifications would have overtime begin at eight, instead of ten hours.
6. Accepted Respondent's anniversary bonus proposal, except Brawley employees would qualify after 500, instead of 700, hours of work. (The Union's previous proposal was for qualification in Brawley after 400 hours. The Brawley operation is far smaller than Salinas Valley.)
7. Rejected Respondent's most favored nations clause, but dropped its clause.
8. Proposed a 4% wage increase in the first year, 3% in years two and three.
9. Proposed a new or modified jobs proposal, requiring notice and the opportunity to bargain over this subject.

In many cases where the Union had accepted Respondent's proposals, the initials, "TA,"(tentative agreement) were inserted. Not only did Respondent reject the proposal, but Gega informed Barajas there were no tentative agreements. Respondent did not accept any of the Union's proposals and, in fact, Gega announced that due to an anticipated major health insurance premium increase, Respondent would have to rethink its entire proposal.[15]

On February 2, 2000, Respondent submitted its last proposal to date. Some the changes from its proposal of July 19, 1999, and the tentative agreements on access and union security were as follows:

[15] In its brief, Respondent cites, as a reason for rejecting this proposal, the Union's "failure" to copy all of Respondent's July 19, 1999 proposals to which it had agreed, instead simply stating it accepted those proposals. The undersigned considers this argument specious. What could be clearer than to state, in effect, "We surrender?" The undersigned also fails to see any testimony by Gega contending this was a reason for rejecting the proposal.

1. Withdrew from the tentative agreement on union security. Deleted the express language requiring union membership for language readily capable of being interpreted as voluntary membership. Proposed capping union dues at 1% of wages. Added a religious exemption clause.[16]
2. Unilateral selection of arbitrators by Respondent.
3. Arbitrator's authority in discharge cases limited to whether the employee committed the act alleged. (Still no grievances for lesser discipline.)
4. Increased minimum hours to qualify for overtime pay for most employees.
5. Deleted pay for funeral leave.
6. Entire agreement null and void if any portion thereof so found, unless the Union and Respondent reach agreement on the voided portion within 30 days.
7. Raised Respondent's payment of monthly health plan premiums for eligible employees to $190 per month, with employees to pay additional increases, or Respondent to choose a new plan.

Gega, at least initially, admitted that several of the above changes did not have an economic component. Respondent contends that the higher hours required for overtime and elimination of paid funeral leave were proposed to offset part of the increased health premiums, which totaled in the neighborhood of $500,000. Examining all of Respondent's conduct, this contention is not credited. Before and after this premium increase, Respondent determined to cover health plan increases without

[16] Gega testified it was not Respondent's intent to make Union membership voluntary. Nevertheless, Respondent could have easily accomplished its purposes without deleting the express requirement for mandatory membership. Union dues are normally 2% of all earnings. Gega testified Respondent proposed a reduction to soften the burden of its economic proposals on the employees.

employee contributions, and the continued proposals to the contrary can only be viewed as a ruse. In fact, Respondent did not proceed with the changes in overtime policy or funeral leave, and Gega's testimony that it did not do so because the Union would not agree, is again discredited as an ex post facto rationalization, as was his testimony concerning Respondent's failure to implement its proposal to have employees contribute to health plan premiums.

Barajas, as might be expected, protested these changes,[17] but agreed to submit another proposal. The Union's proposal of February 15, 2000 essentially restated its November 2, 1999 proposal, but reduced the wage demand for most employees to 2% per year for each of the three years. The Union again marked "TA" next to its proposals that purportedly matched Respondent's July 19, 1999 proposal.[18] In response, Gega reiterated there were no tentative agreements, and further informed Barajas the July 19, 1999 proposal was off the table, and the Union would have to respond to Respondent's new proposal. Gega claimed Barajas agreed to do this.

The parties met again on April 11, 2000. Instead of directly responding to Respondent's February 2 proposal, the Union resubmitted its February 15, 2000 proposal, but reduced the wage demand to 1% in the first year, and 2% in the second and third years. Barajas further stated that if Respondent did not accept the proposal, it would be

[17] Gega did not explain the changes in union shop language when presenting the proposal, so Barajas said little, if anything about this change at the time.

[18] This time, the Union gave a long-form recitation of the proposals it claimed to have agreed to. Respondent complains that in cases where proposals are marked "TA," different language is used. The undersigned has reviewed the proposals and notes that while, in the great majority of cases, the language is exactly the same, in some instances, there are differences. The record does not disclose why these discrepancies existed or whether they were discussed, beyond a general complaint thereon by Gega.

taken off the table.[19] Barajas also discussed the California Supreme Court's then recently issued *Royal Packing* decision,[20] which found employers liable to compensate employees for time required traveling on company buses. Barajas stated that employees were ready to sue Respondent for this compensation, but if Respondent accepted the Union's proposal, he would be able to discourage the lawsuit. Respondent took this as a threat, although James Manassero, a company advisor and negotiator, acknowledged Respondent fully expected such a lawsuit prior to the meeting.

Gega later sent letters to the Union, protesting the threat, rejecting the proposal and inviting the Union to respond to Respondent's proposal of February 2, 2000. Instead, the Union filed its surface bargaining charge, the *Royal Packing* lawsuit was filed, with the Union's attorneys acting as co-counsel, and the Union did not request to meet with Respondent again until it requested the March 20, 2001 meeting, where Barajas made the first of the information requests discussed above.

In addition, shortly prior to the April 11 negotiating session, Barajas visited James Bogart, President and General Counsel of the Grower Shipper Association of Central California, of which Respondent is a member. Barajas asked Bogart to speak with John D'Arrigo, Respondent's President, and urge him to become personally involved in the contract negotiations, because they were not progressing well.[21] Barajas had engaged in similar conduct in September 1999, and when Gega found out about it, he had sent Barajas a letter demanding he cease attempting to go around Respondent's designated

[19] Gega's testimony, as corroborated by his bargaining notes and the testimony of John Snell, one of Respondent's other negotiators, is credited over the evasive, non-responsive testimony of Barajas on this meeting.
[20] *Morillon v. Royal Packing Co.* (2000) 22 Cal.4 575 [94 Cal.Rptr.2d 3].
[21] Bogart's testimony is credited over the evasive, non-responsive testimony of Barajas on this subject.

representatives. On this second visit, Barajas also told Bogart about the anticipated *Royal Packing* lawsuit, and his ability to discourage the action if Respondent agreed to a contract. Bogart spoke with John D'Arrigo, who informed Gega of the communication, prompting Gega to send another letter of protest to Barajas.

After the meeting of March 20, 2001, Respondent and the Union did not meet again until November 4, 2003. Jorge Rivera's information request of that date is discussed above. The parties met again on May 25, 2004 where the Union, with Rivera acting as its chief spokesman, made a new proposal. The Union contends its proposal was delayed by Respondent's refusal/delay in providing the information requested in November 2003.

The proposal retracted some of the agreements the Union had made to Respondent's July 19, 1999 proposal. It, inter alia, reasserted the Union's representation of Huron employees, shortened the time before employees would have to start paying dues, added one paid holiday, added pay for company-provided transportation (*Royal Packing)* and proposed a general wage increase of 5% for each of the three years. Gega's reactions to the new proposal were to tell Rivera the Union was not serious about reaching agreement with Respondent, and to file an unfair labor practice charge against the Union, the status of which was not disclosed at the hearing.

ANALYSIS AND CONCLUSIONS OF LAW

The Information Requests

An employer is obligated to furnish the collective bargaining representative of its employees with information requested to fulfill the union's representational duties. Such

duties include contract negotiation, contract enforcement and the processing of grievances. If the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing of relevance is generally required. Where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower, and the representative must more precisely show why the information is relevant. *Ohio Power Company* (1975) 216 NLRB 987 [88 LRRM 1646], enf'd (C.A. 6, 1976) 531 F.2d 1381 [92 LRRM 3049]; *NLRB v. Rockwell-Standard Corporation* (CA 6, 1969) 410 F.2d 953 [71 LRRM 2328]. The refusal to provide, or unexcused delay in responding to a proper information request violates section 1153(a) and (e) of the Act.

Respondent does not dispute that the request for wage information for Salinas and Brawley employees of March 20, 2001 was relevant to contract negotiations. Rather, it contends that the Union was already in possession of the information by virtue of Respondent's last contract proposal, and the notices it sent thereafter regarding wage adjustments for specific job classifications. Respondent's last proposal containing the wage rates was issued on February 2, 2000, more than one year prior to the request, and about ten months since the parties had last met. While it is true that the employer is not required to furnish requested information in the exact form requested,[22] Respondent is well aware that the Union has not always received its communications. In addition, the

[22] See *Paul W. Bertuccio* (1984) 10 ALRB No. 16, enfd. in pert. part (1988) 202 Cal.App..3d 1369, decision on remand (1989) 15 ALRB No. 15.

Union was not required to assume that it had been given notice of all wage changes, and if so, whether the communications had been received. Given the minor inconvenience compiling this information would have caused Respondent, the refusal to do so may be attributed to its obstinate attitude, a characteristic unfortunately dominating its collective bargaining relationship with the Union. Therefore, Respondent violated section 1153(a) and (e).

With respect to the wage information for Huron employees, in the absence of a unit clarification ruling from the Board, the undersigned is unwilling to side with any party concerning the unit inclusion of these employees. Nevertheless, even if Huron is not in any certified unit, Respondent is well aware of the interrelationship of these operations, as demonstrated by its repeated notification to the Union of wage and other changes for those employees, and Gega's testimony on the issue. After voluntarily providing such information in the past, its refusal to do so upon request again shows an unwarranted obstinance. Respondent now primarily defends its conduct on the Union's alleged failure to properly articulate an appropriate reason for requesting the information, a technical defense that has, on occasion, succeeded. In this case, however, Barajas informed Gega he wanted to submit another contract proposal, and the wage rates paid to lettuce workers in Huron is clearly relevant to what the Union should propose for lettuce workers in Salinas. Furthermore, since the scope of the unit was at issue in the negotiations, the wage rates paid to Huron employees might be a factor supporting the

Union's argument for unit inclusion. Thus, Respondent also violated section 1153(a) and (e) by refusing to furnish this information.[23]

General Counsel contends that Respondent's failure to timely respond to the Union's January 7, 2002 request for the job classifications affected by an increase in the minimum wage also violated the Act. While this is ultimately a matter of opinion, the undersigned does not believe the facts sustain this contention. Given Gega's need to consult with his client, the initial response of February 4 does not appear unreasonable. The Union's delay of almost four months in filing the charge, and doing so without making inquiry as to whether Respondent received the request is clearly more unreasonable. No doubt, Respondent could have been more diligent in checking to see whether the return receipt card had been returned for its initial response, and could have more promptly responded to the unfair labor practice charge. Nevertheless, the charge itself did not identify the request, and thus, some time for clarification was required. In addition, Gega credibly testified he was on vacation for a portion of this time period. Taking all of these factors into account, it is concluded that the delay in providing the information for the second time should also be excused, and the allegation dismissed.[24]

Turning to Rivera's information request of November 4, 2003, the undersigned does not share Respondent's view that it was made for the purposes of harassment, or to establish unfair labor practices. The parties had not met in negotiations in about two and

[23] In this regard, *San Diego Newspapers Guild v. NLRB* (C.A. 9, 1977) 548 F.2d 863 [94 LRRM 2923], cited by Respondent, is distinguishable. In that case, the union sought information for employees found to not be in the bargaining unit. Furthermore, the wage information for those employees did not pertain to contract negotiations.
[24] General Counsel may contend it is not relevant, but nevertheless, when speaking of delays, it is also noted that it took almost three years from the filing of this charge to bring it to hearing.

one-half years, and Rivera had replaced Barajas as the Union's chief negotiator. Under these circumstances, the Union was entitled to request information so it could formulate a new contract proposal. While Respondent did furnish some of the information, and was not required to respond to other portions of the request, its obstinate conduct contributed substantially to the Union's inability to submit a new contract proposal until May 25, 2004.[25]

Respondent refused to provide any of the requested information with respect to the Huron employees, on the ground that since they are not in the bargaining unit, the information is irrelevant. The main factual difference here is that Rivera, apparently, did not expressly state he needed the information to formulate a new proposal but instead, only stated the Union represented Huron employees. Under the factual history of this case, the undersigned does not believe this relieved Respondent of its obligation to respond to otherwise appropriate information requests regarding the Huron operation. Although the Union had earlier agreed to exclude Huron from the agreement, it had taken its last proposal off the table, leaving it free to retract that agreement. Furthermore, by agreeing to Respondent's proposal, the Union did not clearly and unmistakably waive its right to seek information on the issue. Inasmuch as the Union subsequently did, in fact, again claim representation of these employees, the information was again relevant to this issue. In any event, the same factors concerning the relevance of the terms and conditions of Huron employees to those of the acknowledged bargaining unit were still

[25] The undersigned also disagrees with Gega's characterization of the May 25, 2004 proposal as "ridiculous." Given the passage of time, the proposed 5% wage increase for each of the three years was not ridiculous, and the non-economic changes, for the most part, reflected a return to normal contractual provisions that the Union had earlier offered to give up, but had been rebuffed by Respondent.

present, and given this relevance, the failure of Rivera to repeat Barajas' earlier stated need for the information to submit a new proposal will not succeed as a technical defense. Accordingly, to the extent that the information request was otherwise valid, Respondent violated section 1153(a) and (e) by failing to provide the information for the Huron operation.

Respondent initially refused to submit any wage data, claiming the Union already had this information. On January 15, 2004, Respondent relented, informing the Union the wage rates were the same as in its February 2, 2000 contract proposal, except for an attached wage addendum. General Counsel contends the delay was inexcusable, and not in the form requested by the Union (e.g. in one document). The submission of the information in two documents hardly placed an undue burden on the Union, and no violation is found on this basis. Given Respondent's other obstinate conduct in these negotiations, the delay of over two months in providing the information arguably would be inexcusable. This is a close issue, and since Respondent has already been found to have violated the Act by similar earlier conduct, it would be cumulative to reach a decision on this aspect of the case, in any event.[26]

Respondent does not dispute its obligation to turn over job classification or telephone number information for unit employees, but denies maintaining such records. The testimony regarding the non-maintenance of job classifications was unrebutted and will be accepted. It is apparent that at least some employees' home telephone numbers

[26] On the other hand, Respondent's argument that providing this information in 2004 satisfied its obligations under the Union's request for the same information in 2001 is rejected. Again, Respondent's refusal to provide the information for Huron employees did violate the Act.

are kept by their immediate supervisors. Even crediting Gega as to his lack of knowledge of this practice, it could be argued that he made insufficient inquiries thereof. Furthermore, the National Labor Relations Act has been found to impose the Federal Rules of Civil Procedure in requests for information. Under those Rules, a party must state, under oath, that it is unable to supply the requested information, which was not done here. *NLRB v. Rockwell-Standard Corporation*, supra. Under all the facts presented, however, including the uncertainty as to whether the oath requirement would apply under our State Act and Gega's apparent lack of knowledge that supervisors keep employee telephone numbers,[27] it will suffice, rather than finding a violation, to find that in the future, Respondent will be required to check with the supervisors and respond to requests for employee telephone numbers.

Respondent refused to supply employee social security numbers, citing privacy concerns and disputing the relevance of the information. It is well established that in order to sustain an objection on this basis, the asserting party must show a clear and present danger that disclosure of the information would cause them harm. *Shell Oil Company v. NLRB*, supra. Although no such showing has been made on the record, the Union might consider the potential exposure to identity theft of its members, and find another way to keep track of them. It is clear, however, that current precedent finds the disclosure of this information is required, and Respondent violated section 1153(a) and

[27] In *Rockwell-Standard Corporation*, supra, the employer knew a subcontractor under its control had the requested information.

(e) by refusing to do so. *Andy Johnson Co., Inc.* (1977) 230 NLRB 308 [96 LRRM 1366]; *As-H-Ne Farms* (1980) 6 ALRB No. 9.[28]

Respondent supplied a list of the contractors it used, their license numbers and the jobs they worked on. Respondent refused to supply copies of its agreements with the contractors, and failed to supply any of the other contractor information, citing relevance and privacy grounds. Unlike the National Labor Relations Act, section 1140.4(c) of the ALRA makes the employees of a labor contractor the employees of the contracting party. Noting this provision, it is established that information concerning the terms and conditions of contractor employees' work is presumptively relevant and subject to disclosure. *Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758 [205 Cal.Rptr. 860]; *Tex-Cal Land Management, Inc.* (1985) 11 ALRB No. 31. Given the facts presented, although the Union at one point agreed to unit exclusion for such employees, it was free to change its position, particularly since Respondent's demand for unit exclusion may have constituted insistence on a non-mandatory subject of bargaining and hence, unlawful. Accordingly, the refusal or failure to disclose the number of workers employed by the contractors, and their wages violated the Act.

Additional considerations apply to the compensation paid to the contractors and copies of the agreements, which would presumably contain that information. Respondent's bare assertion that the information is confidential is insufficient. Rather, Respondent has the burden of establishing why disclosure of the information would

[28] To the undersigned, the more important significance of this dispute is that Respondent, in its proposal of September 23, 1998, Article 3.4, had unilaterally offered to supply employee social security numbers, (later retracted), but then dug in its heels when the Union requested the same information.

damage its business. If Respondent establishes such harm, then the interests of Respondent to be protected from such harm would be balanced against the Union's need for the information. *Richard A. Glass Company, Inc.* (1985) 14 ALRB No. 11, enfd. (1985) 175 Cal.App. 3d 703.

Nevertheless, the National Labor Relations Board has twice been overruled for requiring disclosure of subcontractor financial information, on the ground that unless the employer raises costs as a reason for subcontracting, the information is irrelevant. *General Electric Company* (CA 7, 1990) 916 F.2d 1163 [135 LRRM 2846]; *Western Massachusetts Electric Company, et al. v. NLRB* (CA 1, 1978) 573 F.2d 101 [98 LRRM 2651]. Even given the difference in the Federal labor legislation, these rulings appear to apply to the ALRA. Accordingly, inasmuch as the record fails to show that Respondent asserted costs as a reason for the subcontracts, it was not required to respond to those portions of the information request.[29]

Surface Bargaining

Section 1155.2(a) of the Act defines good faith bargaining as the obligation to meet and confer in good faith with an object, inter alia, of reaching a collective bargaining agreement, but does not require either party of agree to proposals or make concessions. The making of regressive proposals, without good cause, or illegal terms

[29] General Counsel and the Union contend that other responses to the information request were incomplete. Perhaps this is true, but the undersigned does not believe the record sufficiently establishes the assertion. If the responses were incomplete, the Union appears to have had ready access to supplemental information sufficient to clarify any ambiguities, or simply could have asked for such clarification. With respect to the request for Respondent's overtime policy, the record appears to show that the Union, at the time, was satisfied with a written confirmation that the policy had not changed, and the complaints to the response are a more recent development.

are indications of bad faith bargaining, however. Furthermore, the Board has adopted the National Labor Relations Board's rule that:

> 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.'[30]

The totality of a party's bargaining conduct, at and away from the bargaining table is considered in determining whether the party wanted to reach such agreement.

At the outset, it is noted that Respondent has a substantial unfair labor practice history before this Agency, with several of the violations pertaining to its collective bargaining relationship with the Union. During the Union's organizing campaign, Respondent unlawfully denied access to Union representatives. (1977) 3 ALRB No. 31. Upon the Union's certification, Respondent refused to bargain with it, again violating the Act. (1978) 4 ALRB No. 45. Respondent has repeatedly been found to have made unlawful unilateral changes, unlawfully disciplined Union adherents and again, denied access. (1982) 8 ALRB No. 45; (1982) 8 ALRB No. 66; (1983) 9 ALRB No. 3; (1983) 9 ALRB No. 30; (1983) 9 ALRB No. 51; (1987) 13 ALRB No. 1.

Respondent's initial proposal in this round of bargaining, dated September 23, 1998, taken as a whole, is highly onerous and portions of it are, at best, of questionable legality.[31] Respondent proposed a three-year wage freeze, without claiming an inability to pay more. While "parsimonious" economic proposals in themselves do not establish

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[30] *O.P. Murphy* (1979) 5 ALRB No. 63, at page 10.

[31] As onerous as the proposal was, Respondent argues that it should be considered progressive, because in some areas, notably Union security and grievance-arbitration, it was less oppressive than its prior proposals. Of course, Respondent eventually scrapped most of these "progressive" moves. In light of the discussion below, it is unnecessary to arrive at any final conclusions regarding the legality of Respondent's proposals.

surface bargaining,[32] they are one indication. The effect is heightened in this case, since Respondent simultaneously granted wage increases to those portions of its workforce as it saw fit. Respondent defends this practice on the ground of "economic necessity." On the one occasion when the out leveraged and outmatched Barajas complained about the practice, Respondent sarcastically offered to withdraw the proposed increase if the Union objected, thus placing this assertion of "economic necessity" in question.

This disturbing conduct, of proposing less at the bargaining table than Respondent was willing to give on its own, extended to other areas. Respondent steadfastly proposed that unit employees would pay for premium increases, or it would redesign (lower) their benefits when in practice, Respondent in several instances, paid for the increases. Respondent also proposed restricting its overtime policy, when in practice, it did not. As noted above, Respondent's explanation for this has been rejected as an ex post facto justification. To the contrary, it is concluded that Respondent's conduct shows it wished to exclude the Union from any representational authority over economics.

Respondent's September 23, 1998 non-economic proposals, if anything, were more oppressive. Respondent proposed maintaining its current employment practices, many of which were unwritten, and with only token concessions, refused to seriously consider any alternatives.[33] Not satisfied with rejecting such traditional concepts as just cause for discharge, a reciprocal no-lockout clause and the expression of its legal obligation (shown to have been ignored in the past) not to discriminate against employees

[32] *Tex-Cal Land Management, Inc.*, supra.
[33] Extended discussion does not automatically translate into serious consideration.

for exercising their rights under the Act, Respondent sought a management rights clause virtually excluding the Union from any authority, other than in a very limited grievance procedure and the collection of dues. Respondent also specifically sought to exclude agricultural employees from the unit, and the employees of labor contractors, at best, of very questionable legality. *Cardinal Distributing Co. v. ALRB*, supra; *Paul W. Bertuccio*, supra. This was apparently not enough, because Respondent also sought unfettered authority to expand contracting, to the potential result that the entire bargaining unit would not be subject to the agreement.

The grievance procedure proposal sought to limit employee access to administrative agencies and the courts, also of questionable legality. It further demanded that the Union become a party to this conduct, very possibly opening it up to charges of unlawful coercion against its members. Finally, the proposal subjected the Union to financial liability if employees, even over its objection, obtained relief outside the grievance procedure.

Other facially unacceptable proposals on September 23, 1998, included Union financial responsibility for violations of the no-strike clause for unauthorized conduct of employees, and limiting Union access to one representative (clearly less than the Union was entitled to under Board law). As if to kick sand in the Union's face, Respondent further proposed a favored nations clause to its benefit, when traditionally, if such clauses are invoked, they inure to the union's benefit.

The record shows that Respondent's proposals, without credible explanation, became, overall, more regressive as bargaining continued. At the same time, Respondent

imposed roadblocks to reaching agreement, such as the refusal to consider "piecemeal" proposals or tentative agreements, unless it suited Respondent's purposes, such as with the interim medical plan agreement.

On November 2, 1999, the Union accepted the bulk of Respondent's proposals, although there were certainly important unresolved items. The Union, however, subsequently retreated even further. To the undersigned, Respondent's denial that there were tentative agreements on the many clauses agreed to by the Union clearly exposed its desire not to agree to a contract. Respondent was fully aware that tentative agreements are subject to modification, and had agreed to two such clauses. Thus, its denial of any meeting of the minds cannot be viewed as anything other than contract avoidance.

Respondent's proposal of February 2, 2000, and its subsequent refusal to negotiate from any other point, was virtually an invitation to the instant unfair labor practice charge. Based on an economic ground that has been found to be a pretext, Respondent not only sought economic concessions it had no intention of implementing, but added other more regressive provisions calculated to infuriate the Union. These included withdrawing from the tentative agreement on union security, further limiting the arbitrator's authority, giving Respondent the sole authority over selection of the arbitrator and intruding on the Union's authority to set dues for its members.[34]

[34] While it is true that Respondent's contract with the United Food and Commercial Workers has a similar limitation on disciplinary grievances, that contract, overall, is far less restrictive than Respondent's proposals to the Union. Even if Respondent did not to change Union membership from compulsory to voluntarily, as the new language appears to indicate, the major change in the language, after tentative agreement is properly viewed as part of Respondent's strategy of contract avoidance.

Taken as a whole, Respondent's proposal of February 2, 2000, demanded the virtual abdication of any representational authority by the Union. See *Robert Meyer d/b/a Meyer Tomatoes* (1991) 17 ALRB No. 17. *The undersigned does not believe this is what the founders of the Act and the parent National legislation had in mind when they required good faith collective bargaining.* The reissuance of Respondent's earlier demands, compounded by even more regressive components, based on a false premise, within six months of the filing of the charge, establishes the violation. This finding is supplemented by the evidence of Respondent's earlier conduct evincing a desire not to reach agreement. The credited facts show surface bargaining by Respondent, within the statutory period.[35]

A major defense asserted by Respondent is the Union's conduct during negotiations, the first of which concerns the Union's bargaining positions. While the Union's initial economic proposals may have been high and, in a few cases, the Union increased its economic and non-economic demands, the overall pattern was concessionary, particularly so in light of the unreasonable nature of Respondent's proposals, and its unwillingness to make more than token changes. Thus, by November 2, 1999, the Union had made many major concessions to Respondent. Despite Respondent's protestations to the contrary, on any objective level, the Union then made huge, and in some cases, possibly unlawful concessions in order to accommodate

[35] *NLRB v. MacMillan Ring-Free Oil* (C.A. 9, 1968) 394 F.2d 26 [68 LRRM 2004], cited by Respondent, is factually inapposite. In that case, the employer's contract proposal during the six-month period preceding the filing of the charge was essentially the same as its prior lawful proposals, and the Court found no other unlawful conduct during the relevant period. The Court also noted there was no evidence of dishonest conduct by the employer in that case. In contrast, it has been found herein that Respondent's proposal of February 2, 2000 was unlawful, and based on a pretext.

Respondent's demands, additionally reducing its wage proposal to the standard dues payment level or less.

The only other alleged misconduct by the Union prior to Respondent's February 2, 2000 proposal, was when Barajas, in September 1999, attempted to circumvent Respondent's designated negotiators. While improper, this did not entitle Respondent to intensify its campaign of contract avoidance. Accordingly, Respondent's surface bargaining to that point was not excused by the Union's misconduct.

Respondent alleges several acts of misconduct by the Union after February 2, 2000. The repeated attempt by Barajas to circumvent Respondent's negotiators is indeed misconduct, particularly since he had been warned that Respondent objected to this. It is noteworthy, however, that this action took place after Respondent made its proposal of February 2, essentially preventing any possible agreement. Furthermore, while improper, Barajas' conduct in no way shows that the Union did not wish to reach an agreement with Respondent.

There are also the instances where the Union, in its proposal of February 11, 2000, claimed to have accepted Respondent's language where, in fact, there were differences. The record, however, does not explain why the discrepancies existed, and it does not appear that Respondent asked they be resolved. To the contrary, Respondent angrily rejected the entire proposal on the ground it did not respond to its proposal of February 2.

The other allegations of misconduct by the Union lack merit. With respect to the refusal to respond to Respondent's February 2, 2000 proposal, inasmuch as that proposal was tendered in bad faith, the Union had no obligation to make a response. In any event,

the Union's next proposal was a response, e.g. the rejection of Respondent's unlawful, regressive changes.

Respondent further contends that the Union engaged in misconduct when Barajas threatened to sue it under the *Royal Packing* decision if it did not agree to the Union's proposals. To the extent that Barajas actually threatened such action, there is nothing unlawful where a party to negotiations uses its economic leverage to extract concessions. If the opposite were true, then Respondent would have engaged in unlawful conduct when it extracted concessions from the Union, in exchange for not permanently replacing striking employees.[36]

The record establishes that it was the Union that broke off negotiations, in April 2000. Under the circumstances of Respondent's bad faith bargaining, however, the Union really had nowhere to go at that point, and the passage of time before this case was brought to hearing can hardly be blamed on it. Finally, as discussed above, and contrary to Respondent's contentions, the Union's information request of November 4, 2003 and contract proposal of May 25, 2004 have not been shown to have been made in bad faith. Accordingly, Respondent's surface bargaining, in violation of section 1153(a) and (e) of the Act, continues to date.

THE REMEDY

Having found that Respondent violated section 1153(a) and (e) of the Act, I shall recommend that it cease and desist there from and take affirmative action designated to

[36]*N.A. Pricola Produce* (1981) 7 ALRB No. 4 9, cited by Respondent, does not establish that the Union's "threat" to institute legal action was unlawful.

effectuate the purposes of the Act. Respondent has shown a proclivity to violate the Act, and its refusal to bargain in good faith is a hallmark violation. Therefore, a broadly worded cease and desist order is appropriate.

The Act provides for bargaining makewhole to compensate employees for the delays in obtaining the benefits of collective bargaining occasioned by their employer's refusal to bargain in good faith. *Robert Meyer, d/b/a Meyer Tomatoes* (1991) 17 ALRB No. 17. Unless the employer can establish that, even absent said conduct, no agreement would have been reached, this remedy should be given where all of the circumstances of the case so indicate. Although the parties have negotiated for decades without reaching agreement, the numerous concessions made by the Union indicate that, had Respondent really wanted to reach agreement, accommodations could have been reached on the remaining outstanding issues. Therefore, bargaining makewhole will be ordered.

As noted above, the Union, through Barajas, engaged in misconduct by twice attempting to bypass Respondent's negotiating team, and may have engaged in less serious misconduct by misrepresenting that the Union had agreed to all of Respondent's contractual language in the designated articles of its February 11, 2000 proposal. Nevertheless, the impact of such conduct, the more serious of which took place away from the bargaining table,[37] on the totality of the negotiations appears minimal. Furthermore, in deciding whether to cut off bargaining makewhole, the commission of two additional bargaining-related unfair labor practices by Respondent, in refusing to

[37] See *Tex-Cal Land Management*, supra, where misconduct away from negotiations was held less germane to surface bargaining considerations than the negotiating conduct itself.

provide requested information, mitigates against such action. Accordingly, bargaining makewhole will be ordered until Respondent commences negotiating in good faith. Inasmuch as the issue of the Union's representation of the Huron employees has not been resolved through a unit clarification proceeding, bargaining makewhole shall not apply to them, nor shall the other remedies set forth below. The makewhole period shall commence on January 28, 2000, six months prior to the filing of the charge in Case No. 00-CE-5-SAL.

On the basis of the entire record, the findings of fact and 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, D'Arrigo Bros. Co. of California, its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

   (a) Failing or refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (Union) with respect to wages, hours and other terms and conditions of employment of its employees in the bargaining unit certified by the Board in Case No. 75-RC-14-M.

   (b) Failing or refusing to provide the Union with information requested to fulfill its duties as the collective bargaining representative of the unit employees.

(c) In any other 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 Union as the certified bargaining representative of the employees in the certified bargaining unit concerning wages, hours, working conditions and other terms of employment; and, if agreement is reached, embody such terms in a contract.

(b) Upon request, furnish the Union with the information it requested, but has been found to have been improperly withheld.

(c) Make whole employees in the certified bargaining unit for all economic losses they have suffered as the result of Respondent's failure to bargain with the Union over said employees' terms and conditions of employment, with interest to be computed in accordance with the Board's Decision and Order in *E.W. Merritt Farms* (1988) 14 ALRB No. 5. The makewhole period shall extend from January 28, 2000 until the date on which Respondent commences good faith bargaining with the Union that results in a contract or a bona fide impasse.

(d) In order to facilitate the determination of bargaining makewhole, for the period beginning January 28, 2000, preserve and, upon request,

make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and all other records relevant and necessary for a determination by the Regional Director of the economic losses due under this Order.

(e) Upon request of the Regional Director, 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.

(f) 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) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed in the bargaining unit, 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 no hourly wage employees in the bargaining unit in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(h) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all agricultural employees employed by Respondents at any time during the period January 28, 2000 to January 28, 2001, at their last known addresses.

(i) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

(j) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order.

3. The remaining allegations in the Fifth Amended Consolidated Complaint are hereby dismissed.

Dated: October 21, 2005

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DOUGLAS GALLOP
Administrative Law Judge, ALRB

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by refusing to bargain in good faith with the United Farm Workers of America, AFL-CIO (Union), and by refusing to furnish the Union with requested information.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations 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 fail or refuse to bargain in good faith with the Union as the certified bargaining representative, or provide it with information relevant to the exercise of its representational duties.

WE WILL NOT in any other manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

WE WILL make our employees in the bargaining unit whole for all losses in pay and other economic losses they have suffered as the result of our failure and refusal to bargain in good faith with the Union.

WE WILL, upon request, bargain in good faith with the Union, and provide it with requested information necessary in the performance of its representational duties.

DATED: _____

D'ARRIGO BROS. CO. OF CALIFORNIA

By: _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the ALRB. One office is located at 342 Pajaro Street, Salinas, California. The telephone number is (831) 769-8031.

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

DO NOT REMOVE OR MUTILATE