

Hearings were held on the complaint on February 15 and 16, 2001 and March 30, 2001, in Kaunakakai, Molokai, and on May 22, 2001 in Honolulu, Hawaii. All parties were provided a full and fair opportunity to present evidence and argument.

The Board accordingly, issues 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(4).
2. COH is a coffee plantation established in 1984 on the island of Molokai. As of June, 2000 it employed approximately 25 full-time, three part-time and 35 seasonal employees. COH is an employer within the meaning of HRS § 377-1(2).
3. Daniel Kuhn (Kuhn) is the Chief Operating Officer and President of COH.
4. The financial statements of COH reflect an annual loss of \$1.46 million and accumulated debt of \$10.75 million for the fiscal year ending July 31, 1999. The following fiscal year, the company incurred an additional annual loss of \$.719 million. And between August 2000 and February 2001, losses of \$.509 million were incurred.
5. On April 5, 2000, the Board issued an Agreement for Consent Election and a Notice of Election to Certain Employees of COH, to determine whether the employees of COH wished to be represented for the purposes of collective bargaining by the ILWU. Twenty-six employees (with two challenges) were identified as eligible to vote in the election.
6. On May 11, 2000 the representation election was conducted. By a vote of 13 in favor, 8 opposed, and 4 challenged, the ILWU was selected as the representative of COH employees. In Order No. 1867, dated May 23, 2000, the Board certified the ILWU as the exclusive representative of the employees for the purposes of collective bargaining.
7. By letter dated June 2, 2000, Robert G. Giraldo (Giraldo), Union Vice President requested Kuhn to commence bargaining immediately pursuant to the Union's

(12) To offer or grant permanent employment to an individual for performing work as a replacement for a bargaining unit member during a labor dispute;

certification as the representative of the employees. The Union also requested certain information, regarding the employees, house rules, and benefits within ten days.

8. On June 5, 2000, the COH Board of Directors (COH Board) at a teleconferenced meeting, voted to authorize and direct the prompt filing of plant closing notifications to the State Department of Labor and Industrial Relations (DLIR) and Company employees. The COH Board also voted to authorize and direct the Company's officers to solicit offers for the sale of the Company. The actions taken by the COH Board were based on declining sales and the unavailability of funding to continue operations.
9. On June 9, 2000, COH issued a notification of the possible sale of its assets and termination of employees on or after 45 days from the date of the notice to the DLIR and its employees
10. On July 14, 2000, COH Board Chairman, CEO and Director John Magoon (Magoon), to whom the Company owed more than \$8.5 million because of loans and accrued interest, designated John T. Goss as his agent to assist in the closing of COH.
11. On July 14, 2000, Kuhn wrote to the ILWU to advise of a permanent "downsizing" effective July 24, 2000 to "keep the company from completely closing." Attached to the letter was an "Employee Listing" identifying proposed adjustments in employment status.² The listing proposed the

²The Employee Listing provides as follows:

Status of employment and change on July 24:

FT= remaining full time
PT= remaining part time
Term= terminated on July 24
Term/PT terminated full time continue part-time

Department	Description	Name	Date Hire	Pay rate	Status
Farm:	Field/Irrig Superv.	Llewelyn Starkey	9/26/99	Salary	FT
	Field Worker	Ben Lagazo	9/03/91	\$8.25/Hr	Term/PT
	Field worker	Prudencio Lagazo	9/15/94	\$7.85/Hr.	Term/PT
	Drying Supervisor/ Field Worker	William Luuloa	8/10/98	\$7.85/Hr	FT
	Irrigator	Paulo Espejo	6/12/95	\$7.85/Hr.	Term
	Irrigator	John Habon	10/06/99	\$7.00/Hr	Term
Dry Mill:	Dry mill operator	Alex Salazar	2/15/95	\$7.85/Hr.	FT
	Dry mill helper	Mariano Nunez	10/26/92	\$7.30/Hr	PT

termination or reduction to part-time status of 11 of the 26 listed COH employees. With a single exception of William Luuloo (Luuloo), the employment changes affected employees least senior in each department.

12. Also, by letter dated July 14, 2000, Girald again requested Kuhn to provide the bargaining information previously requested on or about June 2, 2000.
13. On July 20, 2000, Girald responded to Kuhn's downsizing letter by requesting a meeting to "bargain over the effects of your proposal. We believe that the status quo should prevail." The letter further designated Wesley Furtado (Furtado), ILWU International Representative, as the Union's contact.
14. On July 26, 2000, the requested meeting took place. In addition to discussing the proposed downsizing, the Union requested information, including financial statements, to prepare for contract negotiations.
15. On August 2, 2000, Kuhn memorialized the Employer's resultant actions. The relevant activity included:

Department (cont'd)	Description	Name	Date Hire	Pay rate	Status
	Drying lead man/ Dry mill helper	Nelito Vendiola	2/17/00	\$7.50/Hr.	Term/PT
Roasting:	Roaster/Packer	Lynette Espejo	3/04/96	\$7.75/Hr.	FT
	Roast/Pack/Helper	Dorothy Quintua	12/13/99	\$6.75/Hr	PT
	Roast/Pack/Helper	Estella Ruiz	6/26/00	\$6.50/Hr	PT
Shop:	Supervisor	Rodney Aguire	8/09/93	\$8.50/Hr	FT
	Shop worker	Mario Espejo	7/09/91	\$8.25/Hr	Term
	Equipment Operator				
	Dozer/Fabricator	Leo Vilea	2/17/91	\$8.25/Hr	FT
Construction:	Supervisor	Tyler Hulterstrum	5/12/95	\$22.00/Hr	Term
Store/Bar:	Supervisor	Maria Holmes	12/01/99	Salary	FT
	Store/Bar Attendant	Tracy Lindsey	7/16/98	\$7.00Hr	Term/PT
	Store/Bar Attendant	Dollymae Low	3/03/99	\$6.75	Term/PT
	Store/Bar Attendant	Charna Rae Naeole	7/12/99	\$6.75Hr	Term/PT
	Store/Bar Attendant	Desiree Cabrero	9/29/99	\$6.25Hr	PT
Office:	Bookkeeper	Rick TenCate	1/17/00	Salary	FT
	Receptionist	Georgina Naeole	7/19/00	6.00Hr	Term
Sales and Marketing:					
	Supervisor	Chela Kuhn		Salary	FT
	Mail-order Assistant	Annette Gorospe	8/09/98	\$6.50Hr	FT
	Shipping Assistant	Mahana Adolpho	4/19/99	\$6.75Hr	Term

The company is willing to retain the indicated employees on a part time bases (sic). (list supplied July 18th). The company is also willing to retain Ms. Charna Rae Naeole full time rather than part time. The company is also willing to change Mr. Mario Espejo's previous termination and officially terminate his employment with the current layoffs. The company is further agreeing to carry health insurance for all current full time employees through the end of August. The company will also assist with (sic) the Department of Labor to obtain 'dislocated workers allowance'. The company will also give the employees selected for layoff first preference for reemployment, it will not however retain them and their last day of work for the company will be August 3, 2000.

16. On August 3, 2000, the represented personnel actions went into effect.
17. On August 16, 2000, the ILWU filed the instant complaint.
18. On August 23, 2000, the COH Board, as reflected in its Board Minutes, was advised that the personal funding by Chairman Magoon would be unavailable sometime after October 15, 2000. In addition, the sale or dissolution of the Company was proposed for October 15, 2000. The existence of interested potential buyers was also discussed.
19. On February 15 and 16, 2001, certain affected employees testified as to their opinion that COH's terminations and reductions were motivated by anti-union animus. Among the affected employees who provided testimony were:
 - a. Mahana Adolpho (Adolpho), terminated Shipping Assistant, led the Union organizing effort and served as the Union's observer for the representation election. Shortly before the election, Kuhn directed Adolpho to train her supervisor, Chela Lopez-Kuhn (Lopez-Kuhn), to do her job and provide Lopez-Kuhn with all information and forms involved. Adolpho was subsequently denied access to the computer upon which she maintained Company records. She testified that from her desk adjoining Kuhn's office she overheard Kuhn meeting and encouraging certain other employees to "spy" on the Union organizing activities. She testified that she heard Kuhn tell them to "give me names. I'll promise you, you'll stay on board." Adolpho believes that the spies (Luuloa, John Habon [Habon], Nelito Vendiola, Alex Salazar, and Dorothy Quintua) were provided raises and retained because of their spying. She identified 15 employees who were originally active in organizing meetings. Of the 15, ten

were subject to termination or reduction to half time, and two of three alleged "spies" were retained full time and given raises (the other, Vendiola was reduced to part-time status). She also testified that very strained working relations with her supervisor, Lopez-Kuhn, "got worse when they found out about the union."

- b. Prudencio Lagazo, field worker reduced from full time to part-time, believes he was reduced to part-time work "because the union came in." He testified that after the August terminations, seasonal workers were hired to perform the work of terminated employees and the seasonal workers were hired before, and retained after, the limited period during which seasonal workers were customarily employed.
- c. Mario Espejo, terminated shopworker, believes that he was terminated "because of union involvement" and that Union supporters were reduced to part-time work or terminated. Mario Espejo had initially been terminated prior to the August layoffs because of an incident where he had threateningly yielded a knife against a fellow employee.
- d. Paulo Espejo, terminated irrigator, believes that he was terminated because of his support for the Union. Before the election Company bookkeeper Rick TenCate (TenCate) asked him to vote no, and although Espejo answered that he would, he subsequently voted for the Union. He believed that two persons who performed similar work, Luuloa and Habon, were spies for management who received raises and favorable treatment in exchange for reporting on unionizing activities. (Although Habon was among the employees designated for termination, Paulo Espejo testified that Habon was still working at the time of the hearing.) Paulo Espejo admitted to having been offered part-time reemployment in October 2000 which he refused for lack of benefits.
- e. Charna Rae Naeole, Store/Bar Attendant, was initially among those employees to be reduced to part-time status. Her full-time status was retained after the Company met with the Union on July 26, 2000, see, 15, supra. Naeole was involved in Union organizing and the Company was aware of her activities. During the period of organization she felt as though she was being watched. Subsequent to the August layoffs, supervisors performed bargaining unit work.

20. Kuhn was the principal witness for COH. Kuhn testified that while COH was an agricultural and technological success, depressed international coffee prices and extensive State-wide production had depressed prices so that the Company was not able to return a profit. Despite operating losses, the Company had been kept in business through loans from the COH Board Chairman Magoon. As of July 2000, Magoon had loaned the Company more than \$6 million and was further owed more than \$1 million in interest, none of which had been repaid. In 2000, the funds provided by Magoon had "basically run out." Accordingly, expenses, including payroll had to be paid from sales. Sometime after the COH Board voted to close or sell the Company, the decision was made to proceed with one 'last' harvest. In order to make payroll and preserve resources, Kuhn made the difficult decision to downsize the company by laying off workers. He further claimed that the layoffs were based principally on seniority and that following the layoffs and reductions, monthly payroll costs were reduced by approximately \$22,000. With respect to the specific allegations made by dislocated employees, Kuhn testified as follows:

- a. That he did not solicit, reward or meet with any "spies" to learn about the employees' organizing activities;
- b. That the decision to downsize was made purely as a result of the Company's economic difficulties, particularly the difficulty to make payroll;
- c. That the decisions of who to terminate or reduce to part-time was based on seniority, performance, and need and had nothing to do with Union support.
- d. That Luuloa was the single exception to termination by departmental seniority because he served as drying grounds supervisor during harvesting;
- e. That the new part-time hire made subsequent to the downsizing, Newton Kanawalewale, served exclusively as a security guard necessitated by the vandalism of the irrigation system;
- f. That the accommodations made after the meeting with the Union on July 26, 2000, see 15, supra, addressed each of the concerns raised by the Union except that the terminations be characterized as "no work" notices rather than terminations;
- g. That supervisors may have performed the work of dislocated workers but that such activities were necessary and normal for a small company and no contract was in place prohibiting such activity;
- h. That subsequent to the August 3, 2000 terminations, each terminated employee except for Mario Espejo and Mahana Adolpho was offered an opportunity to return on a part-time or

seasonal basis, and that the failure to make offers to Mario Espejo and Adolpho was based on discipline or performance; and

- i. That the Company continued to seek a buyer and if unsuccessful, would be liquidated.

21. Wesley Furtado testified regarding contract negotiations. The first bargaining session was held on Molokai on September 12, 2000. Kuhn was designated as the Company spokesman but was unprepared to negotiate. The Union presented a written proposal to the Company and the Company had no written or oral proposal. On November 2, 2000, a session was held in the Honolulu offices of Ernest C. Moore III, Esq. (Moore), who had replaced Kuhn as the Company spokesman. The Company refused to have negotiating team employee members at the meeting. At the meeting, the Company was again unprepared to negotiate and advised the Union only that the Company was for sale and proceeding with its last harvest. Between November 2 and 24, 2000, Furtado made repeated calls to the Employer attempting to arrange dates for bargaining sessions. No dates were identified by the Employer. A commitment was made to provide a counteroffer by November 17, 2000 but no counteroffer was received. On November 27, 2000, Moore sent a written counteroffer to the Union. On December 6, 2000, the Union received two letters, the first was a letter from Moore offering to set up further bargaining sessions, the second was a letter from Kuhn designating John Kelly (Kelly) as the Company's spokesman. Late in February 2001, Kelly called Furtado offering to have a bargaining session in Honolulu at 1:30 p.m. on February 21, 2001. He cautioned, however, that he had a plane to catch at 4:00 p.m. Furtado continued to attempt to schedule meetings and offered his availability in writing for bargaining sessions on April 24 and 25, 2001 and again on May 24 and 25, 2001. The Employer did not respond to these offers. Furtado believed that the Company did not want to sit down with the Union and negotiate a collective bargaining agreement.

22. With the exception of Kuhn's alleged solicitation of workers to operate as spies, TenCate's questioning of Paulo Espejo, and the Company's motivation in conducting the downsizing, all dates, figures and financial representations identified above are uncontroverted. The frequency, duration and content of Union/Employer communications and meetings are similarly uncontroverted. Accordingly, the Board adopts the uncontroverted representations above as findings of fact.

DISCUSSION

In its complaint, and lengthy post hearing memorandum, the Union alleges that the spying, intimidation, retaliatory terminations, and replacement of terminated Union members by COH constitute unfair labor practices in violation of HRS § 377-6(1), (2), (3), and (12). See, fn. 1. The Union further alleges that the Employer's conduct in the course of negotiating a bargaining agreement evidenced a refusal to collectively bargain in violation of HRS § 377-6(4). Id.

In its defense, the Employer argues that spying, intimidation, and retaliatory terminations did not occur. The Company admits to initiating terminations or changing the status of employees from full time to part-time for ten of 26 of its employees approximately two months after certification of the Union. It claims, however, that the downsizing was entirely motivated and necessitated by the Company's economic distress. And finally, it asserts that since all bargaining took place after the filing of the instant complaint, any claim of refusal to bargain was untimely.

Discrimination

HRS § 377-6(3) 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 or conditions of employment...." Complainant argues that the applicable test was identified by the United States Supreme Court in interpreting the federal counterpart of HRS § 377-6(3). In N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027, 65 LRRM 2465 (1967), the Court summarized this test as follows:

From this review of recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by

legitimate objectives since proof of motivation is most accessible to him. [emphasis added.]

Id., at 34.

We agree that this standard is applicable to Hawaii's law.

As applied to this case, the Board concludes that the Employer's layoffs had a discriminatory impact upon employee rights inasmuch as the Union established to the Board's satisfaction that virtually all the affected employees were Union supporters and virtually all remaining employees had not actively expressed support for the Union. The Board further concludes that the impact was "inherently destructive" of important employee rights since only 13 employees voted for Union certification and as many as ten probable Union supporters were affected by the downsizing. Therefore pursuant to the Great Dane Trailers test, no proof of antiunion motivation is needed and the burden falls upon the Employer to establish that its actions were motivated by legitimate and substantial business reasons.

In the instant case, the Board concludes the Employer has carried its necessary burden. The Employer is deeply indebted and lost substantial amounts of money for the past two fiscal years. The COH Board voted to sell or liquidate the Company and an agent was appointed to facilitate the sale. And perhaps most significantly, since the Chairman of the COH Board had, or was about to, cut off access to additional funds, there was no foreseeable source of additional funding and difficulties would have arisen to meet payroll. In light of these circumstances, the decision to downsize and reduce payroll by more than \$20,000 per month was based on a legitimate and substantial business justification.

Any claim of Union animus is further belied by the conduct of the Employer after notifying the Union of its intended layoffs. With the exception of Luulua, layoffs were made by seniority within each department. The single exception was justified by a unique un rebutted need. The Employer promptly met with the Union, at the Union's request, to discuss the layoffs. Each of the Union's requests, except for the characterization of the layoffs, was accommodated. And, with the exception of two employees for whom performance or disciplinary rationales existed, each of the affected employees was offered reemployment, albeit on a seasonal or part-time basis.

We therefore conclude that the Employer was motivated by legitimate and substantial business objectives and dismiss the Union's complaint with regard to claimed HRS § 377-6(3) violations.

Coercion

In Decision No. 278, United Food and Commercial Workers Union, 4 HLRB 510, 517 (1988) (UFCW), the Board identified the standards to be applied in assessing allegations made pursuant to HRS § 377-6(1):

Section 377-6(1), HRS, makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the free exercise of their Section 377-4, HRS, rights. Section 377-4, HRS, guarantees employees the right “to form, join, or assist labor organizations...and to engage in lawful, concerted activities for the purpose of collective bargaining....” In examining an employer’s conduct under Subsection 377-6(1), HRS, then, “the test is not whether the language or acts were coercive in actual fact, but whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate.” *Corrie Corp. v. NLRB*, 375 F.2d 149, 153, 64 LRRM 2731 (4TH Cir. 1967).

In this case alleged acts by the Employer with a reasonable tendency to intimidate employees are TenCate’s asking Paolo Espejo to vote “no” in the certification election and the downsizing discussed above.

Even assuming *arguendo*, that TenCate questioned Espejo, we do not find that this activity rises to the level of coercion or intimidation. In UFCW, *supra*, we noted that “the questioning or interrogation of employees about their union sentiments is not *per se* unlawful provided that such questioning is not coercive.” (citations omitted.) TenCate’s question to Espejo constituted no more than a permissible interrogation absent more. The record does not contain any assertion by Espejo that TenCate’s question was perceived as coercive or intimidating. Additionally, TenCate, a bookkeeper, exercised no managerial or supervisory authority over Espejo and was, in fact, a member of the bargaining unit. Inasmuch as the question was not accompanied by any threat of sanction and Espejo volunteered that he subsequently voted “yes,” TenCate’s question had little or no coercive impact. *Id.*, at 520 (nonsupervisory secretary’s remark to picketer was non-threatening.)

Moreover, any questioning of Paulo Espejo occurred prior to the representation election held on May 11, 2000. As HRS § 377-9(1) provides that no complaints of any specific unfair labor practices shall be considered unless filed within ninety days of its occurrence, this claim is untimely.

Accordingly, for these reasons, the Board dismisses the Union’s HRS § 377-6(1) claims.

Interference with Union

HRS § 377-6(2) provides that it is an unfair labor practice for an employer to “dominate, or interfere with the formation or administration of any labor organization...” If the Employer solicited and rewarded employee “spies” of the organizational activities within the Company, this could constitute unlawful interference.³

However, any solicitation of the Company’s supporters occurred prior to the certification election of May 11, 2000. Accordingly, these events also fall outside of the 90-day limitations period applicable to the instant complaint filed on August 16, 2000. The Board therefore lacks jurisdiction over these allegations.

Accordingly, for these reasons, the Board dismisses the Union’s HRS § 377-6(2) claims.

Replacement Employees

HRS § 377-6(12) prohibits hiring permanent replacement employees “for a bargaining unit member during a labor dispute.” The Union here alleges that replacement workers were hired after the downsizing of August 3, 2000. There is no evidence, however, that a labor dispute⁴ existed at the time of the hirings. *Cf., Bella Bautista*, 5 HLRB 741 (1997) (settled and withdrawn pending appeal on other grounds). Accordingly, the Board concludes that no violation of HRS § 377-6(12) has been proven.

Refusal to Bargain

HRS § 377-6(4) provides that it is an unfair labor practice for an employer to “refuse to bargain collectively.” The Union alleges that the absence of any meaningful bargaining by the Employer in over a year from the time of certification evidences its refusal to bargain. The Employer asserts that since all contract negotiations took place after the filing of this complaint, no such activities or occurrences can be considered by the Board, and since no bargaining occurred before the complaint was filed, the claim must be dismissed.

³An employer unlawfully interferes with the protected rights of its employees by asking them to gather information concerning union organizing activities. 48 Am.Jur.2d §1925, Labor and Industrial Relations.

⁴HRS § 377-1(8) provides:

(8) “Labor dispute” includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

The United States Supreme Court has considered the question of whether the National Labor Relations Board (NLRB) may exercise jurisdiction over a respondent's alleged unfair labor practices which occur after the filing of a charge. It concluded that "we can find no warrant in the language or purposes of the [National Labor Relations Act] for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." National Licorice Co. v. N.L.R.B., 309 U.S. 350, 369 (1940). In order to examine bargaining subsequent to the filing of this complaint, the Board must first determine whether the subsequent conduct "grew out of" related conduct alleged in the complaint.

The Union made six factual allegations which it alleged constituted violations of Chapter 377. Five of the six related to the downsizing of COH. The remaining allegation was simply that the Company refused to negotiate or bargain with the ILWU for a collective bargaining agreement. The record does not reflect the Company's express refusal to negotiate or bargain prior to the filing of the complaint on August 16, 2000. However, the record indicates that the Union requested bargaining by letter dated June 2, 2000 with an accompanying request for information. Since the Employer failed to provide the requested for information within ten days, the Union made a second request by letter dated July 14, 2000. While the Employer responded in a timely and meaningful fashion to the Union's July 20, 2000 request to bargain over the effects of the downsizing proposal, the record is devoid of any meaningful effort by the Employer to bargain over a collective bargaining agreement. Thus, the Board finds that the conduct of the parties in the course of negotiations subsequent to the filing of the instant complaint "grew out of" the allegations of the Employer's refusal to bargain in the complaint and can be relied upon as a basis for finding and unfair labor practice.

In Decision No. 422, Benjamin J. Cayetano, 6 HLRB ____ (April 3, 2001), the Board adopted the following description of the duty to bargain:

The duty to bargain in good faith is an "obligation to...participate actively in the deliberations so as to indicate a present intention to find a basis for agreement..." This implies both "an open mind and a sincere desire to reach agreement as well as "a sincere effort ... to reach a common ground. The presence or absence of intent "must be discerned from the record." Except in cases where the conduct fails to meet the minimum obligation imposed by law or constitutes an outright refusal to bargain, relevant facts of a case must be studied to determine whether the employer or the union is bargaining in good or bad faith. The "totality of conduct" is the standard by which the "quality" of negotiations is tested. Thus even though some specific actions, viewed alone, might not support a charge

of bad-faith bargaining, a party's overall course of conduct in negotiations may reveal a violation of the Act. (footnotes omitted.)

Hardin, The Developing Labor Law, 608 (3rd Ed. 1992). The Board hereby adopts this standard.

In another public sector case, University of Hawaii Professional Assembly, 5 HLRB 466 (1995), the Board found that the public employer engaged in surface bargaining by failing to submit a formal salary proposal to the union prior to the close of the Legislature and by refusing to negotiate with the union over certain common items. The Board found that the employer's conduct evinced an attitude which was inconsistent with a desire to reach agreement and thus precluded meaningful negotiations and constituted a prohibited practice. The Board relied upon United Technologies Corp., 132 LRRM 1240 (1989) where the NLRB found an unfair labor practice, *inter alia*, by the employer who engaged in delaying tactics and after almost one year of bargaining, the employer had not presented economic proposals despite repeated prompting from the union. The union could not have agreed to a contract even if it agreed to all of the employer's demands.

Thus the issue before us is whether the totality of the Employer's conduct evinces a present intention to find a basis for agreement and a sincere effort to reach a common ground.

Based upon a review of the totality of the Employer's conduct as reflected in the record, we conclude that COH did not engage in any meaningful bargaining. After certification, the Union requested information for bargaining and the Employer initially did not respond.⁵ In the more than one year since Union certification, there were only two

⁵Although the Union did not charge the employer with a refusal to bargain based upon its failure to comply with its initial information request, the Board has previously held that the employer's failure to provide the union with relevant and necessary information constitutes a refusal to bargain. In Order No. 1894, Order Granting Complainant's Motion for Partial Summary Judgment, dated June 28, 2000, in United Public Workers, AFSCME, Local 646, AFL-CIO, the Board stated:

It has long been recognized that intertwined with the duty to bargain in good faith is the duty on the part of the employer to supply the union, upon request, with sufficient information to perform its statutory obligation as a bargaining agent. National Labor Relations Bd. v. Truitt Mfg. Co., 351 U.S. 149, 76 S.Ct. 753, 100 L.Ed. 1027 (1956). It is well settled that it is an unfair labor practice within the meaning of section 8(a)(5) of the Act for an employer to refuse to furnish a bargaining union [such information as] is necessary to the proper discharge of the duties of the bargaining agent." N.L.R.B. v.

cursory bargaining sessions. At the first bargaining meeting, Kuhn, the Employer's spokesman, was entirely unprepared to proceed. At the second, the Employer offered only that the Company was in financial distress and up for sale. Moore, the second Employer spokesman forwarded a written counteroffer to the Union, but his authority was revoked almost immediately thereafter. No bargaining sessions were held with Kelly, the Employer's third spokesman, despite repeated attempts by the Union to secure a meeting date. As a result, there is no contract.

The Board thus concludes that the Employer's principal and perhaps only concern during the period of ostensible "bargaining" was the financial distress and possible sale of the Company. Since liquidation or sale might relieve the Company of any bargaining obligation, forestalling a contract until that time was in the Company's interest and they acted accordingly. But such circumstances do not relieve an employer of its obligation to bargain any more than it robs the employees of their rights to organize. Accordingly, the Board concludes that COH refused to bargain collectively with the ILWU and therefore violated HRS § 377-6(4).

The Employer is ordered to cease and desist from refusing to bargain with the Union. In addition, the Union requested that the Board extend the Union's certification year for one year and the Board finds such order appropriate to undo the effects of the Employer's unfair labor practice. Bethea Baptist Home, 310 NLRB No. 28, 143 LRRM 1340 (1993); Glomac Plastics, Inc. v. N.L.R.B., 592 F.2d 94, 100 LRRM 2508 (1979). Here, the Employer's unlawful conduct appeared at the outset after certification of the Union by not responding to its initial request for information and to commence bargaining in June 2000. Thus, the Board orders that the Union's certification year is extended to May 22, 2002, and the Employer is ordered to proceed to bargain.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaint pursuant to HRS § 377-9.
2. The Union failed to prove that the Employer committed unfair labor practices in violation of HRS §§ 377-6(1) and (3) by terminating or discriminating against alleged Union supporters. The Employer established that the terminations were necessitated by economic conditions and were implemented according to seniority, except in one instance where the Employer required the services of a less senior employee. The Employer thereafter offered seasonal

Whitin Machine Works, 17 F.2d 485, 11 LRRM 693 (4th Cir. 1954); Aluminum Ore Co. v. N.L.R.B., 131 F.2d 485, 11 LRRM 693 (7th Cir. 1942).

work to the employees, except for employees with disciplinary or performance histories.

3. The Union's allegations of spying and coercion in violation of HRS §§ 377-6(1) and (2) in its complaint are untimely and barred by the Board's 90-day statute of limitations.
4. The Union failed to prove that the Employer committed an unfair labor practice by permanently replacing workers during a labor dispute in violation of HRS § 377-6(12) because it failed to establish the existence of a labor dispute within the meaning of HRS § 377-1.
5. Based upon the totality of circumstances, the Employer committed an unfair labor practice by refusing to bargain collectively with the ILWU in violation of HRS § 377-6(4) by its entire course of conduct in negotiations. The Employer failed to promptly comply with the Union's request for information and to commence bargaining; replaced its spokesman three times during the course of negotiations; was unresponsive to the Union's requests to meet; failed to meaningfully participate in the negotiations process; and failed to present any proposals during almost a year of bargaining. The Board concludes the Employer evinced no sincere desire to reach an agreement.

ORDER

1. The Employer is ordered to cease and desist from refusing to bargain with the ILWU.
2. The ILWU's certification shall be extended to May 22, 2002.
3. The Employer shall immediately post copies of this decision in conspicuous places at its work sites where employees of the bargaining unit assemble and congregate for a period of 60 days from the initial date of posting.
4. The Employer shall notify the Board of the steps taken by the Employer to comply herewith within 30 days of receipt of this order.

DATED: Honolulu, Hawaii, August 28, 2001.

HAWAII LABOR RELATIONS BOARD



CHESTER C. KUNITAKE, Member

INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142 and COFFEES OF
HAWAII, INC.
CASE NO. 00-5(CE)
DECISION NO. 426
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER


KATHLEEN RACUYA-MARKRICH, Member

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