

Gold Coast Produce; Francioni Bros., Inc. and General Teamsters, Warehousemen and Helpers Union, Local 890, International Brotherhood of Teamsters, AFL-CIO. Case 32-CA-12867

September 29, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN
AND TRUESDALE

On March 30, 1995, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs to the Respondent's exceptions.

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,¹ and con-

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

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees at the October 14, 1992 meeting for truckdrivers called by the Respondent's co-owner Ray Francioni, we find it unnecessary to rely on his finding that the testimony of employee Trujillo was consistent with that of Ray Francioni regarding the alleged interrogation. We also do not rely, contrary to the judge, on office employee Martha Morales' notes of the October 14 meeting, because at the hearing the judge rejected admitting these notes into the record.

The Respondent in its exceptions contends that the judge applied his own business judgment in finding that the Respondent violated Sec. 8(a)(3) and (1) by closing Gold Coast Produce, subcontracting its bargaining unit work, and terminating its employees. We have examined the record and are satisfied that the judge did not rely on his own business judgment in finding this violation.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify and to bargain with the Union regarding its decision to subcontract bargaining unit work, we note that an additional basis for finding such a violation is that the Respondent's decision to subcontract the bargaining unit work was discriminatorily motivated in violation of Sec. 8(a)(3). Where, as here, such a decision is motivated by antiunion reasons, an employer is not exempt from a bargaining obligation under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687-688 (1981). Discrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision. *Delta Carbonate*, 307 NLRB 118, 122 (1992), and cases cited therein.

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clusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gold Coast Produce; Francioni Bros., Inc., Salinas, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Offer Rudolfo Gomez, Federico Hernandez, Arnulfo Sixtos, David Trujillo, Jose Trinidad Arqueta, Adan Lara, and any nonbargaining unit employees similarly terminated, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision, distinguishing, as necessary, between those employed year-round by traditionally going to Yuma, Arizona, for the harvesting there from those domiciled in the Salinas, California area and working only seasonally in the harvesting of Francioni Bros. farming operations.”

2. Substitute the attached notice for that of the administrative law judge.

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 and 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

²Member Cohen agrees that the Respondent violated Sec. 8(a)(3) and (1) by closing the Gold Coast operation, subcontracting the unit work, and terminating employees. He therefore finds it unnecessary to decide whether these actions also violated Sec. 8(a)(5).

³The General Counsel and the Charging Party have excepted to the judge's failure to find that the Respondent discriminatorily terminated nonbargaining unit employees at the same time as unit employees when it closed Gold Coast and subcontracted its work, and to his failure to provide the discriminatorily terminated nonbargaining unit employees with a make-whole remedy. We find merit to this exception and have modified the judge's recommended Order and notice to employees accordingly. This remedy is conditioned, however, on a finding at the compliance stage of this proceeding that the affected nonbargaining unit employees are statutory employees.

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 coercively question you about your union support or activities for Teamsters Local 890, or any other labor organization.

WE WILL NOT subcontract bargaining unit work because you have become represented by a union.

WE WILL NOT discriminate against employees so as to foreseeably discourage membership in a labor organization.

WE WILL NOT or refuse to bargain with Teamsters Local 890 about our November 20, 1992 decision to subcontract harvesting operations and the effect of that decision on employees of the bargaining unit.

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

WE WILL return the work performed by our truck-driver employees to the jurisdiction of the bargaining unit and, on the Union's request, reinstate the terms and conditions of employment that existed prior to the November 20, 1992 subcontracting of unit work.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All regular full-time and part-time employees employed as truckdrivers in the harvesting operations in Monterey County, California and Yuma, Arizona, excluding maintenance employees, mechanics, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer Rudolfo Gomez, Federico Hernandez, David Trujillo, Arnulfo Sixtos, Trinidad Arqueta, Adan Lara, and any nonbargaining unit employees similarly terminated, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their terminations, less any net interim earnings, plus interest.

GOLD COAST PRODUCE; FRANSCIONI BROS., INC.

Virginia L. Jordan, for the General Counsel.

Robin L. Kubicek, of Salinas, California, for the Respondents.

Michael Kaufman (Beeson, Tayer & Bodine), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried in Salinas, California, on several dates from November 30 to December 22, 1993 (the hearing of December 7, 1993, only, was held in Oakland, California). The charge was filed December 4, 1992, by General Teamsters, Warehousemen and Helpers Union, Local 890, International Brotherhood of Teamsters, AFL-CIO (the Union), and was amended on March 1, 1993. The subsequent complaint issued August 10, 1993, in which Gold Coast Produce (Inc.) and Francioni Bros., Inc. were respectively called Respondent GCP and Respondent FB, and collectively called Respondents. In this decision the Respondents shall for brevity and convenience be called Gold Coast and FB, respectively. The primary issues are (1) whether Respondents are, and at all material times were, a single-integrated enterprise and a single employer within the meaning of the National Labor Relations Act, (2) whether certain threatening and coercive statements were made to employees in violation of Section 8(a)(1) of the Act, (3) whether Gold Coast closed its operations to discourage membership in a labor organization in violation of Section 8(a)(3) of the Act, and (4) whether Respondents failed and refused to notify and bargain with the Union respecting the decision to close and the effects of resultant subcontracting on employees of an appropriate bargaining unit, such assertedly in violation of Section 8(a)(5) of the Act.

On the entire record, including my observation of the demeanor of witnesses, and after considering briefs filed by General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

Gold Coast is a California corporation and at all times material has maintained an office and place of business in Salinas, California, where it has been engaged in the harvesting and transporting of produce grown on the farms of FB and other companies in the States of California and Arizona. FB is a California corporation and at all times material has maintained an office and place of business in Salinas, California, from which it has been engaged in the growing of produce in the State of California. During the 12-month period prior to its closure, Gold Coast, in the course and conduct of its business operations, provided services valued in excess of \$50,000 directly to customers located outside the State of California. On these admitted facts, I find that Gold Coast is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, as is also admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Gold Coast and FB are each corporations that operate in close association with one another for the growing and harvest of vegetables on farmland in Monterey County of California's Salinas valley. With minor exception as with the growing of winter broccoli, the farming season pertinent to

this case typically runs from March into November each year. Until the end of 1992 Gold Coast also engaged in certain harvesting of winter season farm produce grown in Yuma, Arizona. The winter season at Yuma basically filled in the months of December into March, and thus for reference and record purposes spanned portions of two calendar years.¹

FB was incorporated as an agricultural grower and employed field equipment drivers, irrigation workers, maintenance employees, field foremen, and a regular season-long irrigation supervisor. The land being farmed was leased for this purpose from owners, of whom the principals of Respondents themselves had about 20 percent of total. The various areas farmed each had an established location name. Crops other than broccoli included lettuce and lettuce mix, asparagus, bok choy, cabbage, carrots, celery, and specialized others.

Gold Coast was incorporated as an agricultural farm labor contractor and employed field crews of vegetable cutters and packers, along with crew foremen, a regular transport driver moving agricultural implement equipment among the fields to where needed, and a maintenance employee who also engaged in truck driving. Gold Coast maintained a field station as its repair and maintenance building for seasonal needs, vehicles, and equipment. In addition several truckdrivers, the employees about whom this case pertains, were utilized in the transport of harvested produce to coolers. A regular supervisor was also employed to oversee all field harvest and resultant functions, including the trucking done to vegetable coolers, of the entire Gold Coast workforce. By the very nature of farming the number of employees used by Gold Coast, particularly as to size of its field crews, would fluctuate with seasonal peaks of harvest time.

Around early October the truckdrivers employed by Gold Coast expressed a sufficient interest in representation by the Union that an RC petition was filed, leading to a secret ballot election the following month. By letter dated October 9 and received October 13 the Union had advised Gold Coast of a claim to represent a majority of its truckdrivers and an intention to file a representation petition. This letter also invited voluntary recognition and offered to have the claim of majority verified by a neutral person. This letter was not answered, and the RC petition was actually filed on October 15.

While the results of the election were inconclusive because of determinative challenges to ballots of certain employees, this inconclusiveness was lifted in early 1993 when Gold Coast withdrew the challenges it had posed, and a revised count showed five votes for the Union and one against. Based on this revision a certification of representative issued to the Union in early March 1993 for a unit of full-time and part-time truckdrivers.

Meanwhile the Salinas valley farm season had concluded almost coextensively with the election of early November and, by written notice to the employees of the truckdriver unit, Gold Coast management advised that the Company was discontinuing its business and they were terminated from employment. At about the same time Gold Coast abandoned any plans to engage in its traditional winter harvest business in

Yuma. At the time of closure the corporations had been in active existence for about 12 years.

B. *The Single-Employer Issue*

Considering overall management of these closely associated entities, the authority is held by Ray Francioni, hereafter for brevity called Ray, and his brother Danny Francioni, hereafter for brevity called Danny, respectively. Each corporation is equally owned by the brothers, with Ray being the chief executive officer of them both, and Danny in the capacity of chief financial officer of them both. Kathy Francioni, Ray's wife, is the corporate secretary of both Gold Coast and FB.

In functional terms the brothers consult with one another with regard to plans for future growing, planting schedules, the making of "deals" for field harvest by other harvesting companies, the establishment of seasonal wage rates for employees, and other business matters. However, Ray was exclusively active in Gold Coast's overall affairs, whereas Danny was generally confined to the actual planting and growing process in the various fields that were farmed by FB.

Both corporations operated from a commercial building on Pajaro Street in Salinas. An unrelated corporation named TGT shares the office space of the building with Respondents. The property itself is co-owned by TGT and the Francioni brothers personally. The respective business occupants divided the building rental and operating costs by an equal contribution from TGT and the two companies comprising Respondents. Two other corporate entities also maintain the same Pajaro Street address. One is KMA, a leasing corporation owning many of the vehicles and agricultural implement equipment utilized by Respondents. The second is PVP, a now dormant corporation. Both KMA and PVP are jointly owned by the Francioni brothers.

Several office employees assisted in the carrying out of Respondents' business activity. While these individuals were technically on the payroll of one corporation or the other, in practical terms an overlapping of tasks was carried out by those in the office. Robert Munoz, accountant/controller was first employed in 1991 as an equally shared person of both entities. When he found the recordkeeping and dual compensation of this arrangement to be inconvenient and burdensome, Munoz obtained Ray's approval to convert to exclusive employment by Gold Coast. This had no effect on his duties of producing and checking business records of both corporations for purposes of financial statements and tax returns, or as to his helping with repetitive office routines such as billing and accounts payable work as necessary.

After the closure of Gold Coast in late 1992, Munoz soon reverted to the payroll of FB with the same title, however he continued work on the winding up of carryover matters of Gold Coast and to its deactivation as a corporation. This process was concluded around August 1993 when the name was sold, however Gold Coast apparently continues with its basic corporate existence. Office employee Martha Morales also moved from employment with Gold Coast up to the time of its closure over to FB after a period of about 3 months on leave. She had performed field followup and investigation of worker compensation matters involving Gold Coast, as well as working on an employee handbook, a statement of disciplinary policy, and a safety manual in 1992.

¹ All dates and named months hereafter are in 1992, unless indicated otherwise.

These publications were approved for application to employees of both entities by Ray upon his being satisfied that they conformed to law, however he testified that actual content of the publications was arrived at by office personnel including his wife. A blanket or "umbrella" insurance policy covered business risk and liability, plus providing certain personal coverages to the principals of both corporations and to the extent applicable both KMA and PVP.

The Respondents kept separate bank accounts, vendor and customer accounts, health insurance policies, financial statements, and tax returns. Financial statements and tax reporting services were provided to both entities by the accountancy corporation Hyashi and Wayland, of which CPA Sherrie Isaac had been Respondents' principal advisor throughout its existence. As to other office functions, Candace Munoz had served beginning in 1989 and for about 3 years thereafter as office manager employed jointly by Gold Coast and FB. In this capacity she handled response to employment verification inquiries for individuals on either company's payroll. After Candace Munoz left, this employment verification task was shared between Patricia Bravo doing it for Gold Coast from March until November, and Morales doing it for FB. Certain business forms were used interchangeably between the entities. This was the case with employment forms, chemical exposure forms, personnel status change forms, and W-4 tax withholding claim forms. Typically the name of either company was available to highlight in particular use of a form, done by crossing out the inapplicable name. In the particular case of a series of disciplinary warnings to employee Adan Lara during mid-1992, the final one, although not distinguishing Gold Coast from FB as his employer was endorsed by or on behalf of Danny.

In terms of field activities, the agricultural crews of FB and the harvesting crews of Gold Coast were run separately through their respective foremen. However, a distinct separation of this type was not so common with supportive personnel. The chief repair mechanic and maintenance employee was Bobbie Monaris, a person shared on the payrolls of FB and Gold Coast. However, Respondents made no showing that his actual work corresponded to an equal expenditure of time. Lara, a person included within the truckdriver unit throughout the RC petition proceeding, was also intermittently assigned to repair and maintenance work without any pure accounting for his time. Lara was also the backup driver of a water truck, used to dampen down the dust of farm roads as this might otherwise affect employee crews of both growing operations and the harvesting. Comparably the field movement of agricultural equipment was performed with some interchange by Trinidad Arqueta, a truckdriver on the Gold Coast payroll. On occasion Arqueta moved not only tractors and harvesting machines for Gold Coast, but as necessary vegetable growing machinery such as planters, the soil mixing caterpillar, and tractors used by FB. Moreover truckdriver Arnulfo Sixtos testified that during the course of his employment there were two or three occasions where on order of his Gold Coast supervisor he moved equipment bearing FB markings between farming locations. Ray actually testified that Sixtos was the maintenance man of Gold Coast during 1992 performing repair on equipment, however this ambiguity was not clarified for the record.

The Board has long settled on four criteria for principal use in resolving an issue of alleged single- or common-em-

ployer status as between ostensibly separate business organizations. The criteria are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. *Sakrete of Northern California*, 137 NLRB 1220 (1962); *Radio Union v. Broadcast Service*, 380 U.S. 255 (1965); *U.S. Dismantlement Corp.*, 298 NLRB 1068 (1990); *Hydrolines, Inc.*, 305 NLRB 416 (1991). Common ownership is the least critical factor among the four, whereas any particular showing of operational integration is the most significant. In the final analysis the imposition of single-employer consequences as between separately existing entities turns on all the circumstances of a case, and with particular attention to whether or not there is an absence of the "arm's-length" relationship that would characterize truly independent organizations.

Here the intrafamily feature of common ownership is uncontested and plainly apparent insofar as the Francioni brothers jointly hold all currently issued stock of both corporations. Beyond that the pervasive authority of Ray is shown in the important affairs of both companies. Little was developed on the record as to Danny's total management responsibilities, so I must assume he is largely confined to the pure direction of basic agriculture as sketchily described by his brother. There is no showing that Danny had the extensive business involvement with other growers, other harvesting companies, governmental bodies, or the financial and legal advisors to the enterprise as did his brother. On this basis I conclude that Ray undertook to be, and thus constituted himself as, the comprehensive authority figure in overall and interconnected activities of both entities. This in turn leads into the fact that there was also a relevant integration of operations. Such a factor amply shows itself in the mutual presence of both companies at the same Pajaro Street office premises, the handling of shared rental paid over to the Francioni brothers themselves as joint lessor of the commercial property, and the informal and only orally based agreements for harvesting operations on FB farm lands on the 20 percent which was personally owned by the brothers. Additionally both entities leased some of their equipment from the family owned KMA corporation, and as Ray testified without necessarily the formality of a written lease. Other operational integration on the office side of the business is shown as to a common telephone number, the purchase of office supplies for mutual use without consistent allocation of cost, and the crossover sharing of clerical and administrative duties by and among the several persons employed in the office. Morales for example prepared quarterly business returns for FB, without any billing of her time to that entity.

As to field operations, maintenance employee Monaris was regularly engaged in work on equipment of each company, and Gold Coast employee Lara so engaged on the occasional part-time basis of when assigned. More pointedly Arqueta undertook the occasional moving and transport of equipment belonging to the function of both companies, and the arbitrary half splitting of his weekly salary as a compensating adjustment between the two entities was not claimed to be done with a corresponding reference to actual time spent.

As to the significant factor of labor relations, Ray "involved" himself in the determination of hiring supervisory personnel for FB, or of those doing mechanical and repair

work associated with the growing of vegetable crops. For annual setting of FB wage rates to offer field personnel Danny undertook most of the industry comparability surveying, but then discussed his findings with Ray and the two of them jointly set final rates. Ray had even more extreme involvement as to both entities with regard to the creation of employee handbooks and safety manuals that had across-the-board use in the two organizations.

I believe the facts here are sufficient to show that a single-employer status exists between Gold Coast and FB. Each of the four applicable criteria has been amply met. But even beyond this it is shown that the two corporations did not operate on an ordinary "arm's-length" basis. From their closely associated agricultural operations to most office and financial affairs there was essentially a disdain about whether or not a true business separation was maintained. The compensating adjustment for split work done by maintenance employee Monaris was not even done, except on a semiannual or annual basis. The absence of written arrangements for Gold Coast's crop harvesting plus a fair amount of equipment leasing shows this quite plainly, and office procedures as well as the utilization of individuals involved in such functions was frequently blurred as work arising from both entities would be performed without differentiation. Finally it was common for FB to advance operating funds to Gold Coast without security or interest payments, in a manner that showed the brothers themselves were without concern for such an important distinction. On this issue I hold that General Counsel has effectively shown from the evidence that the two entities constituted a single employer at all material times. In its only countering argument Respondents cite *Image Convention Services*, 288 NLRB 1036 (1988). This case has elements far different from circumstances here, and a review of it leads me to conclude that its absence of closely associated business activity is, among other distinguishing factors, sufficient to discount it in regard to the holding that I make as a conclusion of law.

C. The 8(a)(1) Allegations

1. Testimony

David Trujillo testified that he attended the late afternoon meeting of truckdrivers such as himself on October 14 at the location called Ranch 800. This was a gathering called by Ray, and about which Supervisor Jose Alfredo (Fred) Esparza gave personal notification to the various drivers. Esparza did not remain for the meeting, however, Morales was present at Ray's behest in order to assist with language translation as necessary. Ray spoke to the group in Spanish, aided occasionally by Morales as to what he wanted to say or to comprehend what one of the employees raised in response. Ray's Spanish language fluency is limited, and it can only be surmised that with Morales present as backup he communicated himself adequately.

As to what was said during the approximately hour-long meeting, Trujillo testified that Ray said he had gotten the Union's letter and that he asked what reason the truckdrivers had for wanting to be represented by the Union. Trujillo himself answered this by saying that he wanted the Union because he was not paid the same as other drivers and did not have the medical insurance that covered them. According to Trujillo, Ray answered this by saying he could not legally

do anything because of the employees having signed cards for the Union. Trujillo recalled that one of the truckdrivers who customarily went to Yuma for that season spoke up about concern that the Company would not pay expenses for this as done in the past. To this Ray again said he could no longer do anything. Ray also advised that he would later have individual conversations with each of them. Trujillo also recalled noticing that Morales was making notes of what was being said during this meeting, however, he had no further memory of other remarks that were made. Trujillo had no recollection that during this meeting Ray made any threat to close down the company.

Trujillo testified to having a second conversation on the subject with Ray about 2 days before the early November election. This took place without others known to be present around midday at the location known as Lanini ranch (adjoining Sharpe ranch). In this episode Ray had walked up to Trujillo saying the Union was not good for anyone involved, and that if the employees voted it in he would close. Trujillo recalled assuring Ray that he would vote against the Union, a statement for which Ray thanked him before leaving. Trujillo testified that in the course of this brief exchange Ray had said he could not afford to pay wages in the range of \$15 to \$20 per hour.

Trujillo testified that at a time before the election, but after the group meeting of drivers, he was spoken to in a brief conversation around midday at Ranch 12 by Supervisor Esparza. The statement he attributes to Esparza is that employees should think about the question, because if they voted in favor of the Union the Company would close leaving everyone without work. Trujillo believed his only response to this was saying that the employees were thinking about whether to vote yes or no.

Truckdriver Federico Hernandez testified to being present among those at the Ranch 800 meeting on October 14. He recalled some delay while Ray, Morales, and Arqueta spoke among themselves, following which Ray started off asking the group why they were having the Union in the sense of what was the problem. Hernandez recalled a response from at least one truckdriver that the problem from an employee viewpoint was the pay changes being made that had ended the time of steady salaries. In fact Hernandez' basis of pay had been changed from weekly to daily salary only, after he returned from a midsummer vacation in 1992. Hernandez believed that Ray then said the matter of pay was not a problem because he could pay it retroactively. Hernandez also testified that after saying the affiliation with the Union was a right of employees, Ray followed this by saying the Company was too small and that if the employees took the Union he "would have to get out" and "retire." Finally, Hernandez testified that Ray told the group to think about the union question, and while he wanted to negotiate he was prohibited by law from doing so because the Union had already appeared.

Truckdriver Sixtos testified to a first conversation on the subject with Ray after the employees began their effort to have the Union occurring a few weeks before the eventual election. This was at Ranch 800 in the early morning with only Arqueta also present. Sixtos testified that Ray opened by asking whose idea it was for the truckers to have a union. When Sixtos answered it was everybody's idea Ray then said if the Union was put in it would be better if he closed Gold

Coast. Sixtos testified that Ray added at this point that the Union was not good and was "bullshit." Sixtos recalled how at his point Arqueta spoke up asking whether he would have a job if Gold Coast closed. To this Ray said that Arqueta would have one with FB, but when Sixtos also asked about being continued in employment Ray told him he would simply be fired.

In the course of cross-examination Sixtos testified that he had attended a late afternoon group meeting at Ranch 800 where Ray spoke as Morales was present. However, he placed this as happening perhaps a week after the early morning episode with Ray and only Arqueta also present.

Truckdriver Rudolfo Gomez is English-speaking and testified without an interpreter that interest in the Union began about a month before the election was held, and involved his signing an authorization card along with others of his occupation. He recalled being approached a couple of weeks before the election by Ray in late afternoon at the Martin ranch while Spanish-speaking Hernandez and Sixtos were present nearby. According to Gomez, Ray started his remarks in English, saying that since Gomez had not been at his earlier group meeting with truckdrivers he wanted to explain what had been discussed there. Ray then proceeded to say he did not understand why the group would want a union. Gomez recalled how Ray continued by saying that things were going all right even with the then-current hard times, but as a small company he could not "make it" with a union between himself and the employees. Ray following this by saying he "wouldn't make it" in such an instance and might have to close. The incident was highlighted in Gomez' memory because in the course of it the truck of an outside company needed to pass, and Ray inquired of its driver what pay rate he was making. Ray then told Gomez that the driver's pay was only 50 cents more per hour and he disparaged the insurance plan that driver was under. Gomez testified that Ray went on to say he did not understand what the truckdrivers wanted, and he could not compete with companies that paid as high as the \$13- to \$14-per-hour rate.

Gomez also testified to having a short conversation alone with Ray at the Sharpe ranch about 2 days before the election. Gomez recalled how at this time Ray asked what chances were on the imminent union vote, and that he had answered how in his own mind he was yet undecided. Ray repeated his concern about having to compete with bigger companies, following which according to Gomez he said that after a rejection of the Union by truckdrivers the group of them could talk directly with him about the future of their Gold Coast employment.

As Respondent's chief witness on this phase of the case, Ray's testimony covered both the reasons for his several discussions with employees and his version of what was said. After receiving the Union's letter of October 9, he had conferred with legal counsel, and was immediately faxed a "do's and don'ts" outline relative to a union campaign. There had never before been an attempt at union organizing during Respondents' existence.

On the next day, October 14, he desired an "informative meeting from my standpoint to discuss the situation," and with this impetus in mind arranged for the late afternoon meeting. Five of the drivers involved in the representation petition were present, Gomez being the only one unable to attend. Ray testified that he said a new line had been drawn,

and there were now certain things relative to their employment that he could and couldn't do. He expressed surprise that they had all "signed these petitions," and said he had thought there were "close communication ties" that might have avoided what had happened. Ray recalled saying his company was small, and that a lot of bigger ones which operated under union contracts "were no longer in existence." He named a couple of examples. After his introduction a questioning about pay was posed by Hernandez, however, it seemed that Sixtos signaled him not to continue with it. Ray knew there was further conversational exchange, but he could not specifically recall its substance, except for Trujillo discussing his status as a less than full-time employee. Ray testified that he repeatedly said it was now against the law for him to negotiate or promise any wage increases or beneficial change in working conditions. Before the meeting ended one of the truckdrivers brought up the subject of Yuma, where it was approaching the time to make the traditional start of a new winter season. To this Ray said that Gold Coast had still not had final word from key customer Dole as to "what our involvement" might be.

Ray made a series of denials including that he had not asked why they wanted representation, had not discussed retroactive pay, and had not predicted he would close or retire if the drivers "accepted" the Union. Ray believed the meeting ended in less than an hour, and final remarks dealt with the probability of going through an election process. One of his denials was, however, affected by his later testimony that at "the big meeting," he "may have" wanted to know from them whose idea the Union had been.

Ray recalled that several days after the group meeting he had an English-speaking conversation with Gomez at the Martin ranch. It occurred in late morning and Hernandez was nearby. Ray reiterated to Gomez that he had gotten the union letter and what he had previously told the group of truckdrivers when they were assembled. Ray agreed that the episode included his speaking with a passing transport rig driver for Triangle Farms, and then telling Gomez that the man made \$8.50 per hour. As at the group meeting Ray continued to emphasize that the ability of his truckdrivers to "come directly" to him was changed, and he could not make promises or have direct discussion. He expressly denied telling Gomez that if the Union were voted in he would close down. He also denied making any reference to a \$13- to \$14-per-hour pay scale. Ray subsequently asked Gomez to serve as the Company's election observer, but denied that he questioned the employee as to how he would actually vote.

Ray also testified as to his conversation with Trujillo alone about a week after the group meeting at the Lanini (Sharpe) ranch. This was a short discussion in Spanish covering Trujillo's pay scale compared to other truckdrivers. Ray testified he had simply said he could make no promises about any aspect of pay. Ray again expressly denied commenting to Trujillo about closing if the drivers voted for the Union. He also denied making any reference to a \$15- to \$20-per-hour pay range.

Finally, Ray testified to a short midday discussion had with Sixtos between the time he received the union letter and the election. This involved only the two of them, was necessarily conducted in Spanish, and took place at the 1200 (Norton) ranch. Ray had initiated the discussion, saying he hoped the truckdrivers would vote no and the work situation

could return to the direct relationship that had existed before. Sixtos rebuffed this, to which Ray then pictured that with union representation the communication process to management from employees was indirect. Ray again expressly denied saying that Gold Coast might close if the drivers "went Union." He also denied ever having discussed the subject of the Union with Sixtos prior to the group meeting of October 14.

Morales' testimony as to events at the group meeting on October 14 is generally consistent with Ray's. She testified that Ray's opening remarks in Spanish were that he had received the union letter, but didn't understand why after so many years the drivers were making this decision. There was reference to Yuma, which Ray said he was trying to take care of. She recalled how he explained that Yuma hinged on a cabbage deal and whether Gold Coast could lose anything from the past amount of harvesting work. Morales recalled that soon the drivers started to break in with their own comments, but aside from her notetaking only recalled "bits and pieces" of it. She emphatically denied that Ray talked about Gold Coast itself going out of business, although he did remark as to certain other companies that had done so. This included an express reference by Ray to problems Dole was having with its union. Morales testified that Ray repeatedly said it was now against the law for him to negotiate or make changes after receiving the Union's letter. Her rewritten notes of the meeting did contain a statement about Ray asking "why they decided to go this route" when speaking to the drivers in Spanish at the group meeting.

Esparza testified that he had been provided a written outline about a month before the election of what he could and could not say as a supervisor. He did talk with employees about the upcoming election but was never drawn to be more specific than that "some comments" exchanged. As to an actual exchange of remarks with Trujillo, Esparza was not asked if this, at least, had even occurred. He did however testify to not, at "Ranch 12," informing Trujillo that Gold Coast would close if the drivers voted for the Union, or otherwise discussed any possibility of closing prior to the election.

2. Credibility

The testimonial demeanor of Trujillo left me doubting the accuracy of what he presented. After allowing for some stiltedness in the translation process, I sensed that Trujillo himself was not that capable of recalling the essentials of what Ray had uttered, and particularly so as relates the private conversation 2 days before the election. I thus discredit Trujillo insofar as he attributed a threat to close to Ray. I recognize that there is some semblance of agreement between what Trujillo described and what Ray himself testified, as with introductory remarks at the group meeting of truckdrivers on October 14. Beyond this I am not persuaded that Trujillo's testimony had sufficient certainty to be in any way supportive of the 8(a)(1) allegations as expressed in the complaint.

Hernandez presented as a witness of unconvincing demeanor. His testimony is believed to be superficial in delivery and contrived in content. Hernandez' impact as a witness was, above and beyond considerations of demeanor, reduced insofar as his being the only one of the truckdrivers present at, and testifying about, the group meeting of October 14 who attributed a lightly veiled threat by Ray to close if the

Union won representation rights. I reject the full scope of Hernandez' testimony, and in particular that portion about a June 1993 encounter with Ray at a cafe, where he recalled an inconsequential exchange of remarks with Ray about operations.

Sixtos was not of a demeanor that clearly invited particular belief or disbelief. On the one hand his appearance was that of honestly searching for accuracy from his memory, and of displaying mannerisms consistent with a truthful recollection. I cannot, however, credit him because of two significant factors. First, he insisted that his first encounter with Ray was considerably before the group meeting of truckdrivers (about which he was not even questioned on direct examination). This was totally inaccurate, not only from the basic time sequence, but because his version would fix the episode as well prior to Ray even receiving the Union's demand letter on October 13. Secondly, Sixtos had not, in an investigatory affidavit taken during January 1993, made any reference to Ray's supposed differentiation between any employment prospects after Respondents might cease operations as between him and Arqueta. Given these glaring negatives to the testimony of Sixtos, I elect to discredit him in full.

Gomez was the witness of poorest demeanor among the several presented by General Counsel on the 8(a)(1) issue of the case. He was vague, hesitant and seemingly uncertain of his various assertions. Given the completely unpersuasive character of what he covered by his testimony, I reject it in full.

I have a mixed credibility evaluation of Ray. As applicable to the 8(a)(1) allegations I was favorably impressed by his demeanor as he recounted the numerous statements made at the group meeting of truckdrivers, and as he testified in regard to individual employee discussion he may have had prior to the election at the 800, Martin, and Lanini (Sharpe) ranch locations. For purposes of resolving the various issues presented by the 8(a)(1) allegations, I accept the testimony of Ray as a correct version of what he spoke at the various times. The mixed nature of my credibility assessment of Ray will be discussed in a later portion of this decision.²

Esparza is the alleged agent of Respondents named in complaint paragraph 10(d) as having committed an 8(a)(1) violation. Respondents have denied his supervisory and agency status. Esparza had progressed through various jobs with Gold Coast before becoming its field supervisor for about the last 1-1/2 years of operations. He was fully responsible for accomplishments by the harvesting crews, the truckdrivers, and the supporting personnel of Gold Coast. He administered disciplinary actions as necessary, and effected several terminations from employment during his supervisory period. He accounted to Ray for these actions, however this was in the nature of merely informing Ray or making a recommendation of such weight that the top official routinely approved it. I find sufficient indicia of supervisory status to hold that Esparza was Respondents' agent as a supervisor within the meaning of Section 2(11) of the Act at material times. Beyond this I am convinced from his testimonial demeanor that

²It is common for a trier of fact to believe some testimony of a witness, but not necessarily believe all of that witness' testimony. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

his version of the Ranch 12 discussion with Trujillo was the truthful one. Esparza spoke with a confidence and consistency such that I believed his testimony, and particularly the persuasive manner in which he voiced denial of what Trujillo had attributed to him in Spanish.

Respondents' final witness as to Section 8(a)(1) issues of the case was Morales. I found her to be an earnest-appearing witness with a sufficiently favorable demeanor that I credit her in full. This has the further effect of giving corroboration to the testimony of Ray.

3. Holdings

Paragraph 10(a) of the complaint has not been supported by credible evidence. This allegation was based on the testimony of Sixtos, however, I have discredited him in all salient regards.

Paragraph 10(a)(2) of the complaint expressly alleges that Ray had stated to employees he would undertake a retaliatory closure of operations. While this portion of the complaint does not associate to "a meeting of employees" as phrased in paragraph 10(b), Ray himself testified to referring to other companies that had gone out of business with a union in the picture. He had also attributed Dole to having trouble with its union. The overall result of oral testimony is such that a threat of retaliatory closure was constructively litigated during the trial. General Counsel contends this statement left employees with the impression that a union caused those companies to go out of business. The events referred to by Ray had occurred many years before, however, he did not acquaint the assembled employees of this when speaking to them.

Section 8(c) of the Act protests the expression of views, argument or opinion as long as "such expression contains no threat of reprisal or force or promise of benefit." A constantly perplexing issue in this regard is the balancing of an employer's rights under Section 8(c) against the rights of employees under Section 7, in determining whether an employer's remarks about other closures during a union organizational drive are permissible illustrations or threats prohibited by Section 8(a)(1). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court wrote guidingly as follows:

[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . . If there is an implication that an employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion. . . .

On the sketchy evidence known with regard to this statement of Ray, it is not shown that he created a threat of reprisal because of not indicating this as action he would take. The remark thus remained at a level only as the protected expression of views within the meaning of Section 8(c). Cf. *NLRB v. Pentre Electric*, 998 F.2d 363 (6th Cir. 1993); *Blue Grass Industries*, 287 NLRB 274 (1987). I shall therefore propose a complete dismissal of the allegations in paragraph 10(a). This does not treat a separate allegation that unlawful interrogation occurred "at a meeting of employees," only that my

conclusion of law is that no violative interrogation or threat of closure has been established from the discredited testimony of Sixtos or from Ray's own version of these remarks made generally to employees.

I find paragraph 10(b)(1) of the complaint has merit because it is sufficiently supported by one phase of Ray's own version of the group meeting of truckdrivers. He concedes possibly asking the assembled employees "whose idea" the Union was, and this inquiry is consistent with the memory of Trujillo, even though I have discredited other specific particulars of his testimony. More importantly Morales, who denied in her testimony that Ray had asked a "why" question of the truckdrivers about wanting the Union, is shown to have entered in her notes of the meeting that Ray had asked "why they decided to go this route."

Rossmore House, 269 NLRB 1176 (1984), established the current Board test for whether interrogation violates the Act as, considering all the circumstances, it reasonably tends to restrain, coerce or interfere with the rights of employees guaranteed by the Act. In the application of this test I find that Ray's utterances amounted to coercive interrogation of the assembled employees. In general the evidence shows that a mandatory gathering of this nature was highly unusual, and that Ray had little occasion to speak with truckdrivers as they undertook their work even while he was in the vicinity. The ominous and intrusive effect of such an inquiry, coming in the context of Ray's opening blunt statement about having just received the Union's demand letter, was beyond permitted comment by an employer. Accordingly, I hold as a conclusion of law that Respondents violated Section 8(a)(1) in the manner pleaded here.

The same conclusion does not follow as to complaint paragraph 10(b)(2). The evidence as to that issue does not establish Ray having solicited complaints; only that he responded blandly to the several problems raised by individuals and without impliedly promising to remedy them, stating only that he was constrained by law not to act at that time. I shall therefore propose dismissal of this allegation.

A resolution of issues raised by paragraphs 10(c), (d), and (e) of the complaint hinges on the testimony of Gomez and Trujillo. As to the description in those paragraphs of what would constitute a violation of the Act I have discredited the testimony of both named witnesses. For this reason there is a lack of support for the allegations, and I shall therefore propose as a conclusion of law that all such be dismissed.

D. The Closure

Following the representation election of November 6, Gold Coast operations continued as to the dwindling amount of harvest work needed to complete the 1992 season around Salinas. Ray had actually engaged outside harvester Blas Valenzuela to bring in crews that would augment the completion of broccoli and cabbage harvesting. The work of Blas' company began around mid-November, and continued to a point shortly beyond Gold Coast's actual cessation of operations on November 20.

The closure was announced to Gold Coast employees by a short written notice which Ray signed. This was distributed November 20 to be effective immediately. Insofar as truckdrivers were concerned a portent of the notice occurred when Esparza directed them to locate all trucks and trailers at spec-

ified places at the end of work on November 20, rather than leaving them in the fields as would be customary.

At this point in time Gold Coast had already sent certain trucks and equipment to Yuma for the usual winter season there. However, it began the recall of these trucks and equipment to Salinas when it was finally evident that the closure would result in operations at Yuma not taking place. According to Ray this was an obvious consequence of advice from Mary Zischke, a Dole product manager for mixed vegetables based in Salinas, that Dole would only apportion about 300 acres for harvesting in Yuma to Gold Coast over the 1992–1993 season there. Dole had reportedly been becoming increasingly dissatisfied with the quality and reliability of Gold Coast harvesting operations in Yuma. The final advice was received by Ray around early November. Ray testified that as he mulled over what to do, he was determined not to make a premature announcement that no Yuma season would occur, because this would likely mean his crews would abandon the little work left in Salinas and go to Yuma immediately to better have a likelihood of acquiring seasonal work there from other harvesters.

General Counsel contends that the closure was purely in retaliation for the truckdrivers having voted in such a manner as to introduce the Union as a collective-bargaining representative. General Counsel further notes that Respondents participated briskly and normally in the representation procedures that initiated in mid-October, and gave no indication as would have been expected that the procedures were soon to be moot. While challenged ballots were determinative for many weeks following November 6, the ballot of Sixtos was one of those challenged. Ray was aware from his testimony as to a discussion with Arqueta that Sixtos was the person prominent in originating interest in the Union, and one who had assertedly “pressured” Arqueta into signing a supportive authorization card. Moreover, Ray had personally experienced Sixtos’ speaking in a leadership role at the group meeting of drivers and his probable future role as onsite activist for the Union. On this basis it would have been apparent to Ray from and after November 6 that representation procedures would inevitably lead to the Union being declared winner from the election.

General Counsel argues that no evidence of a firm resolve toward the closure of Gold Coast was present until immediately after the union vote, that any business discussions previously had by Ray with growers, harvesters, and shippers did not manifest an intent to close down the business of a then 12-year history of operations. Further, the recent past profitability, or lack thereof, resulting from Gold Coast’s operations was inconclusive as to being a legitimate basis for such a fundamental decision.

Respondents contend to the contrary that the decision to close Gold Coast evolved logically and with increasing validity over about a year, was purely economic in nature, and occurred when it did simply as a natural result of season’s end at Salinas. The further related fact was that continuing in traditional winter activities at Yuma was no longer feasible.

Respondents’ evidence in support of its position is basically the testimony of Ray as to his constant attention throughout 1992 about the prospect of closing Gold Coast, records showing the progressive decrease of both harvested acreage and employment totals into 1992, and the Compa-

ny’s financial statements of recent years. Specifically CPA Isaac testified credibly that she had counselled Ray no later than April that his financial statements, to the extent reflecting profit or loss and retained earnings, were increasingly highlighting a question of whether Gold Coast had the potential of continuing to be a viable business. She testified that Ray was increasingly of this very opinion, and after several indications that he would probably have to close Gold Coast because of its unprofitable potential he finally advised her of a firm decision to that effect in September.

Blas also testified credibly to having two particular conversations with Ray in 1992 about business plans. In the first of these around June or July, carried out at a coffee shop, Ray had said he was looking for a company to start doing harvesting work because “things weren’t going well for him.” After time passed the two talked again while at this coffee shop in September, where Ray had said he might need someone for the harvesting of broccoli. No cost of such services was discussed at that time however, according to Blas’ recollection.

Robert Chavez, owner of an agricultural labor contractor company called Emerald Produce, also testified credibly about several conversations with Ray during 1992. These were concentrated around midyear, and involved Ray stating his costs were too high and seeking information from Chavez as to how he recorded and controlled his own costs. The discussion also covered the function of thinning and hoeing farm fields during the crop season, and whether Ray would need outside service for the broccoli harvest of 1992. Chavez recalled that even in the first conversation, which he fixed as occurring about July, Ray had mentioned his thoughts about getting out of the labor business. This would refer to harvesting, packing, and transport of produce in contrast to the pure growing of crops.

General Counsel contends that all elements of a prima facie case proving that the closure was in violation of Section 8(a)(3) are present. Relatedly General Counsel contends that this shifts a burden of contrary proof to Respondents, and that this resultant burden has not been met. Respondents’ countering contentions rest largely on rationale contained in *Capitol Transit*, 289 NLRB 777 (1988). In this case the Board dismissed the allegation that a commercial hauler had violated Section 8(a)(3) by a change in operations undertaken by arrangement with an employee leasing company. The change in question was a lease of truckdrivers to operate Capitol’s vehicles, the consequence of which was termination of an entire potential bargaining unit of approximately 46 members. The effective date of this fundamental change in manner of operating occurred about 1 month after the employee-drivers of Capitol had commenced a union organizational campaign with a Teamsters local. In its decision the Board found the employer had made an initial decision, subject to certain conditions that were subsequently satisfied, to change to an employee leasing operation, and this was at a point in time prior by several weeks of the organizational campaign. The connective factor influencing the Board was that following the initial decision events had followed a logical progression inasmuch as the conditional concerns were adequately satisfied and a formal agreement executed promptly after this. The Board concluded that the agreement would have been made even in the absence of union activity. Respondents also cite *Leeward Nursing Home*, 278 NLRB

1058 (1986), and *Redwood Empire*, 296 NLRB 369 (1989), in support of its contentions. *Leeward* was a decision with characteristics similar to those found in *Capitol Transit*. Although *Leeward* was a case of intrinsic and procedural convolution, the Board's adoption of rationale was basically that the employer had commenced a definite interest in sub-contracting for cost reduction purposes, and its later knowledge of a union organizing drive was not the cause of continuing to a conclusion of the opportunity this presented. *Redwood Empire* also demonstrated the same principle as espoused in *Capitol Transit* and *Leeward*. This factually dense case led the Board to again adopt a holding that a trucking employer had abruptly decided to centrally consolidate operations before the commencement of a union's organizational campaign. However this view of the case, and even upon a finding that the employer had expressed animus and hostility to its employees' union organizational activity, failed to establish that the closing of operations and discharge of truck-drivers was discriminatorily motivated.

I believe there is merit to the 8(a)(3) allegation in this case. The evidence inclines toward a showing that Respondents might close the Gold Coast side of their business because of uncertain future profitability. However, this did not become a positive event at any time prior to November. In reaching this conclusion I will note the testimony of Isaac that Ray had said he would do so when they last conferred together back in September. While these might have been Ray's words, he had not by then undertaken any overt action which by prudent business standards would show he was actually definite about a closing. Even in his near-contemporaneous discussions with industry acquaintances Blas and Chavez, he had fallen short of telling them that he would discontinue as a harvester, only that it was increasingly seeming to be an option for him. This is a key distinction in the circumstances here when compared to *Capitol Transit* and like cases, for in each of those instances the management person had carried out actual advance steps of a closure. The only specific document that would typify a reflection of genuinely embarking on a course of business closure was the letter dated October 5 from Marci Rios of Yuma-based Fema Company, a person that Ray testified he had telephoned to for quotes on harvesting cost. I note that Respondents have not presented any evidence that Ray formally replied to the quotes contained in Fema's letter even though he was not to learn from Zischke about the Yuma acreage availability until November, and even then she did not understand from him that a final decision was made. If Ray had truly meant to explore the prospects of having Fema undertake all or part of Gold Coast's traditional Yuma harvesting, he had ample time to demonstrate this in the ordinary course of business dealings and still not alarm his Salinas area employees that it was under consideration. This lack of specific action on Ray's part, coupled with a showing of undue intrusion into the self-organizational rights of employees by his coercive interrogation of them, establishes General Counsel's requisite prima facie case.

Under *Wright Line*, 251 NLRB 1083 (1980), aff'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), General Counsel has the initial burden to prove that union or other protected concerted activity was a motivating factor in an employer's decision to take adverse

action against employees. If General Counsel meets this burden, the employer then has the burden to show it would have taken the same action even in the absence of the protected activity. Here the necessity of a *Wright Line* analysis is generated by the allegations in paragraph 11(a) of the complaint.

I do not believe Respondents have met that burden. Aside from the inconclusive direction toward making a closure, the timing of what was done militates against Respondents. The configuration of ballots, those counted and those challenged, told well enough that the Union was eventually to be confirmed as the selection of employees. In contrast to *Capitol Transit*, where the Board noted that a definite date of a leasing decision "effectively . . . weakens" General Counsel's prima facie case, Respondents must here otherwise show how their situation was such that the same action of closure would have occurred even in the absence of union activities. In analogous circumstances the closure of a transportation department had not been made before learning of a union's efforts to organize, showing that company as having "never committed" itself to a concentration on the processing of produce rather than its distribution. On the contrary the claimed business problems had been long present, and not a supposed basis for action until a union "appeared on the scene." *Coronet Foods*, 305 NLRB 79 (1991). Consistent with an overall inclination from the evidence I also simply discredit Ray's testimony that he was motivated only by economic considerations in making his closure decision as and when he did. I believe on the contrary that his dismay with advent of the Union was foremost in his mind, and he has not candidly conceded this in his testimony. After extensive anecdotal testimony, Ray finally summed up his reasons for closure with three concise categories. These were (1) economic factors, (2) factors of efficiency, and (3) an unnecessarily time-consuming and worrisome drain on his energies.

The most essential facts to consider are those relating to crop and marketing factors, profitability trends of Gold Coast with particular reference to labor costs, assertedly increasing competitive pressures, and the changing role of Gold Coast as a prospective harvester in both the Salinas and Yuma areas. These facts are based primarily on the testimony of Ray, secondarily on the testimony of Morales as an experienced employee of Gold Coast with both field and office exposures giving her insights into the business, and of Robert Munoz who generated a variety of comparative data regarding work force totals and harvested acreage by Gold Coast in both Salinas and Yuma.

When examined in its totality these facts as presented by Respondents do not establish a coherent or persuasive showing that closure of Gold Coast was a compellingly necessary act as a matter of prudent business management. Ray testified only anecdotally as to factors and conditions that related to a wide variety of crops, not only the principal broccoli and lettuce but random and unconnected examples touching asparagus, cabbage and bok choy. Besides the traditionally solid 40 percent of FB crops that Gold Coast harvested, it also regularly harvested broccoli in Salinas for the John Pryor Company. Ray testified that during both the 1991 and 1992 growing seasons he solicited other harvesting business in Salinas but was unsuccessful. Meanwhile the Gold Coast harvesting operations for those years were also carried out in Yuma for Royal Packing and BSN Farms, as well as harvesting there for Dole on leased agricultural land which Gold

Coast had taken on for a 3-year period in conjunction with Fresh Choice/Dalgety (Delgetti) as the actual grower. The Yuma operations had only existed on a substantial basis for about 4 years. The impetus had been a potential of developing important business ties with Dole, using the Fresh Choice/Dalgety venture as a vehicle. However this partner pulled out, and Gold Coast was left to scramble for an unprofitable harvesting experience on the leased land, and an eventual turn to Dole that it do the necessary harvesting for a third and final year. In another instance involving Dole, that company took over the completion of harvesting FB's 1991 broccoli crop, after Gold Coast had performed for the first 2 months. Ray explained this was based on increasingly improved equipment and techniques devised by Dole, and that FB itself had determined to have Dole finish that harvest for the cost savings involved. Ray gave no specifics however of what he termed a field analysis of costs leading to the decision of FB.

The testimony of Morales did little to enhance Respondents explanations of why the business of Gold Coast was drifting relentlessly into the circumstances of considering its closure. She recalled office experiences of complaints from personnel of Dole that they were dissatisfied with the quality and yield of cabbage being delivered by Gold Coast. Morales testified that based on Dole's dissatisfaction with how the cabbage crop was supervised, it ultimately advised Respondents that they would not have harvesting of that crop for Dole in either Salinas or at Yuma. Morales knew that Gold Coast had never maintained an established cabbage crew; only that other harvesting crews would respond to this crop when Dole called for deliveries. She also testified that Respondents had experienced problems with the Immigration and Naturalization Service (INS) in Yuma during early 1992, and had been penalized because of the status of persons found by INS working in their fields. As Morales also testified, Hernandez had relocated equipment to Yuma in late October, even as Ray was progressively learning by that time that Dole would not allocate him harvesting acreage at all sufficient to his hopes.

The testimony of Robert Munoz concluded Respondents presentation of its case, and it was through him that the comparative data was introduced into evidence. On its face this data showed a reduction in work force totals of Gold Coast as taken from payroll records for the years 1991 and 1992 at both Salinas and Yuma. The columnar totals for each month of those years showed fewer employees in 1992 compared to 1991, except for the months of October and November when 1992 employee totals slightly exceeded the comparable number of 1991. This result seems strange, unexpected and conflicts with Ray's explanation of things as they supposedly existed at that particular point in time of late 1992 insofar as operations were concerned and the lagging opportunities of Gold Coast.

As to total harvesting deals by available crop acreage, compared over three years, the 1990-1991 amount done by Gold Coast was 85 percent, the 1991-1992 amount 51 percent, and the 1992-1993 amount 43 percent. As to this last year the comparison document notes that to the extent 411 acres of cabbage was harvested for Dole, this will not recur because of Dole's plans to substitute another harvester in the future. This same document also notes the expiration of a 3-

year lease on land where Gold Coast had harvested nearly 56 acres in 1992-1993 at Yuma.

The accuracy, relevance, and most importantly connectedness of these records to Ray's basic closure decision was diminished by repeated showing that Robert Munoz had prepared them from information that was not necessarily complete or reliable. He testified that not all Yuma operations were shown, that he could not find all the documentation that would pertain to Dole, and that he made a "best guess" of some comparison numbers that would lead only to a "rough idea" of the facts.

As a party with the burden of showing that the decision to subcontract operations carried out in the past would have occurred without reference to the advent of union activities, Respondents have not met the necessary burden. They have instead set forth an unconnected and unpersuasive array of problems, changed business relationships and a claimed resolve to finally deal directly with these factors in late 1992. Ray testified ruefully about the INS matter described by Morales, associating it to lax supervision and a concurrent suspicion that payroll padding was occurring as to Yuma crews. To the extent that Ray associated the INS problem to difficulty in maintaining "a consistent crew," he also admitted that a "lot of companies experience the same scenario." What results from this story is that Respondents faced the same operating problems as other firms of their industry, and that stronger management controls were needed to assure competent supervision at the site of harvesting. This does not, however, take the matter out of the ordinary, nor make these experiences part of a convincing basis that a complete closure was warranted.

Neither have Respondents shown that substitute harvesting business was not reasonably available to them as an adjustment to what was lost, or that by an ordinary balancing of overhead costs to revenue that relief would not have resulted. According to Respondents' financial statements, labor costs have been the extraordinarily highest component of operating expenses, and this increased from approximately 40 percent of field revenues for fiscal year ending January 1991, to approximately 50 percent for fiscal year ending January 1992. But even in the face of this trend Ray testified that he continued trying to spread around available work among truck-drivers to be a "nice guy" with his employees. The sentiment is a generous one, but it does not square with his basic testimony, and relatedly that of CPA Isaac, that he had a fundamental concern with profits and profit potential. This part of Respondents' defense touches on Ray's third basic reason for closing; that of reaching a freedom to think of other business considerations free from the aggravations that a harvesting operation holds. I am not impressed with this explanation, for even if Ray had begun confining himself to agriculture, as this point seems to suggest, he would still be dealing with the subject of harvesting problems but from the standpoint of a user not a provider. Finally, his reference to having lost money for the 2 years of operating prior to the closure is not supported by applicable unaudited financial statements, in which net income for fiscal year ending January 1991 showed Gold Coast with net income of \$255,340, leading to a boost in retained earnings at that point to \$262,257. As an enterprise with a seasonal work force high of as many as 150, but only a handful of regular full-time employees, Respondents were well situated to adjust to

changing market and competitive conditions. The election not to do so, and instead simply close at the time and in the manner done, creates inferences persuading me that without the Union's appearance and the election results being faced Respondents would have taken the action at issue here in terms of Section 8(a)(3). I therefore conclude that within the meaning of *Wright Line*, Respondents have not met their requisite burden of persuading that the closure would have occurred even in the absence of union activity.

E. The 8(a)(5) Issue

General Counsel contends that the present case is an action of subcontracting, in contrast to a partial discontinuance of only certain business operations. Respondents, citing *Spring City Knitting Co.*, 285 NLRB 426 (1987), argue that Ray's action as made effective November 20 was purely economic in nature and thus consistent with *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

FB undertook its farming operations under one of three basic contractual arrangements. One was a 50-50 cost-of-production plan with the Company for which the crop was grown. After harvesting the net crop sales were shared on the same 50-50 basis as growing costs. A second type was a fixed-fee contract for the production of a crop. A third arrangement used a guaranteed dollar figure per acre for crop production, allowing bonus income should FB exceed a specified level of production. An occasional variation would be the proprietary growing of mixed lettuce by FB for contract harvesting and subsequent sale by an agent of the grower.

While the basic nature of the business, and the occasional variation, involved an indeterminate utilization of harvesting contractors, or in the case of Dole, that company's own capability, the underlying option of Ray determining to use Gold Coast harvesting crews remained present. It is in this sense that his concerns for efficiency and profitability of operations associate to the principle that a collective-bargaining representative is entitled to participate in actions that fundamentally affect members of its bargaining unit. The landmark case of *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), established that a subcontracting decision, one that did not change the need for specified work still to be performed nor contemplate an investment of capital, was a mandatory subject of bargaining. Here the availability of a representative of employees was of potential value to Respondents in analyzing whether and how Gold Coast could continue to operate. The opinion in *Fibreboard* recognized that no assurance of progress or a breakthrough to successful business change would result from such bargaining, only that the effort of undertaking it was the better choice of a national labor policy. The basic connection to such an obligation is whether the decision turns in part on a need to reduce labor costs. Cf. *Delta Carbonate*, 307 NLRB 118 (1992).

I believe General Counsel has correctly identified *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), and *Toyota of Berkeley*, 306 NLRB 893 (1992), as the basis of Board doctrine requiring Respondents to have given advance notification of this otherwise unilateral subcontracting to the Union. As a nonincumbent union that was, in fact, ultimately certified, this circumstance left Respondents unprivileged to make unilateral changes affecting the bargaining unit at a time between the election and the certification.

Ray's claim that it could not safely reveal the imminent closure for fear of flight to Yuma by his harvesting crews does not carry weight. The crews already knew that the Salinas area harvest was nearing an end, so notice of an intention to present the Union with an opportunity to discuss aspects of such a decision would have no effect. Any individual of the crew that had not already left for Yuma was apparently intending to work out the season with Gold Coast at Salinas. Since harvesting crew members are mobile and seasonal anyhow, the closure would not have that significance to them because Salinas valley farming generally would not be affected by what the one company did. The truly interested and affected persons would be those members of the truckdriver unit who constituted the regular employees and those being thought of as year round. As to them, the involvement of their bargaining representative would not leave them in a worsened employment status; instead such involvement could only be beneficial. Finally, the credible testimony of Blas and Chavez established that Ray did not even request them to keep his thoughts about closing confidential as he claimed to have done.

Respondents argue that Ray's action primarily reflected "a fundamental change in the nature and direction of the business and thus not amenable to bargaining" on the authority of *Otis Elevator Co.*, 269 NLRB 891 (1984). This is not however borne out by the facts. As a single-employer of closely integrated operations, the subcontracting to Blas was merely a switch in the usual harvesting operations from Gold Coast's own crews, including the truckdriving function, to an outside company. Nor was Ray's decision not to attempt the reduced harvesting opportunity in Yuma anything more than an outgrowth of his basic motivation of reacting unlawfully to his truckdrivers choice of a union as their representative. This case does not have any ingredients that approach the sweeping and complex factors present in *Otis Elevator*. The single-integrated operations of the two corporations here make the evaluation even more obvious. The nature of various crop deals and the availability of backup harvesters makes the entire process from planting to delivery a uniquely straightforward matter. Particularly given Ray's authoritative involvement in running both entities, I see no operational change that remotely suggests a new nature and direction of the business. I hold as with other conclusions of law above that Respondents failed in their duty to notify the Union of their imminent decision to subcontract operations, and afford it an opportunity to bargain over the decision and the effects of it respecting employees newly formed into a bargaining unit awaiting certification.

REMEDY

Having found that the Respondent 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.

Because Respondents discriminatorily subcontracted bargaining unit work and unlawfully failed to bargain with respect to its decision to subcontract that unit work, I shall require it to restore the status quo ante as it existed prior to the unlawful subcontracting of unit work effective November 20, reincorporate into the single-employer structure of FB and, to the extent a corporate existence less the Gold Coast name exists, employ its truckdrivers for the hauling to cool-

ers of harvested products as previously performed, and make whole those employees who suffered a loss of wages and benefits as a result of the unlawful subcontracting. Backpay is to be computed on a quarterly basis in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³

I shall order that those individuals previously employed as truckdrivers, and within the Union's bargaining unit, Rudolfo Gomez, Federico Hernandez, David Trujillo, Arnulfo Sixtos, Jose Trinidad Arqueta, and Adan Lara be offered immediate and full reinstatement to their former positions of employment, distinguishing as necessary between those employed year-round by traditionally going to Yuma for the harvesting there from those domiciled in the Salinas area and working only seasonally in the harvesting of FB farming operations. I shall also order that Respondents bargain with the Union respecting subcontracting decisions and their effects on unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Gold Coast Produce; Francioni Bros., Inc. Salinas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies and activities.

(b) Subcontracting bargaining unit work because its employees are represented by a union.

(c) Refusing to recognize and bargain with General Teamsters, Warehousemen and Helpers Union, Local 890, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All regular full-time and part-time employees employed as truckdrivers in the harvesting operations in Monterey County, California and Yuma, Arizona, excluding maintenance employees, mechanics, office clerical employees, guards and supervisors as defined in the Act,

(d) Failing or refusing to bargain with the Union about the November 1992 decision to subcontract harvesting operations and the effect of that decision on the unit employees.

(e) Discriminating against employees so as to foreseeably cause discouragement of membership in a labor organization.

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

³The remedy applies to both the 8(a)(3) and (5) violations, although it is an appropriate remedy for each violation itself.

⁴If 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.

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

(a) Offer Rudolfo Gomez, Federico Hernandez, Arnulfo Sixtos, David Trujillo, Jose Trinidad Arqueta, and Adan Lara immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision, distinguishing, as necessary, between those employed year-round by traditionally going to Yuma, Arizona, for the harvesting there from those domiciled in the Salinas, California area and working only seasonally in the harvesting of Francioni Bros. farming operations.

(b) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Return the work performed by the foregoing named employees to the jurisdiction of the bargaining unit and, on the Union's request, reinstate the terms and conditions of employment that existed prior to the Respondents' November 20, 1992 subcontracting of unit work.

(d) 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.

(e) Post at its facility in Salinas, California copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Notices shall be in both English and Spanish, and shall be mailed to the home address of each individual named in paragraph 2(a) above. See *Caribe Staple Co.*, 313 NLRB 877 (1994).

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

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

⁵If 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."