

STATE OF CALIFORNIA  
AGRICULTURAL LABOR RELATIONS BOARD

VESSEY & COMPANY, INC.,	)	Case No. 79-CE-190-EC
	)	
Respondent,	)	
	)	
and	)	11 ALRB No. 3
	)	(7 ALRB No. 44)
UNITED FARM WORKERS OF	)	
AMERICA, AFL-CIO,	)	
	)	
Charging Party.	)	
	)	

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SUPPLEMENTAL DECISION AND ORDER

On July 28, 1980, Administrative Law Judge (ALJ)<sup>1/</sup> William A. Resneck issued a Decision and Proposed Order in this proceeding. Thereafter, Respondent Vessey & Company, Inc. (Vessey), and the Charging Party, the United Farm Workers of America, (UFW) each timely filed exceptions and a supporting brief. Respondent, the UFW, and the General Counsel all timely filed reply briefs as well. On December 15, 1981, the Agricultural Labor Relations Board (ALRB or Board) issued a Decision and Order herein, affirming the ALJ's rulings, findings, and conclusions with modifications, and adopting his recommended order, with modifications. (Vessey & Company, Inc. (1981) 7 ALRB No. 44 (Vessey I)). In that Decision, the Board determined that Vessey's striking employees tendered a sincere, unconditional offer to return to work on December 4, 1979. The Board found

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<sup>1/</sup> At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, Tit. 8, § 20125, amended eff. Jan. 30, 1983.)

it unnecessary, contrary to the ALJ, to determine whether those employees had, previous to December 4th, been permanently replaced by Vessey. The Board noted that in its Decision issued the previous day, the strikers had been determined to have been involved in an unfair labor practice strike and were therefore entitled to immediate reinstatement to their jobs following an unconditional offer to return, notwithstanding the previous hiring of any permanent replacement workers. (Admiral Packing Company, et al. (1981) 7 ALRB No. 43.) The sole question determined by the Board in Vessey I, therefore, was whether Vessey's striking employees made a sincere, unconditional offer to return to work. (Vessey I, supra, 7 ALRB No. 44 at p. 2.)

On April 2, 1984, Division One of the Fourth Appellate District of the California Court of Appeal denied enforcement of the Board's Decision and Order in Admiral Packing, et al., supra, 7 ALRB No. 43. (Carl Joseph Maggio, Inc., et al. v. ALRB (1984) 154 Cal.App.3d 40 [201 Cal.Rptr. 30].) That Court remanded Vessey I to the Board for an analysis of the reinstatement rights of Vessey's striking employees in light of the Court's finding that the strike was not an unfair labor practice strike, but rather an economic strike. The Court stated:

The consolidated case, Vessey & Company, Inc. v. ALRB, is remanded to the Board for consideration of the striking employees' reinstatement rights as economic strikers. (Id., 154 Cal.App.3d at p. 72.)

Anticipating the Board's reconsideration of this matter on remand, Vessey filed a motion with the Board to dismiss the case on April 20, 1984. Vessey renewed its motion on June 26, 1984.

The UFW filed opposition to that motion on July 10, 1984, and the Employer replied to the UFW on July 16, 1984. The UFW filed a supplemental brief on July 20, 1984.

On September 20, 1984, the Board<sup>2/</sup> issued to the parties an Order to Show Cause why it should not adopt the remainder of the ALJ's Decision in this proceeding and find that the striking employees had not been replaced, permanently or temporarily, prior to their offer ,to return. On October 26, 1984, Respondent, the UFW and the General Counsel filed briefs in reply to the Board's Order to Show Cause.

Pursuant to the provisions of Labor Code section 1146,<sup>3/</sup> the Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs, the decision of the Court of Appeal on remand, the Motion to Dismiss and opposition thereto, and the briefs in response to the Order to Show Cause and has decided to affirm the rulings, findings, and conclusions of the ALJ and to re-issue our previous Order, as amended.<sup>4/</sup>

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<sup>2/</sup> Member Carrillo did not participate in this proceeding, nor in the reconsideration of this matter on remand from the Court of Appeal.

<sup>3/</sup> All Labor Code section references are to the California Labor Code unless otherwise specified.

<sup>4/</sup> The courts annulment of our prior Order and remand of this matter permits us to exercise our discretion to amend the interest rate awarded on the backpay reimbursements to conform with Lu-Ette

(Fn. 4 cont. on p. 4.)

The sole question presented by the Court's remand to the Board is whether Vessey established on this record a legitimate and substantial business justification for depriving its striking employees of their reinstatement rights. (NLRB v. Fleetwood Trailers (1967) 389 U.S. 375, 378 [88 S.Ct. 543]; Harrison Ready Mix Concrete, Inc. (1984) 272 NLRB No. 47.)

We hereby deny Respondent's Motion to Dismiss and General Counsel's request for remand. Contrary to the arguments advanced in support of those motions, we find nothing in the Court of Appeal's decision in this matter which undermines, rejects, or questions our previous decision finding that the employees tendered a sincere, unconditional request for reinstatement. Respondent's attempt to hinge the rights of reinstatement retained by economic (or unfair labor practice) strikers upon the technicalities relating to the application for reinstatement is contrary to established precedent (see Laidlaw Corp. v. NLRB (7th Cir. 1969) 414 F. 2d 99, 106; American Cyanamide v. NLRB (7th Cir. 1979) 592 F.2d 356 [100 LRRM 2640, 2644]; NLRB v. Fleetwood Trailer Co., supra, 389 U.S. at 381), and has been previously rejected by this Board (see Vessey I, supra, 7 ALRB No. 44 at pp. 2-5 and Order denying Respondent's Motion for Reconsideration). Nothing in the later filed pleadings in this matter convinces us of the necessity to reconsider our

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(Fn. 4 cont.)

Farms, Inc. (1982) 8 ALRB No. 55, in order to effectively remedy the violations found herein. (McAnally Enterprises, Inc. (1985) 11 ALRB No. 2.) We have also limited the scope of the mailing remedy and changed the wording of the notice to reflect the nature of the strike conducted.

previous rejection of Vessey's arguments.

Vessey here denied employment to some employees<sup>5/</sup> solely because of the nature of their concerted activities in support of the UFW, while hiring other employees who had not engaged in those activities. As such, Vessey clearly discriminated between classes of employees based upon their participation in protected concerted activities. (NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 32 [87 S.Ct. 1792].) Since the right to strike is an important employee right protected by the Agricultural Labor Relations Act (ALRA or Act) and Vessey's conduct here is "inherently destructive" of that right, Vessey must establish legitimate and substantial business justifications for its discrimination. (NLRB v. Fleetwood Trailer Co., supra, 389 U.S. at 380; Harrison Ready Mix Concrete, Inc., supra, 272 NLRB No. 47.)

We find, in agreement with the ALJ, that prior to December 4, 1979, Vessey had engaged no permanent replacements for its striking workforce. Indeed, Vessey's contract with labor contractor Robert Ignacio took effect on the first day of the 1979 winter harvest which began sometime after December 4th when the strikers made their offer. Even if Vessey decided to subcontract the harvest to Ignacio on a permanent basis some time in November, it is the fact that striking employees had not been permanently replaced as of the date of their offer to

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<sup>5/</sup> Employees who engage in protected strike activities retain their status as employees of the employer. (Bio-Science Laboratories v. NLRB (9th Cir. 1976) 542 F.2d 505 [93 LRRM 2154].)

return to work that is critical, not Vessey's inchoate plans to replace them. (NLRB v. American Cyanamide v. NLRB (7th Cir. 1979) 592 F.2d 356 [100 LRRM 26-40, 2644]; H & F Binch Co. v. NLRB (2nd Cir. 1972) 456 F.2d 357 [79 LRRM 2693] enfing 188 NLRB 72 [76 LRRM 1735].) Similarly, Vessey's recruitment efforts undertaken in Arizona and Mexico were ongoing and incomplete since, as of December 4th, no specific individual had formally accepted an offer from Vessey in the upcoming lettuce harvest. (See, e.g., Murray Products, Inc. (1977) 228 NLRB 268; Anderson & Clayton Co. (1958) 120 NLRB 1208; Superior National Bank (1979) 246 NLRB 721 [102 LRRM 1085].) To obtain sufficient harvest employees<sup>6/</sup> for the 1979 winter lettuce harvest, after receipt of the unconditional offer Respondent could have treated its striking employees in a nondiscriminatory fashion and immediately obtained a substantial complement of employees. Instead, Respondent chose to ignore the offer to return<sup>7/</sup> and to pursue other avenues for obtaining employees, thereby violating

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<sup>6/</sup> Respondent put on no evidence regarding the replacement employees for its striking weed and thin employees. As it thereby failed to meet its burden to demonstrate legitimate and substantial reasons to deny reinstatement to them, these employees will be entitled to reinstatement and backpay after December 4, 1979, when they would normally have been recalled. (NLRB v. Fleetwood Trailers, Co., supra, 389 U.S. 375; Harrison Ready Mix Concrete, Inc., supra, 272 NLRB NO. 47.)

<sup>7/</sup> Respondent's arguments regarding the insincerity or conditionality of the offer have been previously addressed. However, to the extent Vessey now argues it harbored an "honest belief" that had it reinstated the striking employees, they would have engaged in agricultural sabotage, we reject the argument. Respondent's offer of proof was not only speculative but was belied by the actual evidence. Several striking employees were

(Fn. 7 cont. on p. 7.)

section 1153(c) and (a) of the Act. (Mastro Plastics Corp. v. NLRB  
(1956) 350 U.S. 270 [76 S.Ct. 349].)

ORDER

By authority of Labor Code section 1160.3, the  
Agricultural Labor Relations Board (Board) hereby orders that Respondent  
Vessey & Company, Inc., its officers, agents, successors, and assigns  
shall:

1. Cease and desist from:

(a) Failing or refusing to rehire or reinstate, or  
otherwise discriminating against, any agricultural employee because of his  
or her union activities or sympathies.

(b) In any like or related manner interfering with,  
restraining, or coercing any agricultural employees in the exercise of  
their rights guaranteed by Labor Code section 1153.

2. Take the following affirmative actions which are deemed  
necessary to effectuate the purposes of the Act:

(a) Offer to the following strikers who offered to return  
to work on December 4, 1979, full and immediate reinstatement to their  
former or substantially equivalent jobs without prejudice to their  
seniority rights or other employment rights and privileges and reimburse  
them for any loss of pay

(Fn. 7 cont.)

reinstated by Vessey and no evidence of sabotage or violence attributable to  
these employees was adduced at the hearing. Speculative testimony regarding  
employee motivation, even if not properly rejected by the ALJ at the hearing,  
would not provide a substantial and legitimate business justification for  
depriving striking employees of their jobs after their request for  
reinstatement.

7.

and other economic losses they have suffered as a result of Respondent's failure or refusal to rehire or reinstate them on and after December 4, 1979, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (1980) 6 ALRB No. 43, plus interest at a rate of seven percent per annum until August 18, 1982, and thereafter in accordance with Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55:

Maria Ahumado

Maria Elena Beltran

Antonio Caudillo

Enrique Dominguez

Ma. Jesus Espinoza

Pedro Espinoza

Isabel Estrada

Porfirio Aguilar

Jose M. Araujo

Librado Barajas

Isidro Bojorquez

Jesus J. Carrajal

Lazarro Castillo

Fidel Coronado

Rafael Escovar

Ramiro Garcia

Carlos Gil

Elio Gonzales

Armando Guerrero

Jose Luis Guerrero

Ramon Hueso

Rodrigo Hueso

Silviano Mariscal

Andrea Martinez

Celia Palacios

Maria de Partida

Segundo Partida

Vincente Martinez

Simon Pineda

Efrain Reyes

Jorge Reynosa

Fidelis Romero

Ramon L. Santos

Jesus Servin

Francisco Sepulveda, Sr.

Francisco Sepulveda, Jr.

Pablo Testa

Juan Tirado

Jose C. Tirado

Ruben Vallejo



Arturo Guerra M.	Jesus Vega
Armando Hernandez	David Velasquez
Jose Hernandez	Juan Velasquez
Acencion Leon	Martin Velasques
Jesus J. Leon	Tranquilino Verdusco
Alejandro Lopez	Guadalupe Zavala
Fidencio M. Lopez	

(b) Preserve and, upon request, make available to the Board and its agents, for examination and photocopying and other copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amount of backpay due under the terms of this Order.

(c) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time from December 4, 1979, to December 4, 1980.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period and places of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered,

or removed.

(f) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: February 28, 1985

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the El Centro Regional Office, the General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a complaint which alleged that we, Vessey & Company, Inc., had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we did violate the law by refusing to reinstate economic strikers who offered to return to work on December 4, 1979.

The Board has told us to send out and post this Notice. We will do what the Board has ordered us to do. We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT fail or refuse to rehire or reinstate, or otherwise discriminate against any employee in regard to his or her employment because he or she has engaged in a lawful strike or otherwise supported the UFW or any other labor organization.

WE WILL OFFER to reinstate all employees, then on strike, who offered to return to work on December 4, 1979, to their previous jobs, or to substantially equivalent jobs, without loss of seniority or other rights or privileges, and we will reimburse them for any loss of pay and other economic losses they incurred because we failed to rehire them, plus interest.

Dated:

VESSEY & COMPANY, INC.

By: \_\_\_\_\_

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 319 Waterman Avenue, El Centro, California. The telephone number is (714) 353-2130.

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

VESSEY & COMPANY, INC.  
UFW

11 ALRB No. 3  
(7 ALRB No. 44)  
Case No. 79-CE-190-EC

PREVIOUS BOARD DECISION

In Vessey (1981) 7 ALRB No. 44, the Board adopted the findings of the ALJ and concluded that Vessey's striking employees tendered a sincere, unconditional offer to return to work. Since the Board had, in Admiral Packing, et al. (1981) 7 ALRB No. 43, determined that Vessey's striking employees were engaged in an unfair labor practice strike, the Board ruled that Vessey had an obligation to immediately reinstate the returning strikers. The Board accordingly found it unnecessary to consider the ALJ's alternative findings regarding the reinstatement rights of the strikers as economic strikers.

In Carl Joseph Maggio, Inc., et al. v. ALRB (1984) 154 Ca.3d 40, 72 [201 Cal. Rptr. 30], the Court remanded the matter to the Board for a consideration of the striking employees' reinstatement rights as economic strikers. The Court concluded that Vessey's employees were not engaged in an unfair labor practice strike at the time of the offer to return to work.

BOARD DECISION ON REMAND

On remand, the Board adopted the remaining findings of the ALJ. The Board noted that Vessey had the obligation to present evidence of a substantial and legitimate business justification for its refusal to accept the unconditional offer to return to work from the striking employees. The Board ruled that Vessey had failed to present such a justification. Any arrangements made by Vessey to obtain replacement workers begun prior to receipt of the offer to return to work had not resulted in any person accepting employment for the upcoming lettuce harvest. Accordingly, Vessey had no rationale for refusing to accept the unconditional offers to return to work and therefore violated the Act.

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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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