

**J. R. Simplot Company and General Teamsters, Food Processing Employees, Public Employees, Warehouse and Helpers, Local 760, International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Cases 19-CA-20964 and 19-CA-21228

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On September 23, 1992, Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief; and the Respondent filed exceptions, a supporting brief, and a response 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 exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.<sup>3</sup>

The judge found, and we agree, that the Respondent, an operator of a recently closed plant in Wenatchee, Washington, where the Union was the employees' bargaining representative, violated the Act by refusing to recognize and bargain with the Union as the representative of the employees at the Respondent's newly opened plant in Quincy, Washington. The General Counsel has excepted to the judge's failure to require the Respondent to make whole the Union for the loss of any dues revenues which the Union would have received through the checkoff provisions of the parties' contract covering the Wenatchee unit employees who transferred to Quincy. For the reasons set forth below,

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

<sup>2</sup> The judge inadvertently omitted the jurisdictional findings. Based on the record, we find that the Respondent, a Nevada corporation, engages in food processing at its facilities in Boise, Idaho, and Quincy, Washington, where it annually has gross sales of goods and services in excess of \$500,000; and where it annually sells and ships goods or provides services from its facilities within the State of Washington to customers outside the State, or to customers within the State who were, themselves, engaged in interstate commerce by other than indirect means, of a total value in excess of \$50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

<sup>3</sup> We find, as argued by the General Counsel on exception, that the make-whole remedy in the judge's recommended Order applies to seasonal employees because they are encompassed by the unit that the parties stipulated as appropriate for collective bargaining at the Respondent's Quincy facility.

Additional amounts due the benefit funds under the judge's recommended Order shall be determined by the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

we find that the judge properly refused to grant the General Counsel's requested remedy.

It is well settled that an employer's obligation to abide by the terms of a checkoff provision ceases with the expiration of the contract. See *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The General Counsel's theory relies on a contract clause that provides for automatic continuation from year to year in the absence of an effective termination. The General Counsel, however, has not excepted to the judge's specific finding that the parties' contract expired on the day before the employee transfer. Further, in the cases on which the General Counsel relies, the parties' contracts would have continued but for the unfair labor practices. In the instant case, we cannot say with surety that the contract would have continued had the Respondent fulfilled its bargaining obligation. We therefore will not speculate on what the parties might have done about the expired contract in the absence of the Respondent's insistence that the new facility be nonunion. See, e.g., *Xidex Corp.*, 297 NLRB 110, 118 (1989), enfd. 924 F.2d 245 (D.C. Cir. 1991). Accordingly, we find no merit to the General Counsel's exception.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, J. R. Simplot Company, Boise, Idaho, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Patrick Dunham, Esq.*, for the General Counsel.  
*Kathleen A. Anamosa, Esq. (Davis, Wright & Tremaine)*, of Seattle, Washington, for the Respondent.  
*Kenneth J. Pedersen, Esq. (Davies, Roberts & Reid)*, of Seattle, Washington, for the Charging Party, Teamsters Local 760.

DECISION

TIMOTHY D. NELSON, Administrative Law Judge. In this prosecution, the Board's General Counsel claims that J. R. Simplot Company (Simplot), operator of a recently closed plant in Wenatchee, Washington, where Teamsters Local 760 (the Union) was the employees' bargaining agent, owed and violated a duty to recognize and bargain collectively with the Union as the representative of employees at its newly opened plant in Quincy, Washington. Simplot disputes this, claiming a right to open and operate Quincy on a "nonunion" basis. I heard the merits in trial in Wenatchee on April 10 and 11, 1991, where all parties were represented by counsel. Before penetrating the merits of the statutory controversy any further, I will find it necessary to describe and discuss the background as it relates to an arbitration of a contract dispute between the Union and Simplot. This might not have been required were it not for the General Counsel's claim on brief

that, for some purposes, at least, the arbitrator has pronounced the “law of this case.”<sup>1</sup>

The dispute first came to the Board’s attention on June 15, 1990, when the Union filed unfair labor practice charges against Simplot with the Regional Director for Region 19. The Regional Director conducted a preliminary investigation; then, on July 31, he advised the parties in writing that he would “defer” action on the charges, pending the outcome of a scheduled arbitration of a grievance the Union had filed under the Wenatchee labor agreement. That grievance alleged that Simplot’s refusal to continue to apply the “terms and conditions” of the Wenatchee contract at the new Quincy plant violated a “transfer of operations” clause in article II of that same contract, which stated:

*Section 3: Maintenance of the Collective Bargaining Agreement*

In the event the Company elects to transfer in whole or in part its operations to any other city, community, or area within the Union’s territorial jurisdiction,<sup>2</sup> it is agreed that all of the terms and conditions of this Agreement shall be applicable to such an establishment.

The arbitrator issued a decision on August 22, finding that the transfer clause was “clear and unambiguous,”<sup>3</sup> and that the closing of Wenatchee and opening of Quincy involved at least “in part” a “transfer” of Wenatchee “operations” to Quincy.<sup>4</sup> He thus held that, “the Employer violated the collective bargaining agreement in failing to apply its terms and conditions to the newly-opened plant in Quincy, Washington.”<sup>5</sup> The arbitrator was careful to stress that other “considerations” (e.g., “eventual majority status of the Union . . . , representative complement . . . , changes in supervisory hierarchy, . . . new product lines and equipment and . . . greater processing capacity”) were “irrelevant” to his contract-interpretation task, even though “[t]hose may well be matters with which the NLRB concerns itself . . . .”<sup>6</sup> Moreover, the arbitrator was aware of the Union’s pending unfair labor practice charge, but he “specifically decline[d] to address . . . or to decide whatever allegations are set forth in that charge.” He found likewise “irrelevant” any question of Simplot’s antiunion “animus.”<sup>7</sup> The arbitrator also declined to prescribe a remedy for this violation, pending supplemental hearing and argument, which had not been concluded when this trial record closed.

On November 23, the Union filed a second charge, renewing and updating its earlier charges. On January 25, 1991, the Regional Director notified the parties in writing that he

<sup>1</sup>G.C. Br. 5, fn. 3, where counsel asserts that the “issue of the status of these employees [a certain group of Wenatchee transferees] was encompassed in the Arbitration Award[.]” and then concludes, somehow, that,

[i]t is now the law of this case that they were covered by the collective bargaining agreement and that Respondent was obligated to recognize the Union as the representative of the employees who were, at least at the time of the assembly work, employed at Quincy.

<sup>2</sup>The Union’s “territorial jurisdiction” includes Quincy.

<sup>3</sup>Jt. Exh. 8, p. 11.

<sup>4</sup>Id. at 11–13.

<sup>5</sup>Id. at 15.

<sup>6</sup>Id. at 11.

<sup>7</sup>Id. at 13–14.

would no longer defer. On the same date, the Regional Director issued a consolidated complaint in the name of the Board’s General Counsel, charging Simplot with violations of Section 8(a)(5) of the Act, and derivatively, of Section 8(a)(1), all tracing to Simplot’s refusal to relocate the labor relationship from Wenatchee to Quincy as part of its alleged “relocation” of the Wenatchee plant operation to Quincy.<sup>8</sup> Answering the complaint, Simplot admitted that its operations are subject to the Board’s statutory and discretionary jurisdiction, and further admitted most of the fact background selected to be alleged in the complaint, but it denied that it owed any duty to carry-over the Wenatchee labor relationship to the new Quincy operation, and pleaded affirmative defenses.

The arbitrator’s findings, made on a different record, and his conclusions, resting exclusively on contract-interpretation, will not influence my findings, nor my analysis of the statutory merits of the case submitted to me. The General Counsel’s “law of the case” notion is confusing, inconclusively developed, and is seemingly at odds not just with the Act’s commands<sup>9</sup> but with his own disclaimers at trial.<sup>10</sup> And if

<sup>8</sup>The complaint as I construe it more specifically attacks as Sec. 8(a)(5) violations the following (now-admitted) actions of Simplot: (a) refusing to recognize the Union as the exclusive collective-bargaining representative of the Quincy workers as soon as they began working at Quincy; (b) refusing to apply the Wenatchee labor agreement through its April 30 term to Wenatchee Unit employees sent to work at Quincy during a pre-April 30 transitional phase, and (c) refusing after the April 30 expiration of the Wenatchee contract to apply to Quincy employees the wages and other terms and conditions of employment established by that agreement, pending good-faith bargaining for a new contract for the Quincy employees, and instead acting unilaterally with respect to all such issues.

<sup>9</sup>“Law of the case” usually implies that a judge or other juridical body (court or agency) with jurisdiction over a specific pending case has already conclusively ruled on some portion of that *same* case, and has thus to some degree or other delimited the range and scope of any subsequent litigation or analysis in *that* case. An arbitrator of a contractual grievance plainly has no jurisdiction nor power to thus impose the “law of the case” on a separate and distinct proceeding under the National Labor Relations Act. Sec. 10(a) of the Act makes this unmistakably clear; it states (my emphasis) that the Board’s,

. . . [power] to prevent . . . any unfair labor practice . . . shall not be affected by any other means of adjustment or prevention that has been . . . established by agreement, law or otherwise[.]

It is therefore obvious that “law of the case” notions cannot operate to “bind” the Board to a prior arbitral result. (Voluntary “deferral” by the Board in the limited way envisioned in *Spielberg* is a separate question, which I address separately below.)

<sup>10</sup>Near the trial’s outset, the parties submitted a series of joint exhibits; they included the arbitrator’s decision and associated papers, such as the parties’ supplemental briefs to the arbitrator. I questioned the purpose for which these arbitration exhibits were being submitted, particularly the arbitrator’s decision. In the ensuing colloquy, each party seemed to disavow any claim that the arbitrator’s decision should be deferred to in any way. Indeed, counsel for the General Counsel affirmed that he was “not going to argue that some finding made by [the arbitrator] binds Respondent or in some way amounts to res judicata or in some other way allows me [the judge] to make a finding on the same facts found by [the arbitrator].” Tr. 18:12–25; and see the surrounding colloquy at Tr. 17:11–19:25, in which counsel for the General Counsel asserted in various ways that he viewed the arbitration award as “relevant” only insofar as it illuminated certain unspecified “admissions” made by Simplot when it re-

*Continued*

“law of this case” is intended to suggest something more modest—that the arbitration decision deserves “deference” under some application of *Spielberg/Olin*<sup>11</sup> principles, I reject the suggestion: First, I think it is both untimely and barred by the doctrine of estoppel by waiver for the General Counsel now to argue for any form of deferral.<sup>12</sup> Wholly apart from those points, I would not find it appropriate to defer. The arbitrator could not have been more explicit in declining to “consider” the statutory issues, and the facts relevant to them; indeed, he plainly found it entirely inappropriate to his function to decide the grievance submitted to him in terms of its possible merits under the National Labor Relations Act, where facts *other* than the existence of an agreement between the parties would control the question of Simplot’s statutory bargaining duties at Quincy vis-a-vis the Union.<sup>13</sup> It is thus evident that the contract issues decided in the arbitration case and the statutory issues presented in the instant case lack any semblance of “parallelism”; therefore, the arbitration decision could not satisfy even *Olin*’s liberal tests for deferral.<sup>14</sup>

sponded to the award. (Despite this, the General Counsel’s brief does not identify any such “admissions.”)

<sup>11</sup> *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).

<sup>12</sup> I refer specifically to three distinct actions by the prosecutor, any one of which were arguably sufficient to operate as waivers of any claim of deferral, and which, taken together, certainly establish such a waiver. First, the Regional Director, acting as the General Counsel’s agent, considered the arbitration award, and then advised the parties that he would not defer. Second, acting in the same capacity, the Regional Director simultaneously issued a complaint alleging facts and conclusions which in no way referred to the arbitration; much less did the complaint suggest that the decision of the arbitrator was in any way relevant to the disposition of the alleged statutory violations. (There was no suggestion, for example, that the decision gave birth to *statutory* rights on the Union’s part—or duties on Simplot’s part—which did not otherwise exist.) Third, the General Counsel made disclaimers at trial (penultimate footnote, *supra*) which simply cannot be harmonized with a subsequent claim that the arbitration deserves “deference” by the Board.

<sup>13</sup> It is reasonably clear from the cases, many of them discussed further in the next section, that the parties’ statutory rights or duties, if any, following a plant shutdown and reopening at a new location, will have little or nothing to do with the existence or nonexistence of an *agreement* between them about the relocation and its labor relations consequences; rather, these rights or duties, if any, will turn instead on the existence or nonexistence of “sufficient continuity” between the two plants. *Harte & Co.*, 278 NLRB 947 (1986) (no violation to “extend” application of old plant contract to new plant, where “sufficient continuity” found); cf. *Hudson Berland Corp.*, 203 NLRB 421 (1973), *enfd.* 494 F.2d 1200 (2d Cir. 1974), *cert. denied* 419 U.S. 897 (1974) (violation found when employer recognized and contracted with Union A at new, “consolidated” operation, where consolidation involved “merger” of employees formerly represented by union A and employees formerly represented by union B, thereby creating “new” bargaining unit, and “real question concerning representation”).

<sup>14</sup> In *Olin*, the Board panel majority strongly criticized a number of prior decisions finding that *Spielberg*’s deferral tests were not met because of some failure on the arbitrator’s part adequately to “consider” facts relevant to the statutory question, or to “apply” the relevant statutory tests. The *Olin* majority held instead (268 NLRB at 574, my emphasis) that henceforth it,

. . . would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is *factually parallel* to the unfair labor practice issue and (2) the arbitrator was

## FINDINGS AND PRELIMINARY OBSERVATIONS

### I. OVERVIEW: THE PARTIES’ CONTENTIONS; HARTE’S TEACHINGS; MY CONCLUSIONS

I have studied the whole record, including the parties’ briefs and the authorities which they invoke. The facts, although somewhat complex in their relevant details,<sup>15</sup> are not in significant dispute, and the credibility of some of the witnesses will be matters for occasional comment only. The parties are in contest over which facts are important, how to characterize them, and over which legal authorities should properly control the analysis.

The pleadings alone disclose a substantial number of undisputed facts: Simplot had historically recognized and dealt with the Union as the exclusive representative of year-round and seasonal production and maintenance (P&M) employees at its Wenatchee vegetable processing plant and associated cold storage warehouse. Simplot closed the Wenatchee plant on April 30, 1990, the date the Union’s contract expired there, then “began operations” in “May 1990” at a new plant in Quincy (“approximately 28 miles” away, according to the complaint; about “35 miles,” according to Simplot’s answer; and about “30 miles,” as the parties eventually stipulated). As of May 25, 1990, when Simplot conducted a “Grand Opening” ceremony at Quincy, its “Quincy Unit”

*presented generally with the facts relevant to resolving the unfair labor practice.* [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is “clearly repugnant” to the Act. And, with regard to the inquiry into the “clearly repugnant” standard, we would not require an arbitrator’s award to be totally consistent with Board precedent. Unless the award is “palpably wrong” [fn. omitted] i.e., unless the arbitrator’s decision is not susceptible to an interpretation consistent with the Act, we will defer.

<sup>15</sup> I directed the parties on the record at the trial’s conclusion to take special pains on brief to identify with particularity (i.e., by “chapter and verse”) the record source for any factual claims or characterizations they might make. Simplot’s brief substantially conforms to this direction; the General Counsel’s brief does not come close. Moreover, I cannot agree with the General Counsel when he announces at the start of his brief that, “[f]actually, this is a very simple case.” And I have not found his brief helpful in reaching my own factfindings, largely because it suffers from lack of appropriate citation to the record. In other instances I have been mystified by some of his uncited claims about the state of the “record,” which contradict what I have gleaned from presumably the same source. For example, he asserts, without attribution to the record (Br. at 10–11):

[F]rom February through April 30, 1990, Respondent recognized the Union as the representative of its employees at the new facility. . . . It is a matter of record now that Respondent had to, and retroactively did, recognize the Union as the representative of the employees who were performing work in Quincy . . . . But see par. 12 of the parties’ stipulation:

Since a February 13, 1990 request by the Union, Simplot has refused and continues to refuse to recognize the Union as the representative of the Quincy Unit.

See also pars. 13 through 15 of the same central “record” document, in which Simplot stipulates that it did not bargain with the Union, but instead acted unilaterally in establishing all wages and other terms and conditions of employment at Quincy, and in doing so, departed from the status quo ante, i.e., from the terms and conditions established by the Wenatchee labor agreement.

work force was composed of “a substantial number and/or a majority” of employees from the former “Wenatchee Unit.”<sup>16</sup> Simplot has at all times refused to recognize and bargain with the Union as the exclusive representative of the P&M employees working at Quincy, and has acted unilaterally with respect to the Quincy employees’ wages, hours, and other terms and conditions of their employment. Its unilateral actions resulted in departures from the wages and other terms and conditions of employment established for Wenatchee workers by the Wenatchee labor agreement.

While Simplot does not dispute these factual elements of the complaint, it denies the accuracy of the complaint’s characterization of the Quincy plant as a “relocat[ion]” of the operations formerly done at the Wenatchee plant. Simplot’s answer avers instead that the Quincy plant is an essentially “new” operation, a product of a decision by Simplot in “mid-1989” to “combine” and “expand” on the operations formerly done at three plants, Wenatchee being only one of them.<sup>17</sup> And Simplot posits as a matter of law that because Quincy is properly labeled as a “new” operation, the Union enjoys no special presumption that the employees at Quincy want the Union to represent them, no matter that a majority of them at one phase in Quincy’s new operations were persons who had been represented by the Union when they worked at Wenatchee.

Simplot insists in any case that at all times it had a “good faith doubt as to the Union’s continuing majority status” at Quincy. This defense, grounded in the “seasonal” variations in the plant’s complement, apparently assumes for argument’s sake that the existence of a Wenatchee transferee majority in the new Quincy complement would trigger a duty on Simplot’s part to maintain its bargaining relationship with the Union at the new plant. But if so, says Simplot, the “Wenatchee [transferee] majority” at Quincy as of May 25 is not meaningful, because the May 25 employee complement was only a “pre-season” complement, and one which was not “representative” of Simplot’s expected complement at “full operations.” And Simplot equates “full operations” with the peak phase of its fresh-harvest processing season, a roughly 2-month period ending in late September, during which the Wenatchee transferees would temporarily become a minority, as the P&M complement became swollen with new hires, drawn mostly from a new locale, or “labor market.” And it is with these peak season complement configurations in mind that Simplot also argues that to have recognized the Union at Quincy would have been “unlawful assistance,” violating Section 8(a)(2) of the Act. As related

<sup>16</sup> Simplot’s answers this by admitting that when it conducted the May 25 Grand Opening at Quincy, “the majority of the employees at the Quincy plant were employees who had worked . . . in the Wenatchee plant.” In a subsequent stipulation, Simplot clarifies that this “majority” refers to employees formerly in bargaining unit positions at Wenatchee who came to similar jobs within the putative Quincy bargaining unit.

<sup>17</sup> In its answer, Simplot avers (emphasis added):

. . . in mid-1989 [Simplot] decided to combine its Wenatchee, Ferndale, and Grandview, Washington plants and expand its food processing operations at a new facility . . . in Quincy, Washington.

In its brief, acknowledging that the Grandview plant had been sold to a third party in 1986, Simplot has trimmed its claim, maintaining now that the “mid-1989” decision was to “combine” two plants, Wenatchee and Ferndale.

legal support, Simplot cites the Board’s established preference for holding representation elections in “seasonal” industries at or near the peak of the season, when the largest number of eligible voters can most easily participate in an on-site election.

Under the General Counsel’s theory of prosecution, this case is generally governed by principles advanced in “relocation” precedents such as *Westwood Import*,<sup>18</sup> and *Marine Optical*,<sup>19</sup> principles which the Board adopted and refined more recently in *Harte & Co.*<sup>20</sup> I agree that *Harte*’s teachings properly bear on this case, and I think they are worth reviewing at the outset, even though there is a legitimate dispute about whether the term “relocation” adequately captures the relationship between the Quincy plant and the former Wenatchee plant,<sup>21</sup> and even though the “seasonality” of the operations here presents facts which *Harte* and its predecessors did not confront.

In *Harte*, an administrative law judge had found that a union and an employer in a relocation situation violated the rights of the new plant’s employees when the union and employer agreed voluntarily to extend the old plant’s current labor agreement to the employees at the new plant, without some independent, “uncoerced” showing that a majority of the employees at the new plant wanted the union to represent them.<sup>22</sup> In finding no violation and dismissing the complaint, the *Harte* Board construed the precedents—most of them cases where the employer was being prosecuted under Section 8(a)(5) for *refusing* to apply the old plant’s union contract at the new plant—as teaching that a “mere” plant relocation will not defeat the continuing effectiveness of the existing agreement, provided that “sufficient continuity” between the old plant and the new plant may be found to “justify applying [the] existing agreement to [the] new location.” Likewise echoing the precedents, the *Harte* board reiterated that “sufficient continuity” is found where,

the operations at the new facility are substantially the same as those at the old and . . . transferees from the old plant constitute a substantial percentage—approximately 40 percent or more—of the new plant employee complement.<sup>23</sup>

*Harte* further instructs that the *time* for sampling the ratio of old plant transferees to new hires for purposes of a “continuity-of-complement” analysis is not necessarily when the new

<sup>18</sup> *Westwood Import Co.*, 251 NLRB 1213, 1214 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); *General Extrusion Co.*, 121 NLRB 1165, 1167–1168 (1958); and *Marine Optical*, 255 NLRB 1241, 1245 (1981), enfd. 671 F.2d 11 (1st Cir. 1982).

<sup>19</sup> *Marine Optical*, supra.

<sup>20</sup> *Harte & Co.*, 278 NLRB 947 (1986).

<sup>21</sup> I acknowledge that *Harte*’s principles were declared in an “exclusively relocation” fact setting and therefore may play a less certain role in cases where the employer’s new operation may be a product of plant mergers, or consolidations, or expansions, or combinations thereof. Cf. *Central Soya Co.*, 281 NLRB 1308, 1309 at fn. 6 (1986); *Hudson Berling Corp.*, supra.

<sup>22</sup> Thus, as I see it, the *Harte* prosecution challenged not just the parties’ agreement to continue the old plant’s union contract at the new plant, but the very propriety of their continuing their relationship at all after the relocation.

<sup>23</sup> 278 NLRB at 948–949, citing *Westwood Import*, supra, and *Marine Optical*, supra, and *General Extrusion Co.*, supra.

plant becomes “fully operational,” but rather is the time when the employer’s “relocation process” and the associated “employee transfer process” have become “substantially completed.”<sup>24</sup>

Based on details which I narrate and comment on below, I will judge that the Quincy operation amounts to something more than a “mere relocation” of the Wenatchee operation to a new site, but that it amounts to something decidedly less than a “new” or “different” operation in terms of its business purpose, its production methods, and, most important, in terms of the people it has largely relied on to start and stay in operation. Applying Harte’s principles to these unique facts, I will conclude that there existed at all relevant times, one of them being at “Grand Opening,” a “sufficient continuity” of operations and employee complement between the Wenatchee plant and the new Quincy plant to support the General Counsel’s ultimate claims. Thus, I shall conclude that Simplot violated Section 8(a)(5) and (1) of the Act, substantially as alleged in the complaint.

## II. DETAILS<sup>25</sup>

### A. Background

Simplot, a Nevada corporation, headquartered in Boise, Idaho, operates food processing plants and related trucking businesses in several States, including Washington, California, and Iowa; its “Western Hemisphere” operations also include plants in Mexico and elsewhere in Central America. Simplot’s main products are frozen fruits and vegetables, including potatoes. These are all processed similarly at its plants, in two basic stages, “prime pack”—processing and freezing of fresh produce, done during the harvest season (usually called, simply, “the season”), and “repack”—removing frozen produce from bulk warehouse storage and packing it in customer-specified containers, done mostly outside the season. Prime pack and repack are distinct operations, relying on different production equipment and line setups.

We are concerned with what Simplot calls its “Northwest” vegetable operations, where the season typically runs for about 4 months, from approximately June 1 through the end of September. Simplot’s Northwest operations have been concentrated since approximately April 30–May 1, 1990, in a single new plant in Quincy, Washington, the focus of this controversy. Simplot decided to centralize at Quincy a year earlier, in May 1989, at a time when its Northwest operations consisted of two Washington plants. One was a year-round prime pack and repack plant in Wenatchee, on the eastern

slope of Washington’s Cascade range, about 30 miles from the putative Quincy site, where the Union was the historically recognized representative of year-round and seasonal P&M employees, who were then covered by a labor agreement due to expire April 30, 1990. The other was (by May 1989) a prime pack-only plant in Ferndale, some 210-road miles West over the Cascades from Quincy, on Washington’s Puget Sound coast, where P&M employees were represented by another Teamsters local union.

In the Northwest, Simplot followed patterns which are typical to the industry in Washington State,<sup>26</sup> ones which it continues to follow or intends to follow at the new Quincy plant: The plants perform prime pack throughout the June–October season; they typically do repack during all or a large part of the remaining 7–8 months of the year, and also perform repack at intervals during the season. Prime pack starts with pea varieties in early June, and grows in volume as new varieties of produce reach harvest point; it surges most strongly in September, when the inbound corn harvest overlaps with continuing inflow of other produce.

In a typical season, fresh produce is continuously trucked to the plant, and fed through a series of standard processes—inspection, culling, and blanching, then, depending on vegetable type and customer demand, peeling, trimming, slicing or dicing. The initially processed vegetables are then conveyed through “freeze tunnels,” and, once frozen, are poured into bulk storage containers, called “totes.” The totes are then transported to an adjacent, functionally integrated cold-storage warehouse.<sup>27</sup> The warehoused products must eventually be “repacked,” a process in which the loaded totes are returned from the warehouse to the plant and their contents are dumped onto packaging lines, where they are fed through pouring and packaging machinery into customer-specified containers, ranging from polyethylene bulk bags to brand-labelled wax cartons for the retail shelf. Repacked products are then transported to a shipping-staging area back in the cold storage warehouse, where they are assembled to customer order, and made ready for transfer across loading bays into waiting trucks or railcars.

The plants rely year-round on a fairly steady complement of P&M employees, a combination of “general labor” and “classified” workers with specialty jobs,<sup>28</sup> and their non-supervisory leadpersons. During the season, the year-rounders function as a “core group” in each department and oper-

<sup>24</sup> Id. at 949–950, and cases cited.

<sup>25</sup> The pleadings, the exhibits, and the stipulation of facts entered into by the parties make up the framing for all of my findings above and below. I will rely for supplemental detail on the testimony of several Simplot officials: Keith Fletcher, the general manager of Simplot’s corporate-level fruit and vegetable division; Diane Willingham (nee Walker), who was at material times the “Human Resources Administration Administrator” for the same division, and who was on the “implementation team . . . put together to implement [the] plan” to close the Wenatchee plant and to build and staff the plant in Quincy; Larry Shaw, former Wenatchee plant manager and current Quincy plant manager, also on the planning and implementation team; and John Stone, the Quincy plant’s personnel manager, who oversaw recruitment and hiring for the Quincy plant.

<sup>26</sup> I rely in large part on the testimony of Simplot’s Quincy personnel manager, Stone, for findings concerning Simplot’s own employment patterns and practices at its Washington plants. Because Stone had wider industry experience, I also rely in part on his testimony for similar findings about the industry in general. My findings on these points are also informed by findings and descriptions in other cases arising in the same industry in the State of Washington, especially *D & K Frozen Foods*, 293 NLRB 859, 862–863 (1989), and *Bellingham Frozen Foods v. NLRB*, 626 F.2d 674, 676–677 (9th Cir. 1980), *enfg.* in part 237 NLRB 1450 (1978).

<sup>27</sup> In some cases, the plant operator owns and/or operates the cold storage facility directly; in other cases, the plant operator will contract with a third party to perform cold storage services.

<sup>28</sup> “Classified” jobs include the following: mechanics, electricians, and steam or power plant engineers, for installing, maintaining, and repairing plant systems and production machinery; operators for the processing lines and machines used during prime pack and repack; forklift operators; quality control technicians; shipping and receiving handlers and recordskeepers.

ation. During the remainder of the year, they are kept busy on repack work; they also maintain and repair prime pack machinery, and perform other get-ready work for the next season. They normally achieve year-round status by virtue of their experience and relative seniority. In fact, the plant operators, including Simplot, generally maintain a "seniority list," where date of original hire (usually carried over through successive plant owners) determines priority for retention at the end of the season, and for recall during the new season. The lists are updated periodically, to remove persons who are no longer "actively" interested in employment.<sup>29</sup>

Once the season starts, the core group is gradually supplemented by additional workers, especially in general labor classifications, with first preference given to waiting "active" seniority listees, in order of seniority. However, due mainly to roughly 40-percent turnover from season to season,<sup>30</sup> each new seasonal work force will include many new faces. These are mostly untrained people, called-in from State Jobs Services registries when the seniority list has been exhausted; they include students on summer break, and others whose situations leave them available for on-call work, as plant needs may require.<sup>31</sup> Employees in this outside, new-hire category may outnumber the "seniority" workers in the peak months of the season (they did, in fact, during Quincy's 1990 peak). And depending on how many hours these outsiders are willing and permitted to work during the season, they may themselves qualify for inclusion on the next updated seniority list, and thus have priority over other outsiders for available jobs in the next season, if they are still around, and interested.

## B. *The Quincy Plan*

### 1. Its origin and main features

According to Corporate General Manager Fletcher, the May 1989 decision to house all future Northwest operations at Quincy was rooted in a "Four Corners" business strategy,

<sup>29</sup>In unionized plants, such as Wenatchee, the qualifications for inclusion on the seniority list, and the layoff and recall practices associated with it, are set forth in the labor agreement. Under the Wenatchee union contract, for example, an employee must have worked at least 1400 hours in a preceding year's period to qualify for the list. The Wenatchee list included many employees with seniority dating back to initial employment many years earlier with a pre-Simplot operator of the plant.

<sup>30</sup>Quincy Personnel Manager Stone testified that plant operators in the industry, including Simplot, usually assume a "40 percent" turnover rate from one harvest season to the next. Given other indications that the year-round core group work force is composed mostly of high-seniority employees, I presume that most of this turnover occurs among the persons hired for general labor work during each new prime pack season, with the likely result that turnover rates within that latter group substantially exceed the 40-percent figure.

<sup>31</sup>Plant Manager/Superintendent Shaw acknowledged, referring specifically to Quincy operations, that some of these seasonal new hires "work in the plant only for two or three weeks to a month every year," and are hired only for the "biggest production runs and at the peak of those runs[.]" He also acknowledged that partial layoffs may occur during the season, during a lull between harvests, or due to breakdowns in the processing lines. When this happens, seniority will govern who is to be laid off, and necessarily, the most recently hired summer extra workers will be the first targets for any such idling.

originally developed in 1987, in consultation with the Simplot family, the principal corporate owners. Under this overall strategy, Simplot hoped to expand its market share as a "low-cost" purveyor of frozen foodstuffs, and as well, to expand its range of products to serve emerging consumer preferences, by variously "strengthening" each geographic "corner" of Simplot's "Western Hemisphere" operations. The May 1989 decision comprehended these principal elements:

Within 1 year, the Quincy plant would be built and ready to take over all of the Northwest's prime pack and repack volumes; the start of the 1990 season would be the most critical readiness deadline. The Ferndale plant, by then equipped only for prime pack of certain produce, would be closed at the end of the 1989 season, then some 4 to 5 months away. Wenatchee, equipped as well for repack, would continue to operate for another 11-12 months, until the Quincy plant was ready to take over all operations.

Although Simplot had owned and operated the cold storage warehouse associated with the Wenatchee plant, it would instead use an independent cold storage company, Columbia Colstor, for these warehousing services at Quincy. Columbia would also take over operation of the Wenatchee warehouse, on Simplot's exit, and Wenatchee's stockpiled frozen stores would continue indefinitely thereafter to feed Quincy's repack lines.<sup>32</sup>

Quincy would be a substantially larger plant, containing four times more production floor space than at Wenatchee. With space for the running of extra lines, Quincy would process more volumes of product than either Wenatchee or Ferndale, or the two combined, had ever processed. The additional space would also allow the prime pack of some types of produce or foodstuffs which Wenatchee had not previously handled. Moreover, Quincy would be designed and equipped to meet USDA standards for handling of meat and other "protein" items, standards which Wenatchee (or Ferndale) could not meet without substantial upgrading.<sup>33</sup>

Quincy would require more employees than were required at Wenatchee (or at Ferndale, apparently<sup>34</sup>). According to

<sup>32</sup>Shaw's testimony at various points establishes the following related details: Columbia Colstor already operated a warehouse adjacent to the putative Quincy site; in fact, it had been used to handle overflow from the Wenatchee operation in the past. As part of the arrangement with Simplot, Columbia Colstor would "expand" this warehouse, and would purchase certain additional refrigeration equipment from Simplot. In addition, as part of Simplot's exit from Wenatchee, it either sold the Wenatchee cold storage warehouse to Columbia, or otherwise surrendered that operation to Columbia. Finally, Simplot had stockpiled substantial stores of frozen produce at the Wenatchee warehouse before exiting on April 30, 1990, and the Wenatchee warehouse (thereafter under Columbia's management) continued to feed the Quincy plant's repack operation for at least another year. Thus, Shaw acknowledged in April 1991, "The [frozen] product that we left at the Wenatchee facility when we left we've been slowly moving over."

<sup>33</sup>Here, Simplot contemplated blending frozen meat with vegetables, to produce a reheatable "stir-fry" product. In fact, however, no such processing had taken place as of April 1991, when this case was tried.

<sup>34</sup>The record does not show how large Ferndale's peak season employment complement may have been in 1989 or earlier, nor the size of its typical year-round crew in the era when it was also running repack. (As I explain below, Ferndale did not perform repack after

*Continued*

Willingham and Stone, the planners assumed that Quincy would need about 450 P&M workers at September peak,<sup>35</sup> compared to a Wenatchee peak complement of about 225, and would need between 150 and 200 for year-round work,<sup>36</sup> compared to an uncertain number of year-rounders typically used at Wenatchee, but perhaps close to 150.<sup>37</sup> As I will elaborate elsewhere, Quincy would draw heavily on the Wenatchee employees to fill these bargaining unit “core-group” positions, and on the Wenatchee management team to manage the new operation.

## 2. Wenatchee’s dominant status as of May 1989

The Quincy plan was arrived at only after Simplot had first considered alternative ways of “strengthening” its Northwest Corner, such as by enhancing Wenatchee’s capabilities through renovations and expansions. That Wenatchee was an admitted alternative candidate as the central site for Simplot’s future Northwest operations invites the conclusion that, in intention, the new plant would simply function as a beefed-up version of Wenatchee. But Fletcher’s testimony tends to counter that impression; he stated that in deliberations before May 1989, the planners had considered beefing up at Wenatchee and/or Ferndale, to make either of those plants, or even the two in tandem, viable in terms of the Four Corners strategy. And Simplot relies on Fletcher’s testimony to argue on brief that the decision to close Ferndale was likewise not made until May 1989, *simultaneously* with the decision to close Wenatchee.

This claim, and Fletcher’s testimony, although ambiguous on the point, may be intended to imply that Ferndale and Wenatchee were each fully functioning, independent plants, and therefore, the essence of Simplot’s May 1989 decision was to “merge” or “consolidate” two comparable operations. If so, I am not fully persuaded.<sup>38</sup> I have no doubt that

late 1987; it therefore appears that Ferndale ceased to have a year-round crew as of late 1987.)

<sup>35</sup> In the event, Quincy used fewer—431—at its 1990 peak, as the parties stipulated.

<sup>36</sup> In fact, according to Stone, Quincy employed 170–180 P&M workers in April 1991, before the 1991 seasonal influx of extra workers would begin. It thus appears that Quincy’s year-round core group consists of about that same number of employees, 170–180, most of them Wenatchee transferees, as Stone also acknowledged.

<sup>37</sup> The closest attempt to get at the number of year-rounders typically employed at Wenatchee can be found in the General Counsel’s examination of Stone, and the surrounding colloquy between counsel at Tr. 380–386, which focuses on whether the “144” Wenatchee transferees at Quincy as of a certain date were *all* formerly part of Wenatchee’s year-round crew. Stone’s testimony was inconclusive, and Simplot’s counsel would stipulate only that when these eventual transferees were hired in April 1990, they were then “actively” on the Wenatchee seniority list, but not necessarily then working. But her explanatory remarks for so limiting her offer to stipulate make it appear that all of those “144” *would* have been working at Wenatchee in April 1990 were it not for the fact that Wenatchee’s repack operation was then abnormally limited, because its repack equipment was being incrementally dismantled and reinstalled at Quincy. And if this is so, it is possible to infer that Wenatchee’s year-round crew in more typical years included at least “144” workers.

<sup>38</sup> The question is not so much whether Quincy reflects in part a “merger” of former operations—it clearly does—as it is to what extent, if at all, this merger is inconsistent with a finding of operational “continuity” as between Wenatchee and Quincy. And it is with the

Wenatchee was in live contention as a Four Corners base until May 1989, but I doubt that Ferndale occupied equal status as a contender after 1987, and I cannot in any event accept the idea that the two plants stood on equal footing in May 1989. To explain this requires a digression:

In the 3 years before May 1989, Simplot had already done a certain amount of plant-trimming and consolidating in its Northwest operations, apparently leaving Wenatchee by May 1989 as the dominant Northwest plant. Thus, until 1986, Simplot had run a third plant, in Grandview, also within the Union’s territorial “jurisdiction,” where Simplot had recognized and contracted with the Union as the representative of that plant’s P&M employees, in a separate bargaining unit. And when Simplot withdrew from Grandview in 1986,<sup>39</sup> 39 it simultaneously shifted the volumes of corn and sugar snap pea processing formerly done at Grandview to the Wenatchee plant. Likewise (according to Shaw), Simplot transferred some of Grandview’s physical equipment to Wenatchee, including its entire sugar snap pea processing line. This added to Wenatchee’s existing prime pack and repack production volumes. Not long after that, by contrast, Ferndale’s operations contracted, with Wenatchee taking on the volumes that Ferndale could no longer handle. Thus, in the “latter part” of 1987,<sup>40</sup> Simplot dismantled Ferndale’s repack equipment and machinery, and shipped it to a new plant in Bettendorf, Iowa, the new site of Simplot’s “Northeast Corner.” Simultaneously, it transferred Ferndale’s frozen repack stores to Wenatchee, and Wenatchee thereafter handled all of the Northwest’s repack until Quincy took over.

As I understand Fletcher’s overall account of the sequence of things, the dismantling of repack at Ferndale and the opening of the new plant in Iowa was one of the first moves made by Simplot to implement the Four Corners strategy. I doubt that Simplot would have stripped Ferndale’s repack capability in late 1987 if expansion or other beefing up at Ferndale were then still a live option in the minds of its Four Corners implementation team. A more probable interpretation is that these late 1987 developments signaled a decision by that implementation team eventually to close the Ferndale plant entirely, even while the planners continued to actively consider the possibility of beefing up the Wenatchee plant and using it as its “Northwest Corner” plant. Accordingly, I am persuaded that the “mid-1989” decision to operate exclusively from Quincy in the future was not so much a decision to “combine” even two existing operations (that had been one goal of the Four Corners plan to start with) as it was a final decision not to use *Wenatchee* as the new site for such combined operations.

latter question in mind that I will make additional observations and findings about background details.

<sup>39</sup> Some related details are recited in *D & K Frozen Foods*, 293 NLRB 859, a case in which Simplot’s successor at Grandview, D & K, was found to have unlawfully refused to recognize and bargain with the union after its takeover at Grandview. A principal feature of D & K’s violation was that it consciously bypassed former Simplot “seniority” workers for seasonal prime pack jobs, and instead recruited “outsiders” for the seasonal jobs, all as part of a “numbers-conscious” scheme to avoid having a peak complement composed of a “majority” of former Simplot workers.

<sup>40</sup> Testimony of corporate Fruit and Vegetable Division General Manager Fletcher, at Tr. 89:8.

In any case, it seems obvious that Ferndale and Wenatchee did not function on equal footing after late 1987. Rather, Ferndale functioned from then until its postseason 1989 closure as an adjunct to Wenatchee, as a supplemental prime pack operation, with its bulk-frozen product going eventually to Wenatchee for repack. Thus, in the roughly 30-month period between the dismantling of Ferndale's repack operation in late 1987 and the opening of the Quincy plant in May 1990, Wenatchee functioned as Simplot's only year-round Northwest operation, the one handling all of the Northwest's repack volumes, and an apparently substantial part, if not the majority, of the Northwest summer prime pack volumes, as well. By contrast, during the same 30-month period, Ferndale's operations were intermittent, limited to the 1988 and 1989 June–October harvest seasons, a total of roughly 8–9 months.

### 3. The question of “animus”

The General Counsel does not allege in the complaint nor otherwise contend that Simplot was influenced in these decisions (first, to centralize Northwest operations; second, to centralize them at a site other than Wenatchee) by a desire to escape collective-bargaining obligations,<sup>41</sup> or by other union-hostile motives. Simplot's evidence fairly shows in any case that the Quincy decision was fundamentally “economic” in character—the Quincy site most directly fit with the Four Corners strategy; it was uniquely attractive in terms of available space for a larger-scale operation, and the local officials and agencies had offered many incentives and subsidies to defray costs of acquiring land, water and utilities, and waste treatment. My findings elsewhere below will show, however, that Simplot, having apparently chosen for “business” reasons to concentrate future Northwest operations at Quincy, admittedly announced a preference that the Quincy plant be operated on a nonunion basis, indeed, it declared to the Wenatchee employees 5 months before the move that Quincy would be a “nonunion” plant.

### C. The Transition

#### 1. Simplot's Decision not to recognize the Union at Quincy

The Union was somehow made aware in or shortly after May 1989 of Simplot's decisions, and the Union thereafter made various efforts to gain information from Simplot about the intended timing and other implementation details, without directly asserting a right to be recognized in the new operation until mid-February 1990. During much of that same period, Simplot's planners themselves appear to have been uncertain as to the Union's possible status at Quincy. Thus, Willingham admits that it was not until “January” 1990, with Quincy construction on schedule, that Simplot's “implementation team” made a “final determination” that

<sup>41</sup> Fletcher testified without contradiction that “labor costs” at Wenatchee (or Ferndale) were not a factor in the decision to concentrate Northwest Corner operations at a new plant; he explained that while Simplot hoped to achieve economies of scale at Quincy—and thereby reduced labor costs per produced unit—Simplot projected its wage and benefit costs per hour per employee at Quincy using the costs established by the labor agreements at Wenatchee and Ferndale.

Simplot would *not* treat the Union as the representative of the Quincy employees. And this decision apparently went hand-in-hand with Simplot's admitted, near-simultaneous promulgation on a unilateral basis in January of wage and benefit schemes, and other terms and conditions of employment to be applied in the Quincy operation.

The parties stipulated that it was not until mid-February that Simplot disclosed its intention not to carry over recognition to the Union at Quincy.<sup>42</sup> Until that point, it seems, Simplot had merely disputed the Union's claims under the Wenatchee contract's “transfer” provisions that the “terms and conditions” of the Wenatchee labor agreement would continue to govern at Quincy.<sup>43</sup> But a decision not to recognize the Union at all at Quincy was implicit in other communications in January between Simplot and the Wenatchee employees. Thus, in January, Simplot posted information bulletins in the Wenatchee plant, setting forth pay classifications and benefit programs for “nonunion hourly employee[s]” at Quincy, which benefits were characterized as “similar to that provided at other nonunion facilities of the Simplot Food Group.” Moreover, when she addressed a meeting of Wenatchee unit employees on February 14, 1990, one attended by representatives of the Union, Willingham told the assembly, *inter alia*, that the Quincy plant would be “nonunion,” that the company was not recognizing the current Wenatchee labor agreement as being “applicable,” and that Simplot “wants to have a direct relationship with employees without a third party.”<sup>44</sup>

<sup>42</sup> Thus, the parties stipulated that “[s]ince a February 13, 1990 request by the Union, Simplot has refused . . . to recognize the Union as the representative of the Quincy Unit.” The “February 13 request” by the Union is apparently how the parties have mutually chosen to construe a more substantively complex *set* of letters from the Union's attorney to Willingham (Jt. Exhs. 3 and 4), both dated February 13. In one, the Union asserted a contractual grievance under the Wenatchee contract's “transfer of operations” provisions (quoted *supra* at fn. 1); in the other, the Union requested detailed information about Simplot's actions and intentions concerning Quincy.

<sup>43</sup> Thus, in a January 10, 1990 letter from Willingham to a then acting spokesman for the Union, Jerry Shuffield, Willingham noted that the current Wenatchee labor agreement “will expire on April 30,” and that “the Company will no longer have employees working in that facility . . .,” and therefore, that “we intend to let the agreement expire in its entirety.” Willingham continued, “Employees who are currently working at Wenatchee and Ferndale . . . have been offered work at the Company's Quincy facility, which will not be covered by any preexisting labor agreements.”

<sup>44</sup> I rely here on the uncontradicted testimony of the Union's agent, Allen Hobart, and, where his independent memory failed him, on the contemporaneous notes (G.C. Exh. 3) which he took at the meeting where Willingham spoke to Wenatchee employees about the Company's plans for Quincy. Incidentally, Willingham's declarations to Wenatchee employees that Simplot wanted and intended to run Quincy as a “nonunion” plant are not alleged in the complaint as violations of Sec. 8(a)(1), and the General Counsel does not otherwise claim that they were unlawful. But see, *Kessel Food Markets*, 287 NLRB 426 (1987), holding that, at least in a successorship context,

When an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements

*Continued*

Willingham was called on at trial to articulate the “reasons” for the planner’s decision in *January* not to recognize the Union at Quincy, a decision which she acknowledged was guided by legal counsel. Predictably, her testimony echoed positions set forth in Simplot’s answer to the complaint, and focused on Simplot’s expectation that the peak season complement at Quincy would be roughly twice that at Wenatchee, and would come mostly from a different locale. I will reserve most of my discussion of these points to later sections. However, I pause here to comment on Willingham’s additional assertion that Simplot’s planners had no idea in January that recruitment efforts among the Wenatchee employees would result in significant numbers of Wenatchee employees being willing to accept positions at Quincy: I accept that Simplot could not know with clarity *which* of its Wenatchee employees would accept positions at Quincy, until after it had sought them out, which Stone admittedly waited until “mid-April” to do, with substantial success, as I detail in the next section. But I assume that Simplot would not have waited until mid-April to start this process if its planners had been entertaining serious doubts during the preceding months about the success of such recruiting. For Simplot had millions riding on the new plant, and ground had already been broken and construction was well underway even in January. And it is hard to believe that Simplot would have committed to that level of investment without having *first* satisfied itself that substantial numbers of the Wenatchee workers (comprising the only nearby, large-scale source of experienced personnel) could be induced to staff the Quincy plant’s intended 150–200 core group positions. Therefore, I do not believe Willingham insofar as she claims that one of Simplot’s reasons for deciding in January not to recognize the Union at Quincy was a “doubt” that Simplot would be successful in recruiting most of the “active” Wenatchee employees.<sup>45</sup>

## 2. Hiring process for Quincy

Personnel Manager Stone admits that Simplot’s planners looked to the “active” employees on the Wenatchee seniority list, most of them residents in the greater Wenatchee community, as the most likely and the best candidates for jobs at Quincy.<sup>46</sup> Stone began hiring for Quincy jobs in mid-

are coercive and violate Section 8(a)(1). [Id. at 428–429; citations omitted.]

See also, e.g., *D & K Frozen Foods*, 293 NLRB at 873–874.

<sup>45</sup>I am equally unimpressed with a corollary point urged by Simplot, relying on Willingham: Willingham stressed that the Union never “guaranteed” that the Wenatchee employees would take employment at Quincy. This lack of a “union guarantee” strikes me as a red herring: Willingham soon admitted that Simplot never sought the Union’s assistance in recruiting Wenatchee employees for the Quincy plant, much less its “guarantee” that substantial numbers would make the move. Moreover, considering Simplot’s determination not to recognize the Union at Quincy, I doubt profoundly that Simplot would wish to have the Union involved in any way in matters pertaining to Quincy staffing, much less to serve as a labor broker for the Quincy operation.

<sup>46</sup>Employees from the distant Ferndale plant were not seen as a likely source for filling these positions, although Stone “hazard[ed] a guess” that “16” former Ferndale workers eventually relocated from across the mountains and took jobs at Quincy. I note in this regard that, unlike Wenatchee transferees to Quincy, any former Ferndale employees who came to work at Quincy could not have

April, using facilities at the Wenatchee Convention Center to meet with Wenatchee unit employees, answer their questions, and receive written applications from them. As part of its recruitment campaign, Simplot distributed identical letters to Wenatchee unit employees on April 18, along with a packet of informational materials concerning “policies and programs” for the Quincy operation.<sup>47</sup> The form letter, signed by members of the “Simplot Management Staff,”<sup>48</sup> stated pertinently:

We are closing an old facility and opening a new plant in Quincy. We’ve been trying to paint a picture of the kind of workplace we can have in Quincy.

The plant will be among the biggest and best of its kind. We’re in this for the long run, and we need the partnership of trained and talented workers like you. We hope you see how hard we’re working to hear your ideas. We hope you see our willingness to share information, power and profits.

Quincy will truly be a workplace all of us can be proud of. Come be partners with us. Come make Quincy WORK.

As a consequence of these and other recruitment blandishments,<sup>49</sup> Stone received applications in mid-April from “probably 150, 160” (Stone) active Wenatchee seniority listees, and hired virtually all of them. It seems obvious that Simplot intended that employees from this active Wenatchee pool (apparently totaling about 177 seniority listees<sup>50</sup>) would fill the majority of the projected 150–200 year-round positions available at Quincy.<sup>51</sup> It seems equally obvious that Simplot had assured itself by mid-April that Quincy’s year-round unit work force could be staffed primarily with experienced former Wenatchee employees. And it was only after

been considered by Simplot as “active” Simplot employees at the time they were hired for the Quincy operation. This is because the Ferndale plant had shut down for the last time at the end of the 1989 prime pack season, roughly 5–6 months before interviewing and hiring began for the Quincy operation.

<sup>47</sup>Jt. Exh. 7-A, p. 12. This publication was issued during the same period that Quincy’s personnel director, Stone, was conducting interviews among the Wenatchee workers for hire at Quincy.

<sup>48</sup>The letter was signed by 17 newly hired Quincy supervisors and managers, nearly all of whom had come from counterpart positions at Wenatchee, and some of whom were then still working at Wenatchee, or were dividing their time between Wenatchee and Quincy.

<sup>49</sup>Simplot made it simpler for former Wenatchee employees to make the daily commute to Quincy by arranging bus and van pool systems, which carried workers between Wenatchee and Quincy throughout the 1990 season. And when it hired the former Wenatchee workers, it credited them for seniority purposes with their original dates of hire at Wenatchee.

<sup>50</sup>As already noted, the record does not clearly show the number of year-round employees typically used by Simplot at Wenatchee, but Willingham testified that it was her “understanding” that “the maximum number of people [potentially available in the Wenatchee unit for hiring at Quincy] was about 177 if we could pull everybody.”

<sup>51</sup>The text of the April 18 recruitment letter, *supra* (“we need the partnership of trained and talented workers like you”) seems alone to establish the point. And Stone admits that former Wenatchee seniority listees continue to make up the majority of Quincy’s year-round P&M complement, apparently totaling 170–180 employees.

having thus secured a core complement that Simplot turned its efforts to recruiting at the Quincy Jobs Services Center for the extra help it would need during the 1990 season.<sup>52</sup>

### 3. The use of Wenatchee mechanics at Quincy during the term of the Wenatchee labor agreement

Starting as early as July 1989, and continuing through December 1989, Simplot had begun to dismantle certain of Wenatchee's prime pack equipment, as it was no longer needed during the Wenatchee prime pack season, with the intention of gradually reinstalling all or most of it at the Quincy site. It similarly dismantled some of the remaining usable prime pack machinery at Ferndale, intending to use it at Quincy. It began also to dismantle Wenatchee's repack machinery and stage it at Quincy for installation. Simplot also acquired some new equipment, described elsewhere below, never before used in any of its former Northwest plants.

Associated with this, in February, Simplot assigned three Wenatchee unit mechanics to begin the reassembly and reinstallation at Quincy of the transferred and new equipment. These mechanics, augmented by additional mechanics from elsewhere, continued such work throughout March and April,<sup>53</sup> and for an indefinite period thereafter. And even though the Wenatchee labor agreement was effective during the period that much of this reinstallation was going on, Simplot did not pay any of the Wenatchee unit mechanics working at Quincy according to the Wenatchee labor agreement; instead it paid them according to the new pay and classification schemes developed unilaterally for Quincy by Simplot's planners in January.

#### D. Quincy's Staffing and Operational Status in May 1990; the Question of its "Completeness"

##### 1. Bargaining unit complement

Wenatchee transferees dominated the Quincy unit throughout the month of May. According to the parties' Stipulation, on May 1, the day after the Wenatchee plant formally closed, Simplot employed a P&M unit complement at Quincy of 67 persons, 55 of them Wenatchee transferees, yielding a "transferee:new-hire" ratio of 55:12. Although the precise ratio on the May 25 grand opening date is not of record, it can be roughly interpolated from the parties's stipulation,

<sup>52</sup> Simplot's reasons for largely limiting its supplemental recruitment efforts to the Quincy area are not directly challenged by the prosecution as having been part of some overall discrimination scheme, and I could not so find in any case, given these undisputed facts: Wenatchee is the largest city in Chelan County, and is the hub for processing apples grown on the eastern slope of the Cascades. Stone testified that Simplot's Wenatchee plant typically "competed" for general labor workers during summer harvest season with the apple processing plants in the same community. Quincy is a small town in Grant County, a decidedly more rural area. And even though Quincy is only about 30 miles from Wenatchee, Simplot's planners apparently assumed that this distance alone would discourage summer job seekers living in the Wenatchee area from traveling the additional distance to Quincy, particularly when the Wenatchee apple plants would offer comparable summer processing work.

<sup>53</sup> The parties' stipulation shows that on April 1, when the Quincy "unit" apparently consisted only of mechanics doing equipment installation, three of the five unit employees were from the Wenatchee unit.

which shows that the ratio was nearly 3:1 (81:32) on May 15, and roughly 1.5:1 (84:55) on May 31.

##### 2. Management team complement

The parties stipulated that all former Wenatchee supervisors and managers took supervisory or managerial positions at Quincy, and that all of them already occupied status as part of the Quincy management team "in May 1990 or earlier."<sup>54</sup> These included Plant Manager/Superintendent Larry Shaw and nearly all of the divisional managers and day- and night-shift supervisors formerly associated with production and maintenance work at Wenatchee.<sup>55</sup> These Wenatchee "management transferees" comprised a majority of Quincy's management team throughout May (and, so far as this record shows, at all times thereafter). Thus, whatever else may be said about the "completeness" of Quincy as of May 25, it seems reasonably clear that Quincy's management team was fully in-place by that date, and that it was dominated by former Wenatchee managers and supervisors.

##### 3. Operations

Quincy began performing repack operations on an uncertain date in early May. I infer that it was relying exclusively at that stage on frozen product transported from the Wenatchee warehouse.<sup>56</sup> I find from Shaw that reinstallation of the repack lines—all from Wenatchee—had been a "first priority,"<sup>57</sup> and that such reinstallation had been substan-

<sup>54</sup> At least this is how I decipher the following passage in the parties' stipulation:

All supervisors (as defined by Section 2(11) of the . . . Act) and managers, who at the time of its April 30, 1990 closure, were employed at the Wenatchee facility were in May 1990 or earlier employed as supervisors and managers at the Quincy facility.

<sup>55</sup> Counting Shaw, Quincy's management team responsible for production and maintenance work consisted of 10 persons (R. Exh. 4), 7 of whom came from the Wenatchee plant, most of these latter from counterpart positions. The three non-Wenatchee members of the team included Steve Bates, formerly the "production manager" at Ferndale, who took the same position at Quincy, Linda Pennington, newly hired as "night superintendent," and Craig Riley, formerly at Ferndale, hired as Quincy's "plant sanitarian." I note also that Personnel Manager Stone, who came from Simplot's Santa Maria, California divisional headquarters, was a somewhat "new" management face to the transferred Wenatchee workers, although Stone had performed extended personnel duty at Wenatchee during the 1989 season.

<sup>56</sup> I recall Shaw's testimony that stores of frozen product from the Wenatchee warehouse (now operated by Columbia Colstor) continued to be fed into the Quincy repack operation for at least a year after Quincy opened. And it is obvious that Quincy itself could not have been producing any frozen product of its own in May 1990, for freezing is associated with prime pack, and the 1990 prime pack season had not yet begun.

<sup>57</sup> Noting that "ground-breaking" for construction of the Quincy plant did not occur until "November" 1989, Shaw summarized the planners' priorities in the following terms (my emphasis):

. . . we were set to start this facility on prime pack in June of the following year. That didn't leave us a lot of time to do this. Our plan . . . was basically to be working [on construction] even at the point that we were running [production]. So we prioritized the lines so that we would have them ready by prime, and we looked at our repack operation so that at first we could

*Continued*

tially “completed” by no later than May 25, the date of the “Grand Opening” ceremonies at Quincy.<sup>58</sup> I infer, moreover, that the repack operation was substantially “complete” in another sense by May 25—that it was performing at substantially the same scale and volume expected of it during comparable off-season periods in years to come.<sup>59</sup>

It is less certain on this record how to characterize Quincy’s completeness as a prime pack operation on May 25. Simplot emphasizes Shaw’s testimony that some equipment needed for the prime pack of later-season produce was not yet fully installed by that date, and that such equipment continued to be incrementally installed for about another month thereafter. Shaw acknowledged, however, that by May 25, the equipment necessary to prime pack green peas and sugar snap peas was already in place, and within only a few hours of final tinkering and shaking down before being ready to handle a harvest influx of these early season vegetables.<sup>60</sup> In fact, the grand opening ceremonies were held at a prime pack processing line, where green peas were undergoing a demonstration run, even while repack was apparently being conducted simultaneously on the plant’s packaging lines.

Simplot strains, I think, in trying to harmonize its choice to hold “grand opening” ceremonies on May 25 with its claim in this litigation that Quincy was not “complete” (i.e., in “full operation”) until months later, at the peak of the season. Simplot’s counsel asserts on brief that this “[May 25] date was not supposed to signify completion of the new

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*take over [to Quincy] the [repack] lines and get them involved, try to set them up, that wouldn’t hurt us to have them down to begin with. So the first area that we concentrated on was to try to get some of the repack equipment over and inside the shell and get them anchored down.*

<sup>58</sup> Discussing the status of the repack operation as of May 25, and using a plant diagram for reference, Shaw said, “That’s basically everything to the right of where you see that staircase catwalk right under the word ‘repack.’ That was all complete.” Indeed, I would infer that Quincy’s repack operation had been substantially up and running since on or shortly after May 1. This would have been logically part of Simplot’s closely coordinated Wenatchee shutdown-Quincy opening plan: Thus, Shaw admitted that reinstallation at Quincy of repack equipment stripped from the Wenatchee plant was a “first priority,” and we may presume that Simplot would not want to experience any substantial “discontinuity” of Northwest repack operations after Wenatchee’s April 30 closing. Moreover, Simplot made no showing that Quincy repack operations were *not* complete until May 25.

<sup>59</sup> The complement breakdown data in the stipulation reveal that on May 31, only a few days after Grand Opening, when Quincy was doing repack only, the total number of bargaining unit employees then working was 139 (a majority of whom were Wenatchee unit transferees). This total amounts to roughly 80 percent of the approximate total complement (170–180) listed by Stone as currently working in bargaining unit positions about a year later, in mid-April 1991, when this case was tried, and when repack was presumably the sole operation in the plant, and was presumably going at full steam. Assuming a rough correlation between size of complement and level of production in comparable annual repack periods, I therefore infer that at grand opening time in late May 1990, Quincy was producing at roughly 80 percent of its eventual repack capacity. In short, in May 1989 Quincy was “substantially” in “full operation,” considering the time of year.

<sup>60</sup> Shaw also implies that the “cob [corn] line” was basically ready by May 25 to handle corn, even though corn would not come in until later.

operation.”<sup>61</sup> What, then was this date “supposed to signify?” Counsel does not distinctly reply, but she would apparently characterize the May 25 timing as a rather arbitrary choice on the Company’s part for a grand opening date, or at least one which was dictated by considerations unrelated to Quincy’s “completeness” by that date. Thus, she cites Shaw’s testimony that the timing of ceremonies was in part influenced by the schedules of attending members of the Simplot family, and by the fact that it would have been impractical to conduct any such ceremonies after June 1, when the first pea harvest was expected, apparently because prime pack is a relatively more frenzied and overwhelming production operation, leaving little time for any plant personnel to pause for ceremony, and little floor space on which to conduct it.

However true both points may be, they sound only weakly against Shaw’s admissions in the same passages of testimony relied on by Simplot, where Shaw clearly indicates that operational “completeness” was a major factor in Simplot’s decision to hold grand opening ceremonies on May 25. Thus, Shaw stated,

[W]e wanted as much of the plant completed as we could possibly have completed, but . . . we didn’t want it [Grand Opening] to happen while we were actually prime processing. We could not have people walking through the facility when we were running vegetables, so we scheduled it for the 25th of May assuming that any time after the 25th of the May we could be running sugar snap peas or green peas. That was the latest date that we could foresee out.

I recall also that Shaw declared that the ultimate company goal for Quincy was that it be “ready by prime,” and that, by May 25, Quincy was indeed “ready” to prime pack pea varieties, should the harvest come early. Thus, I am not persuaded that it was merely arbitrary for Simplot to have chosen late May as a point to declare a “Grand Opening.” From all appearances, Quincy was by that point as “ready” from an *operational* standpoint as it needed to be, not just ready to continue repack, but ready as well to switch to prime pack operations as soon as the season were to start with the pea harvest.

#### E. Quincy’s Status During and in the Aftermath of the 1990 Season

##### 1. Complement

Recapping earlier findings, Simplot’s efforts to encourage former Wenatchee employees to take jobs at Quincy eventually resulted in the hire of roughly 150–160 “active” employees from the Wenatchee P&M unit, although, due to intervening “resignations” and “injuries,” no more than 148 former Wenatchee unit employees ever ended up working at Quincy at any given point. Moreover, the former Wenatchee unit employees who came to Quincy, although hired for Quincy in April, actually became employed gradually in the new operation (84 by May 31; 148 by August 15). During the same period, Quincy was also bringing in increasing

<sup>61</sup> Simplot Br. at 16.

numbers of new hires, most of them referred through the local Jobs Services Center.<sup>62</sup>

Wenatchee transferees had dominated the Quincy complement throughout May. They continued to be a substantial majority for about 2 more months, until an uncertain point—probably shortly before August 1, when new hires became the majority.<sup>63</sup> I note, however, that even as late as August 1, the number of Wenatchee transferees then on board (146) still qualified as a “substantial percentage,” as *Harte* defines this expression, of the total Quincy complement (368).<sup>64</sup> But even this “substantial percentage” status diminished to something less substantial during the next 2 months of the season, when Wenatchee transferees became an ever-dwindling minority, with the heaviest dilution of their presence occurring on September 30, when the complement peaked at 431, and only 135 of the unit employees, roughly one-third, were Wenatchee transferees.

After the 1990 seasonal bulge subsided, the unit work force returned to a core complement of about 170–180 employees for the remaining 7–8 months until the start of the next season. The majority in that core group again were Wenatchee transferees.<sup>65</sup>

## 2. Operations

As I have found, Quincy had been ready for prime pack of pea varieties no later than May 25, all pursuant to what Shaw described as general plan to “prioritiz[e] the lines so that we would have them ready by prime.” Actual prime pack of peas began in early June, even while further equipment required for the prime pack of varieties to come later was also being installed. So far as this record shows, these additional installations were accomplished on schedule, in time to handle each new harvest. Thus, it appears that *at any given stage* in its initial prime pack season, the Quincy plant was capable of performing—and was performing—the same range and scale of operations which such plants typically perform at that given stage, indeed, substantially the same range and scale of production which Simplot intended Quincy would handle at that stage in years to come.

<sup>62</sup> According to Stone, some of the extra seasonal workers hired through the Quincy Jobs Service Center were actually Wenatchee area residents who had been referred from the Wenatchee Job Service Center, but most of these extra workers were residents of the Quincy area, or were residents of other Grant County rural communities, such as Ephrata and Moses Lake. In prior seasons in Wenatchee, says Stone, only a few seasonal workers had come from these Grant County communities.

<sup>63</sup> On June 15, after prime pack had begun in earnest, the Wenatchee Transferee: New Hire ratio was 133:50. On June 30, the ratio was 140:129. On July 15 the ratio was 144:113. On the next date recorded in the stipulation, however, August 1, the ratio became 146:222.

<sup>64</sup> The 146 Wenatchee transferees at Quincy on August 1 comprised 39.7 percent of the total complement of 368. *Harte* equates “substantial” with “approximately 40 percent or more.” 39.7 percent is “approximately” (i.e., three-tenths of 1 percent short of) “40 percent.”

<sup>65</sup> I rely on the summary testimony of Stone on this point; the parties’ stipulation does not include any specific complement numbers or ratios after September 30.

## F. Miscellaneous

We are instructed by such precedents as *Harte & Co.*, supra, to test for indicators of “continuity” (or “discontinuity”) between “old” and “new” plant operations as one ingredient of the determination whether a union representing employees at the old plant is entitled to continuing recognition as the bargaining agent for employees at the new plant. It is by now plain that the Quincy plant is larger than the Wenatchee plant, and uses nearly twice as many employees at *seasonal peak* than did the Wenatchee plant.<sup>66</sup> That Quincy is thus “bigger” than Wenatchee is the most obvious difference between the two plants. That Simplot continues at Quincy to prime pack and repack vegetables—mostly the same varieties that Wenatchee had also processed, as I discuss below—and has relied heavily on former Wenatchee unit employees and supervisors and managers to accomplish these functions, are perhaps the most obvious indicators of similarity, or “continuity.”

In the end, I will find the latter considerations more influential than Quincy’s “bigness” in finding the requisite continuity. But I must acknowledge that Simplot’s “new plant” defense does not rest simply on Quincy’s relatively larger size; Simplot also invokes a variety of other arguable novelties in Quincy’s operation as facts tending to show that Quincy is not just bigger than Wenatchee, but is essentially different in nature from the Wenatchee operation. Here, I will address these additional factors under somewhat arbitrary category headings, and will explain why I am not persuaded to Simplot’s conclusion.

### 1. Bargaining unit work

The parties stipulated that:

All jobs included in the job classifications [specified in the Union’s contract at Wenatchee] . . . are now performed in the Quincy plant, except for the following:

Cold Storage Warehouse Foreman  
Senior Cold Storage Lift Truck Operator  
Junior Cold Storage and Carloading  
Processing Foreman

The primary reason for the elimination of these positions is that Simplot does not operate a cold storage facility at Quincy. Lift trucks are still operated at Quincy and there are employee positions at Quincy which incorporate lift truck operation, carloading functions, and foreman responsibilities and duties.

Simplot “reserved the right” in this portion of the stipulation to “demonstrate that there are additional classifications, duties, responsibilities, and/or jobs at Quincy which did not exist at the Wenatchee facility or that have been substantially changed from the job at the Wenatchee plant.”

Simplot’s eventual proof on these points is scattered; I will treat with some of the elements elsewhere. But it includes

<sup>66</sup> Based on earlier findings and inferences, however, it is reasonably clear that Quincy’s year-round complement needs did not double in comparison to Wenatchee’s (uncertain) year-round complement. Quincy used about 170–180 year-rounders; Wenatchee may have used upwards of 150.

testimony—mostly Shaw’s—that an uncertain, but apparently small, number of employees now perform tasks in addition to those they performed in counterpart jobs at Wenatchee, and also that certain tasks performed as part of one job at Wenatchee are now being handled as part of a different job at Quincy. Most of the evidence associated with these points bears on changes in the way quality control is handled at Quincy, where Simplot has sought to implement a “concept” called the “Total Quality System,” or “TQS,” under which production machinery operators and even line personnel are supposedly given greater responsibility than at Wenatchee for ensuring the quality of the product at their respective stages in the production process.

The realignments and adjustments associated with the implementation of the TQS philosophy were not shown to have significantly altered the traditional functions or basic work tasks of any given group or classification of employees. Moreover, these changes were not shown to have been necessitated by some inherent “difference” between the Wenatchee and Quincy plant operations; rather, they were changes which Simplot admittedly had chosen not to try to impose at Wenatchee, apparently because Simplot did not want to undergo necessary bargaining with the Union about them. To that extent, it involves a form of bootstrapping for Simplot to invoke those very unilateral changes as a defense to the charge that it had had no right to act unilaterally in the first instance.<sup>67</sup>

As the parties stipulated, Simplot no longer employs persons working in the cold storage warehouse; rather, these positions are now occupied by employees of Columbia Colstor. Relatedly, Simplot points out that plant forklift drivers no longer transfer product in totes from the plant floor to the warehouse; rather, the totes product is conveyed on belts through an opening from the plant into the warehouse, where Columbia Colstor employees handle the stacking and storing of the totes. I note that such changes affected the daily jobs of only a relative few employees, and did not eliminate the need for plant forklift operators. Clearly, in any event, these changes did not transform the overall “nature” of the traditional operation.

## 2. Products

The Wenatchee plant did prime pack of sugar snap peas, corn (cut and cob), and carrots. The Quincy plant prime packs not only those produce items, but also green peas and red potatoes (both prime packed only at Ferndale in prior seasons), and two new items never prime packed at either Wenatchee or Ferndale, lima beans and red russet potatoes. (Wenatchee had handled lima beans and red potatoes, but only as “blended” repack items.) In repack, the principal difference between the two plants’ product lines appears to be that, unlike at Wenatchee, Quincy blends pasta with other vegetable blends. (Wenatchee had blended some vegetables, but not vegetables and pasta.) Moreover, Simplot intends eventually to blend vegetable and meat products into “stir-fry” meals. But as I have already noted, it had not yet done any such blending at the time of this litigation, nearly a year after Quincy first opened. In any case, the introduction of new produce items or blends was not shown to have itself

<sup>67</sup>Cf. *Stewart Granite Enterprises*, 255 NLRB 569, 571 (1981) (first full par.), and 574 (ditto).

created any job classifications not in existence at Wenatchee, nor any changes in the basic way prime pack and repack of a more limited range of produce varieties was handled at Wenatchee.

## 3. Equipment

Simplot’s premise is that a substantial amount of “new equipment” is a factor which supports “good faith doubt.” I think this involves a confusion of concepts at the outset, and is not well supported by the authority it cites.<sup>68</sup> But I will treat the facts as arguably going to the question whether Quincy is so “different” in “nature” from Wenatchee that it is, indeed, a “new” plant, where the Union would enjoy no presumption of majority status in the first instance, and therefore Simplot would never be required to present evidence supporting “good faith doubt” to rebut the (non-existent) presumption.

Quincy Plant Manager Shaw, who held the same job at Wenatchee, testified somewhat unsystematically concerning the origin of the equipment used at Quincy. He concedes that virtually all of Wenatchee’s repack equipment was relocated to Quincy, with the exception of a “Haysen” (polyethylene packaging) line, which was replaced by a newer model; he described only one “change” in the way repack is now being done at Quincy, and this change does not appear to have affected how the repack workers have always performed their jobs. (Summarizing, Shaw stated: “It’s basically the same packaging equipment. It[s] just laid out that we can run it at the same time.”)<sup>69</sup>

<sup>68</sup>Simplot cites *American Fluorescent Corp.*, 275 NLRB 1097 (1985), for this proposition (Br. 27). I think Simplot relies on a dubious interpretation of the judge’s rationale, which the Board in any case failed to adopt. Thus, the judge in *American Fluorescent* construed *Westwood* and other precedents as requiring a transferee “majority” at some point at or near the “commencement of new operations.” Id. at 1101 (last par.)–1102. And he found no such “majority” at any point in the new plant’s operations, which was dispositive in his recommended dismissal of the complaint. But the Board found it “unnecessary” to affirm this reading of *Westwood*’s “‘substantial’ number” test, apparently because the evidence showed in any case that the number of “old” plant workers transferring to American Fluorescent’s new plant amounted to less even than a “substantial” percentage of the new plant complement. The ultimate decision, therefore, had nothing to do with the importation of some “new equipment” into the new plant.

<sup>69</sup>This is what Shaw said in greater detail in response to a question from the bench:

JUDGE NELSON: Again, if this can be done more simply, I’d appreciate it. I’d like to ask the question a different way. What operations do you have at Quincy that you did not have at Wenatchee? I think I can search his answer and come up with that and compare it to other data, but if you can put it that way, I’d appreciate it.

THE WITNESS: The equipment in the repack, about the only difference is in how the equipment is set up. When we set up the repack in Quincy, it was—it went from a system that went from one mix and blend room with the dumpers that fed the lines out to a system where all of the lines in Quincy are totally independent. They have their own dump stations behind each line, meaning that in Quincy we can run the lines independent of each other at the same time. Whereas in Wenatchee, if it didn’t work out quite right with the one mix and blend system, we were limited on what we could run at one time down on the floor. That’s the major difference. As far as in answer to your

Shaw is less clear in describing how much of Wenatchee's prime pack equipment likewise made the move. He acknowledges that Wenatchee's steam blanchers and sugar snap pea line were transferred, and also portions of the freezer lines, and some carrot budding saws and other fresh-processing equipment. In these cases, however, Shaw appears to say that the Wenatchee equipment was first cannibalized, and to some uncertain degree reassembled or reconfigured with additional new parts or elements, such as wholly new, stainless steel roller conveyors, apparently required for USDA "protein"-handling certification.<sup>70</sup> Many of the forklift vehicles likewise came from Wenatchee, says Shaw, although "some" of them, especially fitted for work in the Wenatchee warehouse, were "left" at Wenatchee. This presumably means that these custom forklifts were sold to Columbia Colstor, apparently to be used as they had been historically, including to move frozen product destined for Simplot's repack lines, now relocated to Quincy.

Shaw was led more systematically to itemize the "new" equipment used at Quincy: Although some steam blanchers had come from Wenatchee, an additional cabin plant blancher ("the largest one in existence") was imported from a European manufacturer. It was not shown that the introduction of this new blancher created any significant change in the way blanching had been done at Wenatchee, at least none which impacted on the jobs of bargaining unit workers associated with the blanching operation.<sup>71</sup> Moreover, as a general proposition, it is not obvious from this record that working on "newer" versions of production equipment has created any substantial change in the way the operators of counterpart equipment at Wenatchee had always done their jobs. The same observation is appropriate regarding the introduction of a new freeze tunnel—"the Cadillac of freeze tunnels," as one former Wenatchee worker gushed voluntarily—and the importation from one of Simplot's California plants of a line system used for processing pasta.<sup>72</sup>

An arguably different conclusion might be drawn in the case of the new batch peeler, used mostly for carrots, apparently, which peels skins with steam, rather than lye (as at

Wenatchee), and which therefore avoids creating what Shaw called a "caustic residue that you had to put into a waste-handling system [at Wenatchee]." But again, it is not clear how this innovation might have impacted on traditional bargaining unit work associated with peeling carrots. A more obvious "change" occurred with the introduction at Quincy of a "laser color sorter" as part of the processing of peas; it is used to detect and remove deadly nightshade vines and berries, and it thus automates what apparently had been done by human eye and hand at Wenatchee. It is not apparent how many employees were affected by this, if any. Neither was it shown that the laser system could not have been introduced at Wenatchee, or, conversely, that there was something "different" about the Quincy operation as a whole which made the laser system uniquely useful at Quincy. Finally, a "bar code" scanner system was introduced at Quincy, apparently for inventory control purposes, to some uncertain extent supplanting traditional manual records-keeping, but not eliminating it.

Seeking to quantify all this information, Simplot's counsel asked Shaw (emphasis added), "Approximately what percentage of Quincy's assets *now* are assets that were moved in from the Wenatchee plant?" Shaw replied, based on a recent out-of-court conversation with the Quincy plant's accountant, that "it appears to be about 15–20 percent of the value in the . . . Quincy plant with Wenatchee equipment." I will give little weight to this information: It is plain hearsay. It purports to depict the "valuation percentages" as of a recent date in Quincy's history—the date of Shaw's testimony in April 1991.<sup>73</sup> Shaw's "understanding" was that the Wenatchee asset values used by the accountant to make the comparison were based on tax depreciation schedules, not actual cost of replacement; to that extent, the "old" Wenatchee assets may have been artificially undervalued in comparison to the valuations placed on the "new" equipment bought for Quincy. The percentage of current Quincy assets which were former Wenatchee assets, even if valued appropriately, is still a largely meaningless figure; certainly it tells us next to nothing about the degree of "difference" between the two plants from a functional or operational standpoint.<sup>74</sup>

#### 4. Production capacity

The Quincy plant yields more product volume, and a somewhat wider range of frozen produce varieties and blends than did the Wenatchee plant. Shaw appears to acknowledge that this is largely a function of the Quincy plant's size, which permits the operation of several processing lines simultaneously. Thus, during the 1990 season, Quincy ran as many as three product lines at once (lima beans, red potatoes, and corn), whereas Wenatchee could not conveniently handle simultaneous prime pack of different produce varieties.

question, what additional equipment we have in Wenatchee or, excuse me, in Quincy, it's basically the same packaging equipment. It just laid out that we can run it at the same time.

JUDGE NELSON: Thank you.

(By Ms. Anamosa):

Q. It's the same equipment except for the Haysen—

A. And the Haysen.

<sup>70</sup> It appears also that some Wenatchee warehouse refrigeration equipment likewise made the move to Quincy. Thus, Fletcher testified that Simplot intended to, and eventually did, make arrangements with Columbia, the Quincy warehouse operator, to "purchase some refrigeration equipment from us and to expand their facility," to meet Simplot's needs. My assumption that the equipment in question came from Wenatchee (rather than from some more distant Simplot operation) is based on Wenatchee's proximity to Quincy.

<sup>71</sup> Shaw testified that the new blancher is more "energy-efficient," and "far more technical to operate than the old style blanchers." The former information tells us nothing significant for purposes of a continuity-of-job analysis; the latter only hints at a possible difference between how Wenatchee blancher operators did their jobs and how Quincy blancher operators do their jobs.

<sup>72</sup> Admittedly, Wenatchee did not process pasta, but it is not evident that jobs on this processing line involve significantly different skills or techniques from those involved with processing vegetables at Wenatchee.

<sup>73</sup> In this regard I note that Shaw elsewhere stated that a Wenatchee "bulk line" which was originally reinstalled at Quincy was only later replaced with a new line system. Therefore, the Wenatchee asset "percentages" mentioned at trial by Shaw may have changed substantially from the percentages which prevailed in Quincy's earlier months.

<sup>74</sup> Thus, even if only "15–20 percent" of Quincy's "equipment assets" came from Wenatchee, it would be unreasonable to infer from this that Quincy is now "different" from Wenatchee by a factor of "80–85 percent."

## SUPPLEMENTAL ANALYSIS; CONCLUSIONS OF LAW

## I. MATTERS OF LABELING; THE APPLICABILITY OF HARTE'S TEACHINGS

The parties are in contest at the threshold over how to label the relationship between Quincy and Wenatchee. (Is Quincy “merely” a “relocated” version of Wenatchee? Is it instead a product of “merger” or “consolidation” and/or “expansion?” And no matter how those those preliminary labeling disputes might be resolved, can Quincy justifiably be labeled as a “new” operation?) These labeling questions are not inconsequential, but my view, informed by *Harte*, is that some of these labels, at least, are not necessarily outcome-determinative.<sup>75</sup> Rather, as I explain next, I will find labels useful only insofar as they illuminate the more basic inquiry, described in *Harte* as a search for “sufficient continuity.”

*Harte* itself appears to recognize the limited utility of labels; it seemingly uses the term “relocation” broadly in some passages, implying that something more than a “mere” relocation situation may still require an extension of the old bargaining relationship to the new location, and conversely, something labeled as a “relocation” may nevertheless create a “new” operation, where it will be inappropriate to extend the old bargaining relationship to the new location; but in either case, the test is whether or not there exists “sufficient continuity” between the old and new operations. This is best exemplified in the following passage (278 NLRB at 948):

In relocation cases such as this, our task is to distinguish situations where the new facility is basically the same operation, simply removed to a new site, from those where the new facility is somehow a different operation from the original. . . . Given the complexity of modern business transactions, the determination of exactly what relationship the new plant bears to the old is not always easy to make. Nonetheless, we have developed standards . . . to determine when there is a sufficient continuity of operations . . . .

But *Harte* more obviously refers to “mere” relocation situations when it reminds us that under the precedents, it will not matter that transferees from the old plant may be less than a *majority* in the new plant complement; rather, in such “mere” relocation cases, all that is required to perfect the old plant union’s status as the representative of employees in the new plant is that “the operations at the new facility are substantially the same as those at the old and . . . transferees from the old plant constitute a substantial percentage—ap-

<sup>75</sup> An arguable exception is the label “new.” That label has trivial significance when used for some purposes—any operation done at a different location than formerly is, to that extent, “new,” especially when housed in a newly-constructed building; thus, I have not hesitated to refer to Quincy as the “new” plant. But “new” is also sometimes used by the Board as a conclusory term of art, to describe an operation which is so “different” in terms of its operations and/or the identities of the employees making up its complement that the Board will find that a “real question concerning representation” exists at the “new” operation, and therefore that a union is not entitled to a legal presumption of “continuing majority status” simply because the union formerly represented employees at a different location. E.g., *Hudson Berlind Corp.*, 203 NLRB 421.

proximately 40 percent or more—of the new plant employee complement.”<sup>76</sup>

Simplot reads *Harte* differently; it takes the position that *Harte*’s principles have no applicability because this is not a “relocation” case. This position draws arguable support from *Central Soya*, supra, where a differently constituted Board found that the new plant in question involved “a consolidation as well as a relocation,”<sup>77</sup> and then noted that, “[t]he instant case is therefore distinguishable from *Harte & Co.* . . . and *Westwood Import* . . . which are exclusively relocation cases.”<sup>78</sup> In *Central Soya*, however, the new plant employed in almost equal numbers workers from one former plant represented by the Grain Millers union and workers from another plant where employees had been historically unrepresented. In that unique context, the Board found it necessary to rely on “accretion” principles—and the fact that a “majority” (however slim) in the new complement were transferees from the former Grain Millers-represented plant—to conclude that the employer owed recognition to the Grain Millers.<sup>79</sup> And this, I think, explains the real significance of *Central Soya*’s dictum about the “distinguishab[ility]” of that “consolidation” case from “exclusively relocation cases.” Put another way, *Central Soya* does not reject *Harte*’s broad focus on “sufficient continuity”; rather, it holds that where a genuine “consolidation” of complements of approximately equal size is presented, *Harte*’s “substantial percentage—40 percent or more” standard is not applicable, because in such a case *each* group could meet that standard. Accordingly, I think Simplot errs to the extent it presumes that *Harte* may be ignored except where “exclusively relocation” cases are presented. Rather, I am persuaded that *Harte*’s focus on substantial continuity will apply even where the fact setting may involve other than a “mere relocation.”

If I have misunderstood *Central Soya*’s gloss on *Harte*, and if matters of labeling are more important than I have presumed above, I will record how I would label Quincy’s relationship to Wenatchee: I have no difficulty finding that Quincy is not “merely” the Wenatchee operation “removed to a new site”; rather, Quincy embodies to a limited extent a “consolidation” and “expansion” of operations formerly done at both Wenatchee and Ferndale. But I observe that selecting the appropriate label in these circumstances may well depend on *which* “operation” is being focused upon. Thus, it is reasonable to label Quincy’s prime pack operations as involving a “consolidation,” in the limited sense that Quincy now prime packs a few produce varieties which only Ferndale had processed in the recent past and others which only Wenatchee had processed formerly. But the same obviously cannot be said about Quincy’s repack operation. Ferndale had not done repack since late 1987; Wenatchee was Simplot’s *only* repack operation in the Northwest until Quincy took those operations over in May, upon Wenatchee’s final shutdown on April 30. Thus, if repack—the operation which occupies 7–8 months of Quincy’s annual activities—

<sup>76</sup> For reasons discussed elsewhere below, I will not be required to apply a “substantial percentage” test, but I will find it necessary to rely on the other teachings recapitulated in *Harte* to reach my conclusions.

<sup>77</sup> 281 NLRB at 1309.

<sup>78</sup> Id. at fn. 6.

<sup>79</sup> 281 NLRB at 1309.

is the focus, there can be little doubt that Quincy reflects something very close to a “mere” relocation of the Wenatchee operation.<sup>80</sup>

Even if the prime pack operation is the focus, the limited elements of “consolidation” present were not sufficient to make Quincy a “new” operation. For the Board looks in such cases to whether “changes have occurred in the nature as distinguished from the size of the operations.”<sup>81</sup> Wenatchee, too, was a prime pack plant, just one whose size would not allow it to prime pack *all* of the vegetable varieties flowing in during the Northwest harvest season. Viewed this way, Quincy merely reflects a “replacement” and “expansion” of Wenatchee’s operation. And this expansion was not shown to have significantly “changed” the “nature” of the historical operation at Wenatchee. Indeed, I think Simplot best captured the real relationship between Wenatchee and Quincy when it announced in its April 18, 1990 letter to Wenatchee workers:

We are closing an old facility and opening a new plant in Quincy. . . . The plant will be among the biggest . . . of its kind.

Clearly, the plan as described by Simplot itself in a less guarded moment was to “close” one plant and to “open” a new one of like “kind,” only “bigger.” Therefore, I have no hesitation in concluding, in *Harte* terms, that “the operations at the new facility are substantially the same as those at the old[.]”

Moreover, to the extent there were limited elements of consolidation in Quincy’s prime pack activities, they did not involve the merger at a new location of transferees from two formerly distinct plant complements.<sup>82</sup> Rather, the Quincy prime pack complement, at least during roughly the first 2 months of prime pack (until on or shortly before August 1) was dominated by Wenatchee transferees, and supplemented by “new hires” never before employed by Simplot, who became a numerical majority only in the final 2 months of the season. And these facts substantially distinguish this case from cases such as *Hudson Berlind Corp.*, supra, where “consolidation” of formerly separately represented employees became a key ingredient in the Board’s ultimate conclusion that the new plant was, indeed, a “new” plant, where

<sup>80</sup>Put another way, the facts found above reveal strong elements of “continuity” between the Wenatchee and Quincy repack operations: Quincy “replaced” or “supplanted” Wenatchee’s—and only Wenatchee’s—repack. Quincy relied almost entirely on Wenatchee’s repack equipment, on Wenatchee’s frozen stores, and its repack-experienced employees, to begin repack operations of its own. Moreover, the Wenatchee transferees continued thereafter to be a majority in the complement used in the 7–8 months each year when repack is the dominant activity in the Quincy plant.

<sup>81</sup>*General Extrusion Co.*, 121 NLRB 1165 (1958). See also, *Central Soya*, supra, where the majority emphasized that “the organization and nature of the work force did not change simply by virtue of a mere expansion of the unit.” 281 NLRB at 1309 fn. 7.

<sup>82</sup>Thus, “transferees” in that prime pack complement were almost entirely from Wenatchee; Ferndale “transferees” (more accurately, employees who had been employed at Ferndale before it closed permanently after prime pack in 1989) made up only an insubstantial percentage of Quincy’s new complement.

no union could be presumed to enjoy status as the employees’ bargaining agent.<sup>83</sup>

## II. ULTIMATE QUESTIONS

To recapitulate: Quincy is substantially the same from an operational standpoint as Wenatchee used to be (each operating year-round; each running both prime pack and repack). Quincy’s repack operation is, essentially, the Wenatchee repack operation “relocated.” Quincy’s prime pack operation is, essentially, Wenatchee’s prime pack operation “relocated” and “expanded.” The employees used at Quincy when it started operations came mostly from Wenatchee. Those Wenatchee transferees were intended to and did comprise a majority of the complement used by Quincy during the largest part of its annual operations, including both repack and prime pack. (It was during only 2 months in Quincy’s first year of operations that new hires temporarily outnumbered Wenatchee transferees.) The “consolidation” of work formerly performed separately at Wenatchee and Ferndale did not involve a merger of employees from those former bargaining units, and therefore did not give rise to a “real question concerning representation” such as that presented in *Hudson Berlind*, supra. These factors clearly present a strong basis for finding “continuity” between the Wenatchee and Quincy operations both in terms of operations and employee complement.

If this is so, then, at most, only two basic questions remain: (1) Does it defeat the notion of “continuity” (either in terms of operations or employee complement) that Simplot expected to—and did—rely during the 2-month peak of the season on a complement composed in the majority of new hires? Alternatively, (2) Did the anticipation of the late-season configuration amount to “objective considerations” warranting a “good-faith doubt” such as to justify Simplot’s refusal to extend the Wenatchee labor relationship to Quincy?<sup>84</sup> As to (1), while this “seasonal” issue was not squarely presented in *Harte*, nor in any of the other cases relied

<sup>83</sup>And see the *Harte* Board’s discussion of *Hudson Berlind*’s uniquely distinctive features. 278 NLRB at 950 fn. 11. Moreover, the absence in this case of a real “merger” of employee complements from two former plants likewise distinguishes this case from *Central Soya*, supra, where “accretion” principles were applied, requiring a “majority” analysis, rather than a “substantial percentage” analysis.

<sup>84</sup>I am really inclined to think that these two questions are analytically intertwined, and that only the first question is important, and that the resolution of it will necessarily dictate the answer to the second one. I mention the second question only because in this case, unlike in *Harte* and its principal predecessors (*Westwood Import* and *Marine Optical*), the union contract at the old plant (Wenatchee) had expired coterminous with the old plant’s closure. To that extent, there existed in this case no “contract bar” to the raising of a good-faith doubt defense. But see, e.g., *Mass. Machine & Stamping*, 231 NLRB 801 (1979), discussed in *Westwood Import*, supra, 251 NLRB at 1214–1215, where, as here, the employer refused the Union’s prerelocation demand for recognition and bargaining at the new plant, based on an expectation that the new plant’s eventual complement would be composed in the main of new hires. In finding that the employer thus violated Sec. 8(a)(5), the Board nevertheless relied on the transferee majority existing when the new plant began operations, and on the traditional presumption that new hires “will support the union in the same proportion as the previous employee complement.” 231 NLRB at 802.

on in *Harte*, I think *Harte's* principles are inharmonious with Simplot's claims. As to (2), I find no independent warrant in the cases for treating such peak-season configurations as an "objective consideration" justifying Simplot's withdrawal of recognition from the Union upon Wenatchee's closure.

The notion that transferee: new hire ratios at seasonal peak are the only ones that count for these purposes is difficult to harmonize with *Harte's* instruction that the *time* for assaying the ratio of transferees to new hires is not when the new plant becomes "fully operational,"<sup>85</sup> but is, rather, when the "relocation" process has been substantially concluded.<sup>86</sup> I have found above that this "relocation process" had been substantially concluded by no later than the May 25 grand opening,<sup>87</sup> at a point when not just a "substantial percentage," but a "majority" of the complement consisted of Wenatchee transferees.<sup>88</sup> And *Harte* presumes that the "interest" of the employees thus transferred will be to "retain[]" not just their historical bargaining agent, but "the fruits of their collective activity,"<sup>89</sup> i.e., the terms and conditions of employment which obtained at Wenatchee, as established by the Wenatchee labor agreement. By contrast, the Board has never presumed that "new" employees do *not* wish to enjoy collective representation, or the "fruits of collective activity" harvested by their fellow workers at an earlier point.<sup>90</sup> Therefore, it is difficult to see how the anticipated peak season configuration would alone create a basis for doubting the Union's continuing majority status.

I am mindful, as was the *Harte* Board, that a "tension" exists between the "transferees' interest in retaining the fruits of their collective activity, and the newly-hired employees' interest in choosing whether or not to have union representation."<sup>91</sup> And in this regard it is not frivolous for Simplot to point out that the Board itself prefers to run representation elections in "seasonal" industries at or near the peak of the season, so as to enfranchise the largest number

<sup>85</sup> As a separate point, even if "fully operational" status were important, I cannot accept Simplot's attempt to equate "peak" operations with "full" operations. Clearly, from my findings above, Quincy was operating substantially "fully" (in terms of its expected operations at comparable times in future years) by no later than May 25; indeed, it was never shown *not* to be operating "fully" at any point after the April 30 closing of the Wenatchee plant. And Simplot's careful planning was obviously calculated to ensure just that outcome.

<sup>86</sup> *Id.* at 949.

<sup>87</sup> By May 25, repack operations—and the employees needed to work them—had been "relocated" from Wenatchee. Prime pack equipment was "substantially" in-place by the same point, and the additional Wenatchee transferees who would work on prime pack had already been hired, even if, due to the fact that there was not yet any fresh produce to process, those transferees had not yet been brought onto the plant floor.

<sup>88</sup> Thus, it becomes irrelevant to decide whether *Harte's* "substantial percentage" test properly applies here. Cf. *Hydro-Air Equipment*, 277 NLRB 85 fn. 2 (1985).

<sup>89</sup> *Id.* at 950.

<sup>90</sup> If anything, the contrary is presumed—that "new hires . . . desire union representation in the same proportion as those they replaced." *Mass. Stamping*, supra, 231 NLRB at 802 (citation omitted); *Marine Optical*, supra, 255 NLRB at 1245, citing *Westwood Import*, supra. Thus, we cannot suppose, a priori, that to grant the Union's representation claim at Quincy would be to force the Union down the unwilling throats.

<sup>91</sup> 278 NLRB at 950.

of employees.<sup>92</sup> But decisions arising in the representation case field (where, by definition, a "question concerning representation" of employees has already been determined to exist before the Board turns to the issue of *when* to conduct the election) are of little value in guiding us to a determination in cases of this type *whether* such a "q.c.r." exists. Rather, cases like this invariably present a "tension," rarely present in representation cases, between the competing interests of union-represented transferees from another plant and new hires. In addition, unlike in normal representation case situations, cases like these normally will implicate a "national labor policy favoring industrial stability."<sup>93</sup>

Moreover, just as in *Harte*, we are presented with "additional factors which contribute to our willingness to tip the scales in favor of the transferees."<sup>94</sup> Some of these additional factors are the same as those noted in *Harte* (supra at 950). Thus, Simplot's "acquisition [and opening] of [Quincy] was dependent on its closing of [Wenatchee]"; Simplot "was not presented with rival claims from competing unions, and its recognition of [the Union would not have] implicate[d] the types of considerations . . . addressed in *R.C.A. Del Caribe*, 262 NLRB 963 (1982), and *Bruckner Nursing Home*, 262 NLRB 955 (1982)"; and "[f]inally, the national labor policy favors industrial stability achieved through the collective bargaining process."

There exist here yet "additional considerations" warranting tipping the scales in favor of the transferees: Here, unlike in *Harte*, we are not presented with the expectation that new hires will become a "permanent majority" in the new Quincy operation, and thus the new hires in question do not have the same *stake* in employment at the Quincy plant as the year-rounders (mostly Wenatchee transferees) do: As I have noted previously, the employees in the new-hire category are mostly unskilled, "general labor" workers, who may work only a few weeks out of every year, and, unlike the year-round core group workers, their identities will change substantially from year-to-year (probably exceeding the overall "40 percent" turnover rate described by Personnel Manager Stone). Certainly, when an employer opens a new plant with the realization that its operations will largely depend on the efforts of a steady group of employees who may be presumed to desire continuing union representation, it hardly favors the interests of "industrial stability" to allow that employer to refuse to maintain the established bargaining relationship simply because, months after opening, the employer plans to bring in additional workers whose representational preferences are unknown, and who will comprise a majority in the bargaining unit during only a transitory peak period, and many of whom, in any case, are not likely to be around at next year's seasonal peak.<sup>95</sup>

<sup>92</sup> Simplot cites, among other representation case decisions in "seasonal" industries which support this proposition, *Baumer Foods*, 190 NLRB 690 (1967), and *Industrial Forestry Assn.*, 222 NLRB 295 (1976). See also *Case-Swayne Co.*, 209 NLRB 1069, 1070 (1974). I regret that, despite another closing request I made at trial (Tr. 502:4-8) the General Counsel on brief has barely confronted the point, but has meandered around it only briefly, and wholly inconclusively. See G.C. Br. 20-21.

<sup>93</sup> *Harte*, supra at 950.

<sup>94</sup> *Ibid.*

<sup>95</sup> I reasoned similarly in a "successorship" situation in *D & K Frozen Foods*, supra, 293 NLRB at 864 fn. 15. (There, ironically,

Based on all of the foregoing, I find that Simplot errs in asserting that it would have violated Section 8(a)(2) to have thus recognized and bargained with the Union. Under a *Harte* continuity analysis, it would have been entirely lawful and appropriate for Simplot to have extended recognition to the Union and to have bargained with it before imposing any changes at Quincy which were inconsistent with the “fruits of collective activity” at Wenatchee. Indeed, where it was apparent before Quincy ever opened that transferees from Wenatchee would constitute a majority when the relocation process became substantially completed, and where the expectation of a temporary ballooning in the seasonal work force could not in any case justify a “good faith doubt” of the Union’s continuing majority status, it was unlawful, as alleged in the complaint, for Simplot to refuse the Union’s reopening demands for recognition;<sup>96</sup> it was equally unlawful for Simplot to have made unilateral changes at Quincy from the Wenatchee status quo ante.<sup>97</sup>

#### THE REMEDY

Having found that Simplot has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. At bottom, Simplot’s violation was a refusal to recognize the Union’s status as the lawful exclusive bargaining agent for production and mainte-

Simplot was the predecessor operator of the plant, and there, ironically, the same prosecuting office, Region 19, assumed for purposes of that prosecution against the successor that the “full complement” for “majority”-counting purposes would be the complement on hand at the peak of the season. Although this assumption did not affect the outcome, I nevertheless questioned it, saying, in pertinent part:

Exactly what “complement” should be used for “majority”-counting purposes in a seasonal industry which swells to “peak” employment for only a relatively short time is a difficult question. I note that the employment data recited thus far might support an argument that, viewed from an annual perspective, former Simplot production employees did the “majority” of Respondent’s production work (including repack) on and after August 1, and even possibly that such former Simplot workers did the majority of the work done in the peak season (considering that only one shift, comprised mainly of “core” group carryovers, was scheduled on many of those peak season days). I note also . . . that [plant manager] Crabtree advised Respondent’s managers that the plant would require only “120 to 130” employees in the peak season—not the “151” which the parties stipulated were “employed” as a “full complement” in late August-early September. But with the case pleaded, litigated and argued solely as a “but for” case, one in which the General Counsel has stipulated that Teamsters never represented an actual “majority” in Respondent’s “full complement” (a Burns-inspired phrase of dubious import in this setting) I will not pursue the validity of a potential alternative argument—that Respondent, in fact, employed a majority of former Simplot employees in the production unit at a time when it used a “substantial and representative complement” of production employees within the meaning of the Court’s more recent decision in *Fall River Dyeing Corp.*, supra. [*Fall River Dyeing Corp. v. NLRB*, 107 S.Ct. 2225 (1987).]

Although the Board adopted this decision, my quoted comments must be understood in context as obiter dicta, and I do not assume that the Board’s adoption implied approval of those dicta.

<sup>96</sup> *Mass. Stamping*, supra, 231 NLRB at 802–803.

<sup>97</sup> *Marine Optical*, supra, 255 NLRB at 1245.

nance employees in the Quincy unit,<sup>98</sup> and its unilateral decision, implemented as soon as it began to use employees at the Quincy plant, to impose wages, benefits, and other terms and conditions of employment on those employees which constituted departures from the status quo ante, i.e., the terms and conditions established by, and prevailing under, the Wenatchee labor agreement. It is not certain that any or all of those changes worked to the detriment of employees in the Quincy unit; it is certain that the changes were in derogation of the Union’s status as the employees’ exclusive representative. Accordingly, my recommended order provides that Simplot shall immediately so recognize the Union at Quincy, and on the Union’s request, bargain collectively in good faith with the Union regarding all mandatory subjects affecting unit employment at Quincy, retroactive to the date at which Simplot first sent employees to Quincy. Further, on the Union’s request, Simplot shall cancel and rescind any changes it imposed unilaterally on those employees’ terms and conditions of employment, and shall make employees whole for any losses they may have suffered as a consequence of those changes,<sup>99</sup> with interest.<sup>100</sup>

The General Counsel also specifically alleged in the complaint that Simplot should be required to “make whole the Union for the loss of any dues revenues which it would have received (through dues checkoff provisions from Wenatchee Unit employees who transferred to Quincy) but for [Simplot’s] failure to recognize and/or withdrawal of recognition of the Union[.]” He makes a similar conclusionary request at the end of his brief, but does not argue the point or cite any authorities. Where the General Counsel has not seen fit to research the question (or, if he has, he has not acquainted me with the fruits of that research), I specifically decline to decide whether this remedial prayer might be meritorious. The General Counsel will have another opportunity, if he wishes, to address the question to the Board.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>101</sup>

#### ORDER

The Respondent, J. R. Simplot Company (Simplot), Boise, Idaho, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to recognize or to bargain collectively in good faith with the Teamsters Local 760 (the Union) as the exclusive collective-bargaining representative of employees

<sup>98</sup> The parties have stipulated that “the following employees of Simplot, hereinafter the Quincy Unit[,] constitute a unit appropriate for the purposes of collective bargaining . . . :”

All production and maintenance employees at Simplot’s Quincy, Washington plants, warehouse, sheds or lots adjacent thereto, where commodities or materials are processed or stored, excluding office employees, field personnel, agricultural department employees, guards[,] and supervisors as defined by the Act.

<sup>99</sup> *Ogle Protection Service*, 183 NLRB 682 (1970).

<sup>100</sup> Interest on any amounts owed is to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>101</sup> If 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.

working at its Quincy, Washington plant in the bargaining unit elsewhere found appropriate herein (the Quincy unit).

(b) Unilaterally changing the wages, hours of work, or other terms and conditions of employees in the Quincy unit.

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

2. Consistent with discussions in the remedy section of this decision, take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately recognize the Union as the Quincy unit employees' exclusive collective-bargaining representative, and on the Union's request, bargain collectively in good faith with the Union regarding all mandatory subjects affecting employees in the Quincy unit, retroactive to the date at which Simplot first sent employees to Quincy.

(b) On the Union's request, cancel and rescind any changes it imposed unilaterally on Quincy unit employees' terms and conditions of employment, and make employees whole for any losses they may have suffered as a consequence of those changes, with interest.

(c) 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 analyze the amount of backpay due under the terms of this Order.

(d) Post at its Quincy, Washington plant copies of the attached notice marked "Appendix."<sup>102</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, 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.

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

<sup>102</sup>If this Order is enforced by a judgment of a 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

The National Labor Relations Board has found that we violated the National Labor Relations Act when we refused to recognize or bargain collectively in good faith with Teamsters Local 760 (the Union) as the representative of employees at our plant in Quincy, Washington, and when we made changes in Quincy employees' wages, benefits, and other terms and conditions of employment from those prevailing at our former Wenatchee, Washington plant under the Union's contract there, without notifying or bargaining with the Union about those changes. 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 recognize or bargain collectively with the Union as the exclusive representative of employees in the Quincy unit.

WE WILL NOT make unilateral changes from the wages, benefits, and other terms and conditions of employment established under the Union's contract at the former Wenatchee plant.

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

WE WILL immediately recognize the Union as the exclusive collective representative of employees in the Quincy unit and, upon the Union's request, WE WILL bargain in good faith with the Union concerning all mandatory bargaining subjects affecting employees in the Quincy unit, retroactive to the date we first sent employees to work in Quincy unit jobs.

WE WILL, on the Union's request, cancel, and rescind any changes from the terms and conditions of employment established by the Union's contract at the former Wenatchee plant which affect employment in the Quincy unit; and WE WILL make Quincy unit employees whole, with interest, for any losses they suffered as a consequence of those changes.

J. R. SIMPLOT COMPANY