STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, Complainant, and DEL MONTE FRESH PRODUCE (HAWAII), INC.; EDWARD C. LITTLETON, General Manager, Del Monte Fresh Produce (Hawaii), Inc.; STACEY SASAGAWA, Human Resources Director, Del Monte Fresh Produce (Hawaii), Inc.; GORDON REZENTES, Plant Manager, Del Monte Fresh Produce (Hawaii), Inc.; and DIXON SUZUKI, Hawaii Employers Council, Respondents.	CASE NO. 03-3(CE) DECISION NO. 447 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 12, 2003, Complainant INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142 (ILWU or Union) filed an unfair labor practice complaint with the Hawaii Labor Relations Board (Board). Complainant alleged that on or about April 22, 2003 DEL MONTE FRESH PRODUCE (HAWAII), INC. (DEL MONTE or EMPLOYER) refused to bargain collectively with the ILWU, refused to provide information relevant to an announced downsizing and relocation of the chilled and frozen operations at Honolulu Chilled/Frozen Operations (HCFO) and refused to bargain over the decision and its effects. Further, Complainant alleged that the EMPLOYER interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed in Section 7 of the Act.

On June 17, 2003, DEL MONTE filed Respondent's Motion for Summary Judgment as to Complaint. As the basis for the motion, the DEL MONTE argues that, 1. The National Labor Relations Board, not this Board, has jurisdiction over this matter; 2. DEL MONTE has no legal duty to provide information concerning its downsizing/relocating decision; and 3. DEL MONTE provided the Union with all information regarding effects bargaining to which the Union is legally entitled.

On June 17, 2003, the ILWU filed ILWU LOCAL 142's Motion to Amend Complaint. The ILWU seeks to amend the complaint: to name individuals who acted on behalf of, or in DEL MONTE's interest; clarify the allegation of the complaint which generally states

statutory violations and, erroneously includes violations of the federal statute; and to include additional allegations that arose since the filing of the first complaint and a prayer for relief. EDWARD C. LITTLETON, General Manager, Del Monte Fresh Produce (Hawaii), Inc. (LITTLETON); STACEY SASAGAWA, Human Resources Director, Del Monte Fresh Produce (Hawaii), Inc. (SASAGAWA); GORDON REZENTES, Plant Manager, Del Monte Fresh Produce (Hawaii), Inc. (REZENTES), and DIXON SUZUKI, Hawaii Employers Council (SUZUKI) were added as Respondents.[1]

On June 19, 2003, at a prehearing conference on the complaint, the Board scheduled the hearing on the motions by the parties on June 25, 2003, keeping the hearing on the case-in-chief on June 27, 2003.

On June 24, 2003, the ILWU filed ILWU LOCAL 142's Motion to Amend and/or Supplement Complaint. The ILWU sought to amend and/or supplement the complaint to include events previously unknown to the ILWU that occurred prior to the filing of the complaint and events which arose subsequent to the filing of the complaint. The motion also sought to add additional counts based on the totality of events.

On June 25, 2003, the ILWU filed its Second Amended Unfair Labor Practice Complaint. The complaint alleges DEL MONTE committed unfair labor practice in violation of Hawaii Revised Statutes (HRS) §§ 377-6(1), (3), (4), (6) and (8).

On June 24, 2003, the Board held a hearing on the motions filed by the parties. The parties were afforded full opportunity to argue their respective positions before the Board. After full consideration of the arguments made the Board first granted the ILWU's motion to amend the complaint to permit the filing of the Second Amended Complaint. Secondly, the Board denied the motion for summary judgment because there were material issues of fact in dispute regarding, inter alia, DEL MONTE's decision to relocate, the extent of DEL MONTE's compliance with information requests, etc.

The Board held hearings on June 27 and 30, July 1, 11, 22, 23, 29, and 31, 2003. The parties were afforded full opportunity to present evidence and argue their respective cases before the Board. After a thorough review of the record in the case, 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 DEL MONTE employees including approximately 72 employees at HCFO who, for all times relevant, were located at 1308 Hart Street and where they cored and sliced whole pineapple for sale as fresh and frozen fruit.

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[1]Hereafter Respondents are collectively referred to as DEL MONTE.

2. DEL MONTE is an employer within the meaning of HRS § 377-1.

3. LITTLETON, SASAGAWA, REZENTES and SUZUKI were, at all times relevant, agents representing the interests of DEL MONTE.

4. The ILWU is also the representative of two other bargaining units of DEL MONTE, Oahu Plantation with approximately 420 employees and Kunia Fresh Fruit (KFF) with approximately 214 employees.

5. The ILWU and DEL MONTE are signatory to three collective bargaining agreements for the respective units, Oahu Plantation, KFF, and HCFO, which were in effect through February 7, 2004.

6. In 2002 and again in 2003, DEL MONTE transferred covered seasonal employees from the HCFO to KFF when there was not enough work at HCFO. DEL MONTE negotiated the 2002 transfers with the ILWU but did not negotiate the 2003 transfers.

7. On or about April 10, 2003, the local, unionized employees of DEL MONTE's HCFO facility, the majority of whom had between 20 to 30 years on the job, learned of DEL MONTE's plan to close the facility and move their jobs to Sanger, California, where their functions would be performed by untrained, nonunionized contract day labor.

8. On or about April 11, 2003, LITTLETON informed HCFO employees of the decision to relocate HCFO operations from Waiakamilo to Kunia relocating approximately ten employees.

9. Also on or about April 11, 2003, LITTLETON informed the ILWU in a letter that it proposed to layoff, transfer and reassign employees at HCFO to DEL MONTE's Kunia Fruit Concentrate Plant, currently manned by employees covered by the KFF agreement. The HCFO employees (approximately ten) would provide limited fresh fruit production in addition to operating the concentrate plant with two KFF employees who would become part of the HCFO unit. The rest of the KFF employees would return to the Fresh Fruit operation.

10. In addition, on or about April 11, 2003, LITTLETON wrote to Nelson Befitel, Director, Department of Labor Industrial Relations, State of Hawaii stating DEL MONTE's plan to layoff 67 of 77 HCFO employees, effective June 30, 2003, in the production/ clerical staff and August 2003 for maintenance/mechanical staff. LITTLETON also stated that DEL MONTE "currently has 154 vacancies at the Oahu Plantation and KFF Fresh Fruit facility and will provide the opportunity for all displaced workers to apply for these vacancies."

11. On or about April 22, 2003, the ILWU requested information related to the decision to layoff, transfer and reassign employees at HCFO. The ILWU also requested information regarding the closure and the commencement of bargaining regarding its effects. The Union subsequently requested information and bargaining regarding the decision to close the Waiakamilo facility.

12. SASAGAWA received the ILWU's request. Working with local legal counsel she prepared DEL MONTE's response and submitted it on May 17, 2003.

13. DEL MONTE refused to provide information or negotiate regarding its decision to close the facility. It provided some information and engaged in bargaining regarding effects.

14. On or about May 30, 2003 the ILWU wrote to request that DEL MONTE fully respond to its April 22, 2003 letter and supplemented its initial request for information based on DEL MONTE's May 17, 2003 response.

15. On or about May 30, 2003, DEL MONTE posted at Waiakamilo the HCFO positions that would continue at Kunia and told employees if interested to sign up for these positions. After the posting period, REZENTES went through the sign ups for each position and ranked the employees by their seniority.

16. DEL MONTE set July 1, 2003 as the date to have the HCFO operations up and running in Kunia.

17. The ILWU and DEL MONTE representatives met on June 10, 12, 17, and 21, 2003 to bargain the effects of the closure of HCFO, i.e., the layoff and transfer of HCFO employees from Waiakamilo to Kunia. At the June 17, 2003 session, several tentative agreements were reached, subject to an agreement on all matters.

18. On June 21, 2003 DEL MONTE's committee handed the Union DEL MONTE's final offer that spelled out the consequences if the Union did not agree to the final offer. The first half of the offer reflected the tentative agreements reached as of June 17, 2003 but also required the Union to withdraw the unfair labor practice complaints.

19. Starting on page four of the final offer, DEL MONTE identified the consequences if the Union rejected the offer. If the Union did not accept DEL MONTE's final offer the company planned to terminate all HCFO employees with the exception of a couple of journey employees who would be terminated after the dismantling of the HCFO at Waiakamilo. The terminated HCFO employees would receive only the termination benefits required under the collective bargaining agreement with none of the enhanced benefits discussed

in effects bargaining. It was a take-it-or-leave-it proposition. DEL MONTE intended to empty out the bargaining unit absent the Union's acceptance of the offer. DEL MONTE stated it would implement the consequences on July 1, 2003 if the Union did not accept the offer by noon on June 23rd. The Union rejected DEL MONTE's offer as unlawful.

20. Negotiations were discontinued subsequent to the Union's rejection of the employer's final offer of June 21, 2003.

21. During the week of June 23, 2003, all processing operations at Waiakamilo ceased and DEL MONTE began trial runs in Kunia using HCFO employees selected from the sign up lists.

22. Failing an agreement on all matters, DEL MONTE proceeded with the downsized HCFO operations in Kunia on June 30, 2003.

23. As of July 1, 2003, 55 HCFO members were laid off and 14 were transferred to Kunia. DEL MONTE ran the operations with 14 employees using the HCFO employees from the sign-up lists. Since the HCFO work began in Kunia, it is operating three days a week producing fresh fruit for the local market.

24. All other employees of HCFO were laid off.

DISCUSSION

Based on the record, the Board found on or about April 10, 2003, the local, unionized employees of DEL MONTE's HCFO facility, the majority of whom had between 20 to 30 years on the job, learned of DEL MONTE's plan to close the facility and move their jobs to Sanger, California, where their functions would be performed by untrained, nonunionized contract day labor. DEL MONTE subsequently informed the Union and employees that not all jobs would be lost. Rather, to accommodate the Hawaii and Japanese market for chilled fruit produced at the facility, a severely downsized version of the operation would be transferred to the company's Kunia facility. The downsized operation would require the retention of approximately 10 of the 72 affected employees. The rest would be laid off. July 1, 2003 was identified as the date Kunia's assumption of remaining HCFO functions was to begin.

On April 22, 2003, the ILWU, which represents the members of the HCFO bargaining unit, as well as members of the Plantation and Fresh Fruit bargaining units under contract with DEL MONTE, requested information regarding the closure and the commencement of bargaining regarding its effects. The Union subsequently requested information and bargaining regarding the decision to close the Waiakamilo facility.

DEL MONTE refused to provide information regarding or to negotiate its decision to close the facility. It provided some information and engaged in bargaining regarding effects. Negotiations were discontinued subsequent to the union's rejection of the employer's final offer of June 21, 2003. As of July 1, 2003, 55 HCFO members were laid off and 14 were transferred to Kunia.

On June 24, 2003 the Union filed its Second Amended Unfair Labor Practice Complaint[2] with five counts: **(1)** unlawful interference of employees right to form, join, or assist its labor organization and to bargain collectively through their union; **(2)** breach of Respondents' duty to bargain; **(3)** wilful violations of various provisions of the collective bargaining agreement; **(4)** bad faith bargaining; and **(5)** discrimination in violation of Section 377-6,[3] HRS.

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[2]ILWU's motion to amend its complaint was granted pursuant to HAR § 12-41-43 ("A complaint may be amended in the discretion of the board at any time prior to the issuance of a final order.") inasmuch as the Board determined the inclusion that claims which arose in the course of negotiations subsequent to the filing of the initial complaint should be considered in the interest of administrative economy and resulted in no showing of prejudice to Respondents.

[3]HRS § 377-6 provides, in part:

> **Unfair labor practices of employers.** It shall be an unfair labor practice for an employer individually or in concert with others:
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> (1) To interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed in section 377-4;
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> * * *
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> (3) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. An employer, however, may enter into an all-union agreement with the bargaining representative of the employer's employees in a collective bargaining unit, unless the board has certified that at least a majority of the employees have voted to rescind the authority of their bargaining representative to negotiate such all-union agreement within one year preceding the date of the agreement. No employer shall justify any discrimination against any employee for nonmembership in a labor organization if the employer has reasonable grounds for believing that:
>
> (A) Such membership was not available to the employee on the same terms and conditions generally applicable to other members;
>
> (B) Or that membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and the initiation fees uniformly required as a

DEL MONTE eloquently denies any violation. It argues that it had no obligation to negotiate the closure, bargained in good faith regarding effects, and exhibited no anti-union animus or discrimination in its conduct.

The issues which must therefore be resolved in order to determine whether the claimed unfair labor practices occurred are: 1) Whether DEL MONTE had a duty to negotiate the decision to close the Waiakamilo facility and transfer the remainder of its functions to Kunia?; 2) Whether DEL MONTE negotiated in good faith regarding the effects of its decision?; and 3) Whether the conduct of DEL MONTE was discriminatory or interfered with employee collective bargaining rights?

The Decision to Relocate

The Board concludes that the Employer's decision to close the Waiakamilo facility and relocate the bulk of its operations to Sanger was not a mandatory subject of bargaining so that its failure to engage in negotiations or provide information regarding the move did not constitute an unfair labor practice. Analogous to the Supreme Court's conclusion in First Nat'l. Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 686, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981) (First Nat'l.) "[w]e conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is *not* part of § 8(d)'s "terms and conditions," over which Congress has mandated bargaining." [footnotes and citations omitted.]

In First Nat'l., the Court identified a balancing test in deciding whether an employer had a duty to bargain over fundamental business decisions. The issue before the Court was whether "an economically-motivated decision to shut down part of a business" is a

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condition for acquiring or retaining membership;

(4) To refuse to bargain collectively with the representative of a majority of the employer's employees in any collective bargaining unit provided that if the employer has good faith doubt that a union represents a majority of the employees, the employer may file a representation petition for an election and shall not be deemed guilty of refusal to bargain;

* * *

(6) To violate the terms of a collective bargaining agreement;

* * *

(8) To discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony under the provisions of this chapter; ....

mandatory bargaining subject. Id., at 680. In First Nat'l., the Court discussed its application of a three-part analysis to determine if a subject required bargaining:

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. See Fibreboard, 379 U.S. at 223, 85 S.Ct. at 409 (Stewart, J., concurring). Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. Chemical Workers, 404 U.S., at 178. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." [Citations omitted]. At the same time, this decision touches on a matter of central and pressing concern to the union and its member employees: the possibility of continued employment and the retention of the employees' very jobs. See Brockway Motor Trucks v. NLRB, 582 F.2d 720, 735-36 (3d Cir. 1978); Ozark Trailers, Inc., 161 NLRB 561, 566-68 (1966).
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> * * *
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> The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. [footnote omitted.] Ford Motor Co., 441 U.S. at 500-501; Borg-Warner, 356 U.S., at 350, 78 S.Ct., at 723 (condemning employer's proposal of "ballot" clause as weakening the collective-bargaining process). This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process. Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice. Congress did not explicitly state what issues of mutual

> concern to union and management it intended to exclude from mandatory bargaining. [footnote omitted.] Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

Id., at 676-77, 678-79 (emphasis added).

Here, as in First Nat'l., the Board must conclude that while the instant decision necessarily had an impact on employment, the decision was one focused only on economic profitability involving the scope or direction of the enterprise which was not a subject amenable to resolution through the bargaining process. The employer demonstrated that the decision was motivated by the economic efficiencies and potential inherent in moving the processing of fresh sliced pineapple closer to its target market, the West Coast. Shipping uncontestedly resulted in increase spoilage and reduced shelf life. It was also uncontested that the employer's expanded product line, the fruit medley, could not be economically prepared in Hawaii given the round trip other fruit would have to make. The factors which drove the decision had to do with Hawaii's distance from the West Coast of the United States, and there is nothing that collective bargaining could accomplish to move Hawaii closer to the mainland.

The Union argues that bargainable considerations of labor costs and conditions necessarily entered into management's decision so that bargaining should have occurred. To support its contention, the Union points to the stark contrast between the terms of employment of the displaced Hawaii workers (unionized, trained, experienced permanent employees, paid up to $15/hr) and their Sanger replacements (nonunionized, untrained, contract day-labor, minimum wage). These disparities, coupled with the management's corporate western regional policy against hiring unionized production workers, indeed support a conclusion that labor costs and conditions entered into management's relocation decision.

But the record reflects the undisputed fact that if labor was a principal consideration in the decision to relocate, the quality of the Hawaii workforce mitigated against relocation in that they were up to ten times more efficient in man-hour production than their mainland based counterparts:

> From a production efficiency standpoint, Hawaii is extremely efficient when producing bagged wedges. Pounds per man-hour run in the range of 350 for this category. To put this into perspective, Kankakee' overall pounds per man-hour runs between 30 and 35. Jessup runs in the range of 20 to 25. Again, the Kankakee and Jessup figures are for their entire product line, while Hawaii numbers are for one product.

Respondents' Exhibit 2 at 2. So notwithstanding the stark disparity in the pay, rights and terms of employment, the Board concludes that labor considerations did not enter into the decision to relocate sufficiently to make the decision a mandatory subject of bargaining.

Effects Bargaining

The United States Supreme Court in First Nat'l., supra, recognized and enforced a distinction between an employer's duty to bargain about decisions protected by management rights and the effects of protected decisions when they impact the terms and conditions of employment of workers covered by a collective bargaining agreement. The Court concluded that even though a management decision might not be a mandatory subject of bargaining, if the effects of the decision have a material and substantial impact on the terms and conditions of employment. The Court stated:

> [t]here is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by §8 (a)(5) [of the National Labor Relations Act]. See e.g., NLRB v. Royal Plating & Polishing .co., 350 F.2 191,196; NLRB v. Adams Dairy, Inc., 350 F.2d 108 (CA8 1965) cert denied, 382 U.S. 1011 (1966). And under §8 (a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the [National Labor Relations] Board may impose sanctions to insure its adequacy.

Id., at 682.

The employer acknowledges the duty to bargain over the effects of its decision to relocate and argues that it satisfied any such duty. The ILWU argues that the Employer failed to bargain in good faith and in the course of bargaining interfered with the rights of the union members and discriminated against them on the basis of their membership.

Duty to Bargain

In Decision No. 22, Board of Education, 6 HLRB 173 (2001), the Board adopted the following description of the duty to bargain:

> The duty to bargain in good faith has been described as follows:
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> > 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.) *The Developing Labor Law: The Board, The Courts, and the National Labor Relations Act*, edited by Patrick Hardin, et al. (3d ed., Washington: BNA, 1992), Vol. I, 608.
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> The Board hereby adopts this standard. Thus the issue before us is whether the totality of the HSTA's conduct evinces a present intention to find a basis for agreement and a sincere effort to reach a common ground.

Id., at 177.

The same text from which this test was taken also identified a catalogue of conditions imposed upon bargaining which were "so onerous or unreasonable as to indicate bad faith":

> For example, in *Fitzgerald Mills*, (footnote omitted)components of the employer's bad-faith bargaining were its demand for a union waiver of grievances which were pending under the old contract and its conditioning further bargaining upon a waiver of strikers' reinstatement rights. The Board found the latter to be tantamount to requiring the abandonment of the union's unfair labor practice charges against the employer, a condition which the Board has frequently condemned. (footnote omitted.)
>
> Conditioning further negotiations on cessation of a strike also violates the Act, since the obligation the bargain continues during a strike. (footnote omitted.) As the Fifth Circuit noted in *NLRB v. Safeway Steel Scaffolds Co.*, "the use of economic

> pressure by a union does not relieve the company of the duty to bargain." (footnote omitted.)
>
> Requiring agreement on certain subjects of bargaining as a prerequisite to further negotiations has been viewed as evidence of bad faith. Thus, requiring acceptance by the union of "open shop" and "freedom to discharge" provisions before the company would engage in economic discussion, (footnote omitted) a refusal to negotiate unless the union signed a 120-day moratorium that required, in effect, that the union cease representing the employees for a period of four months, (footnote omitted) and an employer's requirement that the union post an indemnity bond as a condition to the signing of a contract (footnote omitted) all have been evidence of bad faith. Attempting to dictate the composition of the union's negotiating committee, (footnote omitted) and refusing to bargain with the union unless a former employee on the union committee was removed have been similarly treated. Requiring agreement on nonmandatory subjects of bargaining as a condition to further negotiation thus falls in the same category as insisting to impasse on such subjects which under the Borg-Warner doctrine constitutes a refusal to bargain. (footnote omitted)

Hardin, *The Developing Labor Law: The Board, The Courts, and the National Labor Relations Act*, at pp. 596-97.

The Board concludes that the conditions imposed on bargaining within the Employer's final offer were "so onerous or unreasonable as to indicate bad faith" far outstripping those identified above. Accordingly, the Board concludes that DEL MONTE refused to bargain in good faith with the ILWU and therefore violated HRS § 377-6(4).

On June 21, 2003 DEL MONTE's committee handed the Union DEL MONTE's final offer that spelled out the consequences if the Union did not agree to the final offer. The first half of the offer reflected the tentative agreements reached as of June 17, 2003 but also required the Union to withdraw the unfair labor practice complaints.

Starting on page four of the final offer, DEL MONTE identified the consequences if the Union rejected the offer. If the Union did not accept DEL MONTE's final offer the company planned to terminate all HCFO employees with the exception of a couple of journey employees who would be terminated after the dismantling of HCFO Waiakamilo. The terminated HCFO employees would receive only the termination benefits required under the collective bargaining agreement with none of the enhanced benefits discussed in effects bargaining. It was a take-it-or-leave-it proposition. DEL MONTE intended to empty out the bargaining unit absent the Union's acceptance of the offer. DEL MONTE stated it would

implement the consequences on July 1, 2003 if the Union did not accept the offer by noon June 23rd. The Union rejected DEL MONTE's offer as unlawful.

The Employer simply promised to terminate all bargaining unit members on three days' notice unless the Union capitulated to its terms and forfeited its rights to redress. By emptying the HCFO bargaining unit of all of its members the Employer would have satisfied its bargaining obligations by simply destroying the bargaining unit.

This was particularly insidious because DEL MONTE planned to retain the previously promised HCFO jobs and functions at Kunia. It would then create new positions, combined positions doing former HCFO work (boiler/juice operator and packaging machine operator), and then transfer KFF employees to laborer positions to do the rest of the former HCFO work. DEL MONTE also planned to post at the plantation the journey positions it had planned to transfer from HCFO and fill accordingly. Any newly hired plantation mechanic would end up performing HCFO work. With no contractual obligation under HCFO, SUZUKI agreed DEL MONTE could freely create these new positions in KFF to do the former HCFO work.

As a "humanitarian" gesture the Employer intended to permit the laid off HCFO members to apply for and receive preference for vacancies at Kunia. If selected for one of the reputed 154 vacancies, a former HCFO member would, however, be hired as an entry level or "seasonal" employee. Such status entitled an employee to only statutorily required rights and benefits, there would be no right to join a bargaining unit, any accrued seniority would be eliminated, there would be no severance benefits, and no rights under any collective bargaining agreement. Up to 30 years of service would be washed away. And the workforce would be comprised of contract day labor.

Ironically, the former HCFO, now seasonal, employees might have applied for whatever of their old jobs had been transferred to Kunia. Upon posting, the now-seasonal employees could have applied for temporary assignment to their newly posted old jobs. If no regularly employed applicant was determined to qualify to be placed in the position, the obviously qualified former HCFO employees would end up doing their old job, except they would be stripped of bargained for benefits or bargaining rights, and at a substantial savings to the Employer. While the Employer claims that such outcomes were not targeted, it also concedes they were, with the accompanying advantages, possible.

DEL MONTE defends the issuance of its ultimatum by four arguments. First, it argues that the layoffs were necessary in order to meet the scheduled transition of remaining HCFO functions to Kunia. This argument is belied by the fact that the day after exposing the ultimatum in the evidentiary hearing before the Board, the layoff ultimatum was withdrawn and necessary HCFO bargaining unit members were transferred to Kunia with no loss of status. Total layoffs appear not to have been an operational necessity.

Second, in and after its final offer DEL MONTE invited further negotiations. This ostensible evidence of good faith, and the Union's continued unwillingness to accept the invitation, the Employer argues shifts culpability for the collapse in negotiations to the Union in that the ultimatum was not a condition to bargaining. But the utility of negotiations with the Union representing a bargaining unit which was to be unilaterally stripped of membership, and therefore bargaining power, escapes the Board.

Third, DEL MONTE argues that rather than representing an unlawful condition, the threatened layoffs only advised the Union of "an alternative that emphasized the comparative advantages of the final package." Respondents' Post Hearing Brief at 49. Advising the Union of the Employer's lawful alternatives is indeed not an unfair labor practice. But when the "alternative" is nothing more than a promise to empty the bargaining unit which effectively makes further bargaining impossible, characterizing the threat as a consequence rather than as condition can make no meaningful difference.

And fourth, DEL MONTE argues that its conduct throughout the course of bargaining prior to the transmission of its final offer reflected such indicia of good faith that a finding of bad faith based on "the totality of circumstances" is not warranted. The Employer points especially to the uncontested mutual concessions which resulted in tentative agreements for several items, including relating to upgraded severance provisions (additional .5 day of severance, additional two months medical, and pay out options). The Board concludes that any apparent indicia of good faith that could be inferred by the Employer's concessions or conduct prior to its final offer was rendered illusory by the terms of that offer. The Employer's "empty the bargaining unit" ultimatum not only foreclosed bargaining but included the stripping of previously bargained for benefits.

Interference and Discrimination

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).

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). 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).

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).

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." The Board in International Longshore and Warehouse Union, Local 142, 6 HLRB 194, 198 (2001), adopted the applicable test as that identified by the United States Supreme Court in interpreting the federal counterpart of HRS § 377-6(3). In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (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 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 proven 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).

The Board concludes that DEL MONTE violated HRS §§ 377-6(1) and (3) by its 'inherently destructive' discriminatory act of threatening to terminate all members of the HCFO bargaining unit and eliminate their positions. The Board finds that the Employer's conduct had a reasonable tendency to intimidate.

The threat was directed against bargaining unit members. At least for the employees who the Employer had previously intended, and subsequently decided to retain, the threat was a result of their participation in the bargaining unit and the exercise of rights via their exclusive representative. This discriminatory conduct interfered with and was 'inherently destructive' of employee rights as discriminatory employee termination and destruction of the bargaining unit can only be.

Information and Contractual Violations

The ILWU also alleges that DEL MONTE failed to provide information necessary to bargaining and knowingly violated the provisions of the collective bargaining agreement in the course of bargaining and implementing the transition. A finding of such conduct might have contributed to a finding of a failure to bargain in good faith, but the Board concludes that, having already found such failure to bargain and discriminatory conduct on the basis of the Employer's final offer, these allegations need not be addressed. As discussed above; the Employer, by threatening to lay off all members of the bargaining unit unless its terms were accepted, effectively took an illegal bomb to the structure of bargaining. The Board can find no utility in sorting through the rubble of that structure to identify any previous alleged wrongs.

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. The Board concludes that the Employer's decision to close the Waiakamilo facility and relocate the bulk of its operations to Sanger was not a mandatory subject of bargaining so that its failure to engage in negotiations or provide information regarding the move did not constitute an unfair labor practice. Notwithstanding the stark disparity in the pay, rights and terms of employment, the Board concludes that labor considerations did not enter into the decision to relocate sufficiently to make the decision a mandatory subject of bargaining.

4. Based on the record, the Board concludes that the conditions imposed on bargaining within the Employer's final offer were "so onerous or unreasonable as to indicate bad faith." The first half of the final offer reflected the tentative agreements reached as of June 17, 2003 and required the Union to withdraw the unfair labor practice complaints. If the Union did not accept the final offer the company planned to terminate all HCFO employees except a few journey employees who would be terminated after the dismantling of HCFO Waiakamilo. The terminated employees would receive only the termination benefits required under the collective bargaining agreement with none of the enhanced benefits discussed in effects bargaining. It was a take-it-or-leave-it proposition which was intended to empty out the bargaining unit absent the Union's acceptance. DEL MONTE stated it would implement the consequences on July 1, 2003 if the Union did not accept the offer by noon on June 23rd. The Board concludes therefore that DEL MONTE refused to bargain in good faith with the ILWU and therefore violated HRS § 377-6(4).

5. 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).

6. 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). 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).

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. The Board concludes that DEL MONTE violated HRS § 377-6(1) and (3) by its inherently destructive discriminatory act of threatening to terminate all members of the HCFO. The threat was directed against all bargaining unit members. At least for the employees who the Employer had previously intended

and subsequently decided to retain, the threat was a result of their participation in the bargaining unit and the exercise of rights via their exclusive representative.

REMEDIAL ORDER

Having concluded that the management decision to relocate to Sanger, California was not a mandatory subject of bargaining the Board cannot direct the reopening of the Waiakamilo facility. But having concluded that DEL MONTE committed unfair labor practices in the course of the concededly required effects bargaining the Board orders the following:

1. DEL MONTE shall cease and desist from the above identified unfair labor practices and resume effects bargaining with the ILWU subject to the following conditions:

   a. All HCFO members laid off as a result of the closing of the Waiakamilo facility shall be awarded the enhanced severance benefits identified in previous negotiations or the cash value thereof;

   b. Any HCFO members transferred or hired into equivalent positions in the KFF or Plantation bargaining units shall be credited with all seniority and benefits accrued within the HCFO bargaining unit;

   c. For any equivalent HCFO job being performed by KFF or Plantation employees, there shall be a new permanent position established within the effected bargaining unit; and

   d. DEL MONTE shall provide the ILWU with a detailed complete list of its current vacancies. Qualified displaced HCFO employees shall have rights of first refusal in the filling of any vacancies. If the duties to be performed are substantially the same as those of the HCFO job from which the employee was laid off, the newly filled position shall be made permanent and the employee afforded the seniority and rights accrued at HCFO.

2. The conditions identified above may be modified or waived by the mutual consent of the parties in bargaining. But unless waived or deferred by mutual consent, DEL MONTE shall implement the above conditions within 45 days of the issuance of this order.

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 24, 2004.

HAWAII LABOR RELATIONS BOARD

BRIAN K. NAKAMURA, Chair

CHESTER C. KUNITAKE, Member

OPINION, CONCURRING IN PART, AND DISSENTING, IN PART

I concur with the Board majority's conclusion that DEL MONTE's decision to close its Waiakamilo facility and relocate the bulk of its operations to Sanger, was not a mandatory subject of bargaining. However, I respectfully dissent, in part with the Board majority's conclusions of law that DEL MONTE in the course of bargaining over the effects on HCFO employees of its plan to close the Waiakamilo facility engaged in bad faith bargaining and discriminatory conduct that was inherently destructive of employees rights.

By adopting the same standard applied in Board of Education, supra, the issue regarding Union's claim of bad faith bargaining, is whether DEL MONTE's conduct during the course of effects bargaining, that preceded its final written offer, evinces an intention to find a basis for agreement and a sincere effort to reach a common ground. I believe the record supports such a conclusion. Consequently, I disagree with the Board majority's conclusion that the consequences of rejecting the final offer as spelled out by DEL MONTE were "so onerous or unreasonable as to indicate bad faith."

The Board's majority focuses on the Employer's final offer of June 21, 2003, in particular the consequences of rejecting the final offer, and ignores the "totality of conduct" by which the "quality" of negotiations ought to be tested. First, REZENTES' bargaining notes for bargaining sessions that occurred on June 10 and 17, 2003, support a finding that with respect to the majority of affected HCFO employees facing inevitable layoff, DEL MONTE and the Union tentatively agreed to increase severance by a half a day, add two months for medical coverage and add an extra year for housing. Tr. Vol. IV, July 11, 2003, pp. 628-29.

Moreover, at the start of negotiations, DEL MONTE had two possible scenarios -- either relocate the whole HCFO operation to Sanger resulting in layoffs of the entire bargaining unit (which the Board majority describes as "emptying out the bargaining unit") or relocate a downsized unit to KFF to produce for the local and Japan markets.

The tentative agreements to provide enhanced benefits for the HCFO employees facing layoffs due to the Waiakamilo facility closing, however, hinged on ILWU's bargaining over the effects not only on the HCFO employees, but also the impact on the other two bargaining units, i.e., the KFF employees and employees at the Oahu Plantation, because of DEL MONTE's proposals to relocate a downsized operation to KFF.

With respect to downsizing the HCFO unit, DEL MONTE had proposed transferring three HCFO mechanics to the Oahu Plantation at Kunia (to be primarily responsible for the growing and harvesting of fresh whole pineapple) and relocating ten to 14 HCFO employees to perform the chilled/frozen operation at the KFF. But as REZENTES – DEL MONTE's manager of both the HCFO plant and KFF's juice plant – explained, it would have been "ideal from an operational standpoint" to have one rather than two bargaining units under the same roof.[4] The KFF bargaining unit is responsible not only for packing the whole fresh pineapple, and but also the juice concentrate run by two full-time employees.

At one point of the negotiations, the ILWU was open to the Employer's proposals to transfer the three HCFO mechanics, and even more importantly, amending the KFF contract to transfer the two full-time juice concentrate employees to the HCFO so that administratively there would be only one bargaining unit, i.e., HCFO, working at the Kunia concentrate operation. As of the bargaining session on June 17, 2003, Ray Camacho testified,

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[4]REZENTES was also a member of DEL MONTE's bargaining committee and testified as follows:

> Q. [by Chair Nakamura] You testified that in the April, May time frame you were hoping that you didn't – that there were no set decisions regarding whether or not the Kunia jobs would be filled by HCFO transfers or KFF.
> A. [by REZENTES] Yeah, we didn't know if the Union was going to agree at that point.
> Q. And you were hoping to get it done by one bargaining unit?
> A. Yeah. That would be ideal from an operational standpoint. Right now I got two bargaining units under the same roof, and it's hard to administer that kind of program.
> Q. Did you or anybody in authority have any preference as to whether it was the HCFO or KFF?
> A. I can only speak for my personal preference. I would have liked to have seen the majority of the people, the Waiakamilo people with Alice and Edith [KFF employees specially trained and experienced in operating the juice concentrate equipment] brought over to the Waiakamilo contract.
>
> Tr. Vol. IV, dated July 11, 2003, pp. 680-81.

ILWU was "willing to entertain a settlement offer [including the withdrawal of the prohibited practice complaint before this Board] either that strictly dealt with HCFO, but if it went beyond those bounds, which the Employer's proposal did, then it would have to include other considerations, because the other membership would have to ratify it, meaning the Fresh Fruit membership and the Plantation membership." Tr. Vol. VIII, dated July 31, 2003, pp. 1239-40.

As the quid pro quo for agreeing to the transfer of three HCFO mechanics to the Plantation unit and two KFF concentrate workers to the HCFO unit, the Union proposed upgrades to regular status seasonal workers covered under the Plantation and KFF contracts. For the Plantation unit, the Union's proposal sought upgrades of approximately five seasonal workers over a period of two years and 40 seasonal workers at KFF over a period of four years. Tr. Vol. VIII, dated July 31, 2003, pp. 1245-46.

DEL MONTE was not obligated to accept every proposal. DEL MONTE's final offer did not include an agreement for any upgrades of seasonal workers to regular workers covered under either the Plantation or KFF contracts. The Union's negotiator admitted that DEL MONTE's rejection of proposals for upgrades was the deal breaker. Had DEL MONTE agreed to the upgrades in its final offer, the ILWU would have then agreed to withdraw the instant prohibited practice complaint. On this basis, it is reasonable to infer that DEL MONTE's final offer couched in take-it-or-leave-it language, conditioned on the withdrawal of the instant prohibited practice complaint, that spelled out alternative action in accordance with its contractual obligations, at best amounted to hard bargaining and had no effect on the Union's decision to reject the final offer. Under the circumstances, and considering the "totality of conduct," the Union failed to prove bad faith bargaining.

Therefore, I would find that the Union rejected the final offer even though it included substantial enhanced benefits for the affected employees in the HCFO unit, because DEL MONTE would not agree to the Union's proposals for upgrades for the other bargaining units. DEL MONTE's final offer made clear to the ILWU, that it meant to bargain over the effects of its decision to close Waiakamilo for the HCFO employees directly impacted, but refused to agree to ILWU's proposals to upgrade covered seasonal workers to regular employees under the Plantation and KFF contracts. The Union's bargaining proposal thus does not appear to have been in the best interests of the HCFO bargaining unit which was directly impacted by DEL MONTE's decision to close the Waiakamilo facility and relocate a downsized unit to Kunia.

The record supports a finding that both DEL MONTE and ILWU had equal bargaining power. The Union's proposal attempted to leverage regular positions in the Plantation and KFF bargaining units to balance off the downsized HCFO unit being relocated to KFF. The Union risked the enhanced benefits for the HCFO employees being laid off, to add regular workers to the Plantation and KFF. Even from an operational standpoint having its HCFO employees and two KFF employees working under the same roof and under one contract was not worth the cost of committing to upgrades to benefit only the other bargaining units not directly impacted by DEL MONTE's decision to close the Waiakamilo facility.

The record does not support the Board majority's conclusion "that the conditions imposed on bargaining within the Employer's final offer 'so onerous or unreasonable as to indicate bad faith'...." In the end, DEL MONTE did not "empty out the bargaining unit" as the Board majority concludes it schemed to do, but rather relocated 14 employees under the HCFO contract working under the same roof with the two full time juice concentrate employees at KFF. Tr. Vol. II, dated June 30, 2003, p. 339. Given DEL MONTE's rejection of the Union's proposals for upgrades, there is no support in the record for the Board majority to reasonably conclude that DEL MONTE's threats to terminate all members of the HCFO bargaining unit was "inherently destructive." And as DEL MONTE's Human Resources Manager testified the permanent transfer of these 14 employees was conducted pursuant to the provisions of the HCFO contract, the employees retain rights under the HCFO contract, and the HCFO contract provisions remain valid regarding these employees. Id., pp. 340-41. Consequently, even though the ILWU did not accept the final offer, which the Board majority concluded was so "onerous and unreasonable," DEL MONTE in any event, relocated a downsized HCFO unit to KFF and has no intention of implementing the consequences of rejecting the final offer.[5]

Therefore, I respectfully dissent from the Board majority's conclusion that DEL MONTE engaged in bad faith bargaining over the effects of its decision.

Similarly, I respectfully dissent with the Board majority's conclusion that DEL MONTE engaged in an 'inherently destructive' discriminatory act when it threatened to

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[5]Under questioning by Board Chair Nakamura, SASAGAWA testified as follows:

Q. [by Chair Nakamura] What is your understanding the final offer of the Company to the Union?
A. [by SASAGAWA] It was if the Union did not agree to whatever was listed in the letter, that we had an alternative plan that would be implemented.
Q. Is it your understanding that the Union (sic) [Company] reserves the right to implement the alternative plan?
A. I'm not certain what you're asking.
Q. You said if you don't accept our offer, we'll do this.
A. Yes.
Q. Right?
A. Yes.
Q. You have done otherwise.
A. Yes.
Q. What does that do to the final offer?
A. I have no idea.
Q. It matters if the Company is still reserving or intent – to your knowledge is the Company intent on implementing the final offer, given the passage of this?
A. No, we're not.

Tr. Vol. II, dated June 30, 2003, p. 340.

terminate members of the bargaining unit stemming from its decision to close operations. The record simply does not support any findings that DEL MONTE's termination of HCFO bargaining unit members as a consequence of its decision to close the HCFO facility, in and of itself, had a reasonable tendency to intimidate or was "inherently destructive" of important employee rights, to forego the necessity of proving anti-union animus. Thus, in my view, Complainant failed to prove by a preponderance of evidence that bargaining over the effects of its decision to close the Waiakamilo facility and relocate a downsized unit to KFF was based on anti-union animus.

Based on Complainant's failure to prove by a preponderance of evidence bad faith bargaining over the effects of Respondents' decision to close its Waiakamilo facility and relocate a downsized unit to KFF, and anti-union animus as the basis for its conduct in the course of bargaining, the instant complaint should have been dismissed.

K. Racuya-Markrich

KATHLEEN RACUYA-MARKRICH, Member

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