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STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO,

Complainant,

and

DEL MONTE FRESH PRODUCE (HAWAII), INC., Honolulu Chilled/Frozen Operations; EDWARD C. LITTLETON, General Manager, Honolulu Chilled/Frozen Operations; STACIE SASAGAWA, Human Resources Director, Del Monte Fresh Produce (Hawaii), Inc.; TIM HO, Hawaii Employers Council; DIXON SUZUKI, Hawaii Employers Council; and DEL MONTE FRESH PRODUCE COMPANY,

Respondents.

CASE NO. 06-5(CE)

DECISION NO. 464

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 21, 2006, the INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO ("ILWU" or "Union") filed an unfair labor practice complaint against DEL MONTE FRESH PRODUCE (HAWAII), INC. ("DMH"), Honolulu Chilled/Frozen Operations; EDWARD C. LITTLETON ("LITTLETON"), General Manager, Honolulu Chilled/Frozen Operations; STACIE SASAGAWA ("SASAGAWA"), Human Resources Director, Del Monte Fresh Produce (Hawaii), Inc. and TIM HO ("HO"), Hawaii Employers Council (collectively "DEL MONTE" or "Company") with the Hawaii Labor Relations Board ("Board") alleging violations of various sections of Hawaii Revised Statutes ("HRS") Chapter 377. The foregoing Respondents filed an answer with the Board on September 1, 2006.

On December 8, 2006, the Union filed a motion to amend its complaint to allege additional unlawful conduct and to name as additional Respondents DIXON SUZUKI ("SUZUKI"), Hawaii Employers Council and DEL MONTE FRESH PRODUCE COMPANY ("Del Monte Corporate"). The Union was given leave to file the first amended Complaint and it was filed on December 21, 2006. The First Amended Unfair Labor Practice Complaint alleged three counts: (1) unlawful interference of

employees' right to form, join, or assist their union in violation of HRS §§ 377-4 and 377-6(1); (2) breach of Respondents' duty to bargain in good faith in violation of HRS § 377-6(4); and (3) engaging in discriminatory conduct in violation of HRS §§ 377-6(3) and 377-6(8). Respondents filed an answer to the First Amended Complaint on January 5, 2007.

On November 16, 2006, Respondents filed a motion to dismiss or alternatively for summary judgment which the Union opposed on November 24, 2006. On November 28, 2006, the Board heard argument on Respondents' motion and denied the motion.

The Board conducted evidentiary hearings on November 29-30, December 12, 15, and 21, 2006. On December 6, 2006, Respondents filed a Motion to Disqualify or for Recusal of Board Member. The Board heard arguments on the motion on December 15, 2006 and the Board Chair denied Respondents' motion for recusal (Transcript 12/15/06, p. 631) and a Board majority denied the Motion for Disqualification (*Id.*). The Board set January 29, 2007 as the deadline to file written briefs.

On January 4, 2007, Respondents filed a motion to reopen the record to submit evidence of the parties' recent effects bargaining. On January 19, 2007, the Board conducted a hearing on the motion and granted Respondents' motion to reopen the hearing to accept evidence on negotiations which occurred after the December 21, 2006 close of the evidentiary hearing. The parties filed their post hearing briefs on January 29, 2007. On February 7, 2007, the Board conducted a hearing on the post December 2006 negotiations. On February 20, 2007, the parties filed their supplemental arguments to the Board.

Based on a full and complete review of the evidence in this record, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The ILWU is a representative, within the meaning of HRS § 377-1, of the DMH employees.
2. DMH is an employer within the meaning of HRS § 377-1. DMH is wholly owned by Del Monte Corporate whose office is in Coral Gables, Florida.

Del Monte Corporate exercised sufficient control over DMH to be deemed an employer under HRS § 377-1.¹

3. LITTLETON, SASAGAWA, HO and SUZUKI were, at all times relevant, agents representing the interests of DEL MONTE.
4. As of January 2006, DMH was a pineapple plantation in the ewa plains of Oahu which for over 100 years had provided employment for generations of local residents. As of that time it had more than 700 employees.
5. Approximately, one year later it had shut down operations, plowed under all of its crop and terminated all (approximately 500) but a handful of employees necessary to dismantle its remaining infrastructure (approximately 35).
6. DMH grew and sold whole pineapple and processed pineapple products. The company is wholly owned and controlled by a larger multi-national agribusiness, Del Monte Corporate.
7. At all times relevant, hereto, local management, including General Manager LITTLETON, and Human Resources Director SASAGAWA, reported and answered to the Vice President of Finance and Administration of Del Monte Fresh Produce North America, Richard Contreras ("Contreras"). Contreras was an accountant by trade and training who held exclusive final authority over all major capital decisions affecting DMH.
8. The ILWU, has been the exclusive bargaining representative for DEL MONTE employees since 1945. Its President, Fred Galdones ("Galdones"), serves as the principal contact and spokesperson for the Union. The ILWU represents three bargaining units at DMH - Oahu Plantation, Kunia Processing and Packing Operations, and Kunia Chilled/Frozen Operations.
9. In May 2004, the Union and DMH negotiated new collective bargaining agreements for the respective units, effective February 8, 2004 through May 30, 2009. During the negotiations LITTLETON represented that DEL MONTE was investing in its operations in Hawaii and would continue operating in Hawaii. Upon receiving assurances that "Del Monte was in it for the long run," the Union mitigated its demands (including enhanced severance) and entered into a five-year contract with the expectation that operations would continue for that period of time.

¹Based upon the record, Del Monte Corporate exercised control over DMH operations, including the decision to continue operations. The authority of the DMH officers was limited where Del Monte Corporate controlled the bargaining over cost items in effects bargaining.

10. By letter dated September 27, 2004, in response to member concerns regarding an apparent downgrading of activity, Galdones wrote to LITTLETON inquiring about any plans to shut down DMH. Union's ("U.") Exhibit ("Ex.") 4. In a subsequent meeting, LITTLETON made assurances to employees that operational changes were being made to increase profitability, that DMH was in Hawaii to stay and never mentioned financial problems. By letter dated October 11, 2004, LITTLETON assured Galdones that DMH did not have "any present intention to terminate its Hawaii operations or to reduce it agricultural acreage." U. Ex. 5.
11. Approximately 15 months later, on February 1, 2006, LITTLETON wrote to Galdones to inform him that: "effective February 19, 2006, Del Monte Fresh Produce (Hawaii), Inc. . . . will cease its planting of pineapple in Hawaii." U. Ex. 6.
12. The letter went on to assure that, "Even with planting being stopped . . . operations would still continue (at a diminished scale over time) over approximately the next 2½ years." Id.
13. In its "Local Company Statement" issued publicly on the same day, DMH made the following expression of its intent:

It should be noted that Del Monte is not leaving Hawaii immediately. Pineapple has a crop cycle of three years and the Company's current crop cycle will continue to produce quality fruit through mid-2008. Del Monte expects to continue harvesting and packing pineapple in Hawaii through that time. In fact, the Company expects significant volumes during 2006.

. . . Prior to the close of the Kunia plantation at the end of 2008, Del Monte will work with its employees and union representatives to reduce the impact of this decision. The Company has been discussing measures to help its employees, including notifying other potential employers and potentially transferring the Kunia housing to the current employees/tenants. Del Monte is mindful of the Company's obligations to its employees and the local community, and is committed to making every reasonable effort to lessen the impact on all individuals involved. Id.

14. In response to these announcements, on February 9, 2006, the Union wrote to DEL MONTE to request effects bargaining over the closure and

information regarding, *inter alia*, the timing and reasons for the planned closure, and the planned disposition of residual assets. U. Ex. 7.

15. On February 16, 2006, the parties began effects bargaining. U. Ex. 8. It is uncontested that both parties predicated their bargaining upon the announced December 2008 closure date.
16. By letter dated February 27, 2006, the Company reiterated its announced schedule and proclaimed no plans for the disposition of assets.² U. Ex. 9.
17. Throughout bargaining, the Union was principally represented by Galdones as the spokesperson. The Company was represented by a bargaining committee composed of HO, spokesperson from the Hawaii Employers Council, LITTLETON and SASAGAWA. SUZUKI, also from the Hawaii Employers Council, was the spokesperson for the Company in effects bargaining on housing issues. While the Company's negotiating committee had authority to negotiate with the Union, the committee conferred with Contreras, by telephone, who in turn consulted with Corporate's Chief Operating Officer Hani El-Naffy, for any cost items.
18. At the first meeting, the Union presented its proposals. These included three cost items: enhanced severance, six months of medical and dental coverage after closure, and protecting the residents of Kunia Camp by providing seed money to retain a housing association. The Union also presented numerous, mostly administrative non-cost proposals. At the onset, HO advised the Union that the Company's committee had "received their marching orders" and that nothing would be negotiated beyond the scope of the collective bargaining agreement in force. Tr. pp. 656-57.
19. Nevertheless, the Company's committee dutifully costed and transmitted the Union's cost items to Contreras who rejected them because of cost concerns, particularly as to the severance, medical insurance, the almost three years' notice preceding the closure provided employees with ample time to find other employment or otherwise mitigate their potential losses. The rejection was, but the reasoning was never, transmitted to the Union.
20. In the course of the eight bargaining sessions conducted over the following six months, the Company made no concessions over the cost items. But the Company proposed a new cost item on April 12, 2006, a cash "retention

²The Company indicated that the disposition of its assets was not relevant to the Union's role as bargaining agent for the employees because the Company was not claiming that it lacked funds or anticipated lacking funds to pay benefits or other remuneration which the employees would be entitled. U. Ex. 9.

bonus” to be paid to fourth year covered seasonal (non-regular employees who had worked for four years) who remained employed at the Company into 2007. The retention bonus was designed to stop an outflow of such employees given the announced closure date and the anticipated need for employees in 2007 and 2008. The retention bonus proposal also resulted in a tentative agreement.

21. Tentative agreements were also reached for most non-cost items and housing (which included a waiver of the fee for the use of the gym and a commitment of continued housing with no rent increases until December 2008).
22. The last of these negotiating sessions took place in July with no movement by either party regarding cost items.
23. The ILWU filed the instant unfair labor practice charge on August 21, 2006.
24. In a September 2006 meeting between the parties, the Union was assured that DMH did not anticipate any further operational changes in 2006 (Tr. p. 291) and no further layoffs in 2006.³ Tr. pp. 246-47. At about the same time LITTLETON advised Galdones that he was being assigned by Del Monte Corporate to a plantation in Kenya and SASAGAWA would take his place as General Manager. SASAGAWA had no education in agronomy or experience with plantation management except for her few years as human resources director.
25. At around the same time, in a required SEC filing for the third quarter of 2006, Del Monte Corporate reported a loss for the entire value of the existing crop and plantation operation of DMH, essentially writing off DMH more than two years ahead of its announced and anticipated closing. Contreras did not identify any reason for this other than undefined accounting conventions.⁴

³In August 2006, Del Monte Corporate decided to close the Kunia Chilled Fruit Operation (“KCFO”) in September 2006 because there was a two-year inventory of frozen pineapple in storage. The operations ceased and the 17 KCFO employees were paid for 60 days regardless of whether they were laid off or assigned to other work.

⁴Tax, investment or securities implications of this decision and public legal representation are well beyond the scope of the current inquiry.

26. On November 13, 2006, Contreras advised SASAGAWA that he was accelerating the closing to January 22, 2007 and directed the fields be plowed under. Crop destruction dutifully occurred before month's end.
27. With regard to the decision to plow under the newly planted unharvested fields, Del Monte Corporate made no efforts to find a buyer or alternative application for these living assets. Instead it merely ordered the crops to be destroyed to assure that they did not fall into the hands of a competitor.
28. The Union was informed of the accelerated closure on the following day by phone and via a written and public announcement on November 17, 2006.
29. Until this time, no warning or even a hint of accelerated closure had been provided to the Union, DMH employees or even DMH's bargaining committee. DMH never advised or suggested that it was reserving any such power.
30. The sudden unexpected decision was a result of sort of a "eureka" moment by Contreras in the course of preparation and presentation of the Del Monte Corporate annual budget process on November 10, 2006 when each region makes a presentation to upper management regarding the current and the projected following year's financial performance. In the course of preparation and presentation, it became apparent that: 1) due to a precipitous drop in production of pineapple (900,000 boxes or 25 percent of anticipated production) and the lower prices of foreign grown pine, DMH was projected to lose \$5 million in 2006. For 2007, projected losses were about \$3 or \$4 million. At a meeting on November 13, 2006 with the Chief Operating Officer, a decision was made to close DMH immediately.
31. All of this must have come as no surprise to Contreras as he received monthly production reports from DMH which reflected the steady decline in actual production as compared to anticipated production. Nonetheless, neither the Union nor newly commissioned General Manager SASAGAWA were informed of production or profitability concerns. Nor were the Union or DMH employees ever invited to recommend possible ways to cure the shortfall. Nor were any recommendations made by Contreras or Del Monte Corporate.
32. SASAGAWA admitted that DMH expected its employees to rely upon the December 2008 closure date.
33. DMH offered three instances of its commitment to assist terminated employees in their transition. One, English as a Second Language classes for their many non-English speaking (mostly Filipino) employees held at

the Company facility, second, assistance in registration for Commercial Drivers License classes conducted at Leeward Community College, and third, a job fair open to employees and prospective employers conducted at the DMH facility.

34. On December 5, 2006 at the DMH's invitation, the parties held a bargaining session. At that session, DMH offered: in addition to the prior tentative agreements, including housing, one month of extended medical/dental insurance (ostensibly for the lost mitigation time), and two days of additional severance for covered seasonals. The session ended without reaching an agreement.
35. On December 18, 2006, the parties held their tenth bargaining session. Neither presented any new proposal. Instead the Union submitted questions regarding Campbell Estate, the landowner and lessor of the properties where the housing was constructed. The Union further suggested working toward a three-party agreement which would include the Campbell Estate.
36. The parties met again on December 28, 2006 where the Union indicated that it had no change in its position. The Union indicated that it would not make any changes until it met with the Campbell Estate. The parties remained on-call.
37. After Campbell Estate gave the Union a ball park figure on the estimated expense of operating the Kunia camp, Galdones called HO on January 5, 2007 to schedule another meeting.
38. On January 9, 2007, the parties met to bargain and both parties mitigated their positions somewhat. On January 10, 2007, the parties executed a final memorandum of agreement (MOA) ending the effects bargaining.
39. The MOA provided as follows:

MEMORANDUM OF AGREEMENT

This memorandum of Agreement (Agreement) between **DEL MONTE FRESH PRODUCE (HAWAII), INC. (Company)** and **ILWU LOCAL 142 (Union)** constitutes the basis of settlement of all issues involved in negotiations between the parties which were concluded on January 10, 2007 regarding the effects of the closure of the Hawaii operations for employees within **Oahu Plantation, Kunia Processing and Packing Operations (KFF)**, and

Kunia Chilled/Frozen) Operations (KCFO) bargaining units.

The following agreements were reached during the negotiations between the parties and shall be incorporated in the phase out procedures for each of the above referenced bargaining units:

1. Agreements - April 6, 2006 Re: Effects of Closure of Hawaii Operations
See Attachment 1
2. Agreements - April 11, 2006 Re: Effects of Closure of Hawaii Operations

See Attachment 2
3. Letter of Understanding Re: Del Monte Housing - January 10, 2007

See Attachment 3
4. Understanding Re: Bumping - March 22, 2006

See Attachment 4
5. Covered Seasonal Separation Allowance
 - A. A covered seasonal employee who is covered by one of the collective bargaining agreements above on the date of this Agreement shall be eligible for a separation allowance. The separation allowance payable to an eligible covered seasonal employee shall be an amount computed on the basis of three days pay for every completed year of covered seasonal service.
 - B. Years of covered seasonal service shall be determined by taking the total number of months where he/she has performed work for the Company as a covered seasonal employee during his/her current period of continuous service and dividing the total number of months by twelve.

C. The daily rate of pay for the purpose of computing a separation allowance for a covered seasonal employee under this Agreement shall be equal to the applicable Group Grade 1 covered seasonal rate multiplied by eight (8).

6. Oahu Plantation Non-Regular Separation Allowance

Any covered non-regular employee with less than five (5) years of service and otherwise not eligible for benefits under the Separation Allowance provisions of Exhibit "C" of the Oahu Plantation collective bargaining agreement shall be vested under the plan and eligible for benefits based on their length of service as a non-regular employee as provided for under the federal Employee Retirement Income Security Act (ERISA).

7. Agreements - December 5, 2006 Re: Effects of Closure of Hawaii Operations

A. Employees eligible for retirement have the option of electing to take medical coverage in accordance with the applicable collective bargaining agreement(s) and medical plan agreement(s). Employees who elect to take such medical coverage, shall be subject to an offset (value of the medical benefits) in accordance with the Older Workers Benefits Protection Act. **(Union Proposal #3 and 4m)**

C. Employees will be allowed to voluntarily terminate employment after receiving sixty (60) days notice of layoff and be eligible to receive their severance allowance. **(Union Proposal #3c)**

D. Del Monte anticipates that whatever remaining work it currently has should be completed by January 21, 2007. If there is a need to have employees work beyond that date, the Company will inform the Union and affected employees. **(Union Proposal #4b)**

- E. Del Monte will pay a \$750.00 bonus to any essential employee who avails him or herself to work from the date of this Agreement through January 21, 2007 and terminates on or before January 21, 2007. If the employee is terminated before January 21, 2007 or the employee is not available for scheduled work, the bonus shall be prorated in proportion to the number of days actually worked and the number of work days of work opportunity. Absences for the two-day sick leave waiting period, vacation, and authorized union leave will not count as absences for purposes of calculating the prorated bonus amount. **(Union Proposals #4a, 4e, 4i, and 4j)**
- F. Those essential employees assigned to work after November 17, 2006 will be entitled to all benefits provided for under the collective bargaining agreement, including service credit for hours or time worked. **(Union Proposal #4c)**
- G. Del Monte will provide the Union with a list of job classifications and employees (with addresses and phone numbers) who are classified as on-call employees through January 21, 2007. Del Monte will provide this information on a computer disc with the understanding that the Union will keep the information confidential. **(Union Proposal #4d)**
- H. All essential employees assigned to work after November 17, 2006 will be paid no less than forty (40) straight-time hours per week during the 60 day period immediately following the November 17, 2006 notice to employees of closure of operations. **(Union Proposal #4f)**
- I. On-call employees will be paid no less than forty (40) straight-time hours per week during the 60 day period immediately following the November 17, 2006 notice to employees of closure of operations. **(Union Proposals #4g)**
- J. Any employee who voluntarily terminates employment after November 17, 2006 will be paid

no less than forty (40) straight-time hours per week during the 60 day period immediately following the November 17, 2006 notice to employees of closure of operations. **(Union Proposal #4h)**

K. Eligible on-call employees will be entitled to Thanksgiving, Christmas, and New Years Day holiday benefits. **(Union Proposal #4k)**

L. Eligible employees who have not taken their 2006 Floating Holiday will be compensated for their 2006 Floating Holiday benefit. Eligible employees shall have their 2007 Floating Holiday benefit incorporated in their final paychecks payable on January 22, 2007. **(Union Proposal #4l)**

M. Retiree medical benefits will end on April 30, 2009 in accordance with the Medical Plan Agreement for Pensioners dated February 8, 2004. **(Union Proposal #4m)**

N. Del Monte will provide the Union with the names, addresses, and phone numbers of all presently retired employees. **(Union Proposal #4n)**

O. Del Monte will provide the Union with the names, addresses, dates of birth, and phone numbers of all employees (including KCFO employees and irrigators), who are 55 years or older. **(Union Proposal #4o)**

P. In early January 2007, Del Monte will provide a letter to each employee with pension vesting information and severance benefit information. Del Monte will begin having meetings with employees after December 25, 2006. Del Monte agrees to allow union representatives to be present at the meetings, provided that such representatives do not interfere with Company discussions and are present to lend assistance to the process. Before the employees are laid off, Del Monte will provide a mailing stuffer in each employee's paycheck with benefit contact information. If there are any subsequent changes to Del Monte benefit contact

information, Del Monte will notify the Union.
(Union Proposal #4q)

Q. Del Monte will continue to use the Employee Benefit Options form and will provide a breakdown of how the Company calculated the benefit amounts for each employee. **(Union Proposal #4r)**

R. For those employees entitled to pension benefits under the Aloha Papaya Pension Plan, Del Monte will provide a breakdown of the amount of vested benefits under the Aloha Papaya Pension Plan and the amount of vested benefits under the Del Monte Pension Plan. **(Union Proposal #4s)**

8. Extension of Medical Plan Benefits

Covered regular and non-regular employees who, on the date of this Agreement, participate in one of the Company's medical plans, may elect to continue participating in their existing medical plan for two months following their termination. The Company will contribute eighty percent (80%) of the applicable premium for the lowest cost medical plan toward the cost of the medical plan premium during this two month period. Employees may elect COBRA medical coverage thereafter.

This Memorandum of Agreement constitutes final resolution of all issues involved in negotiations regarding the effects of the closure of Hawaii operations and shall be effective as of January 10, 2007, except as other effective dates for certain agreements are expressly specified in this Agreement.

40. Upon the reopening of the evidentiary record of this case, Galdones testified that the Union mitigated its proposals and agreed to DMH's compromise proposals because in the face of the impending terminations scheduled less than 12 days later, the Union had no leverage in the negotiations since a terminated company with virtually no employees has no need for Union or employee support, cooperation or good will. Additionally, his 500 terminated members would be without any enhanced benefits and he had no assurance that the members of his bargaining committee would not be among those terminated. Finally, given DMH's representation that in the

absence of immediate acceptance any further bargaining would have to be post-closure, any incentive for the DMH to ever make further concessions would soon be gone.

41. On January 22, 2007, DMH terminated approximately 500 employees.

DISCUSSION

On November 14, 2006 (ironically, the same day that Corporate advised DMH of the accelerated plantation closure), the Hawaii Supreme Court released its opinion in Del Monte Fresh Produce (Hawaii) v. ILWU, 112 Hawai'i 489, 146 P.3d 1066 (2006) ("Del Monte I"). The case was an appeal of a decision by the Board involving substantially the same parties and legal issues as the instant case. So the Court has provided the Board the substantially controlling guidance in the disposition of the instant case.

The record of this case includes over 1,000 pages of transcript testimony, more than 200 pages of legal briefs, and more than 100 evidentiary exhibits. This virtual mountain of testimony and argument centered on diligent, admirable attempts to identify, through an almost microscopic examination of virtually every word, deed and statement of intent in the course of negotiations to establish each as indicia of good or bad faith in negotiations. But the literal meaning of "weight" notwithstanding, the Board will follow the guidance of the Court that the Board's determination of the "totality" (the dispositive evidentiary standard) "is not a counting game of good or bad acts. . ." Id., at 501. The Board will therefore proceed pursuant to its understanding of the "totality of the circumstances without dissecting or judging every piece of evidentiary minutia introduced or argued."

Failure to Bargain in Good Faith

As in Del Monte I, the ILWU alleges that DEL MONTE refused to bargain in good faith in violation of HRS § 377-6(4) which makes it an unfair labor practice for an employer to "refuse to bargain collectively" with the employees' union. In that case, the Court reiterated and applied without adoption the Board's standard of determining whether such a violation has occurred: "whether the totality of an employer's conduct evinces a present intention to find a basis for a basis for agreement and a sincere effort to reach a common ground." Id., at 500.

In the instant case, the ILWU argues that DEL MONTE's lack of good faith is evidenced by the powerlessness of its bargaining team, the Company's failure to consider any cost items, and the unwillingness to counter any of the Union's proposals. DEL MONTE points to the promptness and receptivity of its team, the dutiful and responsible costing of and transmission to Corporate of the Union's proposals, the prompt and sincere transmission of Corporate's rejections, their reaching of tentative agreements

over all non-cost items and housing, their subsequent to November 2006 moderation of their position, the absence of any contrary knowledge or present intent to mislead the Union in the transmission of information, and the ultimate reaching of a settlement, as indicia of good faith which should be dispositive of our analysis.

The bargaining at issue took place in two discrete phases; one following DEL MONTE's announcement of closure in January 2006 and the other following its announcement of accelerated closure in November of that year.

DEL MONTE argues, and the Board concurs without apparent objection by the Union, that the second phase of negotiations took place in good faith. There was a free flow and no lack of relevant information, both parties, with an unquestioned intent to reach agreement, and moderated and compromised their positions pursuant to which a final and binding agreement was struck.

The Board cannot so conclude with respect to the first phase of negotiations and finds and concludes based on its understanding of the totality of the disclosed circumstances that DEL MONTE failed to bargain in good faith in violation of HRS § 377-6(4) during this phase.

In the opinion of the Board majority, rational foundational prerequisites of information which must be available, or the subjects of open good faith exchange, in the course of effects bargaining accompanying a closure should at the least include: 1) why the closure is taking place; 2) what, if anything, the Union, employees or the employer could reasonably do to delay, forestall the closure or mitigate the detrimental effects of the closure; 3) the reasons for positions taken in developing, modifying or rejecting offers of counter offers; 4) the resources which might be available to effect compromise; 5) the possible retention, redeployment or liquidation of effected human or material resources; 6) what is necessary to establish an open and meaningful avenue of communication with decision makers; 7) steps that can be reasonably taken to mitigate the detrimental effects of the pending unemployment to employees, their dependent families or their community; and 8) the precise timing of the closure.

Each of these elements existed, albeit largely through testimonial disclosure, during the second phase of negotiations and the clarifying of the circumstances precipitating and surrounding the closure, the identity, and expectations of decision makers, and the actual date of closure each contributed to the reaching of a final settlement in accordance with each party's duty to bargain.

This, of course cannot be said for the first phase which was marked by a withholding, frustration or unilateral change with respect to each identified element.

1. The Union was advised of only competitive pricing and lease expiration as the initial reasons for closure;

profitability and production concerns, much less continuing and exacerbated profitability and production concerns were never transmitted to the Union.

2. In the absence of this information and naturally any substantive exchanges between the parties in this regard, the Union had no reason or ability to modify, sweeten or invent new proposals in order to possibly extend the life of the enterprise and its members' jobs. Any hope or possibility of creative collaboration was lost within the confines of spreadsheets which were totally unavailable.
3. DEL MONTE's bargaining representatives dutifully transmitted and costed the Union's cost proposals to Corporate. They also dutifully and steadfastly transmitted Corporate's rejection. But the record is devoid of an instance of the Company's bargaining team ever advising the Union of the reasons for its rejections. Thus, the Union was again left in an informational vacuum. They couldn't obtain the reasons for rejection or reasonably craft a compromise, short of complete capitulations, that might generate movement.
4. The Union and its members were led to believe, based on DEL MONTE's representation, that employment would be available until December 2008, almost three years after its January 2006 announced closure. The closing date implicitly assured crop retention and cultivation, active and gainful employment until that time, and time to plan, budget and live accordingly. Both the Union and DEL MONTE relied upon this representation in establishing its positions. The sudden unilateral acceleration of closure wiped out these expectations and betrayed these reliance.
5. In its public statement accompanying its first announcement of closure, DEL MONTE committed to: ". . . Del Monte will work with its employees and union representatives to reduce the impact of this decision. The Company has been discussing measures to help its employees, including notifying other potential

employers and potentially transferring Kunia housing to the current employees/tenants. Del Monte is mindful of the Company's obligations to its employees and the local community, and is committed to making every reasonable effort to lessen the impact on all individuals involved." In the course of the first round of bargaining, except for a handful of locally generated well-intended classes and a job fair, virtually none of this happened.

6. The Board can identify no piece of information more foundationally relevant to effects bargaining accompanying a closure than the date of the closure. That date defines the time for bargaining, the Company's continued need for employees and hence the Union's economic leverage, the time available for employee mitigation of damages, and the time pressure parameters on the taking and establishment of bargaining positions. The closing date is not necessarily, and was not here argued to be, a subject of bargaining. But the information establishes critical and foundational and operational parameters. Hence, DEL MONTE essentially made disappear the foundation and therefore substance of the first phase of bargaining when it accelerated closure.

The Board does not conclude that any of the factors discussed above, standing alone is necessarily dispositive of this issue. But taken together, as representative of a totality of the circumstances presented before us the Board must conclude that the totality of an employer's conduct during the first phase of bargaining does not evince "a present intention to find a basis for agreement and a sincere effort reach a common ground." *Id.* Instead, its efforts and its conduct indicates an intention to create an informational vacuum and temporal box around negotiations which would induce and require complete capitulation.

Discrimination

The Union also alleges that DEL MONTE violated HRS § 377-6(3), which makes it an unfair labor practice for an employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms and conditions of employment." In Del Monte I, the Board had found a violation of this provision stemming from the Company's threat to fire all bargaining units members unless the Union accepted management's proposal and withdrew pending unfair labor practice charges. The Court reversed the Board in this regard, ruling that

finding of “discrimination” requires some actual adverse personnel action such as “discharge, refusal to hire or lesser forms of discipline . . . beyond mere threat or bargaining proposal.” Id., at 504. Finding no such adverse personnel action, the Court found no violation and reversed the Board’s finding of discrimination.

In the instant proceeding, there has been no showing of adverse personnel action by the Company in connection with Union membership, negotiations or participation. Thus, we are bound by the Court’s guidance to dismiss this charge.

Interference

The ILWU also alleges a violation of HRS § 377-6(1) which makes it an unfair labor practice for an employer “to interfere with, restrain or coerce the employer’s employees in the exercise of the rights guaranteed in HRS § 377-4.” In Del Monte I, the Court articulated and applied the test adopted by the Board in identifying violations: “whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate.” Id., at 504. In applying this standard, the Court found that the Board’s finding of a violation in the threat to empty out the bargaining unit unless its proposals were accepted was supported by substantial evidence. Id.

In the instant case, as with regard to our conclusions regarding discrimination, the Board can identify no employer conduct with a nexus to Union membership, negotiations or conduct which would have a tendency to intimidate any Union members in their exercise of their organizational or representational rights. Accordingly, the charge must also be dismissed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS § 377-9.
2. It is an unfair labor practice for the employer to refuse to bargain collectively with the representative of a majority of its employees. HRS § 377-6(4).
3. Based on the totality of the circumstances presented, the Board majority must conclude that with respect to the first phase of bargaining, the totality of the employer’s conduct during the first phase of bargaining does not evince “a present intention to find a basis for agreement and a sincere effort reach a common ground.” Id. Instead, its efforts and its conduct indicates an intention to create an informational vacuum and temporal box around negotiations which would induce and require complete capitulation. The Union was not provided any information regarding profitability or production concerns. The representatives at the bargaining

table either remained silent on the financial condition of the Company or were unaware as to how DMH was financed. This lack of knowledge or information as to the financial considerations of the plans for continued operation precluded meaningful bargaining. Moreover, upon questioning as to the future of the Company, the Union was misled by DMH's assurances that DMH would be in Hawaii at least until December 2008, and that there would be no more operational changes in September 2006. Shortly thereafter, LITTLETON left his General Manager position to SASAGAWA. The Union was further misled to believe that it had time to negotiate the impact of the final closure to the majority of employees until 2008. Accordingly, the Board concludes that the Company failed or refused to bargain in good faith and thereby committed a prohibited practice in violation of HRS § 377-6(4).

4. It is an unfair labor practice for an employer to interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in HRS § 377-4. HRS § 377-6(1).

5. HRS § 377-4 provides:

Employees shall have the right of self-organization and the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and such employees shall also have the right to refrain from any and all such activities, provided that employees may be required to join a union under an all-union agreement as provided in section 377-6(3).

6. In the instant case, the Board cannot identify any employer conduct with a nexus to Union membership, negotiations or conduct which would have a tendency to intimidate any Union members in their exercise of their organizational or representational rights. Accordingly, the Union's charge that the Company violated HRS § 377-6(1) is dismissed.
7. It is an unfair labor practice for an employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. HRS § 377-6(3).
8. In the instant proceeding, there has been no showing of adverse personnel action by the Company in connection with Union membership, negotiations or participation. Accordingly, the Union's charge that the Company violated HRS § 377-6(3) is dismissed.

REMEDY

Having found the Company in violation of the duty to bargain in good faith, the Board now turns to the appropriate remedy. The Union, in order to make its members whole from the effects of the accelerated closure that contributed to the violation argues that its members should be awarded “back pay” from December 2008 (the date of the initially announced closure) to the time of their actual termination. DEL MONTE argues that such a remedy would be speculative, punitive, excessive in its ignoring probable mitigation.

The Board cannot adopt the Union’s proposed remedy because closure date and consequent employee tenure were not subjects of collective bargaining at the interfered with and ultimately frustrated initial round of bargaining. So no remedy based strictly on the grounds of aborted tenure will be awarded.

The contested subjects during these negotiations included severance, medical and health insurance extensions, and housing.⁵

1. With respect to severance, negotiations on both sides proceeded under the employer generated information that closure would take place in December 2008. The Union relied upon this representation and proceeded under the assumption that severance for employees terminated as a result of closure would include all of 2006, 2007 and 11 months of 2008. Employees and both parties formulated their positions and expectations on this basis. The accelerated closure violated these reasonable employer generated expectations. The unnegotiated, unilateral dashing of these reasonable expectations without warning, explanation or employer mitigation is unfair and inequitable.

Accordingly, DEL MONTE is ordered to pay additional severance at the contractually provided rate to all employees terminated as a result of closure for the almost two years between actual closure and December 2008.

2. With respect to medical and dental coverage, the Union originally proposed six months of extended coverage. DEL MONTE rejected the proposal in part because employees had almost three years to obtain other employment and mitigate their damages. Ironically, in this respect the accelerated closure exploded DEL MONTE’s expectations and reasoning and led to the moderation of their

⁵As the parties resolved their specific housing concerns, those terms are not separately addressed, infra.

position (to first one month then the agreed upon two) in the second phase of bargaining. During the first phase, however, DEL MONTE flatly rejected any medical and dental coverage extension without explanation.

Health insurance often stands as the last barrier between families and poverty or tragedy in the fact of medical emergencies. In proposing six months of extended coverage, the Union, in reliance on DEL MONTE's promise of almost three years of employment, strived for that amount, a cumulative time of some medical security. In the second phase of bargaining, in its temporal box and without effective leverage, the Union modified its position and agreed to two months of medical coverage. After all was said and done, the net result was a loss of approximately 28 months of medical coverage (24 months because of the accelerated closure, and four months for the necessary moderation of Union's position) for up to 500 agricultural workers' families. It is difficult, if not impossible, for the Board to calculate the damages that flowed as a result of DEL MONTE's bad faith bargaining of health insurance. But it would be cruel and unfair to not try to address the effects of the violation.

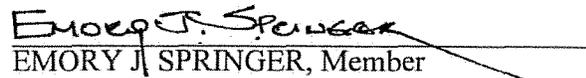
Accordingly, it is ordered that the parties reopen negotiations with respect to medical insurance and attempt to reach an agreement which supplements and expands their current agreement (two months of medical) with a program that would provide at least 12 months extended coverage to the workers (and their families) who have not as yet acquired insurance. If an agreement is not reached within 30 days of the issuance of this order, the Board will entertain a motion from the Union to reconsider this portion of the decision and fashion a more definitive remedy.

3. Respondents shall immediately post copies of this decision in conspicuous places at work sites where employees of the bargaining unit assemble and congregate, and on the Respondents' website for a period of 60 days from the initial date of posting.
4. Respondents shall notify the Board of the steps taken to comply herewith within 30 days of the receipt of this order with a certificate of service to the Complainant.

DATED: Honolulu, Hawaii, March 21, 2007

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


EMORY J. SPRINGER, Member

Opinion, Concurring in Part, and Dissenting in Part

For the reasons discussed below, I concur in part and dissent in part. I concur with the Board Majority's conclusions that there was no failure by the Company to bargain collectively in good faith during the second phase of negotiations; that there was no action by the Company to interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in HRS § 377-4 in violation of HRS § 377-6(1); and that there was no action by the Company to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment in violation of HRS § 377-6(3).

I also concur, for different reasons, with the Board Majority's conclusion that the Company failed to bargain collectively in good faith during the first phase of negotiations, although I write separately because I dissent from portions of the Board Majority's findings of fact, discussion, and conclusions of law relating to the failure to bargain. I further dissent from the Board Majority's remedy regarding medical coverage.

- I. Failure to Bargain in Good Faith During the First Phase of Negotiations.
 - A. Consideration of Proposals in Good Faith.

At the first meeting, the Union presented its proposal on three cost items: enhanced severance, six months of medical and dental coverage after closure, and protecting the residents of Kunia Camp by providing seed money to retain a housing association. The Union also presented numerous and mostly administrative non-cost proposals.

The Company's negotiating committee, however, had received "marching orders" from the corporate office that there would be no enhanced benefits provided. The record is unclear as to when the "marching orders" were first given;⁶ however, the record is clear that throughout the course of bargaining during the first phase, the Company made no concessions or counter-proposals regarding the cost items proposed by the Union.

While an employer may take a "hard line" during negotiations, and is not required to agree to any proposal, the employer must nevertheless meet with the union, provide information necessary to the union's understanding of the problem, and in good faith consider any proposals the union advances. First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 679 n. 17, 101 S. Ct. 2573, 2581 n.17 (1981) (emphasis added).

Because the Company's representatives were given "marching orders," the Union's proposals on the three cost items could not have been considered in a meaningful way throughout the first phase of negotiations, and thus bargaining could not occur in good faith. While the Company's committee did "cost" the Union's proposals, such costing appears to have been a futile exercise in the face of such marching orders.

Additionally, the Company made one substantive cost proposal to the Union on April 12, 2006 - a cash "retention bonus" to be paid to fourth year covered seasonals. However, the Company made it clear that the offer of the retention bonus was good for that day only, despite statements by Galdones that he wanted to take this issue back to the members before deciding. Given the magnitude of the impact the closing would have on employees, and the scope of negotiations the parties were involved in, giving less than one day's notice of a "take it or leave it" cost proposal does not appear to constitute bargaining in good faith.

Although the employer bargained in good faith over, and was able to reach tentative agreements with the Union on, various non-cost issues during the first phase of negotiations, the most significant issues, in my opinion, were the three major cost items - housing, severance, and medical and dental insurance, and to a lesser extent the retention bonus proposed by the Company. Because I believe these cost items were not negotiated in good faith during the first phase for the reasons discussed above, I would conclude that under the totality of the circumstances, the employer failed to bargain in good faith during the first phase of negotiations. Accordingly, I concur with the Board Majority's conclusion on this issue.

⁶The term "marching orders" appears in notes from an April 6, 2006, meeting (U. Ex. 46); however, the notes do not reflect when the orders were first given.

B. Duty to Supply Information.

I respectfully dissent from the Board Majority's discussion concerning the eight "rational foundational prerequisites of information which must be available" in the course of effects bargaining.⁷ As a general rule, an employer has a duty to supply information necessary to the union's understanding of a problem. First National Maintenance Corp., 452 U.S. at 679 n. 17, 101 S. Ct. at 2581 n.17. The eight factors discussed by the Board Majority that "must be available," however, go beyond this general rule and would intrude on legal rights of the parties.

In its discussion, the Board Majority lists items such as "the reasons for positions taken in developing, modifying or rejecting offers or counter-offers; the "resources which might be available to effect compromise"; and the "possible retention, redeployment or liquidation of effected human or material resources[.]" This information may be confidential in nature, and the appropriate procedure is for a court to weigh the employer's concern for confidentiality against the union's need for the information on a case-by-case basis. Detroit Edison Co. v. N.L.R.B., 440 U.S. 301, 99 S. Ct. 1123 (1979).

While an employer must provide a union with relevant information, there is an exception for information that is confidential in nature. Id. Additionally, although the relevance of information concerning the terms and conditions of employment is presumed, no presumption applies to information concerning an employer's financial structure and condition, and each case must turn on its own particular facts. See ConAgra, Inc. v. N.L.R.B., 117 F.3d 1435, 1439 (D.C. Cir. 1997); International Woodworkers v. N.L.R.B., 263 F.2d 483, 485 (D.C. Cir. 1959); Truitt*Manufacturing Co., 351 U.S. 149, 76 S. Ct. 753 (1956).

In Decision No. 130, Manuel Veincent, Jr., et al., 2 HPERB 494, Case No. CE-11-54 (1980), this Board's predecessor held that the employer's personal notes, as a reflection of management thinking and deliberation, were entitled to a shield of confidentiality. See also Illinois Educational Labor Relations Board v. Homer Community Consolidated School District No. 208, 514 N.E.2d 465 (Ill. App. Ct. 1987) (court balanced the interest in finding the truth with the need of a party to be able to plan negotiating strategy with a reasonable expectation that it will not have to reveal that strategy to its opponents; rule applicable to both employers and bargaining representatives).

⁷There is no evidence in the record that the Union requested each of the eight factors that the Board Majority discusses.

The Board Majority also lists as an item, “what, if anything, the Union, employees or the employer could reasonably do to delay, forestall the closure or mitigate the detrimental effects of the closure.” To the extent such discussion could intrude on managerial decisions, I dissent from the Board Majority’s reasoning. Management decisions, such as changes to the scope or direction of an enterprise, or the decision to be in business at all, are not subject to negotiations. First National Maintenance Corp., 452 U.S. at 677, 101 S. Ct. at 2580.

For these reasons, I dissent from the Board Majority’s discussion requiring the eight “rational foundational prerequisites of information which must be available” in the course of effects bargaining. The general rule is that an employer must provide a union with relevant information, with an exception for information that is confidential in nature, and that a weighing of the parties’ interests⁸ must be done under the particular facts of each case; therefore the Board Majority’s eight foundational prerequisites are unnecessary and its rationale for pronouncing a per se requirement for the information applicable for all closures is inappropriate.

II. Appropriate Remedy.

The Board Majority concluded, and I concur, that the Company failed to negotiate in good faith during the first phase of negotiations, although the Company did negotiate in good faith during the second phase. The parties were able to reach an agreement during the second phase of negotiations; however, the difficult question is what is the appropriate remedy for any injury that the Union may have suffered due to the Company’s failure to bargain in good faith during the first phase.

I believe the crucial inquiry is what benefits, or enhanced benefits, could the employees reasonably have expected to receive had the Company bargained in good faith during the first phase. This is a difficult question because an employer is not required to agree to any particular proposal of the union. However, the record here provides some guidance in determining a reasonable remedy.

When the Waiialua Sugar Company closed down, the employer and the Union entered into an Memorandum of Agreement that provided in relevant part:

⁸In N.L.R.B. v. New England Newspapers, Inc., 856 F.2d 409 (1st Cir. 1988), this balancing test was applied by the court in the context of effects bargaining following announcement of a newspaper sale and facility closing.

Medical plan coverage shall continue for up to six months following the employee's date of termination, beginning on the first month after termination and ending six (6) months later or when the employee is eligible for another employer's medical plan, whichever is sooner. (U. Ex. 53, emphasis added).

When the Oahu Sugar Company closed down, the employer and the Union entered into a Memorandum of Agreement that provided in relevant part:

For laid off employees who are not eligible for coverage with their new employer or spouse's employer, the Company shall offer continued medical coverage for six (6) months following layoff. The employee and the Company shall pay the same percentage premium as for active employees during that extension, and the time shall count toward the COBRA coverage period. (U. Ex. 52, emphasis added).

Finally, when Dole Packaged Foods Company closed down, the employer and the Union entered into a Memorandum of Agreement that provided in relevant part:

INITIAL LAYOFFS

* * *

Employees may be placed on "no work offered" status prior to the termination dates shown above. Medical, dental and group life insurance benefits will continue until the end of the month in which actual termination occurs. The Company and the employees will continue to pay its respective portions of the benefit plan premiums during this period.

* * *

SUBSEQUENT LAYOFFS

* * *

Employees may be placed on "no work offered" status prior to their scheduled date of termination. Medical, dental and group life insurance benefits will continue for three (3) months following the employees' last day of work. The Company and the employees will continue to pay its respective portions of the benefit plan premiums during this period.

(U. Ex. 51, emphases added).

It appears that the Union and agricultural employers in the past have negotiated enhanced medical benefits for periods ranging from a fraction of a month to six months following termination, with the shorter periods including dental and group life insurance benefits. Although this does not conclusively establish what additional health benefits, if any, the parties would have agreed to in the present case, I believe it provides useful guidance. Additionally, the Union's own initial proposal during the first phase of negotiations was for six additional months of medical and dental coverage following termination.

Using these facts in the record as guidance, I believe a reasonable, make whole, remedy would be to award four additional months of enhanced medical coverage beyond the two-month period ultimately agreed to by the parties, for a total extended period of six months.

Accordingly, I respectfully dissent from this portion of the Board Majority's Remedy.

III. Summary.

For the reasons discussed above, I concur with the Board Majority's conclusions that there was no failure by the Company to bargain collectively in good faith during the second phase of negotiations; that there was no action by the Company to interfere with, restrain, or coerce its employees in the exercise of rights guaranteed in HRS § 377-4 in violation of HRS § 377-6(1); and that there was no action by the Company to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment in violation of HRS § 377-6(3). I further concur, for different reasons, with the Board Majority's conclusion that the Company failed to bargain collectively in good faith during the first phase of negotiations, although I dissent from portions of the Board Majority's findings of fact, discussion, and conclusions of law relating to the failure to bargain. Finally, I dissent from the Board Majority's remedy regarding medical coverage.


SARAH R. HIRAKAMI, Member

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