Agricultural Mechanization: The Grower's Duty to Bargain under the California Agricultural Labor Relations Act

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California's Agricultural Labor Relations Act requires agricultural employers to bargain with their workers over changes in the terms and conditions of employment. Unresolved, however, is whether or not the employer must bargain over a decision to mechanize operations which, as a by-product, eliminates jobs. This article suggests that the employer has a duty to bargain over every such decision and proposes a remedy for an employer's violation of this duty.

Introduction

As the pace of technological innovation accelerates, job displacement through mechanization threatens the security of numerous employees.[1] This threat is particularly significant to California's agricultural laborers, since the invention of many labor-saving agricultural machines has induced farmers to look closely at the potential savings offered by mechanization. Agricultural employers are likely to make the decision to mechanize with increasing frequency.[2]

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[1] For an overview of this trend and its wider ramifications, see L. Ulman, The Changing American Economy 182-200 (J. Coleman ed. 1967); P. Lane, The Industrial Revolution, The Birth of the Modern Age (1978).

[2] *See generally* W. Ebeling, The Fruited Plain, The Story of American

Section 1153(e) of the California Agricultural Labor Relations Act (ALRA)[3] requires agricultural employers to bargain with representatives of unionized farm workers over "any changes in the terms and conditions of employment."[4] Unresolved, however, is whether or not the decision to mechanize farm work constitutes a change in the "terms and conditions of employment," and hence is one over which the ALRA requires bargaining.

By statutory mandate, the California Agricultural Labor Relations Board (ALRB)—the body responsible for enforcing the ALRA—looks to National Labor Relations Act (NLRA)[5] precedent for guidance in interpreting such questions under the ALRA.[6] Because agricultural mechanization has never been ad-

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AGRICULTURE (1979); W. FRIEDLAND & A. BARTON, DESTALKING THE WILY TOMATO (1975).

[3] CAL. LAB. CODE §§ 1140-1166.3 (West 1980).

[4] Under the ALRA, farmworkers have the right to organize and to be represented by a collective bargaining representative. *Id.* § 1156. Once the workers have elected a representative (usually a union), the grower/employer must bargain with this representative over any changes in the terms and conditions of employment. *Id.* § 1153(e).

[5] 29 U.S.C. §§ 151-169 (1976).

[6] CAL. LAB. CODE § 1148 (West 1980). The ALRA is patterned after the NLRA, and many sections of the ALRA have adopted intact or followed closely the wording of the corresponding NLRA sections. For example, the sections at issue here concerning the employer's duty to bargain are similarly worded in both acts. *See, e.g.*, ALRB v. Superior Court of Tulare County, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed,* 429 U.S. 802 (1976).

29 U.S.C. § 158 (1976) provides in part:

> (a) It shall be an unfair labor practice for an employer
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> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159(a) (1976) provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

29 U.S.C. § 158(d) (1976) provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and

dressed under the NLRA,[7] the ALRB will have to look to deci-

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conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

By comparison, CAL. LAB. CODE § 1153 (West 1980) provides:

It shall be unfair labor practice for an agricultural employer to do any of the following:

. . .

(e) To refuse to bargain collectively in good faith with labor organizations pursuant to the provisions of Chapter 5 (commencing with section 1156 of this part).

CAL. LAB. CODE § 1156 (West 1980) provides:

Representatives designated or selected by a secret ballot for the purposes of collective bargaining by the majority of the agricultural employees in the bargaining unit shall be the exclusive representatives of all the agricultural employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

CAL. LAB. CODE § 1152.2 (West 1980) provides:

(a) For purposes of this part, to bargain collectively in good faith is the performance of the mutual obligation of the agricultural employer and the representative of the agricultural employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This does not mean, however, that NLRA precedent will always control. *See, e.g.*, ALRB v. Superior Court of Tulare County, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183, *appeal dismissed*, 429 U.S. 802 (1976).

[7] The NLRB has addressed the significance of automation in other contexts, pointing out its ramifications and importance as a joint responsibility of labor and management, in Rochet d/b/a/ The Renton News Record, 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962). There the employer discharged its composing room employees when it changed its composing room operation from "hot" to "cold" type. While the NLRB found that the employer had a duty to bargain over both the decision to automate and its effects on the bargaining unit, the NLRB gave the subject of automation only brief treatment. The NLRB said that technological improvements are not only important for our entire economy but also a matter of grave concern for the employees directly affected by automation. Automation is thus a responsibility to be faced jointly by labor and management. *Id.* at 1297, 49 L.R.R.M. at 1973-74. The NLRB found that this responsibilty imposed upon employers the obligation to bargain over the

sion bargaining cases addressing the underlying question, that is, when is an employer obliged to bargain over decisions which eliminate bargaining unit jobs?[8]

Part I of this article analyzes recent cases involving the obligation to decision bargain under the NLRA. Part II discusses the applicability of these cases to agricultural mechanization under the ALRA and concludes that the better approach for the ALRA is to require that the decision to mechanize be the subject of bargaining. Finally, Part III examines the remedies for violations under the NLRA and their applicability under the ALRA. It proposes that the most appropriate and effective remedy for the failure to decision bargain under the ALRA is a restoration to the *status quo* existing prior to mechanizing operations.

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introduction of automation in order to soften the impact of the decision by encouraging planning between employers and employees. *See also* NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 86 L.R.R.M. 2078 (8th Cir. 1974); Richland, Inc., 180 N.L.R.B. 92, 73 L.R.R.M. 1017 (1969).

However, neither the NLRB, the circuit courts nor the U.S. Supreme Court has chosen to address fully the underlying issue, decision bargaining, in the context of automation. Instead, they have addressed decision bargaining most fully in the contexts of subcontracting and partial closure of business operations. Regardless of the sub-issue—be it automation, subcontracting, partial closure or any other—the courts have found the major subcontracting and partial closure cases to be persuasive. This is exemplified in the treatment of farm mechanization by the Wisconsin Supreme Court in Libby, McNeill & Libby v. Wisconsin Employment Relations Comm'n, 48 Wis. 2d 272, 179 N.W.2d 805, 75 L.R.R.M. 2759 (1970), *discussed in* notes 8 & 58 *infra*. The Wisconsin court relied completely on subcontracting and partial closure cases. Therefore, this article also relies extensively upon the logic of cases addressing the true issue, decision bargaining, rather than focusing on the few, sparely worded automation cases available.

[8] That no case law exists directly on point is evidenced by the law to which the California ALRB has turned in determining obligations created by mechanization. In two cases addressing this issue under the ALRA, both currently pending before the ALRB, Cardinal Distrib. Co., Case No. 78-CE-12-C, and O. P. Murphy Produce Co., Case Nos. 78-CE-113-M, 113-1-M and 79-CE-330-SAL, the General Counsel and the Administrative Law Officer of the ALRB both relied heavily upon many of the cases which this article explores. *See* note 81 *infra*. Similarly, in the only farm mechanization case uncovered to date, a case arising under Wisconsin state law, the Wisconsin Supreme Court also turned to these same cases, commenting that it had been unable to find any cases directly on mechanization. Libby, McNeil & Libby v. Wisconsin Employment Relations Comm'n, 48 Wis. 2d 272, 179 N.W.2d 805, 75 L.R.R.M. 2759 (1970).

I. Decision Bargaining under the NLRA

Whether the NLRA requires an employer to bargain over a management decision which eliminates jobs in a bargaining unit depends upon various factors. One of the most significant is the motivation behind the employer's decision. In some instances the decision is the result of economic considerations.[9] Often, however, it is motivated by anti-union animus.[10] While there is unanimous agreement that a decision based upon anti-union animus must be bargained over,[11] there is no such consensus with respect to economically motivated decisions.

A. Economically Motivated Decisions under Fibreboard

In *Fibreboard Paper Products Corp. v. NLRB*,[12] the U.S. Supreme Court addressed the decision bargaining issue head on. In that case, Fibreboard employed a staff of custodial workers under union contract. After extensive investigation, the company decided that its maintenance costs could be reduced if the custodial work were contracted out. When the time came for renegotiation of the contract, the company disclosed the results of its investigation to the union and complained that maintenance costs were too high. The company also said that past experience with the local indicated that attempts to negotiate a new contract and reduce costs would be pointless. Consequently, when the contract with the union expired, Fibreboard hired an independent contractor to perform the custodial work. The union claimed that Fibreboard had refused to bargain over changes in the "terms and conditions of employment" as required under

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[9] *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 57 L.R.R.M. 2609 (1964), *discussed in* notes 12-23 and accompanying text *infra*.

[10] *See, e.g.*, NLRB v. Coastal Motors, 542 F.2d 637, 93 L.R.R.M. 2411; NLRB v. American Mfg. Co. of Texas, 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965).

[11] Even in those cases most strictly limiting the duty to bargain over economically motivated decisions which eliminate jobs, there is agreement that the presence of anti-union animus introduces the requirement to bargain. *See, e.g.*, Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039, 92 L.R.R.M. 2013, 2021 (8th Cir. 1976); NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027-28 (8th Cir. 1970). Unfortunately, these opinions have mistakenly linked the issue of anti-union animus with the requirement to bargain. *See* note 53 and accompanying text *infra*.

[12] 379 U.S. 203, 57 L.R.R.M. 2609 (1964).

the NLRA.[13]

The Court held that Fibreboard's decision did affect the "terms and conditions of employment" and, therefore, that the company had violated its obligation to bargain with the employees' union representative.[14] The Court reasoned that requiring bargaining over subcontracting decisions would effectuate the purposes of the NLRA by prompting the settlement of labor disputes at the negotiating table.[15] The Court upheld the NLRB order directing Fibreboard to reinstate the custodial workers with back pay.[16]

In a concurring opinion, three Justices sought to limit the Court's holding.[17] They were concerned that the case might be read to require management to consult with labor regarding decisions traditionally considered to be within the sole prerogative of management.[18] They cautioned that *Fibreboard* should not be read to require bargaining over management decisions such as the complete termination of a business or the introduction of labor-saving machinery, since such decisions involve the investment of capital and the basic direction of the enterprise.[19] The concurrers reasoned that decisions involving capitalization were

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[13] *Id.* at 207, 57 L.R.R.M. at 2611. The union alleged that the employer had violated §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158 (a)(1), 158(a)(3) and 158(a)(5) (1976). The NLRB found that the employer had violated § 8(a)(5) by refusing to bargain over a mandatory subject of bargaining, *i.e.*, the decision to subcontract the maintenance work. The NLRB found that the employer had not interfered with the employee's collective bargaining rights in violation of § 8(a)(1), nor had it discriminated against the employees because of their union adherence in violation of § 8(a)(3). *Id.* at 208 & n.2, 57 L.R.R.M. at 2611 & n.2.

[14] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210, 57 L.R.R.M. 2609, 2611-12 (1964). The requirement to bargain over changes in the terms and conditions of employment is contained in sections 8(a)(5), 8(d) and 9(a) of the NLRA. 29 U.S.C. §§ 158(a)(5), 158(d) 159(a), (1976), set out in note 6 *supra*. For convenience, an employer's duty to bargain with an employee representative under these sections will be referred to as arising under § 8(a)(5) in this article.

[15] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-11, 57 L.R.R.M. 2609, 2612 (1964).

[16] *Id.* at 215-17, 57 L.R.R.M. at 2614-15.

[17] *Id.* at 217-26, 57 L.R.R.M. at 2615-18.

[18] *Id.* at 218, 57 L.R.R.M. at 2615.

[19] *Id.* at 223, 57 L.R.R.M. at 2617. To the concurring Justices, such decisions "are not in themselves primarily about conditions of employment though the effect of the decision may be necessarily to terminate employment." *Id.*

traditionally within the sole prerogative of management and that the majority opinion should not be read to indicate otherwise.

B. The Reaction to Fibreboard

1. The NLRB's Response

The NLRB has adopted an expansive reading of *Fibreboard,* interpreting it to require bargaining over such decisions as subcontracting,[20] transferring unit work,[21] automating[22] and partially closing operations.[23] Perhaps the most comprehensive NLRB opinion in this area is *Ozark Trailers, Inc.*[24] *Ozark* involved an employer's economically motivated closure of one of its plants and the transfer of unit work to another plant.[25] The union was not informed that the plant was being permanently closed, nor was it afforded an opportunity to bargain over the decision.

Relying on *Fibreboard,* the NLRB held that the employer's decision to close a part of its operation affected the hours, wages

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[20] Decision bargaining over subcontracting has historically been required by the NLRB even before *Fibreboard. See, e.g.,* Town & Country Mfg. Co., 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962), *enforced,* 316 F.2d 846, 53 L.R.R.M. 2054 (5th Cir. 1963).

[21] American Needle & Novelty Co., 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973); Senco, Inc., 177 N.L.R.B. 882, 71 L.R.R.M. 1532 (1969).

[22] Richland, Inc., 180 N.L.R.B. 92, 73 L.R.R.M. 1017 (1969); Rochet d/b/a/ The Renton News Record, 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

[23] Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966); Red Cross Drug Co., 174 N.L.R.B. 85, 70 L.R.R.M. 1064 (1969).

[24] 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966). *Ozark* followed a line of NLRB cases requiring decision bargaining. *See* Town & Country Mfg. Co., 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962), *enforced,* 316 F.2d 846, 53 L.R.R.M. 2054 (5th Cir. 1963); Rochet d/b/a/ The Renton News Record, 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

[25] Ozark Trailers, Inc., was one of three companies which the NLRB found to constitute a single employer. Ozark Trailers, Inc., 161 N.L.R.B. 561, 564, 63 L.R.R.M. 1264, 1265 (1966). These companies were in various aspects of the manufacture, sales and service of trucks and truck trailers. Ozark Trailers, Inc., carried on the manufacture of semi-trailers for sale to the general public. The company decided to discontinue its manufacturing operations at the Ozark plant but did not inform the union that it was permanently closing its operations. Instead, the company laid off employees on a seniority basis as each of its last truck bodies was completed and told the union steward that the lay-offs were temporary. *Id.* at 562, 63 L.R.R.M. at 1265.

and other conditions of employment and, thus, had to be bargained over in compliance with section 8(a)(5) of the NLRA.[26] The NLRB concluded that, since partial closure and transfer of unit work were analytically indistinguishable from subcontracting, *Fibreboard* was dispositive.[27]

In response to the concerns of the *Fibreboard* concurrence, the NLRB said that the requirement to decision bargain should not hinge on whether the decision involves a change in either the character of the employer's business or the employer's capital structure.[28] Instead, the NLRB said that, while those considerations were important, they should be weighed against the experience, seniority rights and pension benefits of the employees so that the rights of both labor and management received adequate consideration.[29]

The NLRB also found that requiring bargaining over partial closure would promote the purposes of the NLRA.[30] Partial termination of operations is of critical importance to both labor and management,[31] and the NLRA was designed to bring such subjects within the collective bargaining arena. Moreover, the NLRB found that restricting the unfettered freedom of employers was in fact Congress' intent in passing the NLRA.[32] To Congress, the interests of workers carried sufficient weight to burden

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[26] *Id.* at 565, 63 L.R.R.M. at 1267. Just as in *Fibreboard*, the union alleged violations of §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), 158(a)(3) and 158(a)(5) (1976). The NLRB found that, in connection with the closure of the Ozark plant, the employer violated § 8(a)(1) by interfering with the employees' collective bargaining rights, and violated § 8(a)(5) by failing to bargain over its decision to close its Ozark plant. 161 N.L.R.B. at 562, 63 L.R.R.M. at 1265. No violation of § 8(a)(3) was found in connection with the closing. *Id.* at 562 n.1, 63 L.R.R.M. at 1265 n.1.

[27] Ozark Trailers, Inc., 161 N.L.R.B. 561, 566, 63 L.R.R.M. 1264, 1267 (1966).

[28] *Id.* at 566-67, 63 L.R.R.M. at 1267-68. As examples of cases taking this narrow view of the requirement to decision bargain, the NLRB cited NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965), and NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[29] Ozark Trailers, Inc., 161 N.L.R.B. 561, 566-67, 63 L.R.R.M. 1264, 1267-68 (1966).

[30] *Id.* at 567, 63 L.R.R.M. at 1268.

[31] *Id.* To the NLRB, the issue of partial closure was just as important to the bargaining parties as subcontracting was found to be in *Fibreboard*. *Id.* at 569, 63 L.R.R.M. at 1269.

[32] *Id.* at 568, 63 L.R.R.M. at 1268.

employers with the obligation to bargain collectively with employee representatives over "matters affecting them."[33]

Addressing the more practical aspects of decision bargaining, the NLRB pointed out that a union may be able to affect the causes inducing plant closure.[34] It noted that most of the employer's economic difficulties related primarily to the cost of labor and quality of work on the production line, areas at least partially under the control of the workers. These areas, the NLRB said, fell within the ambit of traditional collective bargaining and were particularly susceptible to successful resolution at the bargaining table. The NLRB pointed out that, notwithstanding the polar interests of employers and unions, they had been able to come to accord in the face of a plant relocation or closure in a number of instances.[35] Thus, the NLRB held that the employer had a duty to decision bargain with the union in *Ozark,* even though the union and employer were clearly at odds and the partial closure decision was the result of pressing economic necessity.[36]

Two other practical considerations were emphasized by the NLRB in *Ozark,* both of which balanced the burden that decision bargaining placed upon employers against the protection of workers' interests. First, the NLRB pointed out that its decision required that employers only bargain in good faith. They were not being forced to agree with the workers' representatives.[37]

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[33] *Id.*

[34] *Id.* at 570, 63 L.R.R.M. at 1269 (citations omitted).

[35] *Id.* The recent concessions of the United Auto Workers (UAW) to the Chrysler Corporation in response to Chrysler's threatened economic collapse demonstrate the continued validity of this observation. At the beginning of 1980, the UAW conceded $243 million in wage and benefit increases due the workers over the term of the current three-year contract. These concessions were in addition to the concessions made by the UAW in October 1979, when the union negotiated its three-year contract and agreed to accept $203 million less than the General Motors and Ford pattern settlements. The Chrysler workers also agreed to reduction in paid holidays and sick leave and to deferrals of wage increases during the period of the contract. In return, the company agreed to a stock-sharing plan for the employees. *See* [1980] 103 LAB. REL. REP. 21, 21-23.

[36] Ozark Trailers, Inc., 161 N.L.R.B. 561, 571, 63 L.R.R.M. 1264, 1270 (1966).

[37] The NLRB said:

> The argument has been made that to compel an employer to bargain about a decision to relocate or terminate a portion of his business would significantly abridge his freedom to manage the busi-

Second, and perhaps more important, the NLRB concluded that merely requiring an employer to bargain over the effects of the decision is both inadequate and ineffective.[38] To the NLRB, there were cases where the effects of a decision and the decision itself were "so inextricably interwoven" that any distinction between the two would be meaningless.[39] Accordingly, the NLRB found that limiting the duty to bargain to only the effects of a decision made that duty meaningless because there was no longer the possibility of revising the decision itself.[40]

From an historical perspective, *Ozark* did two things. First, it reaffirmed the NLRB's pre-*Fibreboard* position stated in *Rochet d/b/a The Renton News Record*,[41] where the NLRB had ruled that an employer decision which automated certain bargaining unit jobs out of existence had to be bargained over.[42] Second, *Ozark* signalled the NLRB's intention to interpret the duty to decision bargain expansively in future cases.[43] In fact, *Ozark*

> ness. In the first place, however, as we have pointed out time and again, an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a *bona fide* effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

Id. at 568, 63 L.R.R.M. at 1268 (footnote omitted).

[38] *Id.* at 570, 63 L.R.R.M. at 1269.

[39] *Id.*

[40] *Id.*

[41] 136 N.L.R.B. 1294, 49 L.R.R.M. 1972 (1962).

[42] *Id. See* note 6 *supra.*

[43] Actually, the NLRB was continuing its already expansive approach to the duty to decision bargain. *See* note 24 and accompanying text *supra.* In any event, this trend continued in the years following *Fibreboard* and *Ozark*, as the NLRB required decision bargaining in virtually every instance that a decision by management caused a loss of unit work. Not only did the NLRB mandate decision bargaining when unit work was transferred to another plant, Senco, Inc., 177 N.L.R.B. 882, 71 L.R.R.M. 1532 (1969), or when an employer decided to close part of its business, Red Cross Drug Co., 174 N.L.R.B. 85, 70 L.R.R.M. 1064 (1969), but the NLRB extended the duty to instances where the employer decided to relocate, Thompson Transp. Co., 165 N.L.R.B. 746, 65 L.R.R.M. 1370 (1967), *rev'd*, 406 F.2d 698, 70 L.R.R.M. 2418 (10th Cir. 1969); Transmarine Navigation Corp., 152 N.L.R.B. 998, 59 L.R.R.M. 1232 (1965), *rev'd*, 380 F.2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967), and where there were shift changes

reigns today as the dominant NLRB approach to employer decisions which cause job loss, requiring bargaining as a per se rule.[44]

2. The Response in the Courts of Appeals

There is a split of authority among the circuits regarding mandatory bargaining over economically motivated decisions which eliminate bargaining unit jobs. Shortly after *Fibreboard* was decided, the Eighth Circuit took a restrictive view of the case in its decision in *NLRB v. Adams Dairy, Inc.*[45] An employer had sold its fleet of delivery trucks and discharged its drivers. It thereafter contracted with independents to have its dairy products delivered. The court held that the company had no obligation to bargain with the drivers' union because (1) its decision involved a major change in capital structure and (2) the change was not the result of anti-union animus.[46]

Regarding its first rationale, the court explained that the dairy company had neither helped finance the independents nor retained an interest in its products once they left the loading dock. The court stated that since the company's decision to discontinue its delivery business was one of substantial capital significance, it was distinguishable from the subcontracting arrange-

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or termination, Dixie Ohio Express Co., 167 N.L.R.B. 573, 66 L.R.R.M. 1092 (1967).

There was, however, a brief hiatus during which the NLRB appeared to reverse its expansive approach. For example, in General Motors Corp., 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971), *enforced*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972), in a 3-2 decision, the majority looked to the *Fibreboard* concurrence and found no duty to bargain over GM's decision to discontinue direct operation of a franchise dealership which it sold outright to Trucks of Texas. But the NLRB soon returned to its expansive reading of *Fibreboard* and has maintained that approach since. *See, e.g.*, American Needle & Novelty Co., 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973); Brockway Motor Trucks v. NLRB, 582 F.2d 720, 99 L.R.R.M. 2013 (3d Cir. 1978).

[44] *See* Brockway Motor Trucks v. NLRB, 582 F.2d 720, 727-31, 99 L.R.R.M. 2013, 2021-28 (3d Cir. 1978), in which the Third Circuit reviewed the current status of decision bargaining in both the courts and the NLRB. *See also* note 43 *supra*.

[45] 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

[46] *Id.* at 110-13, 60 L.R.R.M. at 2086-88. For a discussion of how the motivation of the employer became erroneously linked with the duty to bargain in *Adams Dairy* and its progeny, see note 53 *infra*.

ment in *Fibreboard*.[47] The court pointed to the language of the *Fibreboard* concurrence limiting *Fibreboard* to cases where employees in the bargaining unit are merely replaced by employees of a subcontractor to do the same work under substantially the same conditions.[48] The court also emphasized the view of the concurrence that *Fibreboard* did not apply to situations involving significant capital investment or changes in capital structure.[49] According to the Eighth Circuit, *Adams Dairy* involved a major shift in capitalization and method of operations, thereby obviating any duty to bargain arising under *Fibreboard*.[50]

Regarding its second rationale, the court discussed the discontinued delivery operations in light of an anti-union animus case, *Textile Workers v. Darlington Manufacturing Co.*,[51] which the Supreme Court had heard contemporaneously with *Fibreboard*. *Darlington* involved a bitterly contested organizing drive in a South Carolina textile mill, one of several mills owned by a single employer. The employer had stated publicly that if the employees voted to be represented by the union, he would close the Darlington mill. On the heels of the union victory, the mill closed, and charges were filed by the union. The Supreme Court ruled that an employer was legally entitled to go out of business completely for any reason, including anti-union animus. However, the employer could not legally close *part* of its business to defeat unionism. The Supreme Court held that partial closure to chill unionism violated section 8(a)(3) of the NLRA, which prohibits an employer from discriminating against employees on the basis of their union beliefs or activities.[52] Since no anti-union animus had been shown in the *Adams Dairy* case, the Eighth Circuit held that there had been no violation of the precepts of *Darlington*.[53]

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[47] NLRB v. Adams Dairy, Inc., 350 F.2d 108, 110-13, 60 L.R.R.M. 2084, 2086-87 (8th Cir. 1965).

[48] *Id.*

[49] *Id.*

[50] *Id.* Moreover, the court indicated that even if there were a duty to bargain, the employer had arguably bargained over its decision during negotiations with the union. *Id.* at 113, 60 L.R.R.M. at 2088.

[51] 380 U.S. 263, 58 L.R.R.M. 2657 (1965).

[52] *Id.* at 274-75, 58 L.R.R.M. at 2661.

[53] NLRB v. Adams Dairy, Inc., 350 F.2d 108, 113, 60 L.R.R.M. 2084, 2088 (8th Cir. 1965). Unfortunately, the court discussed *Fibreboard* and *Darlington* without taking care to keep the discussions separate. As a result, the elements

The Ninth and Tenth Circuits have also stressed both the limiting language of the *Fibreboard* concurrence and the requirement of anti-union animus in limiting the employer's duty to decision bargain. For example, in *NLRB v. Transmarine Navigation Corp.*,[54] the employer ran a small shipyard in Los Angeles which had as its major customer a Japanese shipping line. When

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of the *Fibreboard* violation of the duty to bargain under § 8(a)(5) were apparently confused with those of the *Darlington* rule prohibiting discriminating against employees for their union beliefs under § 8(a)(3). The confusion occurs at the beginning and end of the court's discussion of *Darlington*. At the beginning, the court stated that *Darlington* "lends support for our contentions here," *id.* at 112, 60 L.R.R.M. at 2087, the contentions being that the employer had no duty to decision bargain. And later, concluding its discussion, the court held:

> Accordingly, this being only a partial closing, unstimulated by union animus, having its motivation based solely in economics of operation, and not being a substitution of one set of employees for another but an entire and independent operation, we reaffirm our statements made in the original *Adams Dairy* case.
>
> Even if the partial liquidation of *Adams* involved herein could be held subject to collective bargaining, it is arguable that such bargaining actually took place. . . .

Id. at 113, 60 L.R.R.M. at 2088.

From these statements it appears that the court mixed the elements of the *Fibreboard* and *Darlington* violations to conclude that, where a significant change in capitalization has occurred, the duty to bargain depends on the presence of anti-union animus. Subsequent Eighth Circuit cases have made the same erroneous link between §§ 8(a)(5) and 8(a)(3). *See* Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039, 92 L.R.R.M. 2013, 2021 (8th Cir. 1976); NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027-28, 74 L.R.R.M. 2055, 2056-57 (8th Cir. 1970).

This confusion is unnecessary. The Eighth Circuit could have reached the same result by basing its holding solely on the economic concerns about capital investment stated in the *Fibreboard* concurrence, without regard to employer motive. The Third Circuit did exactly that in NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965). There the court excused the duty to bargain where the employer faced both a forced sale to the local Housing Authority and severe economic losses. The Third Circuit relied on the concerns of the *Fibreboard* concurrence in reaching its holding. *Id.* at 195-96, 60 L.R.R.M. at 2035-36. At the same time, the court recognized in a footnote that such a closure, if motivated by the desire to thwart unionism, would be prohibited. *Id.* at 196 n.4, 60 L.R.R.M. at 2036 n.4. The court's choice of words demonstrates that it understood the difference between prohibiting anti-union-motivated discrimination against employees on one hand and requiring bargaining over changes in the condition of employment—regardless of employer motive—on the other, thus avoiding the confusion in *Adams Dairy*.

[54] 380 F.2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967).

the Japanese government changed its policies regarding the shipping trade, many Japanese shipping companies, including Transmarine's major customer, merged. This created a need for significantly larger shipyard facilities than Transmarine could provide. Transmarine therefore merged with two other small companies and moved to a much larger shipyard in Long Beach. As a result of the merger and move, bargaining unit employees were terminated without the opportunity to bargain over the decision.[55]

The Ninth Circuit held that Transmarine had no duty to bargain.[56] The court reviewed the cases applying an expansive interpretation of *Fibreboard*[57] and distinguished them as involving a history of anti-union animus. The court concluded that the limiting approach of *Adams Dairy* better suited the facts at issue both in light of the *Fibreboard* concurrence and the absence of anti-union animus. To the court, the fact that Transmarine's decision involved a shift in capital structure and a basic change in operations of the company—both motivated by economic necessity—removed the case from the ambit of *Fibreboard*.[58]

Opposing these cases limiting *Fibreboard* is a line of cases ex-

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[55] NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 934-36, 65 L.R.R.M. 2861, 2862-63 (9th Cir. 1967).

[56] *Id.* at 939, 65 L.R.R.M. at 2866.

[57] *Id.* at 937-38, 65 L.R.R.M. at 2864-65, *discussing* NLRB v. American Mfg. Co. of Texas, 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965); NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 62 L.R.R.M. 2218 (6th Cir. 1966). *See* notes 59-64 and accompanying text *infra*.

[58] 380 F.2d at 936-40, 65 L.R.R.M. at 2864-67. *See also* NLRB v. Thompson Transp. Co., 406 F.2d 698, 70 L.R.R.M. 2418 (10th Cir. 1969), in which the court found no duty to bargain over the employer's decision to close a terminal after losing a major customer. The court was persuaded to reach this result both by the significant capital change and by the finding that the decision was not motivated by anti-union animus. *Id.* at 702-03, 70 L.R.R.M. at 2420-21.

The *Adams Dairy* approach was also adopted by a majority of the Wisconsin Supreme Court in Libby, McNeill & Libby v. Wisconsin Employment Relations Comm'n, 48 Wis. 2d 272, 179 N.W.2d 805, 75 L.R.R.M. 2759 (1970), where Wisconsin first encountered the issue of agricultural mechanization in the context of its state labor code. The Wisconsin court considered the language of the *Fibreboard* concurrence and of *Adams Dairy* and its progeny to be persuasive and found no duty to bargain over the introduction of a mechanical cucumber harvester. *Id.* at 281-84, 179 N.W.2d at 810-12, 75 L.R.R.M. at 2763-64. The dissenting opinion was vigorous and urged adoption of the *Ozark* approach. Because the case arose under Wisconsin state law, it has no controlling effect upon the ALRA.

panding it. The first of these was *NLRB v. American Manufacturing Company of Texas*,[59] which paralleled *Adams Dairy* in both its facts and the time of its decision. There the Fifth Circuit held that an employer was required to bargain over its decision to sell its fleet of delivery trucks, terminate its drivers and have its deliveries contracted out to independents.[60] The court also addressed the issue of anti-union animus, concluding, contrary to the *Adams Dairy* line of cases, that the duty to decision bargain existed independently of anti-union animus.[61]

The Fifth Circuit continued its expansive approach to *Fibreboard* in *NLRB v. Winn-Dixie Stores, Inc.*[62] The employer operated a chain of supermarkets in the South. In its 95-store Jacksonville division, cheese cutting and prepackaging had been centrally handled at the Jacksonville warehouse. The employer later found that it would be more profitable to buy its cheese from Kraft, which would pre-cut, package and price the cheese for the entire division. As a result, Winn-Dixie unilaterally decided to discontinue its cheese-packaging operation and permanently lay off most of the workers employed in that operation.[63]

The court held that Winn-Dixie had violated the NLRA by not making this decision the subject of bargaining. It noted that settled law would have required Winn-Dixie to bargain over its decision had the company bought its cheese in bulk and employed an independent contractor to come in and do the packaging. The court concluded that there was no material difference between that situation and the actual facts of the case, where Winn-Dixie had terminated its operations and paid Kraft to handle the entire cheese operation.[64]

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[59] 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965).

[60] *Id.* at 80, 60 L.R.R.M. at 2126.

[61] *Id.* The court stated, "Quite apart from anti-union conduct, or here the claim of economic justification, the decision to subcontract work is a mandatory subject of bargaining." *Id.*

[62] 361 F.2d 512, 62 L.R.R.M. 2218 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966).

[63] *Id.* at 513, 62 L.R.R.M. at 2219-20. The court noted that at the time the cheese operations were discontinued, Winn-Dixie's operation had ten employees, four male and six female. All four males were transferred to the company's beef-packing operation, while the six females were permanently laid off. *Id.* at 514, 62 L.R.R.M. at 2220.

[64] *Id.* at 517, 62 L.R.R.M. at 2222. The court said, "[W]e find no material difference in the facts of the instant case and the American Manufacturing Company case, if, as indicated in the opinion in the latter case, anti-union con-

The Sixth Circuit has also taken an expansive approach to *Fibreboard*. In *Weltronic Co. v. NLRB*,[65] the court affirmed the NLRB's finding that an employer had violated sections 8(a)(5) and 8(a)(1) of the NLRA by refusing to bargain with the union over its decision to transfer unit work from its older plant to a new, non-union facility three miles away.[66] The court said simply that, since the loss of unit jobs had a significant impact on the wages, hours and other terms of employment, the employer's decision required bargaining.[67]

Significantly, the amount of capital expenditure in *American Manufacturing, Winn-Dixie* and *Weltronic* did not sway these courts. Contrary to the *Adams Dairy* approach, where the change in capitalization was a key consideration in deciding whether or not a duty to bargain existed, these courts did not tie the duty to decision bargain to the amount of capital involved. To these courts, the mandate of *Fibreboard* was unequivocal—employers had to bargain over decisions which eliminated bargaining unit jobs. Thus, their approach to *Fibreboard* and decision bargaining is in accord with that of the NLRB.[68]

The most recent appellate case in this area is *Brockway Motor Trucks v. NLRB*.[69] In that case, the employer had closed its Philadelphia outlet for sales and service of its trucks without bargaining over the decision with the union. Based on the parties' stipulation that the closing had been motivated by "economic considerations," the NLRB had ordered the employer to

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duct and economic justification may be laid aside in reaching the ultimate decision." *Id.*

[65] 419 F.2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969), *cert. denied*, 398 U.S. 939 (1970).

[66] *Id.* at 1122-23, 73 L.R.R.M. at 2015-16.

[67] *Id. See also* Garment Workers v. NLRB, 463 F.2d 907, 80 L.R.R.M. 2716 (D.C. Cir. 1972), affirming a finding of violation of the duty to decision bargain against the employer, a clothing manufacturer and seller. The company had sought to avoid its obligations to its employees, who were represented by the International Ladies Garment Workers Union, by surreptitiously moving its plant from Indiana to Uniontown, Alabama, while representing to the union that the company was going out of business completely. The court concluded that the principles of *Fibreboard* governed in the context of plant relocation, citing, among other cases, Weltronic Co. v. NLRB, 419 F.2d 1120 (6th Cir. 1969). 463 F.2d at 916, 80 L.R.R.M. at 2722.

[68] *See* notes 24-44 and accompanying text *supra*.

[69] 582 F.2d 720, 99 L.R.R.M. 2013 (3d Cir. 1978).

bargain over its decision.[70] The Third Circuit, however, refused to accept the parties' invitation to establish a per se rule that an economically motivated partial closure invariably does or does not require decision bargaining. Instead, it denied enforcement of the NLRB order to bargain, but "without prejudice to the NLRB to commence additional proceedings should it seek to do so."[71]

The court attempted to reconcile the split in prior circuit court decisions. On one hand, the court found that each of the cases taking a narrow view of *Fibreboard* could be distinguished factually from *Fibreboard,* thus negating any inference that these cases automatically excused the duty to bargain over economic decisions which terminate unit jobs.[72] On the other hand,

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[70] *Id.* at 723-24, 99 L.R.R.M. at 2015-16. Brockway had operated a number of truck-manufacturing facilities, including the Philadelphia plant involved in this dispute. Soon after the collective bargaining agreement between Brockway and the machinists union expired, the employees went on strike. Brockway then unilaterally closed its Philadelphia plant without giving the union notice or an opportunity to bargain. *Id.*

[71] *Id.* at 741, 99 L.R.R.M. at 2028. The case was remanded to the NLRB for fact finding in accordance with the guidelines provided by the Third Circuit. The NLRB concluded that the company had not been compelled to make its decision by such pressing economic necessity that bargaining would have been futile, and consequently the NLRB reaffirmed its original finding that the employer had violated its duty to bargain. Brockway Motor Trucks, Division of Mack Trucks, Inc., 251 N.L.R.B. No. 23, 104 L.R.R.M. 1515 (1980). As a yardstick for how pressing the economic necessity must be before the NLRB will find the duty to bargain obviated, Brockway went completely out of business between the time the Third Circuit heard the case and the time the NLRB received it on remand, and still the NLRB found a duty to decision bargain.

[72] For example, the court distinguished NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), because the union had actually been afforded the opportunity to bargain about discontinuing the delivery operations during bargaining sessions preceding the last collective bargaining agreement reached between the employer and the union. Brockway Motor Trucks v. NLRB, 582 F.2d 720, 728, 99 L.R.R.M. 2013, 2019 (3d Cir. 1978). As to both Transmarine Navigation Corp., 152 N.L.R.B. 998, 59 L.R.R.M. 1232, *rev'd,* 380 F.2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967), and Thompson Transp. Co., 165 N.L.R.B. 746, 65 L.R.R.M. 1370 (1967), *rev'd,* 406 F.2d 698, 70 L.R.R.M. 2418 (10th Cir. 1969), the *Brockway* court pointed out that the basic operational changes were brought on by economic necessity, so that bargaining over the decisions would have been futile. 582 F.2d at 729, 99 L.R.R.M. at 2019-20. Finally, NLRB v. Royal Plating & Polishing Co., 350 F.2d 191, 60 L.R.R.M. 2033 (3d Cir. 1965), was distinguished as involving the sale of one of the employer's plants because of severe economic necessity and because of a pending forced sale by the local Housing Authority. 582 F.2d at 727, 99

the court said that bargaining might not be required over every economically motivated decision. Instead, the court felt that *Fibreboard* mandated a case-by-case analysis, balancing the interests of labor and management.[73]

In explaining what this balancing approach should entail, the court began with the premise that an employer has a duty to bargain over decisions which eliminate unit jobs. It saw no justification for distinguishing between decisions to subcontract and decisions to partially close. In either situation, there are strong reasons for obliging an employer to meet with employees prior to making a final decision.[74]

The court then discussed several factors that might obviate the employer's duty to bargain. The court suggested that if the decision resulted from government order, severe economic losses, the need to restructure the company to stay in business, or possibly the need for secrecy due to delicate management negotiations, then the duty to bargain might be overridden.[75] The court said that the "economic considerations" motive stipulated to by the parties in *Brockway* was not sufficiently specific to enable the court to undertake a proper balancing.[76]

In seeking to harmonize the conflicting appellate decisions, the court in *Brockway* adopted an approach similar to that of the NLRB in *Ozark*.[77] Both *Brockway* and *Ozark* viewed *Fibreboard* as establishing a general rule requiring bargaining over decisions which would eliminate unit jobs. Further, both recognized the positive aspects of cooperative problem solving by labor and management. But the *Brockway* and *Ozark* approaches differ as to when the duty to decision bargain would be excused. To the *Brockway* court, there would be no duty to bargain when the decision resulted from some necessity which would render decision bargaining useless.[78] According to the court, an exception should be recognized only when the interests

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L.R.R.M. at 2018. Hence, *Brockway* concluded that these courts found no duty to bargain over decisions brought on by inescapable necessity.

[73] Brockway Motor Trucks v. NLRB, 582 F.2d 720, 734-40, 99 L.R.R.M. 2013, 2023-27 (3d Cir. 1978).

[74] *Id.* at 734-35, 99 L.R.R.M. at 2023-24.

[75] *Id.* at 738-39 nn.101-02, 99 L.R.R.M. at 2026-27 nn.101-02.

[76] *Id.* at 739, 99 L.R.R.M. at 2026-27.

[77] Ozark Trailers, Inc., 161 N.L.R.B. 561, 63 L.R.R.M. 1264 (1966). *See* notes 24-42 and accompanying text *supra*.

[78] *See* note 75 and accompanying text *supra*.

of employees in retaining their jobs was outweighed by business considerations of management.[79]

II. BARGAINING UNDER THE ALRA

Under the ALRA a grower must bargain in good faith with representatives of its organized farmhands over changes in the terms and conditions of employment.[80] Although the ALRB has never decided whether or not a grower must bargain over its decision to mechanize, the ALRB has that issue squarely before it right now.[81] Logically, bargaining over the decision to mechanize

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[79] The court said that the determination depended on "whether the employer's interests . . . were in fact of a magnitude and immediacy that would make unacceptable and unfair the imposition of the duty to bargain." Brockway Motor Trucks v. NLRB, 582 F.2d 720, 739, 99 L.R.R.M. 2013, 2027 (3d Cir. 1978).

[80] CAL. LAB. CODE § 1153(e) (West 1980). *See* notes 3-4 and accompanying text *supra*.

[81] This issue has been raised in Cardinal Distrib. Co., Case No. 78-CE-12-C, and in O.P. Murphy Produce Co., Case Nos. 78-CE-113-M, 113-1-M, 113-2-M and 79-CE-330-SAL. Both cases are currently pending before the ALRB for a review of the opinions issued by the respective administrative law officers, who found that there was a duty to bargain over the decision to mechanize. *O. P. Murphy* involves a series of unfair labor practice charges arising out of a grower's struggle with the United Farm Workers of America. The administrative law officer found that there was insufficient evidence to prove that the mechanization was the result of anti-union animus but that the company nevertheless had a duty to bargain over the decision to mechanize under § 1153(e).

O. P. Murphy is the first commercial grower of fresh harvest tomatoes in California to introduce a mechanical harvester. Although canning tomatoes have been mechanically harvested by commercial growers for years, fresh harvest tomatoes have been hand picked because their fragile skin could not withstand the rigors of a mechanical harvester. The mechanical harvester and the special varieties of fresh harvest tomatoes bred for mechanical harvesting were in large measure developed at the University of California, Davis. For a discussion of the University's leading role in agricultural mechanization research and the development of the tomato harvester, see Comment, *The Public Purpose Doctrine and University of California Farm Mechanization Research*, 11 U.C. DAVIS L. REV. 599 (1978); *see also* W. FRIEDLAND & A. BARTON, *supra* note 2, at 41.

In *Cardinal Distributing Co.*, the administrative law officer found a duty to bargain over the decision to switch from a hand-harvested to a mechanically harvested crop. The employer switched from onions to carrots and in the process displaced in excess of 600 hand pickers. The employer was additionally found to have violated its duty to bargain in good faith with the United Farm Workers of America after the workers had elected the union to represent them.

should be required since mechanization drastically changes the "terms and conditions" of those jobs which are displaced as a result of mechanization.[82] Just as an employer is obliged to bargain over issues like hours and wages, the employer should be required to bargain over changes which eradicate hours and wages altogether. Furthermore, the ALRA expressly requires the ALRB to "follow applicable precedents" of the NLRA.[83] Since cases arising under the NLRA involving subcontracting, partial closure and the like, discussed at length above,[84] offer ample analogical support for requiring bargaining, the ALRB and the California courts should find that requiring bargaining is consistent with the letter and spirit of the ALRA.

Requiring the grower to bargain over its decision to mechanize would be consistent with the Supreme Court's holding in *Fibreboard*[85] in several respects. There the Court decided that by eliminating jobs through subcontracting, the employer changed the terms and conditions of employment, thereby triggering the duty to bargain.[86] The same reasoning would require bargaining over the elimination of jobs via mechanization. Further, the considerations underlying the court's holding in *Fibreboard* apply equally to the ALRA. Just as the purposes of the NLRA were served by requiring bargaining over decisions which eliminated unit jobs,[87] requiring bargaining over the decision to mechanize would effectuate the purposes of the ALRA by bringing a critical subject to the bargaining table. Additionally, *Fibreboard* should be controlling because a grower's decision to mechanize typically parallels the employer's decision to subcontract in *Fibreboard.*[88] As in *Fibreboard,* the employees will be

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[82] *See* notes 3-4 *supra.*

[83] CAL. LAB. CODE § 1148 (West 1980). Since federal law concerning bargaining requirements in the face of job elimination is unsettled, the courts and agencies in California are free to choose the most persuasive approach. *See* Social Workers Union v. Alameda County Welfare Dep't, 11 Cal. 3d 382, 392 n.13, 521 P.2d 453, 460 n.13, 113 Cal. Rptr. 461, 468 n.13 (1974).

[84] *See* Section I, "DECISION BARGAINING UNDER THE NLRA," *supra.*

[85] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 57 L.R.R.M. 2609 (1964), *discussed in* notes 12-19 and accompanying text *supra.*

[86] *Id.* at 215, 57 L.R.R.M. at 2613.

[87] *See, e.g.,* NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 62 L.R.R.M. 2218 (5th Cir. 1966), *cert. denied,* 385 U.S. 935, (1966), NLRB v. American Mfg. Co. of Texas, 351 F.2d 74, 60 L.R.R.M. 2122 (5th Cir. 1965).

[88] The fact that the employer has made capital imvestments in the machinery does not alter this conclusion, nor has this issue been ignored. *See* text

replaced while the grower remains in the same business, at the same location and operating in the same manner.

Moreover, *Fibreboard* should be veiwed as controlling precedent for farm mechanization notwithstanding the limitations urged in both the *Fibreboard* concurrence and *Adams Dairy*[89] and its progeny. The concurrers sought to limit *Fibreboard* to instances of subcontracting, where work of the bargaining unit is done by others without changing the employer's basic operations or capital structure.[90] The *Adams Dairy* line of cases espoused this limitation and further, based upon its reading of *Darlington*,[91] added that such capital or directional changes must be motivated by anti-union animus before a duty to bargain arises.[92] Because farm machinery is costly,[93] farm mechanization might appear to fall within these exceptions to the duty to bargain, especially where the mechanization has been implemented to defeat unionism.

But the *Adams Dairy* analysis is inapplicable to farm mechanization because of two flaws in its appraoch. The first flaw concerns linking the duty to bargain to the motivation behind the decision. In *Adams Dairy* the court discussed both *Fibreboard* and *Darlington* in connection with an employer's contracting out its delivery business, and in the process blurred the distinction between the violations in the two cases. *Darlington* did not involve a violation of the duty to decision bargain. Rather, it involved the employer's decision to punish union adherents by closing down a part of its business.[94] The fact that the employer had not bargained over the decision was irrelevant. In *Fibreboard*, on the other hand, the violation involved the employer's failure to bargain over its decision even though the deci-

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accompanying note 68 *supra* and notes 116-117 and accompanying text *infra*.

[89] NLRB v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965), *discussed in* notes 45-53 and accompanying text *supra*.

[90] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223, 57 L.R.R.M. 2609, 2617 (1965). *See* notes 12-19 and accompanying text *supra*.

[91] Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 L.R.R.M. 2657 (1965).

[92] *See, e.g.*, Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1039, 92 L.R.R.M. 2013, 2021 (8th Cir. 1976), *citing* NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1027-28, 74 L.R.R.M. 2055, 2056 (8th Cir. 1970).

[93] A tomato harvester, for example, costs approximately $100,000. 11 U.C. DAVIS L. REV., *supra* note 81, at 615 n.150. *But see* notes 121-123 and accompanying text *infra*.

[94] *See* notes 51-52 and accompanying text *supra*.

sion itself was found to have been motivated by economic considerations and not anti-union animus.[95] That this linkage is a conceptual mistake is apparent by examining the elements required to show a violation of the duty to bargain under the NLRA.[96] No showing of animus is required. A violation can be found without ever establishing the motive for failing to bargain.[97]

The second flaw, dismissing the duty to bargain where an employer's decision affects the capital structure or the basic operations of the company,[98] also renders the *Adams Dairy* approach inapplicable to mechanization. While an employer has an interest in managing its business as it sees fit, this interest must be weighed against the legitimate interests of employees in seniority, pension and other such rights.[99] Congress intentionally curbed the employer's desire for unfettered freedom in making decisions affecting the management and direction of the company in favor of encouraging bargaining between the parties when it passed the NLRA.[100]

So, too, the California Legislature sought to curb the right of California growers to alter unilaterally the terms and conditions of employment in favor of bargaining and to protect the rights of employees. To this end, the ALRA was designed to ensure the rights of farmworkers to organize and to be represented collec-

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[95] *See* notes 12-19 and accompanying text *supra*.

[96] 29 U.S.C. § 158(a)(5) (1976), set out at note 6 *supra*.

[97] *See, e.g.*, Garment Workers v. NLRB, 463 F.2d 907, 916-17, 80 L.R.R.M. 2716, 2722-23 (D.C. Cir. 1972); Weltronic Co. v. NLRB, 419 F.2d 1120, 1123, 73 L.R.R.M. 2014, 2016 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 516-17, 62 L.R.R.M. 2218, 2222-23 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966); NLRB v. American Mfg. Co. of Texas, 351 F.2d 74, 79, 60 L.R.R.M. 2122, 2125 (5th Cir. 1965).

[98] This approach is traceable to the limiting approach to *Fibreboard* espoused in the concurring opinion. *See* notes 17-19 and accompanying text *supra*.

[99] *See, e.g.*, Ozark Trailers, Inc., 161 N.L.R.B. 561, 566, 63 L.R.R.M. 1264, 1267 (1966); Brockway Motor Trucks v. NLRB, 582 F.2d 720, 735 n.87, 99 L.R.R.M. 2013, 2024 n.87 (3d Cir. 1978).

[100] The NLRA was designed to aid the parties in reaching collective bargaining agreements by providing a balance of power between labor and management. It establishes ground rules for and limitations on the tactics that the parties may employ in reaching these agreements. *See, e.g.*, Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 147, 92 L.R.R.M. 2881, 2886 (1976).

tively at the bargaining table.[101] Excusing bargaining on the ground that the employer invested capital in the machinery to replace the workers trammels the thrust of the entire act and particularly the legislature's desire to create a dialogue between the parties over important matters. It also ignores the interests of farmworkers in the rights gained under their collective bargaining agreements—rights held by their counterparts in industry and construction, including seniority health insurance, sick leave, established wage scale, pension and grievance procedures.[102] The only reasonable conclusion is that the ALRA requires the employer to bargain over its decision to mechanize operations.

A final consideration involves the efforts of the Third Circuit in *Brockway*[103] to reconcile the NLRB and *Adams Dairy* approaches by proposing a balancing test, which would excuse bargaining when the employer was faced with economic necessity or other overriding circumstances that would make bargaining a futile exercise.[104] In contrast, the NLRB and other circuit cases requiring bargaining do not suggest exceptions to bargaining. In *Ozark Trailers,* for example, the NLRB found a duty to bargain notwithstanding that the employer's decision was the result of

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[101] The introductory paragraphs to the ALRA state:

> In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. . . .

[102] The right to work under contract, so that the employer is no longer free to act capriciously toward an individual worker, is the backbone of collective bargaining. However, farmworkers who have organized in California have experienced protacted difficulties in getting their various rights secured under contract. *See generally* M. DAY, FORTY ACRES (1971); C. MCWILLIAMS, FACTORIES IN THE FIELDS (1971).

Additionally, the reasoning of those cases adopting the expansive approach to bargaining is equally applicable to agricultural mechanization, since the elimination of jobs by mechanization is analytically indistinguishable from job elimination from subcontracting or partial closure. *See* notes 116-117 and accompanying text *infra.*

[103] Brockway Motor Trucks v. NLRB, 582 F.2d 720, 99 L.R.R.M. 2013 (3d Cir. 1978).

[104] *Id.* at 734-40, 99 L.R.R.M. at 2023-27. *See* notes 69-79 and accompanying text *supra.*

pressing economic necessity.[105]

The *Brockway* approach raises practical and theoretical problems in the agricultural mechanization context because the employees are not afforded the chance to explore the facts behind the decision. Thus an employer may decide that it is under no obligation to reveal the details of its decision, except to inform the employees of the effects. This invites litigation and the filing of refusal-to-bargain charges, since only after the case has been heard and possibly appealed will the two sides know whether or not a duty to bargain existed.

This article suggests that the per se approach, requiring bargaining over any decision to mechanize which eliminates unit jobs, is the most appropriate for the ALRA. All parties would then be aware of their obligations before a decision is implemented. If the employer's decision is based on necessity, that will be readily apparent at the bargaining table. Any balancing of "necessities" would be put into the hands of the bargaining parties instead of the courts and administrative tribunals, and the balancing would center on whether or not to implement the decision rather than whether or not to discuss it.[106] This approach would be more in accord with the purposes of the ALRA than one that left the parties unsure of their obligations and required them to seek solutions away from the collective bargaining table.[107]

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[105] Ozark Trailers, Inc., 161 NLRB 561, 571, 63 L.R.R.M. 1264, 1270 (1966). *See* notes 24-44 and accompanying text *supra*.

[106] In any event, whether or not the decision is "necessary," the employer is only obliged to negotiate. As both *Ozark* and *Brockway* point out, the employer is never required to agree with the union proposals. If after negotiating the employer remains unpersuaded to alter its decision, the employer is free to act. Ozark Trailers, Inc. 161 N.L.R.B. 501, 568, 63 L.R.R.M. 1264, 1268 (1966); Brockway Motor Trucks v. NLRB, 582 F.2d 720, 738, 99 L.R.R.M. 2013, 2026 (3d Cir. 1978).

[107] It is in fact the purpose of both the NLRA and the ALRA to allow the collective bargaining parties to iron out differences and reach acceptable agreements at the bargaining table. These two laws essentially present rules of the game intended only to facilitate the collective bargaining process and not to subsume or replace it. *See* Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 150 n.11, 92 L.R.R.M. 2881, 2887 n.11 (1976), *citing* NLRB v. Insurance Agents, 361 U.S. 477, 498, 45 L.R.R.M. 2704, 2711 (1960). For a discussion of Congress' intent to respect the freedom of the collective bargaining process, see Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of* Garmon, 72 COLUM. L. REV. 469, 478-80 (1972).

III. Remedies for Violations of the Duty to Bargain

Assuming that agricultural mechanization is held to be within the bargaining requirements of section 1153(e) of the ALRA,[108] there remains the question of the appropriate remedy for violations of the bargaining obligation. This question is an important one, since a requirement that employers decision bargain is meaningless absent an adequate mechanism to enforce that requirement.

A. Remedies under the NLRA

In *Fibreboard,* the Supreme Court ordered the employer to resume its former operations and to reinstate the employees displaced by its decision to subcontract out unit work.[109] The Court thus required the employer to restore the *status quo* existing prior to the violation and to bargain before making any such decision in the future.[110]

While several cases have adopted the *Fibreboard* resumption-and-reinstatement remedy intact,[111] others have fashioned alter-

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[108] Cal. Lab. Code § 1153(e) (West 1980), set out in note 6 *supra.*

[109] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 215, 57 L.R.R.M. 2609, 2614 (1964).

[110] *Id.* at 216-17, 57 L.R.R.M. at 2614-15. The Supreme Court affirmed the order of the NLRB.

[111] For example, in American Needle & Novelty Co., 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973), the NLRB found that an employer had violated its bargaining duty by refusing to negotiate with the union over its decision to close down certain of its Chicago plant operations and transfer them to its Harrisburg plant. The NLRB ordered the employer to resume operations at the Chicago plant, to rehire the laid-off employees and to bargain with the union over its decision to transfer work. *Id.* at 535, 84 L.R.R.M. at 1529-30. In ordering this remedy, the NLRB concluded that restoration of the *status quo ante* was necessary to insure "genuine bargaining over the decision." *Id.* at 1530.

The NLRB saw no undue hardship in ordering a return to the *status quo* since the Chicago facility still performed substantially the same functions as before, with the exception of the transferred operations. Moreover, since the employer was part owner of the building housing the facility, it could resume the transferred operations at that facility. As to reinstatement of the laid-off employees, the NLRB felt that, since the employer's unlawful refusal to bargain caused the termination, it could only fashion a meaningful order by reinstating the workers to the same or equivalent jobs with back pay. *Id.*

In NLRB v. Coastal Motor Lines, 542 F.2d 637, 93 L.R.R.M. 2411 (4th Cir. 1976), the court enforced the NLRB-ordered resumption of local delivery operations and reinstatement of local drivers with back pay to remedy the employer's refusal to bargain. In so holding, the court affirmed the NLRB's obser-

native remedies in recognition of an employer's exceptional circumstances. For example, where an employer's expanded operations enabled it to re-employ all of the laid-off workers for substantially equivalent work, resumption of the employer's discontinued operations was not required.[112]

Another exception has been recognized where the employer's decision was the result of "pressing economic necessity" or where resumption would have been unduly burdensome to the employer. In these instances, although reinstatement of laid-off employees was impossible without resumption of the employer's discontinued operations, the NLRB and circuit courts declined to restore the *status quo ante*.[113] Instead, they ordered the em-

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vation that "[r]estoration of the *status quo ante* following an unfair labor practice is prima facie appropriate." *Id.* at 638, 93 L.R.R.M. at 2412. The Fourth Circuit also pointed out that it made no difference in affirming this case whether the company action was classified as a "transfer of work from Union employees to non-Union employees or as a partial dismantling of a business enterprise." In either case, the result would be the same. *Id. See also* American Needle & Novelty Co., 206 N.L.R.B. 534, 84 L.R.R.M. 1526 (1973).

[112] *E.g.*, Stone & Thomas, 221 N.L.R.B. 573, 90 L.R.R.M. 1570 (1975), *modified*, 221 N.L.R.B. 579, 92 L.R.R.M. 1228 (1976); Royal Typewriter Co., 209 N.L.R.B. 1006, 85 L.R.R.M. 1501 (1974), *enforced*, 533 F.2d 1030, 92 L.R.R.M. 2013 (8th Cir. 1976). *Stone & Thomas* involved a furniture warehouse receiving operation. The employer had centralized its receiving and marking operation in Wheeling, West Virginia. After a successful organizing drive, the Wheeling employees voted to be represented by the Teamsters. Thereafter, without first affording the union an opportunity to bargain, the company began the process of decentralizing its furniture receiving and marking operations. The NLRB ruled that the economically motivated transfer was a mandatory subject of bargaining. 221 N.L.R.B. at 574-77, 90 L.R.R.M. at 1572-74. However, the NLRB's resumption-and-reinstatement remedy was later modified when, upon rehearing before the NLRB, the company demonstrated that its expanded operations made reinstatement possible without resumption. *Id.* at 579, 92 L.R.R.M. at 1228.

Similarly, in *Royal Typewriter Co.*, where one of the Royal plants was closed without bargaining, the NLRB ordered only preferential hiring for the displaced employees. This was adequate because Royal and Litton Industries were found to be a single employer, thereby greatly expanding the number of local facilities available and making resumption and reinstatement unnecessary. 209 N.L.R.B. at 1015, 85 L.R.R.M. at 1512.

[113] For example, in Ozark Trailers, Inc., 161 N.L.R.B. 561, 571, 63 L.R.R.M. 1264, 1270 (1966), *discussed in* notes 24-44 and accompanying text *supra*, the NLRB declined to order resumption and reinstatement because the employer had been forced to close due to pressing economic necessity and because the cost of reopening would have been too great. *Id.* at 570-72, 63 L.R.R.M. at 1269-70. While the NLRB recognized that this was the type of case in which

ployer to bargain over the decision, or simply its effects, and awarded the employees back pay.[114] Of course, reinstatement would be required if the discontinued operations were resumed in the future.[115]

B. Remedying the Refusal to Bargain over Agricultural Mechanization

The *Fibreboard* remedy, restoration of the *status quo ante,* is the most appropriate remedy where an employer has displaced employees by mechanizing without first bargaining with unit representatives. Only this remedy will sufficiently deter employers from violating the obligation to bargain and redress violations effectively and completely.

The facts of the typical mechanization case will parallel those of *Fibreboard* and leave little room for modification of the resumption-and-reinstatement remedy based on exceptional circumstances. In *Fibreboard,* the custodial workforce was replaced by another which could apparently do the same job for less money.[116] The location, the type of work performed by the replacements and the general operation of the company remained the same.

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resumption and reinstatement would be appropriate, it felt that such an order would be impractical under the circumstances, since the company would have to close its operations again. The NLRB therefore limited its order to requiring bargaining about the decision and its effects. The NLRB ordered back pay and the posting of the NLRB order on the employer's premises. *Id.* Similarly, in NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 62 L.R.R.M. 2218 (5th Cir. 1966), *discussed in* notes 62-64 and accompanying text *supra,* the court found a duty to bargain but stopped short of ordering resumption and reinstatement because of the burden to the employer.

[114] *See, e.g.,* Ozark Trailers, Inc., 161 N.L.R.B. 561, 570-72, 63 L.R.R.M. 1264, 1269-70 (1966); NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512, 516-17, 62 L.R.R.M. 2218, 2222-23 (5th Cir. 1966); Garment Workers v. NLRB, 463 F.2d 907, 921, 80 L.R.R.M. 2716, 2728 (D.C. Cir. 1972). This same back-pay remedy has been ordered by those courts taking a narrow view of *Fibreboard,* limiting the employer's duty to bargain only over the effects of its decision, *see* notes 45-58 and accompanying text *supra. See, e.g.,* NLRB v. Drapery Mfg. Co., 425 F.2d 1026, 1029, 74 L.R.R.M. 2055, 2057 (8th Cir. 1970).

[115] *See, e.g.,* Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 92 L.R.R.M. 2013 (8th Cir. 1976), in which the court, while finding no duty to decision bargain and no obligation to resume operations, nevertheless required reinstatement should the employer resume operations. *Id.* at 1044, 92 L.R.R.M. at 2025.

[116] *See* notes 12-19 and accompanying text *supra.*

This will also be true in the typical agricultural mechanization setting. Consider the example of a mechanical harvester which replaces hand pickers. The farming operation will continue; the land will be prepared, cultivated, watered, weeded and harvested. The crops will continue to be rotated, plowed under and marketed in accordance with the dictates of the soil, the condition of the crops, the advance of the seasons and the economic fluctuations of the market.[117] The difference is that the pickers have been replaced, just as the workers were replaced in *Fibreboard,* except that the replacement is not human.

Exceptional circumstances allowing less than resumption and reinstatement will likely be absent. First, hand pickers replaced by a mechanical harvester will probably not find equivalent work on a farm, assuming that harvesting represents the farm's most significant employment activity.[118]

Second, the introduction of a mechanical harvester is ordinarily not the result of overriding necessity. Mechanization is only one means of increasing the employer's profit margin, and it is influenced by many competing business considerations. For example, if an employer wished to introduce a mechanical harvester to harvest fresh market tomatoes, the employer would have to plant a different tomato, one bred to withstand the rough handling of a machine.[119] If the market favored the hand-picked breed over the tougher breed, the profitability of using hand pickers would return. Or if the employer switched from green onions, which are hand picked, to carrots, which can be mechanically harvested, the market or weather conditions might shift, dictating a return to onions.[120]

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[117] In one of the two mechanization cases currently before the ALRB, Cardinal Dist. Co., Case No. 78-CE-12-C, a company representative testified that everything in the operation, from soil preparation to marketing, remained the same, except for the harvesting itself.

[118] For example, in *Cardinal Dist. Co., id.,* the employer introduced a mechanical harvester which effectively eliminated more than 600 workers, the bulk of its harvesting crew. The company employed only a small crew except during the harvest season.

[119] In the second mechanization case pending before the ALRB, O.P. Murphy Produce Co., Case Nos. 78-CE-113-M, 113-1-M and 79-CE-330-SAL, the grower introduced a tomato bred specifically for mechanical harvesting.

[120] In Cardinal Dist. Co., Case No. 78-CE-12-C, the employer testified that the company's decision was based solely upon economic considerations and that, assuming a shift in these conditions, the employer might well consider returning to growing green onions.

Finally, ordering an agricultural employer to resume its former hand-picking operation would not be unduly burdensome.[121] While agricultural machinery is somewhat expensive, it can be set aside temporarily, leased to another farm or perhaps even sold without greatly affecting the employer's overall financial picture.[122] Any inconvenience that resumption and reinstatement would cause must be balanced against the potential harm to the employees who would be displaced by the employer's unilateral decision.[123]

In sum, the introduction of agricultural mechanization presents none of the circumstances that have obstructed resumption and reinstatement in other cases. Thus, the *Fibreboard* remedy of restoring the *status quo ante* should be adopted. To order less would invite future violations of the duty to bargain over replacing farmworkers with machinery and add unnecessarily to the existing uncertainty between growers and

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[121] The land, crops, cultivation, marketing and company operation remain the same. The employer could thus resume and reinstate without additional capital outlays.

[122] A tomato harvester, for example, costs approximately $90,000 11 U.C. DAVIS L. REV., *supra* note 81, at 615 n.150. In the scale of capital investment in California agribusiness, this is a small investment. Farms in California have followed the nationwide trend toward consolidation. *See generally* D. VILLAREJO, GETTING BIGGER, LARGE SCALE FARMING IN CALIFORNIA (1980). By 1974, approximately 60% of the cropland in California was farmed by growers who owned 1,000 or more acres each. More significantly, today almost one quarter of California's cropland is farmed by less than one percent of the state's farmers. *Id.* at 5. This trend toward consolidation is directly related to recent advances in farm mechanization. Since mechanization requires large tracts of the same crop to be cost-effective, farms that are big enough to mechanize often absorb those that are not. Thus, for example, between 1964—when the mechanical tomato harvester was introduced—and 1974, expansion by large growers caused the number of tomato growers to be reduced from 4,000 to 600. *Id.* at 22-29. One consequence of this modern trend is that today's large growers have sufficient holdings to withstand any difficulties encountered in reselling or subleasing farm equipment until bargaining has taken place. *See generally* U.S. DEP'T OF AGRICULTURE, AGRICULTURAL STATISTICS (1980).

[123] If it is shown that the employer has been involved in protracted research and planning efforts which perhaps pre-date the election of a union by the employees, the ALRB could take this into account and tailor a remedy to the particular facts of the case. In any event, the employer is only bound to bargain, not to agree. *See* note 106 and accompanying text *supra*. Should the employer be ordered to resume operations and reinstate employees, it would still be free to bargain over reintroducing the machinery. If the union and employer reached an impasse in their negotiations, the employer would be free to act.

farmworkers.

CONCLUSION

The introduction of farm mechanization is perhaps the single most significant issue facing farmworkers. The California ALRA was passed to bring important matters to the bargaining table and to ensure peace in the fields. Logically, the ALRA's requirement that changes in the terms and conditions of employment be bargained over should include bargaining over the introduction of farm machinery which eliminates employment itself.

Support for this position emerges from cases decided under the NLRA that provide statutory precedent for cases arising under the ALRA. While certain circuit courts have sought to limit the duty to bargain over employer decisions which as a by-product eliminate jobs, these cases are not persuasive in the context of mechanization. Rather, the broader view of the duty to bargain taken by the NLRB and other circuit courts provides better guidance to the ALRB. The ALRB should look to these latter cases in deciding that growers must bargain over the decision to mechanize.

In those instances where growers violate their duty to bargain, the appropriate remedy is to require the grower to restore the *status quo ante* through resumption of operations and to reinstate the affected employees with back pay. Without such a remedy, growers will not be deterred from violating the obligation to bargain over decisions which eliminate jobs.