STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CHARLES MALOVICH, Respondent,	)	Case No. 82-CE-84-D
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	9 ALRB No. 64

DECISION AND ORDER

On January 31, 1983, Administrative Law Judge (ALJ) Brian Tom issued his attached Decision in this proceeding. Thereafter, the United Farm Workers of America, AFL-CIO and General Counsel each timely filed exceptions to the ALJ's Decision and a brief in support thereof, and Charles Malovich (Respondent) timely filed an answering brief to the exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel. The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ.[1/]

[1/] Several times in his Decision the ALJ erroneously refers to the use of a labor contractor by an agricultural employer as "subcontracting." However, the ALJ correctly analyzed Respondent's decision to use a labor contractor under the guidelines of Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85, in which the Board

(fn. 1 cont. on p. 2)

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: November 10, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

(fn. 1 cont.)

concluded that since labor contractors are not employers under the Agricultural Labor Relations Act, the employees provided by a labor contractor are members of the bargaining unit. Thus, engagement of a labor contractor does not in itself constitute subcontracting out of bargaining unit work or a reduction of such work.

CASE SUMMARY

CHARLES MALOVICH
(UFW)

9 ALRB No. 64
Case No. 82-CE-84-D

ALJ DECISION

The ALJ found that the Employer had unilaterally changed its hiring practices by engaging a labor contractor instead of hiring new employees by its usual method of asking foremen to bring more workers. However, the ALJ concluded that exigent circumstances excused the Employer's unilateral change, and that the Employer's notice to the Union two days after the decision, along with providing the opportunity to bargain at that time, met the requirement of bargaining to the extent circumstances permitted. The ALJ also concluded that General Counsel had not shown that the Employer engaged the labor contractor because of employees' concerted activities and support for the Union. Therefore, the ALJ recommended that the complaint be dismissed in its entirety.

BOARD DECISION

The Board affirmed the rulings, findings, and conclusions of the ALJ and dismissed the complaint.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Charles Malovich, Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	)	Case No. 82-CE-84-D

Appearances:

Manuel M. Melgoza
Nicholas F. Reyes
for General Counsel

James A. Bowles
of Hill, Farrer, & Burrill
for Respondent

Tomas Gonzales
David Villarino
for the Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

BRIAN TOM, Administrative Law Officer: This case was heard before me on September 7, 8, 9, 15, 16, 17 and 22, 1982 in Bakersfield, California.

The hearing was held pursuant to a Complaint dated August 3, 1982.1/. The complaint is based upon a charge filed by the United Farm Workers of America, AFL-CIO

1/. All dates herein refer to 1982 unless otherwise indicated.

(hereinafter "UFW" or "Union") on June 10, 1982. Said charges were duly served on Respondent Charles Malovich. At the hearing General Counsel moved to amend some of the language in the Complaint, a motion which I granted.

As amended the Complaint alleges that Respondent violated Section 1153(a), (c) and (e) of the Agricultural Labor Relations Act (hereinafter "Act") by engaging in the following activity:

1. Respondent reduced available bargaining unit work by unilaterally subcontracting peach picking, nectarine picking and thinning of fall peaches.

2. Respondent reduced bargaining unit employees work by employing labor contractor, Richard Molina, because of the employees' support for the UFW and because of concerted activities to obtain higher wages.

Respondent filed a timely answer, generally denying that he violated the Act in any manner.

Findings, Analysis and Conclusions

I. Jurisdiction

Respondent is engaged in Agriculture in California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act, as was admitted, and I so find.

II. Background Information

Respondent is a sole proprietorship engaged in the growing, picking and packing of nectarines, peaches and pomegranates. His farming operation is located in Arvin, California. Respondent's seasonal work normally progresses as follows: In mid-December the trees are pruned. Pruning continues until mid-February. Thinning of spring peaches[2/] and spring nectarines begins in the first week of April. The thinning season lasts for three weeks to a month. It is not necessary to thin pomegranates. Spring nectarines are harvested beginning from May 28 to June 1. The harvest lasts approximately one week. The spring peach harvest lasts ten to eleven days depending on the weather. Fall peaches are thinned in June, at times during the period spring peaches are being harvested and at times afterwards. They are harvested in August, September and October. During the pruning season Respondent employs 10 to 20 workers. During the thinning season 40 to 70 workers are employed.

In the 1982 season, spring peaches were harvested from May 19 to May 30 or 31. Spring nectarines were harvested from June 1 until June 4. After the spring nectarines were harvested fall peaches and fall nectarines were thinned.

Arturo Tellez, Tomas Garcia, and Henry Ledesma are Respondent's foremen in charge of the various crews.

2/. Peaches and nectarines are harvested twice a year; the earlier ones are referred to as spring peaches and spring nectarines, the later ones, fall peaches and fall nectarines.

FACTS

Negotiations

The UFW was certified as the collective bargaining representative for Respondent's employees on May 9, 1979. Thereafter, on December 15, 1981, February 22, 1982, April 12, 1982, April 23, 1982, May 14, 1982 and June 2, 1982 negotiation sessions were engaged in by the parties.

Both Deborah Miller, the UFW negotiator and Al Caplan, Respondent's negotiator testified regarding the substance of the various negotiation sessions.

Caplan was Respondent's negotiator during all the negotiation sessions set forth above. At the December 15, 1981 session the Union first offered its sub-contracting proposal, in evidence as Respondent's 9. This proposal provides for a prohibition against any subcontracting of bargaining unit work. He does not recall if he made an immediate response to the proposal. At a subsequent session, he told Miller that Respondent rejected the proposal. He told the Union it was unacceptable because the company did not want to be bound by any restrictions in regard to subcontracting and that the company subcontracted for various work during the year. Miller then asked what work was actually being subcontracted by the company.

Caplan apparently did not know, and a response was delayed until after that meeting when Caplan got the answer from Malovich. The subcontracting was for spraying pesticides and various other work for which Respondent did not have the necessary equipment. He identified these areas as spraying, the marking of land, sub-soil work and equipment maintenance. This information was relayed to Miller at a subsequent meeting. On April 23, 1982, the Union made another proposal on subcontracting, in evidence as Respondent's 10. This proposal provided that the Respondent could subcontract work where regular employees lacked the skill for the work to be performed or where the Respondent did not have the equipment to do the work being subcontracted. Workers of the subcontractor actually operating or maintaining the equipment were not to be covered by the contract; other workers of the subcontractor were to be covered. The proposal also provided for notice to be given the Union in the event a subcontractor was used. Either on that same day or at a later meeting, Caplan advised Miller that the Respondent could not agree to their new proposal. Respondent did not agree with that part of the proposal whereby some of the subcontractors' employees would be covered by the contract. The Respondent also could not agree with the notice requirement of the proposal because he felt there would be emergency periods when Respondent would not have time to consult with the Union prior to subcontracting.

There was some more discussions between Caplan and Miller regarding this proposal and ultimately this proposal was left aside as being an issue which had not been resolved in the negotiations.[3/]

In addition to the subcontracting proposal Caplan also testified that he and Miller had reached tentative agreement on a management rights section proposed on April 12, 1982. This proposal is in evidence as Respondent's 1 and states in part that the rights of management not modified by the contract were retained by Respondent.

Miller essentially corroborated Caplan's testimony. In addition she testified that Caplan told her that Respondent did not subcontract any work that field workers would perform. While Respondent had used labor contractors in years past according to Miller, he no longer used them. She states that Caplan said labor contractors had not been used for 15 years. She further added that the Respondent's proposal was to delete the subcontracting article altogether.

On the one point where her testimony differs from Caplan's, she denied that Caplan ever raised the issue of emergencies in reference to the subcontracting issue. In response to a question as to why Respondent rejected the

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3/. Subsequent to the second union proposal a third proposal on subcontracting was offered by the Union on July 21, 1982 which also was not agreed to.

Union's second proposal, she stated that Caplan told her he didn't feel the subcontractors should be covered by the union contract and also that the notice in advance prior to subcontracting was too restrictive. In regard to why it was too restrictive, she stated that Respondent "wanted to do what they had done in the past."

The Work Stoppage

On May 24, seven to nine workers on Respondent's peach picking crew gathered in a house occupied by some of the workers to discuss the wage rate they were receiving. At that meeting it was decided that they would ask for a raise and stop work if they did not receive one. On the following morning these workers arrived at work 10 to 15 minutes before the normal starting time of 7 a.m.

When these workers arrived, Malovich as well as three of Respondent's foremen Arturo Tellez, Enrique Ledesman and Alberto Gonzales were already present. The workers who had attended the meeting the evening before, talked with the other workers present, and they all agreed to ask for a raise and if not granted, they would engage in a work stoppage.

At the starting time, Tellez asked the workers to begin. The workers, however, told him they wanted a raise from $3.75 per hour to $4.25. Tellez went to confer with Malovich who was closeby, and after a short discussion returned and told the workers that "Charlie says he cannot pay any more. If you want to go in, go in, if not, well, see what happens."

The workers responded that they would not begin work under those circumstances.

The workers then asked Sigifredo Reyes, a worker who could speak English, to talk directly to Malovich. He did so, and advised the workers that Malovich told him that they were to leave or he would call the law.

Malovich then left the premises and a short while later returned with some policemen. Malovich pointed out Reyes and the policemen went up to him and told him to tell the workers to leave.

The workers then adjourned to a house in Arvin, and one of the workers went over to the Union office to contact David Villarino, a union organizer and negotiator. Villarino came to the house, found out what happened, and went to talk to Malovich. Villarino first went to the Respondent's packing shed, where he was directed to one of the fields where he found Malovich. Villarino started the conversation by asking what was going on - that he understood Malovich had fired the employees when they asked for a wage increase. Malovich denied he fired anyone and that was confirmed by Tellez, who was standing nearby. Villarino then offered to get the workers back, and Malovich agreed. Villarino also told Malovich if he needed to hire more workers that was fine. Villarino then returned to the house and told the workers to go back to work. They did so

shortly after noon time that same day. The following day the workers began work at the regular time and continued working until their normal seasonal layoff.

Operation of Ranch

Normally, Malovich tries to thin fall peaches prior to harvesting the spring peaches. In 1982 the thinning was delayed until after the spring peaches were harvested. Malovich testified that the timing of when peaches are thinned is very critical because any delay may impact the size of the fruit when they are harvested. Fall nectarines harvested at the time of the hearing were smaller this year.

Malovich has the responsibility for hiring employees. The number of workers he needs for picking spring nectarines and spring peaches depends on the weather, the size of the fruit and the number of acre to be thinned.

His determination as to the number of workers needed is made on a daily basis because of the variables involved. The number has varied from year to year in the past.

Because the harvest and thinning season is of a short duration Malovich is required to build up his crew quickly from any source available. As he puts it "Well, you get as many as you can get. The job lasts 3, 4, 5 weeks and they come and go because the grape harvest is competition to you . . . . So you take on anybody you can and then you lose them . . ."

Normal hours of work for employees in the spring peach harvest is 8 to 10 hours a day, six days a week, Monday

through Saturday. Malovich testified that he seldom works his employees in the peach harvest over 10 hours a day because their efficiency is less due to the heat in the late afternoon. In addition after 10 hours he is required to pay overtime. Normally only six days a week are worked in picking fruit because his packing shed can only operate for six days and there is no room to store the picked fruit if the workers picked on Sunday. In any given year he may have the pickers work one or two Sundays.

Use Of Contractors In Past

Prior to 1974, Malovich regularly used labor contractors whenever he did not have sufficient employees necessary to complete his work. In 1974 he discontinued the use of labor contractors so he could maintain better control over his payroll. His practice since that time has been to ask his crew bosses to locate workers for him. As an incentive for them doing so, he pays his crew bosses 50 cents for each day that a worker remains on the payroll. He refers to his crew bosses as labor "contactors".

The Hiring of Labor Contractor Richard Molina in June, 1982

Testimony of Malovich

Malovich testified that after the May 25 work stoppage he faced a severe labor shortage. He was unable to build up his crews. He felt that part of the reason that he was unable to do so was because of the work stoppage and that potential employees wanted to avoid "union problems". He

further testified that throughout the week of the 24th of May he tried asking his crew bosses to locate workers for him, however, this proved unsuccessful.

To corroborate his testimony, Respondent introduced into evidence his payroll records for 1980, 1981 and 1982 for the relevant time periods. The records show that for 1980 from May 19 until early June, employee count varied between the high 40's to the low 50's. For 1981 in approximately the same time period the count was from the low 30's to the high 30's. Malovich testified that the 1980 harvest and thinning requirements were more analogous to 1982 situation as they were both heavy years as opposed to 1981 which was a light year.

In 1982, the employee count was as follows:

May 19	14
May 20	24
May 21	31
May 22	32
May 24	37
May 25	28
May 26	28
May 27	28
May 28	27
May 29	27
May 31	26
June 1	25

From June 2 to June 12 the count varied between 22 and 25 employees.

Malovich further testified that after the work stoppage, the production dropped partly because of a work slowdown by the remaining workers. In support of Malovich's

testimony Respondent introduced into evidence Respondent's "packouts" and "shed reports" for the year 1980 through 1982. The packouts, as Malovich calls them, are Inspection Certificates issued by the U.S. Department of Agriculture, Food Safety and Quality Service and the State of California Department of Agriculture, and signed by one of its inspectors. On the packout the inspector enters the number of boxes packed on any given day, the quality of the fruit, whether there is any decay in the fruit and the grade of the fruit. Malovich testified that he is required to pay a tax of 12 to 15 cents a box based on the number of boxes shown on the certificate.

The packouts show the total peaches packed by Respondent, including those he packs for two other growers. On his shed report the total boxes packed are identified separately among the growers so that the proper grower can receive credit for his production.

Malovich testified that normally fruit are packed the same day they are picked. The reason why they do so is that, if the fruit is held overnight, they become bruised from their placement in a four foot deep bin. Their cullage rate, or wastage, then sharply increases. Thus the date shown on the shed report for the most part is the date the fruit are picked.

Referring to the shed report the production figures for 1982 for spring nectarines and spring peaches are as follows:

May 19	749
May 21	2,609
May 22	1,983
May 24	3,501
May 25	1,188
May 26	1,490
May 27	1,090
May 28	1,475
May 29	898
May 31	1,854
June 1	2,959
June 2	3,192
June 3	1,450
June 4	1,436

The shed reports establish that in 1980 there were 16 days of packing, in 1981, 17 days and in 1982 14 days. He explained that in 1982 they had less days of operation because of a heat wave which caused the fruit to mature faster. In 1982, the fruit was already matured when the picking was lightest. In the earlier years, when there were light days of picking they would leave some of the fruit until they were matured and then come back later to pick heavier when the fruit was mature. Thus in the two earlier years there were a few more days of operation. In addition the heat wave also affected the most advantageous time for thinning fall peaches. The hot period causes the fruit to mature faster, at the same time spreading out the growth over more peaches per tree. By delaying the thinning, when it is time to harvest the fruit, the fruit is smaller than

it would otherwise have been had the trees been thinned sooner. In spring 1982, because of the heat wave, the fruit matured sooner. At the same time the fruit was thinned a little late. The result was that at harvest time the fruit was smaller than it had been in previous years.

Respondent also introduced into evidence "tally sheets". Tally sheets are tallies kept by the crew bosses of the number of buckets of fruit picked by each member of a crew on a daily basis. The tally sheets are turned over to Malovich usually at the end of the work day. From the tally sheet Malovich can determine if any individual member of a crew is not performing up to standard.

The tally sheets corroborate the packouts in that the number of buckets picked for a significant number of workers after the work stoppage was less than prior thereto.

Malovich testified that he relied on the tally sheets to determine the average work that a picker was producing.

Respondent also introduced into evidence photographs taken on May 28, 1982 of his peach field showing a number of peaches on the ground. He testified the amount of peaches shown on the photograph was not normal. He testified that normally for spring peaches there are four or five peaches under each tree. The photos show the roadway between the tree and approximately twenty peaches on the road near to each tree. Malovich explained that the reason for the large

number of peaches on the ground was because they fell to the ground from being overripe.

Malovich estimated his monetary loss for his peaches at between $115,000 to $125,000 and his nectarine loss at $15 to $20,000. He based this estimate on his production in 1980 when he packed 40,527 boxes of peaches and nectarines. The conditions in 1980 were similar to 1982 which he characterized as heavy years as opposed to 1981 which he called a light year. In 1982 he packed only 25,874 boxes of peaches and nectarines in the spring harvest.

His estimate was based on $10 a box. He testified that in fact he was receiving on the average $12.50 per box.[4/]

Malovich testified that on May 31, after observing that the rate of progress on picking fruit was not too fast, he decided that he should call in a labor contractor. He wanted to get Alfred Moreno as foreman, a person who had worked for him the previous eight years and had done a good job for him during that time. He called Molina, a labor contractor who was Moreno's employer at the time, to find out whether Moreno was available. Molina indicated he was and that he would have a crew available for him. Molina told Malovich that Moreno would cost sixty dollars a day, and Malovich responded that "that didn't mean anything. I

4/. I note that this amount is without deduction for costs of production. A net loss figure would obviously be lower.

had to have people in a hurry. I had to have them the next day." In addition Molina told Malovich his percentage would be 32 percent instead of 29 percent of the gross wages.

When asked why he didn't notify Caplan immediately of his plans to hire Molina he responded that the 31st was a holiday. On the next day he called Caplan and notified him that he had hired a subcontractor. He testified he did not notify Villarino directly because it was a holiday and it was an emergency. In addition he felt Villarino had sanctioned the hiring of a subcontractor by his statement the previous week when Villarino said he could hire more employees.

At the time he hired Molina he did not think the Union would object, because Molina told him he was working as a subcontractor for another ranch who was under a union contract. After the subcontractors crew was hired, they were paid the same wages and worked the same hours as Malovich's normal crew.

Molina's crew, some 25 workers, was hired initially to harvest spring nectarines. They started doing so on June 1 and completed the harvest on June 4. At that time 10 of the crew were laid off. The remainder of the crew thinned peaches until the 14th of June, when they were laid off. None of Malovich's regular crew was laid off until June 18 when some of the more inexperienced workers were released from work. Malovich testified that none of his regular crew

lost any work or hours as a result of the use of Molina's crew.

Malovich testified that on the 31st when he hired Molina he knew of no other way he could get that amount of labor on such short notice. He described his plight as desperate. He had exhausted his normal supply of labor, by asking his crew bosses to find workers, but such efforts were unavailing. He felt that Molina did him a favor by providing him with a crew, because of his previous employment of Moreno for 8 years.

Testimony of Molina

According to Molina he first contacted Malovich in May asking for work. Malovich responded that he had no work for him. Molina then left his business card with Malovich.

Some one or two weeks later Malovich contacted him and asked for Molina's help because his fruit was spoiling.

He testified that he sent his crew to Malovich two or three days later,"more or less." When he went to check on his crew 2 or 3 days after they started to work at the Malovich ranch he saw that they were throwing a lot of nectarines on the ground because they were very soft and "no longer any good for market."

Testimony of Paul Mendoza

Mendoza worked for Malovich in 1981 and 1982. He participted in the work stoppage of May 25. He testified

that some three days after the work stoppage Tellez told him that "due to the work stoppage that we had done that they were going bring in a contractor."

On cross examination, Mendoza testified that he was working on a row of peaches when Tellez walked up to him made that statement and apparently left. He testified that they did not discuss anything else. He never mentioned this conversation to anyone else until he told Manual Melgoza, one of the attorneys for General Counsel. He doesn't recall when he told Melgoza, only that he did so. On further examination he recalls that he distinctly remembered the 27th or 28th as the date of the conversation with Tellez but could not recall details about his work at the time the conversation took place. I do not credit this testimony because the circumstances surrounding the alleged conversation do not appear plausible. In addition Mendoza demeanor while testifying did not appear truthful. He appeared confused and had a lapse of memory on a number of questions asked by Respondent's counsel.

Testimony of Thomas Garcia

Garcia is a foreman for Respondent and has worked for him thirty years. His crew was picking peaches at the time of the work stoppage. Normally there are three to four crews working for Malovich picking peaches in Spring. A crew is made up of 12 pickers. After the work stoppage

there were two crews. He testified that after the strike he had problems with the workers putting too many soft peaches into the boxes, requiring someone else to go by and throw them out. In addition he stated that he would ask workers to work an extra hour, but they would refuse. After the strike Malovich would always tell him to find more workers, but he was unsuccessful in doing so. He testified that there were more peaches on the ground in May of 1982 was more than in previous years. The reason peaches were on the ground was because they were overripe and would fall due to the lack of workers to pick them. He felt that after the strike the workers worked slower. Where before it would take half an hour to fill a bin, afterwards it would take "one hour almost, 45 minutes". He did not find out that Malovich hired a subcontractor until the crew was working. Malovich did not give him prior notice.

Testimony of Henry Ledesman

Ledesman has worked as a crew boss for Respondent for approximately 15 years. He essentially corroborated the testimony of Garcia that they were short of workers after the work stoppage, that fruit was being lost due to the lack of workers, that he along with other crew bosses tried to hire more workers, and that the workers worked slower after the work stoppage. He also testified that he did not find out that Malovich hired a labor contractor until two days

after they started working.

Malovich's Testimony - Credibility

General Counsel disputes Respondent's theory that he faced any emergency prior to hiring Molina. In support of his position, General Counsel points to "inconsistencies" in Malovich's testimony, arguing that Malovich's testimony should not be credited. As the testimony of Malovich is critical in determining the outcome of this case, I will discuss some of the more important points raised by General Counsel on Malovich's credibility.

General Counsel initially argues that Malovich's testimony regarding the heat wave should not be believed because it was not corroborated by his two supervisors' that testified. Both Garcia and Ledesman testified that it was no hotter in the week after the work stoppage than other days. However, Malovich was more precise and knowledgable in his testimony regarding the weather and its effect on the fruit, and I credit this testimony over that of Garcia and Ledesman.

General Counsel challenges Malovich's testimony that a large number of spring peaches had fallen or were thrown to the ground due to their being overripe. Malovich had taken pictures of the peach orchards showing a large number of peaches on the ground. General Counsel showed these pictures to two employee witnesses and they both testified

that the amount of peaches depicted in the pictures was the same as always and further testified that the amount of peaches on the ground was the same during the spring and fall harvests. Neither of these two witnesses elaborated on the differences between the spring and fall harvest. In contrast, Malovich explained in some detail why more fruit would fall to the ground in the fall than in the spring. First, the fall peaches produce more peaches per acre than spring peaches, some 2,000 boxes as opposed to 500 boxes per acre. As a consequence, more peaches would fall to the ground. In addition, fall peach trees need to be propped up by 2 x 4's as they are more heavily ladden with fruit as opposed to spring peaches which require no propping. And finally the weather conditions are different, with more rain and windstorms in the fall, which cause peaches to fall to the ground.

General Counsel also points to a contradiction in Malovich's testimony when, in response to a question asked on the sixth day of the hearing in reference to whether Malovich had taken any pictures of the fall peaches, Malovich stated that it wasn't necessary, that they hadn't had a windstorm yet. Yet on the seventh day of the hearing, after being shown pictures of the fall peaches, Malovich testified that there had been a windstorm a week or so ago, and later on, in reference to the same question, he said a windstorm had taken place Friday or Saturday the week before. With respect to his initial response, it is clear

that Malovich's answer was made in the context of a line of questions about whether there was a severe enough windstorm to require a taking of pictures. He earlier testified that he only took pictures of unusual situations, including major storms. It appears that his testimony was that there was not a serious enough storm to warrant the taking of pictures and not necessarily that there had been no storm at all. In addition, I note that from the sixth day of the hearing to the time the pictures of fall peaches were taken, four days had passed including a weekend. I thus credit Malovich's testimony that at the time he hired a labor contractor, he was losing a large number of fruit due to their being overripe.

General Counsel argues that Malovich contradicted himself when he initially testified that he relied on packouts to determine that his production was lower and later "changed" his testimony to say he also relied on the tally sheets. However, a careful reading of the testimony shows that Malovich relied on the packouts to determine his production on any given day and the tally sheets to see if any individual worker was working slower than normal.

General Counsel argues that it was unreasonable for Malovich to rely on the packouts to determine that there was a slowdown as there are a number of variables that would make that number different from the amount the workers actually picked including the possibility of conveyor belt breakdown and the fact that packers are selecting out unmarketable peaches prior to packing and thus the amount of

peaches would be different than that picked. Respondent does not claim, however, that the packouts show precisely the amount of fruit being picked in the fields. In any event, I find that the packouts are a reasonably accurate reflection of the amount of fruit being picked, and they are certainly accurate enough to show that the amount of fruit being picked is greater or less than in previous time periods.

Several other such "inconsistencies" are referred to by General Counsel which upon a careful reading of the transcript proved themselves not to be contradictious at all. Accordingly, I credit Malovich's testimony. In those few instances where there is a conflict between Malovich's testimony and that of other witnesses, as for example, where other witnesses denied they engaged in a slowdown, I credit Malovich's version of the facts. I base my credibility finding on the fact that Malovich's testimony was consistant and informed. Throughout his testimony, he proved to be knowledgeable and throughly familiar with all phases of the operation of his farm. I also base my credibility finding on Malovich's demeanor while testifying. He answered questions in a straightforward and sincere manner throughout his three and a half days of testimony. In addition, his testimony was corroborated by the packouts, tally sheets, payroll records and time records introduced into evidence. These records indicate that in June 1982, he was unable to hire as many workers as he needed and that production was lower than expected in comparison to the

previous two years.

I find that at the beginning of his spring peach harvest season Malovich was progressing towards a "heavy" season of production when the work stoppage took place. After the work stoppage, some of his crew engaged in a slowdown, causing a drop in production. In addition, a heat wave caused the fruit to mature rapidly during that period. I further find that he made reasonable effort to recruit workers after the work stoppage but was unsuccessful. I find that he decided to hire Molina on May 31 to harvest the spring nectarines and that the harvest was completed in four days. The Molina crew then continued on to thinning work in the peaches for an additional 7 work days.

Analysis and Conclusion

The Board, in a recent case involving subcontracting, held that agricultural employees provided to an employer by a labor contractor are members of the bargaining unit and employees of the employer for all purposes under the Act. Tex-Cal Land Management, Inc. 8 ALRB No. 85. Thus, subcontracting, does not result in the loss of bargaining unit work.

In Tex-Cal Land Management, Inc. the Board went on to hold that the unilateral change in the employer's hiring practices, by the use of a subcontractor, affected the terms and conditions of employment, and therefore an employer's failure to notify and bargain with the union prior to such a change would be unlawful under the Act. As subcontracting

and hiring are mandatory subject of bargaining, any unilateral changes in these areas would establish a prima facie violation of Section 1153(e) and (a) of the Act.

Thus, unless there is some lawful excuse or justification for Respondent's use of a subcontractor, a violation of Section 1153(e) and (a) has been shown.

Respondent argues that due to an emergency Respondent's conduct in employinga subcontractor was excused.

In Joe Maggio, Inc., Vessey & Company, Inc., and Colace Brothers, Inc. 8 ALRB No. 72, the Board recognized that under certain circumstances, a unilateral change in terms or conditions of employment could be excused because of business necessity or exigent circumstances. Bargaining to impasse would not necessarily be required under this defense. However, bargaining would be required to the extent the situation permits. In addition, economic considerations alone would not justify a unilaterial change without prior notice and bargaining with the Union. Noting that the National Labor Relations Board has not set forth any general or specific rules for determining when a business necessity or exigent circumstances would justify a unilateral change in wages or working conditions, the Board decided to examine the exigent circumstance or business necessity defense on case-by-case basis.

In the instant case, the chain of events which

constitute the exigent circumstances began on May 24, 1982 when the workers engaged in a spontaneous work stoppage. This work stoppage was a surprise both to the Respondent and to Villarino, the negotiator for the Union. While the workers returned to work the next day, throughout the one week period following the work stoppage, Malovich found that he was unable to attract new workers from his usual sources. At the same time, he noted that the production of his existing workers decreased from what he would have normally expected from them. As he monitored this situation through the course of the week of May 24th, he began to realize that due to the above related circumstances he would be unable to harvest his spring nectarines or thin his fall peaches in a timely manner. On May 31st, after seeing that his situation would not improve, he called in Molina to harvest his spring nectarines. Molina began work on June 1. On that same date Malovich notified Caplan his labor negotiator, who in turn notified Villarino on June 2, at a regularly scheduled bargaining session. Other than to object generally, Villarino did not request bargaining over this issue, nor did he specify what the Union's position was on the issue. I find that notice to Villarino 2 days after Malovich's decision to hire the subcontractor, along with the opportunity to bargain at that time met the requirement that bargaining was engaged in to the extent circumstances permitted.

Molina's crew harvested the spring nectarines in four days. This harvest period was shorter than those in previous years because the fruit was more mature at the time of harvesting. A quantity of overripe fruit had already fallen to the ground or was too ripe for packing.

Molina's crew then continued on to thinning peaches. This operation was performed later than normal, and resulted in smaller fruit being harvested in the fall.

The evidence establishes that Malovich hired Molina on a temporary basis only for the time period set forth.

While Malovich was motivated in part by economic considerations, he was also motivated by his inability to hire new workers, the lower production of the existing workers, the potential loss of his spring nectarines and the possible effect of late thinning on his fall peaches.

Under the above conditions, I find that exigent circumstances excused Respondent's hiring of a subcontractor without notice or bargaining with the Union. Accordingly, I will recommend dismissal of this part of the complaint.

Section 1153(c) and (a) Violation

General Counsel also alleged that Respondent employed a subcontractor because of his employees' support for the Union and because of their concerted union activities to obtain higher wages. This conduct, General Counsel alleges, violates Section 1153(c) and (a) of the Act.

In order to establish a prima facie case of unlawful conduct under 1153(c) and (a), General Counsel must prove that the employee was engaged in union activity, that the employer had knowledge of the employee's union activity and that there was some connection or causal relationship between the activity and the complained of conduct. Jackson & Perkins Rose Co. 5 ALRB No. 20 (1979).

Assuming, arguendo, that the unauthorized work stoppage was protected activity, I find that no causal connection was shown between the alleged protected activity and Malovich's decision to hire a subcontractor. The evidence shows that after being contacted by Villarino after the work stoppage, Malovich immediately rehired all the workers who had engaged in the work stoppage. It appears quite clear that Malovich hired a subcontractor not with any illegal purpose in mind, but for a business purpose as set forth in the section above.

For all the above reasons, I recommend that the complaint be dismissed in its entirety.

Dated: January 31, 1983

BRIAN TOM,
Administrative Law Officer