

Tri-Produce Company and Fresh Fruit and Vegetable Workers, Local No. 78-B, United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 32-CA-9024 and 32-CA-9054

December 21, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On June 28, 1989, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings, and conclusions² and to adopt the recommended Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As the record, exceptions, and brief adequately present the issues and the positions of the parties, the Respondent's request for oral argument is denied.

The Respondent has also excepted to the judge's recommended Order and remedy which require, among other things, bargaining and backpay regarding Parker and Firebaugh employees. In this regard, the Respondent represents that it permanently closed its Parker facility following the 1987 season and that it concluded with the Union in 1988 a valid successor agreement covering the Firebaugh employees. We shall leave the resolution of these issues raised by the Respondent's exceptions to the compliance phase of this proceeding.

²Members Cracraft and Devaney find no merit in the Respondent's contention that it was privileged to withdraw its June 20 "offer" before the Union's notification to it that the "offer" had been ratified by the employees. They agree with the judge's finding, for the reasons stated by him, that on June 20, 1987, Union President Lyons accepted the Respondent's contract proposal, and they find that at that point the parties had reached a binding agreement. Even assuming arguendo that the Respondent's subsequent attempted withdrawal of its "offer" occurred before the Respondent learned of the employees' ratification of the contract, the Respondent's withdrawal was unlawful. The matter placed before the employees for ratification was not merely an unagreed-to proposal that the Union had consented to submit to the employees. Cf. *Loggins Meat Co.*, 206 NLRB 303 (1973). Moreover, the parties had not agreed that the Respondent's offer could be accepted only by a vote of the employees. Under these circumstances, Lyons' statement at the outset of negotiations that any final agreement would be subject to employee ratification was not a condition precedent to forming an agreement but, rather, merely a limitation the Union voluntarily imposed signifying that the rights and duties under any agreement reached would not become effective until ratified by the employees. See *Sacramento Union*, 296 NLRB 477 (1989). Additionally, it is clear from Respondent Representative Barsamian's insistence at the end of their June 20 meeting—that Lyons not depart as soon as the employees voted on ratification but, rather, remain until a memorandum of their agreement was typed for his signature—that ratification was viewed as a mere formality.

Chairman Stephens agrees that the Respondent violated Sec. 8(a)(5) by failing to execute the bargaining agreement negotiated by the parties, and timely ratified by the employees, on June 20, 1987. In reaching this conclusion, he finds it unnecessary to resolve the question whether employee ratification was, on the one hand, merely a condition precedent (self-imposed by the Union) to performance under an otherwise binding contract reached by the parties, or on the other hand, the act of accepting a revocable offer so as to form a binding contract. For a discussion of this distinction, its legal ramifications, and the problems attending the relevant Board's precedents, see the Chairman's

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Tri-Produce Company, Firebaugh, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

concurrency in *Sacramento Union*, supra. Even assuming that ratification fell into the latter category, Chairman Stephens finds that given the fact that the Respondent's attorney specifically asked the Union agent Lyons not to leave Parker, Arizona, as he had intended, but to wait until a memorandum of agreement could be typed up for signature, the Respondent impliedly promised to hold open its offer for a reasonable time so that ratification could be concluded and execution obtained. The Respondent's attempted withdrawal of the offer so shortly after it was extended was ineffective.

Virginia L. Jordan, Esq., for the General Counsel.
Harry Finkle, Esq., with *Ronald H. Barsamian* and *Neal E. Costanzo, Esqs. (Finkle & Stroup)*, of Fresno, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Fresh Fruit and Vegetable Workers, Local No. 78-B, United Food and Commercial Workers International Union, AFL-CIO, CLC (the Union) filed the charges in the above cases on June 30 and July 8, 1987,¹ alleging that Tri-Produce Company (Respondent or the Company) violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act (the Act). Based on those charges, the Regional Director for Region 32 of the National Labor Relations Board (NLRB or the Board) issued a consolidated complaint and notice of hearing before an administrative law judge in both cases. The complaint alleges that the Respondent discriminated against its employees and refused to bargain in good faith with the Union, the collective-bargaining representative of its packing employees.

The Respondent filed a timely answer wherein it admitted certain foundational allegations, denied that it engaged in the unfair labor practices alleged, and asserted a variety of affirmative defenses.

I heard this matter on February 9, 10, and 11, 1988, at Fresno, California. Having now carefully reviewed the record, considered the credibility of the witnesses who appeared before me and studied the posthearing briefs filed on behalf of the General Counsel and the Respondent, I have concluded that the Respondent engaged in some of the alleged unfair labor practices on the basis of the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

The complaint contains four salient allegations. First, it alleges that the Respondent unilaterally altered terms of employment without first bargaining with the Union when on June 3 it notified certain of its employees that they must fur-

¹Where not shown otherwise, all dates hereafter refer to the 1987 calendar year.

nish evidence of citizenship or lawful employee status as a condition of employment or reemployment, for reasons other than the Immigration Reform and Control Act (IRCA), Pub. L. 99-603, enacted November 6, 1986. Second, it alleges that Respondent repudiated and refused to execute an agreement concluded with the Union on June 20 applicable to its Parker, Arizona, employees. Third, it alleges that Respondent unlawfully refused to reinstate its striking Parker employees following their unconditional offer to return to work. Finally, it alleges Respondent unilaterally altered the wages, hours, and terms of employment of its Firebaugh, California, employees before an impasse in negotiations with the Union.

Respondent specifically denied the unfair labor practices alleged and asserted six affirmative defenses. Respondent's principal affirmative defense is that the Union engaged in bad-faith bargaining at the times material to the complaint. The remaining defenses assert the complaint is barred by the 6-month statute of limitations, laches and the clean hands doctrine; and that it fails to state a cause of action as well as facts sufficient to constitute a cause of action.²

B. *The Evidence*

1. Background

Respondent, a California corporation, is a nonretail enterprise engaged in the processing, sale, and distribution of cantaloupes and honeydew melons.³ Respondent operates packing facilities at Firebaugh, California, near its headquarters, and at Parker, Arizona, 500 or 600 hundred miles south of Firebaugh. Both cantaloupes and honeydew melons are packed at Parker; only cantaloupes are packed at Firebaugh.

Operations at the two packing sheds are seasonal. The Firebaugh season lasts approximately 90 to 100 days beginning about July 1. The Parker season begins about June 1 and lasts approximately 30 days. Typically, Parker employs approximately 140 employees at the peak of the season and 50 to 60 percent of those employees then move to Firebaugh for that season.

The Union has represented Respondent's packinghouse employees since 1961 when the Company commenced operations.⁴ The wages, hours, and conditions of employment of Respondent's employees have been contained in a series of complex collective-bargaining agreements between Respondent and the Union. Although all employees were ostensibly in a single bargaining unit, separate agreements govern the cantaloupe and honeydew melon operations, separate seniority lists were maintained at the two locations, and wage differentials have existed between the Firebaugh and Parker cantaloupe employees. A piece-rate wage system applies to

employees who pack melons in shipping cartons.⁵ Other support workers are paid by the hour. All employees are provided fringe benefits, including health and life insurance, and pension plans, which are said to be "shelf" plans provided by the Western Growers Association (WGA).

For a number of years, Respondent belonged to the WGA, which negotiated collective-bargaining agreements with the Union on a multiemployer basis that included the Respondent. Although Respondent apparently still belongs to the WGA, Respondent and some other employers began negotiating their own agreements with the Union separately in 1983. Two competitors operating in the Firebaugh area failed to reach an agreement with the Union that year. After protracted strikes during which these two employers continued to operate with replacement employees, the Union was decertified. Respondent, however, concluded a separate cantaloupe agreement and adopted a multiemployer honeydew contract. The agreements contained identical health and pension plans available through the WGA and were effective from March 16, 1983, to March 15, 1986.⁶

In addition to the changing labor relations climate, the western fruit and vegetable packing industry has been undergoing technological changes. Although some employers still utilize hand sorting and sizing methods, others, including the Respondent, now sort and size primarily by machine. Yet others have abandoned packing at central shed locations altogether in favor of field packing. Both the mechanized sheds and the field packing operations have substantially lowered labor costs, making those employers more competitive. Field packing in particular has exerted a significant downward pressure on industry labor costs because field workers are paid much lower wage rates and lack sophisticated fringe benefit packages.

2. 1985-1986 bargaining

The initial bargaining session was held on November 8, 1985. Jess Telles, Respondent's principal, if not sole owner, Ronald Barsamian, a labor counsel, and Steve Patricio, company controller, were present for this meeting. The Union was represented by its president, Michael Lyons, and a workers' committee. Among other matters, Telles informed the union negotiators that Barsamian and Patricio did not have authority to make proposals or conclude an agreement without his prior authorization. For the Union's part, Lyons informed management that any final agreement would be subject to employee ratification.

Barsamian and Lyons were familiar as negotiators. They had bargained prior agreements for Respondent and other employers. Pertinent symbols and techniques peculiar to them evolved from their prior bargaining. If one made a package proposal, the other understood his sole option was to accept or reject the entire proposal. In contrast, an item-by-item proposal provided the option to accept certain items while rejecting others. Finally, if either raised an "idea," it was implied that the subject matter had not been previously

²Only the claim that the Union bargained in bad faith during the period relevant to the complaint is treated in Respondent's brief. As the charge was timely filed and processed, and as the complaint clearly states a cause of action, I find that the affirmative defenses related to the timeliness of the charge and the adequacy of the complaint plainly lack merit. Accordingly, those claims are not addressed further.

³Respondent admitted that its direct outflow exceeded \$50,000 in the year preceding the issuance of the complaint. Accordingly, I find Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that it would effectuate the purposes of the Act for the Board to assert its jurisdiction in this labor dispute.

⁴The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

⁵Packers gross pay under the most recent agreement is not insubstantial. A good packer earns from \$1500 to \$2000 per week when full operation is achieved.

⁶Throughout 1986, the Union maintained that both agreements had automatically renewed. However, as the Company applied the agreements during the 1986 season and the Union agreed to negotiate during 1986, this difference had no practical effect.

cleared by a principal, i.e., Telles in Barsamian's case, and the workers' committee in Lyons' case. These bargaining customs are central to the major issue in the case.

Telles spoke at length during the first bargaining session concerning the Company's competitive position in the industry. Dwelling on the changes since the last agreement had been negotiated, he painted a bleak picture. In addition to stressing the changes in the industry, Telles told of the specific difficulties he faced obtaining production loans because of the uncertainty about land values in the growing area served by the Firebaugh plant.⁷

After Telles' assessment, the Union surely was not surprised when the Company later submitted written proposals for substantial economic concessions, including wage reductions of 20 percent.⁸ The Union's initial economic proposal called for a wage freeze and only limited improvements in the fringes. In June and September 1986 the Union, at the Company's insistence, sought ratification of company proposals but, on both occasions, the proposals were defeated. Nevertheless, the parties continued to bargain tenaciously to narrow their differences.⁹

3. The early 1987 bargaining

The number of sessions in February and April 1987, indicates the parties' major effort to conclude an agreement prior to the start of the 1987 season. A Federal mediator assisted them to narrow many differences at a lengthy session on April 22 in Firebaugh. Lyons and the workers' committee were present for the Union; Barsamian and Patricio were present for the Company. The mediator separated the bargaining teams throughout nearly all of this session and served as a conduit to transmit proposals and evaluations. Near the end, the Union offered the following package proposal to modify the prior agreements:

- Reduce hourly wage rates 7.5%.
- Reduce the packer rate to \$.1314 per carton.
- Establish a \$.005 per carton pool for hourly employees.
- Delete the average packer rate (an existing piece-rate scheme).
- Adopt the new multi-employer honeydew agreement.

⁷At approximately this time, there was considerable publicity throughout California concerning potentially dangerous levels of selenium in the Kesterson Reservoir. This reservoir receives water runoff from the agricultural land to the north where Firebaugh is located. Because some attributed the source of the selenium to agricultural chemicals in the runoff water, proposals were made to abate the flow of that water into the reservoir. In that event, the utility of the adjacent land would have been greatly reduced.

⁸Barsamian's bargaining notes contain repeated references in the early sessions to the Company's desire for a 20-percent wage reduction. On the surface, however, the Company's April and July 1986 proposals seem to contain wage reductions ranging from 35 to 50 percent below the levels specified for the 1985 season in the parties' last agreement. Raoul Gradillez' testimony concerning wage rates implemented at Firebaugh in 1987—supposedly based at above the July 1986 offer—seems to confirm that the wage reductions sought in mid-1986 were far more draconian than a 20-percent reduction.

⁹After the first meeting in 1985, bargaining sessions were held on the following dates in 1986: April 7 and 29; June 3 and 25; July 3, 8, 9, and 21; August 7, 15, 27, and 29; September 5 and 12; and November 11. In 1987, bargaining sessions were held on January 15; February 2, 3, and 26; April 6, 7, and 22; June 11, 18, and 20; and July 1. In addition, the parties exchanged a number of proposals in writing and the principal negotiators discussed their differences on a number of occasions while engaged in bargaining other unrelated contracts.

—Establish a 52 hour work week target with any attendant disputes to be resolved under the grievance-arbitration provisions of the agreement. Pro rate the 52 hour work week concept based on the number of days worked and make it inapplicable to the Firebaugh plant for the first three pay periods and the last pay period.¹³³—Pay \$112 per month for a WGA medical plan designated by the crew at the start of the season.

—Adopt WGA Pension Plan A with a 173 hour per month per employee contribution cap.

—Agreement duration: To March 15, 1990 with a June 1989 reopener.

This proposal was rejected for three principal reasons. First, the Company felt the workweek target would, in practice, become a guarantee. Second, the Company opposed the piece-rate scheme for the hourly employees. Third, the Company thought the Union's medical plan proposal was too expensive. In response, the Company countered with the following package proposal designed to "buy out" objectionable portions of the Union's last proposal:

- Reduce hourly wage rates 7%.
- Reduce the packer rate to \$.1310 per carton.
- No change in existing overtime rates.
- No pool for hourly paid employees.
- Delete the average packer rate.
- WGA Plan 24A medical benefit with a non-duplication feature for family members and permitting individual waivers. Cost of buying up to more expensive plan to be borne by employees.
- WGA pension Plan A with a 173 hour per month contribution cap.
- Adopt the multi-employer honeydew agreement but substitute the medical and pension plans from the cantaloupe contract in the honeydew agreement.
- No 52 hour work week target but the Company would agree to a stable work schedule policy. In return for the wage concessions, Company would not intentionally add packers to the seniority crew for the purpose of cutting the work week. The grievance procedure would be used to resolve disputes about the application of the policy.
- Agreement duration: Same as the Union's proposal.
- Union and workers' committee must fully recommend ratification.

Barsamian claims that when the mediator returned from submitting the proposal, he reported that it appeared there was agreement on all items except the 52-hour workweek issue. At the conclusion of the session, Barsamian claims that Lyons told him directly that the Company's proposal "looks pretty good . . . [but] there's still some differences." At the time, Lyons mentioned that he was "trying to figure out how we can resolve the work week." When the Union team began to leave as if to conclude the session, Barsamian, Patricio, and the mediator followed.

At least Barsamian and Lyons spoke in the parking lot before going their separate ways. Lyons claims that Barsamian focused exclusively on his concerns about the workweek target becoming a guarantee in this exchange so Lyons asked about the other differences in the parties' last proposals.

Lyons says that Barsamian told him not to “sweat the small shit.”

Barsamian claims that both Patricio and the mediator were present when he spoke to Lyons in the parking lot. By his version, Lyons agreed that the workweek proposal was the only remaining issue but Lyons rejected the mediator’s suggestion that the parties remain to iron out this remaining issue. Instead, Barsamian claims, Lyons said he would submit some written language on the workweek issue in a few days and departed.

Following the April 22 meeting no formal bargaining sessions were held until the season started at Parker. However, Barsamian wrote letters to Lyons on May 12 and 28 claiming again that the workweek was the only outstanding issue. The May 28 letter contained his suggested workweek language. No response to either letter was forthcoming from Lyons. In explanation, Lyons claimed that he never received the May 12 letter and received the May 28 letter so close to the next bargaining session (set at some point for June 11) as to make a response unnecessary.¹⁰

4. Preparations for the 1987 Parker season

In the meantime, the Company was making other preparations for the start of the 1987 Parker season. Customarily, the Company notifies seniority workers of the starting date for the Parker packing season. Patricio prepared a letter notice in April or May announcing that the 1987 season would begin in Parker on June 3.¹¹

Based on information received from WGA, the letter also set forth strict requirements for proof of work eligibility but made no mention why such unusual forms of identification were necessary. (See Jt. Exh. 3(ss).) The letter emphasizes that the Company “cannot hire or rehire anyone without [the specified identification documents]” and warns “[t]here will be absolutely no exceptions.” The next paragraph states:

Please note that this is IN NO WAY related to the Immigration Reform and Control Act of 1986 (legalization of illegal aliens).

Patricio altered a suggested WGA form letter to include the quoted paragraph in order to avoid misleading any employees who might be considering an amnesty application pursuant to IRCA. A copy of the letter was sent to Lyons who promptly filed an NLRB charge. That charge was later withdrawn.

5. Bargaining on June 11 and strike authorization

The June 11 bargaining session was held at the Canton Cafe in Parker. Telles, Patricio, and Barsamian attended for the Company; Lyons, Union Agent Thornton, and a worker committee represented the Union. There is some indication that the Union’s committee for this session differed signifi-

cantly from that which had attended the more recent sessions; in particular, it appears that several workers classified as sorters were now included on the committee.

Telles anticipated that an agreement would be concluded quickly because he had been led to believe that only the workweek issue remained unresolved. The opening of the session focused on this issue. After a few remarks, Lyons suggested that the Telles and the workers’ committee be left to discuss the workweek issue. His suggestion was accepted; Lyons, Thornton, and Barsamian then left the room.

While away from the bargaining table, Lyons spoke with Barsamian about other outstanding differences between their final proposals on April 22, i.e., the packer rate, and the multiemployer medical and pension plan in the honeydew agreement. Barsamian replied that he did not anticipate a problem with the packer rate but he would have to discuss the potential for movement on the honeydew fringes with Telles.

Just before lunchtime Barsamian and Lyons were summoned back to the bargaining table. They were informed that Telles and the committee had reached an understanding on the workweek issue. Lyons requested a luncheon recess to review the understanding with the committee. The company negotiators reluctantly agreed.

After lunch, Lyons inquired about other outstanding issues and disclosed that the sorters (one group of hourly paid employees) now insisted upon a wage freeze rather than a 7-percent reduction as proposed by the Company.¹² Surprised by this sudden change of position, Barsamian quickly requested a private side bar with Lyons. While aside, Lyons, looking embarrassed by Barsamian’s account, confessed that the committee was “screwing” him. After the two returned to the table, Telles announced that the Company would not move its last proposal on April 22. The Company insisted that the Union ratify that proposal. Lyons protested initially but finally agreed to seek ratification in the next day or two. It is undisputed that even though the Company’s outstanding package called for a wage reduction, it had agreed not to implement that reduction for the remainder of the Parker season.

At some point on June 11—it is not entirely clear when—Lyons asked Barsamian about the Company’s need for personal identification as outlined in Patricio’s letter. Lyons did not believe the identification was necessary if it was not being requested for compliance with IRCA. Barsamian was unfamiliar with the matter but promised to obtain an answer for Lyons.

On June 12, the Union held a ratification meeting. The ratification proposal was cast in terms authorizing the Union to call a strike if the Company’s offer was not ratified. The membership rejected the Company’s April 22 offer but no immediate strike was called.

6. June 18 events—The Parker strike

Arrangements were made to resume negotiations on Thursday, June 18. However, that morning a notice was posted by at least one of the timeclocks which stated that no paychecks would be issued until all employees had submitted the re-

¹⁰ Barsamian also claimed that he met with Lyons on other matters during the interim and requested workweek language but it was not forthcoming. In its brief Respondent argued at length on the basis of Barsamian’s testimony and the two unanswered May letters that only the workweek issue remained after the April 22 session. I do not credit that claim. Lyons’ position that other issues remained is supported in a prehearing affidavit provided by Barsamian in support of a bad-faith bargaining charge the Company filed against the Union which the General Counsel dismissed. (See R. Exh. 35 at 6.)

¹¹ The startup at Parker was delayed for about a week due to an electrical fire which occurred during the shed reopening procedures.

¹² The finding that a face-to-face exchange occurred between the negotiating teams following lunch is based on a composite of Lyon’s testimony and Barsamian’s prehearing affidavit. (R. Exh. 35, pp. 7–8.) I credit that version as opposed to the testimony at hearing of Telles and Barsamian, both of whom claimed that no such meeting occurred.

quired proof of work eligibility.¹³ Considerable employee discontent erupted. Thursday was the customary payday and the expired agreement required that paychecks be issued by noon. As most employees were not residents of Parker, many required cash to meet their current away-from-home living expenses.

Barsamian visited the plant prior to the scheduled bargaining session. There, he encountered Lyons speaking to a group of employees in the parking lot. When Barsamian approached, a verbal altercation broke out primarily between Dennis Wren, a member of the workers committee, and Barsamian. After the shouting subsided, Barsamian promised that he would attempt to resolve the paycheck matter.

Barsamian first telephoned Patricio who explained the need for the work eligibility proof. Then Barsamian drafted a declaration (required by IRCA) and instructed the office staff to secure all identification documents possible at that time. Barsamian also removed the disquieting paycheck notice.

Near the end of this process, Barsamian claims that Lyons came to the plant office with a form declaration which could have been used in place of the form Barsamian drafted. Perturbed by Lyons belated offer, Barsamian expressed his lack of appreciation for Lyons' attitude including the parking lot confrontation. Purportedly, Lyons said that he was amused at Barsamian's predicament. Lyons denied that he made light of Barsamian's problem; he claims to have only made an effort to see that the paychecks were issued.

By shortly after noon paychecks were issued and arrangements were made to excuse employees from work for brief periods to cash their checks. There is no evidence that this matter produced any further similar disruption.

Barsamian arrived at the Kofa Cafe in Parker between 2:30 and 3 p.m., the time and place of the scheduled bargaining session. Lyons, Union Agent Thornton, and the workers' committee were already engaged in a private meeting when Barsamian arrived and requested further delay. At approximately 4 p.m. bargaining began. Following preliminary exchanges concerning the problems that morning and another current complaint, Barsamian said the Company had no additions to its final proposal of the April 22 but it was still on the table. In an effort to avoid an impasse, Lyons offered an item-by-item proposal.

By Barsamian's account, Lyons detailed the Union's position on each item in the expired agreement. When finished, the Union's position essentially called for a complete renewal of the prior cantaloupe agreement but for its willingness to accept, the Company proposed WGA Plan A pension. The Union also proposed that the Company completely "me too" the multiemployer honeydew agreement. Notwithstanding the item-by-item proposal, Lyons maintains that the Union still had a package proposal on the table but there is no agreement that a package proposal was discussed in any detail.

Barsamian caucused to speak with Telles by telephone about the Union's item-by-item proposal. Upon returning to the table, Barsamian responded to the Union's proposal item-

by-item. Following that, Barsamian offered an item-by-item proposal and told the Union that where the respective proposals differed, the Company rejected the Union's proposal.

A dinner break followed. During this period, Barsamian claims that he had a discussion with Lyons during which Lyons discussed certain ideas. Those ideas included—according to Barsamian—the subjects of reopeners, a freeze on all wages, deleting the average packer rate, and insurance with premiums entirely paid by employees. Although Lyons expressed uncertainty about his ability to sell these ideas to his committee, Barsamian attempted to confer with Telles about this news but failed.

When the parties returned to the table about 8 p.m., Barsamian reported that he had no new proposals because he could no longer reach Telles by telephone. As the two sides were stymied by Barsamian's inability to communicate with Telles, the parties agreed to conclude their session and meet the next morning.

After the bargaining adjourned, Lyons reviewed the situation with the workers' committee. Because there was sentiment on the committee favoring an immediate strike, Lyons polled the committee members. A majority were not in favor; the minority favoring a strike walked out after one stated, "we're going to do what we're going to do." The statement was prophetic; later that evening when Lyons visited a local market he learned by chance from an employee that employees had walked out on strike shortly after 9 p.m.

The following morning Barsamian was preoccupied with securing temporary replacement employees¹⁴ while Lyons was preoccupied with picket line logistics so the planned bargaining session did not occur.

On the morning of June 20, the Company commenced hiring permanent replacements for the striking cantaloupe employees. These replacements were told that the Company could not guarantee their jobs in case there was a strike settlement which required reinstatement of the strikers.

7. June 20 bargaining—The alleged agreement

Later in the morning of June 20, Barsamian met with Lyons and Thornton at the Kofa Cafe. The substance of this meeting and the events which followed shortly thereafter are hotly disputed and critical to the most significant portion of the case.

a. Lyons' version

When the meeting began, Lyons made a package offer to settle the strike.¹⁵ Barsamian told Lyons he would discuss the proposal with Telles and left for a period estimated to be between 20 to 40 minutes.

On his return, Barsamian presented the following proposal: (1) split the unit so there would be separate units at Parker and Firebaugh; (2) freeze the Parker agreement for the present year but have a wage reopener in the next 2 years; (3) start negotiations for a Firebaugh agreement the next day from the positions which existed on June 18; and (4) "me

¹³ This notice was apparently posted only in the cantaloupe shed. According to Lyons, the dock foreman and the honeydew foreman both told him that morning that they had been instructed to withhold checks in their possession until the proper documentation had been received and both refused. Lyons observed checks being issued in both areas before noon.

¹⁴ Respondent concedes that replacement employees utilized on Friday, June 19 were not permanent as they were primarily field workers from the farms supplying produce to the Company.

¹⁵ Lyons said this proposal included the \$.1310 packer rate, the verbal work-week agreement, the \$112 medical insurance contribution by the Company, no \$.005 pool for hourly employees and "me too" the multiemployer honeydew agreement.

too” the multiemployer honeydew agreement with the amended Plan A pension as required by the pension trust and without the 35-hour workweek guarantee. Lyons quickly told Barsamian “he had a deal” and that he would take the agreement to ratify it. Lyons asked about the “scabs” and Barsamian responded that they were “temporary” pending a “resolution with the Union.”

The meeting ended with a handshake between Lyons and Barsamian. Lyons announced that he planned to leave immediately after ratifying the agreement for his El Centro, California, office as he had another pressing matter. Barsamian asked that Lyons not depart Parker until a memorandum of their agreement was typed for signature at the plant office. Lyons agreed and left for the picket line where he obtained ratification of the agreement.

b. *Thornton’s version*

By Thornton’s account of the June 20 Kofa Cafe session, Lyons first outlined the Union’s bottom line for resolving the strike. Barsamian then left purportedly to speak with Telles. After about 45 minutes Barsamian returned with a proposal.

Thornton claims that Barsamian proposed to split Firebaugh and Parker into separate units; to freeze the last cantaloupe agreement in place at Parker with a reopener in the “next two years”; to negotiate immediately for a separate Firebaugh agreement; and to adopt the multiemployer honeydew contract in its entirety.

On direct examination, Thornton implied that the Barsamian proposal included the previously proposed pension cap. Otherwise, the pension and insurance plans applicable to Parker would be as negotiated in the prior cantaloupe agreement and the multiemployer honeydew agreement.

When asked later to recount again the agreement reached, Thornton made no mention of the pension cap; instead, he stated flatly that the pension and insurance plans at Parker (which would include both the cantaloupe and honeydew workers) would be as specified in the prior cantaloupe agreement and the existing multiemployer honeydew agreement.

Thornton said that Lyons accepted Barsamian’s proposal and that the two then agreed that all replacement employees would be laid off in a day or two so the strikers and replacements would not be working side-by-side. When Lyons suggested that he was leaving immediately, Barsamian urged Lyons to ratify the proposal while he returned to the Company office to prepare a typed memorandum of agreement. Lyons agreed and the meeting ended with a handshake.

c. *Barsamian’s version*

Barsamian’s account of the meeting varies substantially from that of Lyons and Thornton. After a preliminary exchange in which Lyons set forth what the Union had to have to settle the strike, Barsamian left to speak by telephone with Telles. During their conversation, Telles rejected the Union’s proposal as well as an idea purportedly floated by Lyons that a Parker agreement be consummated between Richard Telles and the Union.¹⁶

¹⁶Richard Telles, Jess Telles’ brother, had an undivided half interest in the cantaloupes packed at Parker but no longer held any interest in the packing-houses. Whether Lyons was aware of the business relationship between the Telles brothers is not known.

Thereafter, Barsamian said he offered some ideas of his own to Telles. Those ideas were: (1) adopt a freeze at Parker for the balance of the cantaloupe season without an agreement; (2) “me too” the multiemployer honeydew agreement except substitute the medical plan proposed previously by the Company, cap the pension contributions at 173 hours per month and eliminate the workweek provision in the honeydews agreement; and (3) negotiate for a Firebaugh contract from the current positions.¹⁷

Telles provided Barsamian with his “initial” impressions but would not commit himself because he felt pressure from his brother to consult about any proposed contract. In addition, Telles told Barsamian that he wanted also to check the condition of the fields with his son. Barsamian told Telles that in the meantime he planned to discuss this idea with Lyons to see if there was any interest on the Union’s part. Telles told him “great, go for it.”

Back at the Kofa Cafe, Barsamian outlined his idea to Lyons in Thornton’s presence. Barsamian described the scene:

I went back in. I went back to the booth. Mike and Jiggs [Thornton] were still there. It’s in the back booth, in the back of the restaurant. I sat down. I spoke first. I told Mike, look, I’ve got an idea. Jess is still thinking about it. How does this sound to you? . . . We’ll freeze Parker. We’ll negotiate Parker separately. It doesn’t mean there’s a contract or there’s reopeners. We’ll negotiate Parker separately, but at least for this season we’ll freeze it.

For honeydews, my idea would be that we accept the honeydew agreement like we’ve always proposed, but without the medical and pension and work week. On Firebaugh, my idea is, wherever we are in negotiations now, we continue negotiating for the upcoming Firebaugh season.

Mike then responded immediately that he liked it. He said he had to get back to El Centro to write a brief. At that point, I told him to whoa, to stop. Put my hands up. I said, you go back and talk to your people. We’ve already had many problems with you telling us what you think you can do, and then finding out you can’t. I still have to talk to Jess. He’s still trying to find out from Jay [Telles’ son] what’s going on.

I then told him that after we checked with our respective people, if we have an agreement, [and] work out all the details, we’ll put it in writing.

As the meeting was concluded, Lyons asked if the Company planned to bypass any of the fields. Barsamian said that Telles was currently inquiring about that point so he had no answer. Barsamian then left for the company office.

d. *Barsamian’s prehearing affidavit*

In his prehearing affidavit, Barsamian states that he met with Lyons and then returned to the plant where he relayed Lyons’ proposals to Telles. In response, Telles told him that

¹⁷Barsamian summarized the meaning of his Firebaugh idea as follows: “[i]f we’re at impasse, we’re at impasse. If we’re not at impasse, we’re not at impasse. Wherever your proposal is, wherever our proposal is, we’re not touching that.”

he wouldn't mind a freeze in Parker, continue negotiations for a Firebaugh contract and "[m]aybe we could give them the honeydew agreement." Barsamian told Telles that he would try out some of these ideas and returned to the Kofa Cafe to meet further with Lyons and Thornton.

When Barsamian set forth Telles' idea or proposal Lyons told him "great" and reported that he had to leave for El Centro. Barsamian prevailed upon Lyons to "speak" with his people while he spoke with the company officials "and that if we had an agreement we would put it in writing."

After the Kofa Cafe meeting concluded, Barsamian's affidavit states that the company officials mulled over this form of resolving the dispute for about two hours before concluding they did not benefit by it. For this reason, and because the Parker shed was already fully staffed with replacements, the Company rejected this resolution.

e. *Telles' version*

Telles recalled three telephone exchanges with Barsamian on June 20. In the first telephone call Telles merely authorized Barsamian to meet with Lyons. No proposals were discussed.

About 30 minutes later, Barsamian called Telles again to report Lyons' demands to settle the strike. Telles rejected those demands. Thereafter, Barsamian reported that he would return to speak further with Lyons as he had some ideas. On direct examination, Telles gave no indication that there was any discussion of Barsamian's ideas. On cross-examination, Telles stated that he could not recall if any specific ideas were discussed. Yet Telles advised Barsamian that he "felt obliged" to discuss the whole matter with Richard Telles before making any final decisions.¹⁸

After another 30 or so minutes, Barsamian called Telles a third time. On this occasion, Barsamian told Telles that the Union wanted a freeze at Parker under a 2-year "deal" with reopeners. Telles also thought the idea also included further negotiations for a Firebaugh agreement. Telles described his response this way:

[R]on, I told you this earlier, that I wasn't interested . . . I had a little concern with Dick . . . I've talked to Dick, and . . . Dick has told me . . . you do whatever you want to do in this connection . . . Ron, we're not settling it . . . I've taken the beating. When I needed help they didn't help me . . . everything's lost down there anyway . . . and then on top of it . . . even if we could pack melons, we couldn't sell 'em. And our packing costs were in excess of . . . the market price.

f. *Events after the Kofa Cafe meeting*

Several striking employees were on the picket line at the Parker facility when the events of June 20 developed. Dennis Wren recalled that Barsamian first drove out of the parking lot and stopped for Lyons who entered Barsamian's car.¹⁹

¹⁸Richard Telles' role at this point is entirely unclear. In any event, Jess Telles later stated that his brother essentially told him to do whatever he wanted as far as the negotiations were concerned.

¹⁹Employees at the picket line who testified uniformly recalled that Lyons left with Barsamian for the Kofa Cafe that morning. Barsamian and Lyons, however, are in agreement that Thornton, not Lyons, rode to the Kofa Cafe with Barsamian that morning.

The two men then drove off together in the direction of the Kofa Cafe.

Later, while Wren was still at the picket line, he observed Barsamian return alone in his auto. On this occasion, Wren asked how things were going and Barsamian responded, "I think we've almost got it worked out." Yet later, Wren was standing near the plant entrance gate when Barsamian again approached in his auto. On this occasion, Barsamian flashed an "o.k." gesture with his thumb and forefinger in Wren's direction.

Larry Hall, another striker, claimed to have seen Barsamian and Lyons drive away from the picket line together in the direction of the Kofa Cafe at about 10 or 10:30 a.m. At approximately 11 or 11:30 a.m. Hall observed Barsamian return to the plant office alone. Hall walked to the Kofa Cafe where he asked Lyons about the progress in negotiations. Lyons reported that the two sides were "getting closer." Hall left before Barsamian returned but again observed Barsamian return to the plant office, flashing the "o.k." gesture as he went through the plant gate.

Raoul Gradillez, a striker who had been a member of the Union's worker committee through much of the negotiations, recalled that Lyons approached the picket line about 1 p.m. on June 20. At this time Lyons told Gradillez that he had come to an agreement and instructed Gradillez to gather the employees near the plant gate—located 100 to 150 yards away from the plant office by Lyons' estimate—if they wanted to vote on it.

Lyons said that he returned to the picket line after concluding the Kofa Cafe session with Barsamian on June 20 and ratified the agreement reached. He estimated that there were approximately 100 employees present at the time.²⁰

Some of the strikers present for the ratification reported that the unanimous or near unanimous vote to approve the accord reached was accompanied by considerable commotion, an emotion evoked by a welcome end to the strike. When the ratification process was concluded, Lyons waited for Barsamian near the gate for a short period before announcing that he intended to go to a nearby convenience store for a drink and to telephone his office.

After Lyons departed, Barsamian emerged from the office carrying a yellow writing pad in his hand. He approached Gradillez near the plant gate and inquired of Lyons' whereabouts. Gradillez told him that Lyons had left to make a telephone call and would return soon. Gradillez then asked when employees would be going back to work. Barsamian waived the yellow pad at Gradillez and replied, "as soon as Mike signs the paper . . ." Barsamian then retreated part way back into the parking lot where he was photographed a very short time later. That photograph (G.C. Exh. 3) shows Barsamian holding a yellow writing pad, Gradillez in the left foreground, Stephan Cubarulla, the sorters' steward, in the right foreground gesturing with his left thumb pointed up, and the gate guard in the right background.

As Lyons approached the plant gate on his return from the convenience store Jay Telles stepped from the office and hailed Barsamian to come to the office. Lyons trailed Barsamian up to the office door but did not enter. After waiting a short period for Barsamian to return, Lyons returned

²⁰Lyons gave the highest estimate of the number of employees present for the ratification vote. Striking employees who were present gave varying estimates ranging from 40 to 75 employees present.

to the vicinity of the gate where he waited for 15 or 20 minutes until Barsamian emerged from the office. The two men walked toward each other meeting in the middle of the parking lot.

When they met, Lyons said that Barsamian told him that there was no agreement because Telles had "pulled it off the table." Lyons protested vehemently. Barsamian argued that the proposal was off-the-record; Lyons retorted that he did not ratify off-the-record proposals. Lyons then stated that he wanted everyone put "back to work" and that if Barsamian did not want to take the workers back, he'd let the Board settle the matter. After trading "a few profanities," the exchange ended.

Barsamian said that after the Kofa Cafe meeting ended, he returned to the plant office and spoke by telephone with Telles. As noted above, Telles told Barsamian that he had decided that Barsamian's ideas produced no gain for the Company. Thereafter, Barsamian remained in the office for a period of time watching from a window for Lyons' auto. Finally, Barsamian walked out to the plant gate to look for Lyons or his auto but did not see either so he made several inquiries of Lyons' whereabouts before learning that Lyons had left to make a telephone call and would be returning. After waiting in the lot for a period of time, he returned to the office. As he approached the office, Jay Telles was standing outside and reported that Barsamian had a telephone call from another client.

Barsamian remained in Jay Telles' office until he observed Lyons reappear. He then left the office and met Lyons half way into the lot. When they met, Barsamian told Lyons there was no deal because "Jess does not want to go through with anything like that." He explained that the elder Telles did not understand why he should provide the increases called for in the honeydew agreement when he was not getting the cuts he wanted in the cantaloupe agreement. Lyons insisted that the two sides had a "deal." Barsamian responded that Lyons did not know what he was talking about because the final Kofa Cafe exchange was only an idea and, even though the workers were in favor of it, his side was not. After some strong words the exchange ended.

Lyons reported to the group of workers gathered outside the fence that there was no agreement. He claims that he told the employees to go back to work under any conditions even if the Company wanted to pay the minimum wage and that he would file a charge with the Board or a grievance to settle the matter. At approximately 2 p.m., Lyons left to return to his El Centro office.

Barsamian denies that he told Lyons or anyone else at anytime on June 20 or thereafter that the two sides had a deal. He further denied that he told anyone at anytime that he was "in the process of writing up an agreement." Barsamian did not specifically deny the exchange near the gate reported by Gradillez; he could not recall with whom he spoke when he went to the gate in search of Lyons.

8. Return to work offers

Don Montgomery, a dock loader in the dock area and an employee since 1976, called Foreman Matt Forstedt about 3 p.m. on June 20. He told Forstedt that Lyons had told the crew to call about returning to work. Forstedt asked for an opportunity to check with the company office and requested that Montgomery call back later. About an hour later, Mont-

gomery telephoned Forstedt again and was told that no one seemed to know what was going on. Forstedt asked for and received Lyons' office and residence telephone numbers. He told Montgomery to check back with him the following day.

About 6 p.m. on June 21, Montgomery met Barsamian on the street in Parker. Barsamian told Montgomery that he would have to speak with his assistant, Michael Kimbrough, at the company office about returning to work. Yet later that day Montgomery telephoned Kimbrough and told him that he had been told (presumably by Lyons) to return to work. Kimbrough told Montgomery that he was taking names as people called in for a preferential hiring list and that the Company would be taking the strikers back as the replacements left. Montgomery testified that Kimbrough also told him that he would be crossing his own picket line if he returned to work. When Montgomery told Kimbrough that there was no picket line anymore, Kimbrough said "as far as the company's concerned the picket line's still there . . . [i]f you come in, you'll be crossing your own picket line, you're not in the union."

The following day, June 22, Montgomery spoke with Kimbrough and Forstedt in front of the company office. Montgomery claims that Kimbrough told him that the Company was only recalling people from the preferential list and that seniority would not apply. Forstedt interrupted to tell Montgomery to be at work the following morning at 8:30. Apparently speaking to Kimbrough, Forstedt asserted, in effect, that he needed people who could do the work he had to do and that he could not use simply the first person who came up on the list. As Forstedt started to walk away, he told Montgomery to have his wife and son report for work at the same time.

At approximately 7:30 a.m. on June 22, Montgomery received a message to telephone the Company. On this occasion Montgomery again spoke with Forstedt who told him not to bring anyone to work yet because it was still unclear what was going on. Forstedt asked Montgomery to call back in about an hour. When Montgomery called Forstedt as instructed, he was informed that there was another picket line at the Company and that he should not return to work.²¹ Montgomery next worked for the Company when the season began in Firebaugh.

Early on June 21, a group of striking employees gathered in Gradillez' motel room as he was one of the few with a telephone. Gradillez estimated that the group eventually grew to about 25 employees and that about 10 of the employees called the Company's office about returning to work.

Gradillez telephoned the Company office about 8:30 a.m. He spoke with an office employee, gave her his name and told her that he was reporting for work. He was told that he had been permanently replaced but that his name would be put on a "waiting" list. Although Gradillez remained in Parker for another 3 days he was never recalled to work. However, Gradillez was hired for work in Firebaugh when that season started in the early part of July.

Dennis Wren telephoned the company office from Gradillez' room about 9:45 a.m. and spoke with Kimbrough. Wren told Kimbrough that he was checking in for work. Kimbrough told Wren that he had been replaced and that his

²¹ There is evidence that the Union picketed after June 20 with signs claiming that employees had been locked out.

name would be put on a preferential hiring list. Wren thanked Kimbrough and the conversation ended.

Shortly after 10 a.m., Wren telephoned the company office again and spoke with Kimbrough. On this occasion, Wren told Kimbrough that he was calling on behalf of the entire cantaloupe crew to inform the Company that they were all ready, willing and able to return to work. Kimbrough asked if they were returning unconditionally. Wren stated that they were returning "as per the contract we ratified the day before." Wren did not await a response from Kimbrough. Wren was not recalled for work in Parker.

Larry Hall also telephoned the company office that morning from Gradillez' room. He spoke with Kimbrough. Hall told Kimbrough that he was calling to find out when he could begin working. Kimbrough asked if Hall was willing to cross a picket line. Hall responded that the Union did not have a picket line because there was an agreement. Kimbrough then asked if Hall would be willing to return to work unconditionally and sign a form denouncing the Union. Hall told Kimbrough that he would not be willing to denounce the Union but that he would come back to work "with our agreement." When Hall learned from Kimbrough that a hiring list was being kept, he asked to have his name included as the number ten packer, a position he wanted when recalled. Kimbrough told Hall that employees would be hired from the list in the order of their telephone calls.

Sometime in the afternoon of June 21, Barsamian telephoned Lyons at his residence in El Centro. The apparent purpose of this call was to inquire about the nature of Wren's call to the Company that morning on behalf of the entire cantaloupe crew. According to Lyons, he was still upset at Barsamian over the events of the prior day. Barsamian told Lyons that Wren had made an "unconditional offer for everybody to go back to work." Barsamian asked Lyons who spoke for the Union. Lyons told Barsamian that he knew who spoke for the Union and told Barsamian not to bother him at home anymore.

In sum there is no evidence that any of the Parker strikers returned to work at Parker during the 1987 season.

9. The alleged impasse and changes at Firebaugh

Meanwhile, Barsamian sent a mailgram to Lyons on June 22 declaring that the Union's "regressive and bad faith bargaining" as well as the strike of June 18 had produced an impasse. This message further stated that the Company's last package proposal (made on April 22) remained on the table but the Company retained the right to withdraw or amend it and to change the existing wages and working conditions. (Jt. Exh. 3(ii).)

Lyons responded with his own June 22 mailgram claiming that the Union accepted the Company's June 20 proposal and that the Company was locking employees out at Parker. Finally, Lyons reiterated that the employees were ready to "return to work." (Jt. Exh. 3(jj).)

Barsamian promptly responded by inquiring (rhetorically) if the Union's claimed agreement was based on acceptance of the Company's April 22 offer and denying that there was a lockout. (Jt. Exh. 3(kk).)

On June 23, Barsamian sent another mailgram to Lyons withdrawing the April 22 package proposal, requesting that further bargaining be arranged through a Federal mediator

and advising that the Company's last article-by-article proposal remained on the table. (Jt. Exh. 3(ll).)

Lyons responded claiming again that an agreement had been reached and ratified on June 20. Lyons further denied that the Union had bargained in bad faith and asserted that the Union intended to seek redress with the Board and the courts for actions of the Company and its representatives. (Jt. Exh. 3(mm).)

On June 24, Barsamian wrote Lyons to review recent events from the Company's perspective. Barsamian advised that the Company was now withdrawing its last article-by-article proposal and again claimed that an impasse had been reached in negotiations. Because the Company believed an impasse had been reached, the letter advised that new economic terms would be implemented when the Firebaugh season began. (Jt. Exh. 3(nn).) A copy of those terms was included in the letter to Lyons and was posted on the entrance gate at Firebaugh when employees arrived to start the season. There is no evidence that a strike occurred at Firebaugh.

The Federal mediator apparently called a further meeting between the parties on July 1 but it produced no change in positions. Further brief and unfruitful sessions were held on July 6 and 13.

C. The Argument

1. By General Counsel

On the proof of work eligibility issue, the General Counsel argues that as Patricio's letter specifically states that the requirement was unrelated to IRCA and as no such requirement previously existed, Respondent was legally obliged to negotiate with the Union concerning this change as well as withholding pay as a means of compelling compliance. As Respondent implemented the change without prior bargaining, it violated its statutory duty to bargain.

As for the June 20 agreement issue, the essence of the General Counsel's argument is that the credible evidence establishes the existence of an agreement which Respondent is obliged execute when reduced to writing and to implement. This agreement, the General Counsel contends, has a domino effect on the issues related to the 1987 wage and benefit changes made at Firebaugh as well as Respondent's obligation to reinstate the striking Parker employees. If, as the General Counsel contends, an agreement came into fruition on June 20, the terms of that agreement contemplated further negotiations for a separate Firebaugh agreement from the position which existed on June 18. As those negotiations did not occur because of the dispute which erupted over the June 20 agreement question, no bona fide impasse occurred concerning Firebaugh which would privilege the changes made by the Respondent at the start of the 1987 season there. Moreover, the General Counsel believes that one of the provisions of the June 20 agreement which Respondent unlawfully refused to implement specifically involved the understanding that replacement workers would be laid off to make room for returning strikers.

Even assuming that no agreement was concluded on June 20, the General Counsel still contends that the Firebaugh changes were unlawful for two reasons. First, she argues that the events of June 20 at least reflected movement on both sides which precludes finding that an impasse existed. Second, even assuming that an impasse existed, the changes

were unlawful because they were not reasonably encompassed in any prior proposal made by the Respondent.

Finally, the General Counsel argues that Hall's testimony concerning his telephone conversation with Kimbrough on June 21 is reliable and provides the basis for finding that Respondent conditioned his reinstatement on his willingness to renounce the Union.

2. By Respondent

Respondent contends that the General Counsel misreads Patricio's letter and distorts its meaning. In effect, Respondent asserts that the proof of work eligibility requirement was imposed by IRCA and it had no choice concerning its implementation. Therefore, Respondent believes there was really nothing to negotiate and it did not violate the Act by failing to bargain concerning its implementation with the Union.

Respondent claims any finding of a June 20 agreement is unwarranted for a variety of reasons. First, Respondent claims there was no meeting of minds on at least three material terms, to wit, the health and pension plans in the honeymoon agreement, the contract term, and the scope of the Parker "reopeners."

Second, Respondent argues there was no June 20 agreement because the conditions precedent at the outset of negotiations were not met. Specifically, Respondent argues that under those conditions any agreement concluded by the negotiators was still subject to Telles' approval as well as union membership ratification. Respondent asserts that Telles declined to approve the agreement when Barsamian returned from the Kofa the second time on June 20 but in any event the ratification is flawed.

Third, Respondent contends that there was no agreement because the offer was withdrawn before any acceptance was communicated. Central to this argument is the Respondent's contention that Barsamian informed Lyons that Telles had withdrawn the offer before Lyons communicated the fact of ratification to Barsamian.

Believing that no binding agreement was concluded on June 20, Respondent argues that there is insufficient evidence that an unconditional offer to return to work was made by or on behalf of the strikers. Respondent contends that as Lyons did not elaborate on the precise terms under which he was offering to put everyone back to work, no basis exists to conclude that this June 20 statement of Lyons was an unconditional offer.

Respondent further argues that the credible evidence establishes that none of the strikers were informed that they would have to renounce, denounce, or resign from the Union when they reported that they were available for work.

Respondent argues at length that as of June 20 the parties had reached an impasse in negotiations which privileged the unilateral changes made at the start of the 1987 Firebaugh season. The changes implemented there, according to Respondent, conformed precisely to its July 1986 item-by-item proposal except the wage rates implemented were slightly higher than those in that proposal.

Finally, Respondent contends that the Union's own bad-faith bargaining over the course of these negotiations precludes testing its own good faith. In this connection, Respondent asserts that Lyons, on behalf of the Union, failed to provide, or procrastinated in providing, Respondent with written proposals as previously promised by him on numer-

ous occasions, canceled or failed to attend scheduled bargaining sessions, and altered his position on critical issues when it appeared that agreement was imminent. This conduct was motivated, the Respondent claims, to avoid an agreement with Respondent which would undermine another agreement between the Union and a multiemployer group which contained a "most favored nations" clause.

D. The Issues

The issues framed by the pleadings, facts and arguments are as follows

1. Whether the Respondent made an unlawful unilateral change by requiring employees to provide proof of work eligibility at the start of the 1987 season.

2. Whether Barsamian made a firm contract offer or merely proposed an "idea" on June 20.

3. If Barsamian made a firm contract offer, was it timely withdrawn before acceptance by the Union?

4. Were any unconditional offers to return to work made by, or for, the Parker strikers?

5. If Respondent's conduct beginning on June 20 is unlawful, is it excused by the Union's prior bad-faith conduct?

6. Whether Respondent unlawfully conditioned reinstatement of the Parker strikers upon the renunciation of their union membership.

7. Whether Respondent unlawfully implemented new economic terms at the outset of the 1987 season at Firebaugh.

E. Further Findings and Conclusions

1. The work eligibility verification issue

Complaint paragraphs 11(a) and (b) pertain to the Respondent's demand for proof of work eligibility. I conclude these allegations lack merit as I am satisfied that Patricio's letter when understood in the context of IRCA does not state that the work eligibility requirements are unrelated to IRCA.

IRCA became effective November 6, 1986, following well-publicized congressional deliberations. IRCA title I (8 U.S.C. § 1324a and § 1324b) and title II (8 U.S.C. § 1255a) represent a significant change in American immigration law.

Title I prohibits employers from employing aliens after November 6, 1986, who are not authorized to work in the United States, establishes an elaborate work eligibility verification scheme, and prohibits discrimination in the hire and tenure of employees on the basis of national origin.

Under the IRCA's work eligibility verification scheme, each newly hired employee must attest under penalty of perjury that he/she is a U.S. citizen or national, or, if an alien, that he/she is legally authorized to work in the United States. In addition, the employer is required to attest under penalty of perjury that a responsible agent has inspected the documents offered by new workers to establish his/her U.S. citizenship or nationality, or alien work authorization, and that the documents appeared genuine. 8 U.S.C. § 1324a(b).

The statute categorizes and lists some forms of acceptable identification in the following manner: (1) those establishing both employment authorization and identity; (2) those establishing employment authorization; and (3) those establishing individual identity. If an employment applicant provides one document from the first category, that is enough. Otherwise, the new employee must produce one document from each of the two other categories.

Implementation of the new work eligibility verification system was divided into three stages. The first stage which lasted until June 1, 1987, was designed to educate employers and employees about the requirements of the new law.

The second stage permitted agents of the Immigration and Naturalization Service to conduct compliance investigations and issue warning citations for violations. This stage lasted until June 1, 1988.

The third stage—now permanent—subjects employers hiring aliens without proper U.S. work authorization after November 6, 1986, to civil penalties ranging from \$250 to \$2000 per employee for the first offense. Subsequent violations carry higher civil penalties. District courts are authorized to enjoin a pattern or practice of hiring aliens not authorized to work and such violators are subject to criminal prosecution. Employers who fail to obtain proper verification and attestations are subject to civil penalties ranging from \$100 to \$1000 per employee. 8 U.S.C. § 1324a(e).

The statute exempts employees hired before the date of enactment from the employment verification requirements. Employees hired before that date who are subsequently absent for approved leaves of absence, strikes or temporary layoffs also need not complete the verification requirement.²² However, under regulations adopted to implement the so-called preenactment exemption, employees are deemed to have lost their preenactment status if they quit, are terminated by their employer (which includes situations “in which an employee is subject to seasonal employment . . .”), or are excluded, deported or depart the country under an order of voluntary departure. 8 CFR § 274a.(b).

Title II established a so-called amnesty program to legalize the U.S. residency of aliens who entered the country illegally but who had since resided here for 5 consecutive years or longer. The program established under Title II set a specified period of time for such individuals to make application for legalization of their residency. Wide publicity was given to this program potentially applicable to millions of individuals.

Against the foregoing statutory backdrop, I have concluded that Patricio’s June 1987 letter, fairly read, simply says that the work eligibility verification requirement, which he detailed, is in no way related to the Title II program for legalizing the residency of illegal aliens. The disputed paragraph in the letter cannot be read to mean that the work eligibility requirements are unrelated to the entirety of IRCA simply because the amnesty clarification is parenthetically enclosed.

Having concluded that Patricio’s letter does not state flatly that the new proof of work eligibility is unrelated to IRCA, I further find that Respondent did not violate the NLRA by unilaterally requiring that proof or by the temporary withholding of paychecks on June 18 as claimed by the General Counsel.

Although Respondent may not have been subject to a civil penalty in June 1987, IRCA nevertheless imposed a non-negotiable duty upon Respondent to verify the work eligibility status of its employees. Whether Respondent’s seniority employees were exempt is, at best, very doubtful as their employment is clearly seasonal. For this reason, I am satisfied

²² See, e.g., “Handbook for Employers” containing instructions for completing Form I-9, the employment eligibility verification form at page 8. This publication was prepared and widely distributed by the Immigration and Naturalization Service as a part of the Service’s program to implement the educational program mandated by the statute.

that Respondent reasonably construed IRCA as being applicable to its situation.

Although I agree with the General Counsel’s contention that the pay withholding action seriously affected employees, the evidence is insufficient to establish that Respondent acted unlawfully. This is especially true where, as here, the evidence shows that the clumsy compliance effort was not uniformly enforced and was quickly corrected without further incident when Barsamian was made aware of the situation on June 18.

For these reasons, the recommended Order provides for the dismissal of these allegations.

2. The June 20 agreement issue

The preponderance of the credible evidence warrants finding that a binding agreement was concluded on June 20. This resolution is compatible with the usual rules of contract formation even though it is recognized that those rules do not confine the collective-bargaining process. *Presto Casting Co. v. NLRB*, 708 F.2d 495, 497–498 (9th Cir. 1983).

The credibility resolutions concerning this issue are not without difficulty. Both Barsamian and Lyons were disturbingly argumentative while testifying, a fact that did not inspire immediate confidence in either witness. However, for reasons stated below, I find Lyons’ account to be the more reliable of the principal witnesses on this issue.

Barsamian insistence that he presented only an amorphous idea when he returned to the Kofa Cafe is inexplicably inconsistent with a variety of independent events which followed shortly thereafter. Lyons’ action in seeking prompt employee ratification strongly suggests that a firm proposal had been made by Barsamian; it is highly improbable that Lyons would have taken this step absent a belief that a firm understanding existed.

Other witness who did inspire substantial confidence while testifying lend support to the scenario depicted by Lyons. Gradillez’ account of his exchange with Barsamian following the ratification vote is particularly important. Barsamian’s remark to Gradillez states outright that an agreement awaited Lyons’ signature. Barsamian’s remark to Gradillez is tantamount to an admission on the critical point related to this issue and Barsamian provide no clear denial.

Extrinsic evidence of Barsamian’s public demeanor up to that point, while not conclusive, is consistent with my conclusion. In short, Barsamian acted like an agreement had been reached. This evidence includes his acknowledged insistence that Lyons delay returning to his office; the handshake at the conclusion of the meeting; and the “o.k.” signal in the direction of Wern and Hall upon returning to the plant. These incidental events are all compatible with Barsamian’s remark to Gardillez and Lyons’ assertion that an accord was reached. Even the photograph depicting the sorters’ steward flashing a thumbs-up signal is some slight indication of a positive event.

Respondent calls attention to the fact that Thornton did not fully corroborate Lyons on the details of the agreement reached. Although true to a certain extent, Thornton agreed with Lyons on the important point that a proposal was made which Lyons accepted on the Union’s behalf. Having observed Thornton testify, I do not place significant weight in his inability to recount the details of the agreement as well as Lyons. Thornton did not impress me as a perceptive indi-

vidual on matters of this sort. Indeed, even Respondent complained bitterly about Thornton's distortion of its proposal when he conducted the June 1986 ratification vote.

Barsamian's own account of his parking lot exchange with Lyons on June 20 implicitly acknowledges that only Telles was not in accord with the understanding reached that day. Viewing that exchange, the question is really reduced to whether or not Telles had previously approved the proposal made by Barsamian. On this point, I find Respondent's evidence seriously confused.

In his testimony, Barsamian takes credit as the originator of the "idea" which led to the agreement. By contrast, his prehearing affidavit attributes at least the broad outlines of that "idea" to Telles which places the matter in a far different posture in deciding whether or not Barsamian had prior authorization. The conclusion which I have reached that Barsamian made a previously authorized proposal when he returned to the Kofa Cafe is consistent with Lyons' ratification action and the other evidence implying that he returned to the company office only to prepare a memorandum of agreement.

Telles' testimony concerning the content of the telephone calls between Barsamian and himself was vague and inconsistent. Thus, his account of the second phone call that day gives little indication of any significant discussion about Barsamian's "idea." Yet, in agreement with Barsamian's testimony, he sent his negotiator back to the table for further discussions. Telles' account of the third telephone conversation with Barsamian suggests that he had previously rejected either Barsamian's "idea" or any type of accord with the Union. I find it impossible to reconcile this serious inconsistency.

Having credited Lyons' account of the June 20 events, I find that Barsamian presented an offer previously authorized by Telles which Lyons accepted subject to membership ratification.

Respondent's further contentions merit comment. Its claim that a condition precedent, i.e., Telles' subsequent approval, was not met lacks merit. Although Telles informed the Union at the first bargaining session that both Barsamian and Patricio actions required his approval, the subsequent bargaining process establishes that Barsamian did not make proposals without being authorized to do so by Telles. For example, the bargaining on June 18 was terminated precisely because Barsamian could not reach Telles to determine if he desired to modify the Company's existing proposal.²³

Having concluded that Barsamian returned to the Kofa Cafe on June 20 with a package proposal rather than an "idea" or an "off-the-record" offer, I find that under the guidelines established by the parties, the offer had previously been cleared by Telles. As Lyons accepted the proposal tendered rather than making a counteroffer, further approval by Telles was unnecessary. Hence, the condition precedent argu-

ment is inconsistent with the evidence concerning the negotiation ground rules and the practices followed in the prior bargaining sessions. By contrast, had Barsamian accepted an offer propounded by Lyons, those ground rules would have required Telles' subsequent approval.

I reject Respondent's contention that the offer was withdrawn before acceptance was communicated. Although true that Barsamian announced to Lyons in the parking lot that the proposal had been taken "off the table" before Lyons mentioned that it had already been ratified, I am satisfied Barsamian was aware that ratification had already taken place.

Assuming that favorable membership action was necessary to remove the sole limitation on Lyons' authority to accept Respondent's proposal, there is no evidence of an understanding concerning the method of communicating the fact of ratification. Where, as here, the ratification vote was conducted immediately outside the plant entrance gate in clear view from the company office and was attended with much commotion, it is reasonable to infer that these circumstances alone provided the necessary message about the outcome of the ratification vote. If not, this evidence coupled with Barsamian's response to Gradillez' inquiry about returning to work shows convincingly that Barsamian already knew the outcome of the ratification vote. These events occurred before Barsamian told Lyons that the proposal had been removed from the table.

The *Loggins Meat* case on which Respondent relies in fashioning its timely withdrawal argument is inapposite to the circumstances found here. There, the union's negotiator did not directly accept the offer made. Instead, he merely told the company negotiator that he would submit the proposal to the membership for acceptance. In these circumstances, ratification became the equivalent of acceptance and could not be dispensed with or modified by the union agent as has occurred in other cases.²⁴ Because the offer was later withdrawn before any notice of membership acceptance was communicated, the Board held that no contract was formed. In effect, this decision applies elementary contract law of offer and acceptance.

In contrast to *Loggins*, Lyons specifically accepted the Company's proposal on June 20 leaving only ratification as the final hurdle. As found above, the fact of ratification thereafter became apparent to Barsamian before notice of withdrawal was communicated to the Lyons. It is my conclusion that when Barsamian acquired this information by whatever means, the final step had been taken to the formation of a binding agreement and Respondent was no longer at liberty to withdraw its Kofa Cafe proposal.

Respondent's contention that there was no meeting of minds sufficient to form an agreement also lacks merit. As noted earlier, even Barsamian's testimony refutes this contention. The statements he made to Lyons in the parking lot following the ratification vote are unrelated to a lack of agreement. Instead, his statements implicitly recognize that there was an understanding between Lyons and himself; only Telles' belated withdrawal of the proposal earlier made in the Kofa Cafe prevented implementation of the agreement. The claim now made that there was no meeting of minds on the

²³Typically, the Board views ratification by a negotiator's principal as a limitation on the negotiator's authority to conclude a final agreement rather than a condition. See, e.g., *Joe Carroll Orchestras*, 254 NLRB 1158 (1981); *University of Bridgeport*, 229 NLRB 1074 (1977); and *Sunderland's Inc.*, 194 NLRB 118 (1971). In contrast, scholars view conditions, whether precedent or subsequent, as facts or events related to a party's right to bring a cause of action on a contract formed by rules of offer and acceptance. See *Corbin on Contracts*, One vol. ed., West Publishing Co., St. Paul, MN, 1952, Chapter 30; *Basic Contract Law*, 4th Ed., Fuller & Eisenberg, West Publishing Co., St. Paul, MN, 1981, pp. 959-962.

²⁴See, e.g., *C & W Lektra Bat Co.*, 209 NLRB 1038 (1974); *M & M Oldsmobile*, 156 NLRB 903 (1966).

substantive content of the agreement is inconsistent with the clear indication given by Barsamian that Telles did not approve the agreement concluded earlier with Lyons.

Respondent's claim that the June 20 agreement is defective for want of agreement on material terms such as a term of the Parker cantaloupe contract, the scope of the second- and third-year reopeners, and the health and pension plans in the honeydew contract is unsupported by the evidence.

In accord with Lyons' testimony, I find that the Respondent agreed to "me to" the honeydew contract in its entirety save for the modifications mandated by the pension trust and the workweek provision which the parties long previously agreed to delete. Hence, with respect to the honeydew agreement, both the term and the fringe benefit plans are dictated by the terms found in the multiemployer agreement itself.

Respondent cites the extended dispute in the negotiations over the health and pension plans as evidence of the improbability that the June 20 agreement included the health and pension plans in the multiemployer honeydew agreement. Although true that this departure represented a significant concession, Lyons almost immediate acceptance suggests with equal force that such a concession was made. By doing so, the Parker cantaloupe and honeydew agreements retained their historical feature of similar fringe benefits.

Lyons claim that the June 20 proposal accepting the multi-employer health and pension plans is not the only evidence that such a move was under consideration. Lyons also asserted without contradiction that Barsamian had remarked to workers' committee member Loren Hoover on April 22 that Respondent would consider a complete "me too" of the honeydew agreement. Moreover, in his prehearing statement, Barsamian claimed that Telles initiated the June 20 proposal which included "giv[ing] them the honeydew agreement." Because the strike had a serious and immediate economic impact,²⁵ reliance on past proposals as a gauge for proposals likely made on June 20 is not entirely reliable.

The agreement for a "freeze" at Parker with wage reopeners in each of the following 2 years similarly implies that the Parker cantaloupe agreement was to remain in place for a 3-year term. As the June 20 agreement alludes to no further specific dates for the contract term, it is reasonable to infer that the term "freeze" as used by the parties here includes both the dates specified in the last agreement adjusted for the calendar years encompassed by the 3-year term implied by the reopener understanding and the noneconomic language of the prior cantaloupe agreement.

No one disputes the fact that negotiations for a Firebaugh agreement were to continue. Hence, the Parker agreements were not applicable to Firebaugh. No claim is made that a material term is lacking from this portion of the understanding.

The final aspect of the June 20 agreement relates to the return of the striking employees. Essentially, this portion of the parties' understanding provided only that replacement workers would be laid off and the striking employees would be returned to work as needed. Here too, no material term is lacking. In agreement with the General Counsel, I find the

fact that the parties discussed this issue at all is further evidence that agreement had been reached on other matters.

The principal remaining claim is whether the Respondent's failure to bargain in good faith in this circumstance is excused by any prior bad-faith bargaining on the part of the Union. In the main, Respondent relies on the *Continental Nut* case²⁶ which held, inter alia, that the course of conduct by a union negotiator was so lacking in good faith that it "removed the possibility of negotiation and precluded the existence of a situation in which Respondent's good faith could be tested." Here, Respondent asserts that the totality of the Union's conduct in general and Lyons' conduct in particular evidences a lack of good faith.

In support of its claim of bad-faith conduct by the Union, Respondent cites occasions in the long negotiations when Lyons failed to provide, or procrastinated in providing, written proposals as previously promised; canceled or failed to attend scheduled meetings; and repudiated tentative agreements previously reached. In particular, Respondent claims that following the understanding between the workers' committee and Telles on June 11 over the work week issue, Lyons began making increased demands which precluded completion of an agreement that day.

Having carefully studied the record, I am satisfied that the consistent claim that only the workweek issue remained at the conclusion of the April 22 session is erroneous. Moreover, there is scant evidence in the record that the negotiations were impeded by any canceled bargaining sessions and ample evidence that when Lyons was not present personally for negotiations, Union Agent Thornton was. Likewise, the negotiations do not appear to have been seriously hampered by the lack of written proposals.

But entirely aside from the blame Respondent attempts to attribute to Lyons, this case differs markedly from the situation in *Continental Nut*. In that case, the General Counsel claimed that the employer had engaged in surface bargaining. The the pertinent part of that decision was that the union's bad-faith conduct made it impossible to determine the true nature of the employer's conduct.

By contrast, the issue here is focused solely on to whether Respondent unlawfully repudiated an agreement reached on June 20. Even if it is assumed for purposes of argument that the Union's prior conduct was short of the good-faith mark, when the parties came to an agreement on June 20, the Union's prior conduct—and for that matter the Respondent's prior conduct—ceases to have relevance insofar as the statutory requirement to reduce their agreement to writing and execute it is concerned. At that point, the relevant inquiry shifts to the actions taken by the parties to implement the agreement concluded. Unlike the situation in *Continental Nut*, the parties' good faith toward the execution and implementation of their agreement is subject to measure without regard to what occurred before unless the agreement itself was induced by fraud or unlawful coercion. No fraud or unlawful coercion is claimed by Respondent.

For the foregoing reasons, I find that Respondent's affirmative defense to the allegation that it unlawfully refused to execute and implement the June 20 agreement because the Union engaged in prior bad-faith bargaining lacks merit.

²⁵ Apart from Telles' testimony about the damage caused by the strike, foreman Forstedt's rebellion against management's plan for recalling strikers from the preferential list is further indication that inexperienced employees, whether strikers or replacements, made operations difficult.

²⁶ *Continental Nut Co.*, 195 NLRB 841 (1972).

By repudiating the June 20 agreement, I find that Respondent breached its duty to bargain in good faith. It is well settled that parties are obliged to execute written contracts incorporating any agreement reached and to adhere to the terms of such agreements. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). Where, as here, an employer repudiates and refuses to adhere to the terms of an agreement, the Board is empowered to enter an order requiring the execution of an agreement and the reimbursement of employees for the losses suffered as a consequence of the failure to adhere to the terms of an agreement. *NLRB v. Strong Roofing*, 393 U.S. 357 (1967).

3. The remaining issues

As the binding June 20 agreement included, in effect, a strike settlement requiring Respondent to lay off replacement workers and reinstate the striking Parker employees, I find that Respondent's total repudiation of the agreement, including its strike settlement aspect, also violated the Act. Accordingly, I find it unnecessary to decide whether any independent, unconditional offer to return to work was made by, or on behalf of, the striking employees.

In addition, having concluded that Respondent repudiated the binding agreement of June 20, I further find that no bona fide impasse had been reached in the negotiations for a separate Firebaugh agreement when Respondent implemented the unilateral changes in wages and fringe benefits at the outset of the outset of the 1987 Firebaugh season. *NLRB v. Katz*, 369 U.S. 736 (1961); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983).

Within 4 days following the June 20 agreement, Respondent had withdrawn all pending proposals and announced that it intended to implement the changes at Firebaugh on a unilateral basis. When this action is viewed in connection with the repudiation of the remainder of the June 20 agreement, Respondent's claim that an impasse existed at Firebaugh is plainly unsupported. Under that agreement, Respondent had obliged itself to continue the negotiations for a separate Firebaugh agreement using as a point the departure the state of negotiations which existed prior to June 20. Its conduct subsequent to June 20 involving Firebaugh reflects the total repudiation of the binding agreement reached on June 20.

Finally, General Counsel alleges that Respondent violated Section 8(a)(1) and (3) of the Act on the basis of Larry Hall's testimony that he was asked to sign a form denouncing the Union when he telephoned the Parker office on June 21 seeking reinstatement. Attorney Kimbrough who fielded most of those calls for the Respondent emphatically denied making any such statement to any of the strikers who called on that date but had no specific recollection of speaking with Hall. Although several other strikers called for the same purpose on that date and reported speaking with Kimbrough, none testified to any similar statement during the course of their calls.

In these circumstances, I credit the denial of Kimbrough and find that Respondent did not insist that employees denounce the Union as a condition of returning to work. Accordingly, the recommended order provides for the dismissal of this allegation.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By repudiating the agreement reached with the Union on June 20, 1987, and refusing to execute a memorandum containing the terms of that agreement, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. By unilaterally altering the wages and fringe benefits applicable to its Firebaugh, California, employees commencing with the start of the 1987 season, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. Respondent did not engage in any further unfair labor practices alleged in the complaint of the General Counsel in this matter.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

As Respondent repudiated, and refused to reduce to writing and execute the agreement reached with the Union on June 20, 1987, the recommended Order provides that Respondent must, upon request by the Union, execute a written instrument memorializing the June 20 agreement and promptly implement that agreement. The recommended Order further provides that Respondent bargain in good faith with the Union and reduce to writing, execute and implement any further collective-bargaining agreement reached with the Union concerning its employees at Firebaugh, California.

The recommended Order also requires Respondent to reinstate the striking employees at Parker, Arizona, in accord with the June 20, 1987 agreement. Employees at both Parker, Arizona, and Firebaugh, California, are to be made whole for all losses incurred by them as a consequence of its repudiation of the June 20, 1987, agreement reached with the Union and its subsequent unilateral change in the wages and fringe benefits at Firebaugh, California. Backpay, if any, shall be computed as though striking employees at Parker, Arizona, had been reinstated to their former positions in accord with the June 20, 1987, agreement, and as though its Firebaugh, California, employees had been paid in accord with the terms and conditions of employment in effect prior to Respondent's unlawful unilateral changes at Firebaugh.

Backpay, if any, is to be computed in accord with the formulae established in *Ogle Protection Service*, 189 NLRB 682, 683 (1970), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The appropriate method of determining interest on any backpay due is specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to the trust fund account of any employee shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

The Respondent, Tri-Produce Company, Firebaugh, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Fresh Fruit and Vegetable Workers, Local 78-B, United Food and Commercial Workers International Union, AFL-CIO-CLC (Union) as the exclusive representative of Respondent's employees in the following separate units appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

(1) All full-time and regular part-time packinghouse employees at Firebaugh, California, engaged in packing and handling lettuce, chicory or endive, carrots, topped carrots, celery, broccoli, cabbage, melons, prepacked celery or carrots and/or cauliflower; excluding office clerical employees, guards, and supervisors as defined in the Act.

(2) All full-time and regular part-time packinghouse employees at Parker, Arizona, engaged in packing and handling lettuce, chicory or endive, carrots, topped carrots, celery, broccoli, cabbage, melons, prepacked celery or carrots and/or cauliflower; excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) Refusing to execute a written memorandum containing the terms of the June 20, 1987 agreement concluded with the Union and promptly implementing those terms, including the reinstatement of its striking Parker, Arizona, employees to their former positions.

(c) Unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees represented by the Union without the Union's agreement or an impasse in negotiations with the Union concerning such changes.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive representative of the unit employees at its Firebaugh, Cali-

fornia, and Parker, Arizona, packinghouses concerning wages, hours, and other terms of employment.

(b) On request, execute a written memorandum containing the agreement reached with the Union on June 20, 1987, and promptly implement the terms of that agreement including the reinstatement of striking employees at its Parker, Arizona, packinghouse to their former positions or substantially equivalent positions if their former positions no longer exist.

(c) Restore and maintain the expired agreement with the Union insofar it applied to the employees of the Firebaugh unit prior to the start of the 1987 Firebaugh packing season until a new Firebaugh agreement is negotiated with the Union or a lawful impasse is reached in negotiations for a new Firebaugh agreement.

(d) Make whole employees and their fringe benefit trust fund accounts for all losses resulting from (1) its failure to timely reinstate striking Parker unit employees pursuant to the June 20, 1987, agreement with the Union and (2) its unilateral change in the pay rates and fringe benefits at the start of the 1987 Firebaugh packing season, together with interest, as provided in the remedy section of the administrative law judge's decision in this matter.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the backpay and trust fund reimbursements due under the terms of this Order.

(f) Post at its packinghouse facilities in Firebaugh, California, and Parker, Arizona, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

²⁸If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing before an administrative law judge, the National Labor Relations Board has found that we violated the National Labor Relations Act. To inform you of the out-

²⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

come of that matter, the Board has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Fresh Fruit and Vegetable Workers, Local 79-B, United Food and Commercial Workers International Union, AFL-CIO-CLC (Local 79-B) as the exclusive bargaining representative of our employees in the following separate appropriate units:

- (1) All full-time and regular part-time Firebaugh, California packinghouse employees engaged in the packing and handling of lettuce, chicory or endive, carrots, topped carrots, celery, broccoli, cabbage, melons, prepacked celery or carrots and/or cauliflower; excluding office clerical employees, guards, and supervisors as defined in the Act.
- (2) All full-time and regular part-time Parker, Arizona packinghouse employees engaged in the packing and handling of lettuce, chicory or endive, carrots, topped carrots, celery, broccoli, cabbage, melons, prepacked celery or carrots and/or cauliflower; excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to execute a written memorandum containing the terms of the agreement reached with Local 79-B on June 20, 1987, and immediately implement those terms.

WE WILL NOT change the terms and conditions of employment established in any agreement reached with Local 79-B until a successor agreement is negotiated or a valid impasse in bargaining for a new agreement is reached.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL promptly execute a written memorandum containing the terms of the agreement concluded with Local 79-B on June 20, 1987, and abide by those terms, including the reinstatement of the striking Parker employees.

WE WILL, on request, bargain with Local 79-B concerning the terms of a new agreement applicable to the Firebaugh employees.

WE WILL, on request by Local 79-B, restore and maintain the terms and conditions of employment contained in our expired agreement with Local 79-B insofar as it was applicable to the Firebaugh employees, including wage rates and fringe benefits, until a new agreement is negotiated or a valid impasse in bargaining is reached.

WE WILL make employees of both units and their fringe benefit trust fund accounts whole for the losses incurred as a result of our failure to timely reinstate the striking Parker employees pursuant to the June 20, 1987, agreement with Local 79-B and our failure, beginning with the 1987 season, to pay our Firebaugh employees the wage rates and fringe benefits contained in our expired agreement with Local 79-B, together with interest required by law.

TRI-PRODUCE COMPANY