Hanford, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TAYLOR FARMS, a General Partnership; ERNEST A. TAYLOR and ETHEL I. TAYLOR, individually, and as partners of TAYLOR FARMS, Respondents , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, and JOSE LOMELI, an Individual, Charging Parties.	Case Nos. 93-CE-29-VI 93-CE-30-VI 20 ALRB No. 8 (June 21, 1994)

DECISION AND ORDER

On December 7, 1993, Administrative Law Judge (ALJ) Arie Schoorl issued the attached Decision in which he found that Taylor Farms, a General Partnership, Ernest A. Taylor and Ethel I. Taylor, individually, and as partners of Taylor Farms (Taylor Farms or Employer) did not commit any of the unfair labor practices alleged in the complaint in the above-captioned case. The alleged violations of the Agricultural Labor Relations Act consisted of claims that Taylor Farms unlawfully refused to offer reinstatement to striking employees who had made an unconditional offer to return to work, discharged Antonio Rangel because of his support of the strike, and filed and served unlawful detainer actions against striking employees living in company housing in order to discourage them from engaging in union and other concerted activities.

The ALJ found that Taylor Farms had permanently replaced the striking employees and that, subsequent to the unconditional offers to return to work, openings have been filled by the former strikers. The ALJ also concluded that the evidence showed that Rangel quit his job voluntarily and therefore was not unlawfully discharged. Lastly, the ALJ found that the company housing was a condition of employment, the right to which ceased upon going on strike, and that the unlawful detainer actions were filed for that reason.

The General Counsel filed timely exceptions to the ALJ's decision and Taylor Farms filed a response. The General Counsel then filed a motion to strike portions of Taylor Farms' response brief on the grounds that it relied on matters outside the record. Taylor Farms filed a response to the motion to strike. In Administrative Order 94-9, dated June 3, 1994, the Board requested further briefing on the import of evidence that employees not working due to layoffs, vacations, or other absences were allowed to remain in company housing. Taylor Farms and the General Counsel submitted briefs in response to the request.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm

the ALJ's rulings,[1] findings,[2] and conclusions.[3] Accordingly, the Board will dismiss the complaint herein.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby

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[1]We note that, contrary to the implication in the ALJ's decision, the Board has not overruled Seabreeze Berry Farms (1981) 7 ALRB No. 40. However, since the evidence in the record indicates that the employees in question were primarily year-round rather than seasonal, Seabreeze Berrv Farms is, in any event, inapplicable.

[2]Several of the General Counsel's exceptions, such as those dealing with the dates of various filings in this case or with the number of employees at the Employer's Hanford location, are well taken. However, such exceptions deal with peripheral matters which in no way undermine the critical findings and conclusions which led the ALJ to recommend dismissal of the complaint.

In its motion to strike, the General Counsel asserts that the Employer has improperly included in its opposition brief matters outside the record. In particular, the Employer appended documents from Unemployment Insurance Appeals Board (UIAB) proceedings of which the Employer unsuccessfully moved to have the ALJ to take administrative notice. Since there was no appeal of the ALJ's denial of the motion, these materials are outside the record and not properly before the Board. Accordingly, those documents, as well as factual assertions made by both parties for which there are no supporting record citations, have not been considered or relied upon by the Board.

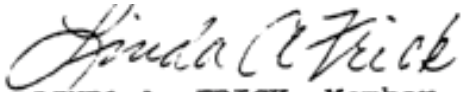
[3]With regard to the issue on which we requested further briefing, we conclude that the evidence of Taylor Farms' past practice of allowing employees in a nonworking status to remain in company housing is insufficient to determine if the strikers were subjected to disparate treatment. In light of this conclusion, coupled with the reasons set forth by the ALJ, we find that the threat of eviction was not proven to have been in retaliation for the strike activity or to have otherwise unlawfully interfered with the right to strike.

dismisses the complaint in Case Nos. 93-CE-29-VI and 93-CE-30-VT.

DATED: June 21, 1994

BRUCE J. JANIGIAN, Chairman

IVONNE RAMOS RICHARDSON, Member



LINDA A. FRICK, Member.

CASE SUMMARY

TAYLOR FARMS
(UFW, Jose Lomeli)

20 ALRB No. 8
Case Mos. 93-CE-29-VI
93-CE-30-VI

ALJ Decision

On December 7, 1993, Administrative Law Judge (ALJ) Arie Schoorl issued a decision in which he found that Taylor Farms did not commit any of the unfair labor practices alleged in the complaint. The alleged violations consisted of the claims that Taylor Farms unlawfully refused to offer reinstatement to striking employees who had made an unconditional offer to return to work, discharged Antonio Rangel because of his support of the strike, and retaliated against striking employees by seeking to evict them from company housing.

The ALJ found that Taylor Farms permanently replaced the striking employees and that subsequent openings have been filled by the former strikers. The ALJ also found that Rangel quit his job voluntarily and therefore was not unlawfully discharged. Lastly, the ALJ found that the attempted evictions were not retaliatory but instead motivated by the fact that company housing was a condition of employment, the right to which ceased upon going on strike. The General Counsel filed timely exceptions to the ALJ's decision and Taylor Farms filed a response. The General Counsel filed a motion to strike portions of Taylor Farms' response brief on the grounds that it relied on matters outside the record. Taylor Farms filed a response to the motion to strike. The parties also submitted briefs in response to Administrative Order No. 94-9, dated June 3, 1994, in which the Board requested further briefing on the import of evidence that employees not working due to layoffs, vacations, or other absences were allowed to remain in company housing.

The Board Decision

The Board affirmed the ALJ's decision and dismissed the complaint. The Board noted that several of the General Counsel's exceptions were well taken, but observed that those exceptions dealt with peripheral matters which in no way undermined the ALJ's recommendation to dismiss the complaint. The Board also noted that while, contrary to the implication in the ALJ's decision, it has not overruled Seabreeze Berry Farms (1981) 7 ALRB No. 40, that case is not applicable here because the evidence showed that the employees at issue were primarily year-round rather than seasonal. In addition, the Board concluded that Taylor Farms improperly submitted various documents with its brief because it had failed to appeal the ALJ's earlier refusal to take administrative notice of the documents. Accordingly, those documents, as well as factual assertions made by both parties which were unsupported by the record were not considered or relied upon by the Board. Lastly, the Board found that the

evidence of Taylor Farms' past practice of allowing employees in nonworking status to remain in company housing was insufficient to determine if the strikers were subjected to disparate treatment and, therefore, affirmed the ALJ's conclusion that it was not proven that the threaten evictions were in retaliation for the strike activity or otherwise unlawfully interfered with the right to strike.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of :	
TAYLOR FARMS, a General Partnership; ERNEST A. TAYLOR and ETHEL I. TAYLOR, individually, and as partners of TAYLOR FARMS,	Case Nos . 93-CE-29-VI 93-CE-30-VI
Respondents,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO, and JOSE LOMELI, an Individual,	
Charging Parties .	

Appearances :

Spencer Hipp
Littler, Mendelson, Fastiff,
Tichy & Mathiason
Fresno, California
for the Respondent

Stephanie Bullock Visalia
Regional Office Visalia,
California for the General
Counsel

Dated: December 7, 1993

DECISION OF ADMINISTRATIVE LAW JUDGE

This case was heard by me on July 27, 28, 29 and 30 and August 5 and *6,* 1999, [1] in Visalia, California. On May 10, 1993, the United Farm Workers of America (hereafter referred to as the Union or the UFW), filed charge number 93-CE-29-VI alleging that Taylor Farms, a general partnership, had committed violations of the Agricultural Labor Relations Act (herein referred to as the Act.) The charge was served on Respondent Taylor Farms on May 12, 1993. Subsequently another charge, 93-CE-30-VI was served and filed by the Union against Respondent Taylor Farms alleging an additional violation of the Act.

On May 18, 1993, the General Counsel cause to be issued the complaint in this case incorporating matters alleged in the aforementioned charges. Respondent Taylor Farms filed an answer on May 25, 1993. On June 11, 1993, General Counsel caused to be issued a consolidated second amended complaint, joining additional Respondents, namely Ernest A. Taylor and Ethel I. Taylor, individually, and as partners of Taylor Farms and as proprietors of Ernest A. Taylor Farming and Ethel I. Taylor Farming, respectively; Triple T. Farms, a general partnership, Triple T. Farms II, a general partnership; Brian K. Taylor Childs Trust, Monica L. Taylor Childs Trust and Cheryl L. Taylor Childs Trust, partners of Triple T. Farms and Triple T. Farms II; Jonathan A. Taylor, individually, and as a partner of Triple T. Farms; Jonathon A. Taylor Childs Trust, a partner of Triple T. Farms II; Ernest A. Taylor Farming, Larry Bettencourt Farming;

[1]All dates will refer to 1993 unless otherwise specified.

Larry Bettencourt; Myra Crookshanks Farming; and Myra Crookshanks (herein referred to as Respondents) and alleging additional violations of the Act by Respondents. Respondents filed an answer to the consolidated second amended complaint on June 11, 1993 .

General Counsel alleged that Respondents constituted a single integrated business enterprise and a single employer or joint employers within the meaning of the Act. However at the hearing, Respondents Taylor Farms, a general partnership, Ernest A, Taylor and Ethel I. Taylor, individually, and as partners of Taylor Farms, respectively moved to dismiss the other Respondents. General Counsel agreed and I granted the motion and the single integrated enterprise/joint employer issue was dropped from the proceedings.[2]

General Counsel further alleges that Respondent by refusing to reinstate or offer to reinstate striking employees[3] who had made an unconditional offer to return to their former positions of employment thereby violated Section 1153(a) of the Act. Respondent denies such violations and alleges that it had replaced the striking workers with permanent replacements and therefore had no duty under the Act to dismiss replacement

[2]Taylor Farms, a general partnership, Ernest A. Taylor and Ethel I. Taylor, individually, and as partners of Taylor Farms will be referred to herein as Respondent.

[3] At the hearing, Paragraphs 23, 27, 30 and 32 of the consolidated second amended complaint were amended to delete therefrom the name Cesar Cabrera and to add that the worker listed as Cesar B. Martinez was also know as Cesar Cabrera.

workers and moreover, since the striking employees served their unconditional offer, has filled all employment openings with striking employees who have signed such offer to return to work.

General Counsel further alleges that Respondent discharged Antonio Rangel because of his support of the strike and thereby violated Section 1153(c) of the Act. Respondent denies such allegation and alleges that Rangel quit of his own accord and further that Rangel is a supervsor and is not entitled to the protection of the Act.

General Counsel further alleges that Respondent served upon various striking employees notice to vacate company-provided housing, filed and served an unlawful detainer against them in order to discourage them from engaging in union and concerted activities and thereby violated Section 1153(c) of the Act. Respondent admits that it served and filed such documents but denies it did so to discourage union and concerted activities.

The General Counsel and the Respondent were represented at the hearing. General Counsel and Respondent filed timely briefs after the close of hearing.[4]

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[4]On November 11 and also on November 24, Respondent submitted, by letter, copies of two decisions by an Administrative Law Judge of the Unemployment Insurance Appeals Board in connection with Jose Lomeli's and Antonio Rangel's unemployment insurance claims. In the first letter Respondent requested that I take administrative notice of these two decisions and the underlying records. In its second letter it repeated its first request and further requested that I admit into evidence the decisions and underlying records.

General Counsel, by letters, submitted objections to Respondents requests contending that I should not consider in any manner the decisions and records so submitted.

Respondent's requests are actually motions to reopen the

The Charging Parties did not intervene. Upon the entire record including my observations of the witnesses, and after considering the post-hearimg briefs submitted by General Counsel and Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted in its answer and I find that it is an agricultural employer within the meaning of section 1140(c) of the Act. Respondent admitted in its answer that the United Farm Workers of America is a labor organization within the meaning of section 1140.4(f) of the Act. In its answer, Respondent denied that Antonio Rangel was, at all times material herein, an agricultural employee within the meaning of section 1140.4(b) of the Act but admitted that all the individuals listed in paragraph 23 of the Consolidated Second Amended Complaint are agricultural employees with the exceptions of Mario Alonso, Jesus Ruiz and Jose Berber.

II. SUBSTANTIVE FINDINGS

A. Background

In 1993, Taylor Farms carried on agricultural operations at three locations: the Hanford Ranch, Five Points and the Naval

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hearing for the introduction of additional evidence. However, Respondent has failed to state sufficient grounds to reopen the record since the only reason it gives for such reopening is that such decisions and records would be enlightening with regard to the proceedings. Accordingly, I deny Respondent's request and motion to reopen the record for the submission of the aforementioned documents.

Air Base in Lemoore. Approximately 20 to 25 permanent employees worked at Five Points, 7 at Hanford and 12 to 13 at the Base. Taylor Farms was engaged in growing cotton (850 acres), corn (80 acres) and kiwis (15 acres) at Hanford. Respondent raised cotton, wheat and safflower at Five Points and the Base.

Taylor Farms and the aforementioned entitites Triple T. Farms, Triple T. Farms II. etc. draw from a common labor pool for irrigators and general laborers. The equipment operators work only for Taylor Farms.

Taylor Farms also performs custom work for other farmers, providing equipment and operators for planting, subsoiling, disking, harvesting, grading and spraying. Sometimes the same employees who work at Taylor Farms are used in these operations. If these operators are occupied at Taylor Farms, Taylor Farms will hire from outside sources.

From mid-March, Taylor Farms has provided custom work to about eight other growers. The custom work begins to taper down in the middle of August.

Ernest Taylor, one of the owners of Taylor Farms, directs all operations at the three localities. Larry Bettencourt is the ranch manager, Jose Lomeli was the foreman at Five Points, and Manuel Fernandez is the foreman at the Base.

B. Respondents Alleged Unfair Labor Practices in Refusing to Reinstate Strikers

1. Facts

On Wednesday evening, April 28, 1993, fifteen of Respondent's employees met at the bunkhouse at Five Points. They

discussed a request for higher wages and perhaps a strike. Not all those workers were bunkhouse dwellers. The next morning, April 29, they talked to coworkers who had come to the bunkhouse to be picked up for work. All the workers agreed to ask management for a raise in wages. If Respondent failed to meet their demands, they would go on strike. They so informed ranch foreman Lomeli.

Lomeli called Bettencourt at the Hanford Ranch and informed him of the situation. Bettencourt arrived at the bunkhouse. There were approximately 20 workers there, and as there was no individual spokesman, they all expressed their demands for higher wages. Martin Montelongo[5] acted as the interpreter since Bettencourt knew little Spanish and the workers little English. The workers requested an hourly rate of $5.50 for tractor drivers and $5.00 for irrigators and $12.00 a line for line movers.[6]

Bettencourt contacted Taylor by telephone and informed him of the wage demands and the pending strike. After a discussion, Bettencourt returned to the workers with an offer to increase the hourly wage rate to $4.60 for general laborers, $4.80 to $5.00 for beginning tractor drivers, and $5.50 for existing tractor drivers. Irrigators would be paid $50.00 per day and line movers would continue to be paid $12.00 per line. The workers requested

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[5]Martin Montelongo worked for Farm Employers Labor Service (PELS) which provided Respondent with various services including foreign language interpreting.

[6]The current pay rates were $4.30 per hour for general laborers, $4.50 to $5.00 per hour for tractor drivers, $47.00 per day for irrigators and line movers $12.00 per line.

the $5.50 for tractor drivers regardless of the kind of work they were doing.

Bettencourt, Montelongo and Richard Espinosa[7] contacted other ranches in the area to ascertain their wage rates. Bettencourt talked to Taylor again and then spoke to the workers. He explained that Respondent's wage offer was the highest in the area and that the tractor drivers would have the option of going home if they did not want to perform non-tractor work at the lower wage scale. The workers' rejected the offer and requested to speak with Taylor personally.

Taylor arrived at the bunkhouse at approximately 1:00 P.M. He explained to the workers the reasons why the Company would not pay more wages, informed them that the raises he had offered would be implemented immediately and asked them to return to work.[8] The workers refused to do so.[9]

Taylor and Bettencourt came to the conclusion that they and the non-striking employees would have to perform the necessary tractor work; i.e., on the fields where the cotton had to be planted or replanted and uncovered.[10]

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[7]Another PELS employee.

[8]The workers once again requested Respondent to pay the tractor drivers $5.50 an hour for non-tractor work but Taylor declined to accept that modification.

[9]Despite the strike, Taylor immediately implemented his offer to raise wages. The 7 employees at the Hanford Ranch accepted Taylor's offer and did not join in the strike.

[10]To uncover cotton is to remove a dry cap that is laid over the recently planted cotton seed. After 4 or 5 days the cap has to be removed and it is done by tractors with harrows.

As Taylor and Bettencourt were en route to the equipment yard, Lomeli and Rangel signaled them to the side of the road. Lomeli informed them that the striking workers had informed him that they intended to stop any tractors that were working. Taylor and Bettencourt told him that they did not have to operate any tractors in the field. Later that day, Lomeli and Rangel moved some of the tractors into the equipment yard for safekeeping. The next day Rangel drove a tractor to uncover cotton and make ditches. Respondent notified the Sheriff's Office that a labor dispute existed and hired security guards to protect the equipment at night.

That afternoon, Taylor, Bettencourt and a few other employees drove tractors to uncover cotton until after dark.

The next morning, Friday, April 30, several workers including Agostin Lomeli, contacted the United Farm Workers Union in Delano. They talked to Efren Barajas who agreed to meet with the workers later that morning. Sometime around noon, three UFW representatives, Barajas, Jose Luis Rivera and Jose Esqueda and approximately 25 to 30 workers in 8 or 9 cars approached Bettencourt while he was operating a tractor in the field. Remembering Lomeli's warning about the strikers' intention to stop any tractors in the fields, Bettencourt telephoned the Company's office and asked the secretary to call the Sheriff's Office and request assistance.

Barajas introduced himself and asked Bettencourt about a possible solution to the conflict. Bettencourt replied that he

believed that the Company's last offer was fair because it compared favorably with the wage rates at the neighboring farms. Barajas retorted that just because Respondent's neighbors exploited their workers did not signify that Respondent should do the same. Bettencourt said that nothing could be resolved until he talked to Taylor. Rivera testified that Barajas mentioned getting the workers back to work and Bettencourt responded that he did not want the workers back. Bettencourt denied making such a statement. When Bettencourt said he had to continue with his work, Barajas said it was not his intention to stop him from doing so. Bettencourt gave Barajas his name and telephone number. The UFW representatives and the workers left in their motor vehicles and Bettencourt continued with his tractor work. On the way out, the workers' caravan was stopped by a sheriff's deputy. Barajas explained the situation and the group proceeded to return to the bunkhouse.

Taylor and Bettencourt, along with Bettencourt's father and Van Tassel's husband,[11] and a few non-striking workers had been performing the necessary work on Thursday, Friday, Saturday and Sunday. Since there was an abundance of work to be done and inadequate manpower, Taylor and Bettencourt decided that if the strikers failed to return to work on Monday, they would begin to hire replacement workers.

When the striking workers did not report for work on Monday,

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[11]Irene Van Tassel was Taylor Farms bookkeeper and secretary.

Respondent sent the word out that Respondent needed to hire workers. Also as is common in farm labor, applicants dropped by looking for work on a daily basis.

Respondent began to hire replacement workers on Monday morning May 3rd and continued to do so through Tuesday May llth.

At that time, it was urgent that certain work be done otherwise there was danger of losing the cotton crop. There were still fields unplanted and cotton that needed to be uncovered. Moreover, it was indispensable to irrigate a number of fields so that the seeds would germinate.

Respondent hired replacement employees between May 3 and May 12. It prepared a form which read :

> There is a Labor Dispute/Strike in progress. You are being hired to replace a striking employee. For the purposes of the Agricultural Labor Relations Act only, you are classified as a permanent replacement for that employee. This means that we intend to employ you as a "Regular Employee". Although your employment may be terminated in the future, you will not be terminated solely for the purpose of reinstating strikers whom you have replaced unless reinstatement of those strikers is required by the Agricultural Labor Relations Board, a court of competent jurisdiction, or the provisions of a strike settlement. Your employment at all times is subject to the standards of performance and conditions of employment applicable to employees of the Company." [12]

Montelongo interviewed the job applicants,[13] explained to

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[12]The forms were in Spanish for the Spanish speaking replacement workers and in English for the English speaking ones.

[13]At times Bettencourt and Taylor were present during the interviews. Neither of them speak Spanish so it was the Spanish-speaking Montelongo who conversed with the job applicants the vast majority being Spanish-speaking. Taylor credibly testified that all of the replacement workers had had farm working experience, most with irrigation, some with tractor driving and some with both.

them that their jobs would be permanent,[14] and witnessed their signatures on the forms. On the first day of hiring, May 3, Respondent hired 10 replacements. Montelongo witnessed two while a labor contractor, Sufuentes, who assisted Montelongo,[15] witnessed seven and Irene Van Tassel witnessed one. Montelongo witnessed the executed forms on the following days except for one signed by Jose Pacheco on May 11 and witnessed by Merla Taylor.[16]

Virtually all of the replacement workers who testified were looking for permanent work, although six of them admitted that they would have accepted temporary work.

Some of the persons who replaced the striking workers for a few days were neighbors, relatives and friends, all of whom signed the forms.[17]

Of the 14 replacement workers, who testified, 12 stated either implicitly or explicitly that they were currently employed

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[14]Of the 14 replacement workers who testified, eleven stated that Montelongo informed them that their jobs were permanent, three testified that Montelongo and/or Taylor informed them of their employment status and one made no statement in this regard whatsoever but he testified he had read the form. Ten replacement workers testified that they had also read the form that they had signed.

[15]Montelongo told Sufuentes to make sure the new employees understood the form and that they signed it and dated it.

[16]Ten employment forms were executed on May 3, five employment forms were executed on May 5, six on May 6, eleven on May 7, eight on May 8, three on May 9, none on May 10, three on May 11 and none on May 12.

[17]There were some discrepancies between the dates they came to work and the dates they signed the forms.

at Respondent's. One, Manuel Luis Perez, answered to a direct question that he was still employed there. The fourteenth one made no mention of the subject in his testimony.

On May 12, Agostin Lomeli delivered to Larry Bettencourt a written unconditional offer to return to work. It was signed by all the employees who had ceased work and participated in the strike. Striking employees Celso Cervantes and Jesus Aguilar and a UFW representative witnessed such delivery.

Respondent acknowledged receipt of the offer, placed all the striking ismployees on a preferential hiring list and since May 12 has filled all job openings with strikers, 7 so far.

In June and July, Taylor Farms contracted with a labor contractor, Valle Dorado, to do cotton weeding in the cotton fields at Respondent's Hanford Ranch. General Counsel alleges that Respondent had a legal obligation to comply with the preferential hiring list and rehire some of the striking employees to perform this weeding work and in failing to do so committed an unfair labor practice.

Respondent points out that every year it has contracted a labor contractor to come in and do the weeding at the Hanford Ranch. It does so because a labor contractor can bring in a large contingent of workers, up to 90 workers, and complete the work expeditiously. Speed is of the essence since the spraying of chemicals, the application of fertilizer and the refashioning of furrows must quickly follow. Moreover, the contracting out of the weeding is more economical since the labor contractor

employees work for minimum wage. Furthermore, Respondent does not have supervisors available to oversee cotton field weeding.

It is true that the striking workers have done weeding work but it has been incidental to their regular work. Respondent would assign tractor drivers, irrigators and general laborers to weeding during lapses in their regular work. Respondent did this so that a worker could put in a full days work and not have to be sent home. They weeded around poles, fences, etc. and occasionally in cotton fields.

2. Analysis and Conclusion

The Board has decided that economic strikers have the right to immediate reinstatement upon tendering an unconditional offer to return to work unless the employer can show that its refusal was due to a legitimate and substantial business justification. Such a justification could be the fact that jobs claimed by the returning strikers were occupied by permanent replacements during the strike.

The courts, the NLRB and the ALRB have held that replacement workers are deemed permanent if the employer can show that the replacements and the employer had a mutual understanding that the replacements were hired on a permanent basis. In Sam Andrews' Sons (1087) 13 ALRB No. 15 and Vessey & Co. Inc. (1987) 13 ALRB No.22 the mutual understanding between the company and the replacement workers that the nature of their employment

was permanent is controlling.[18]

In the instant case it is evident such a mutual understanding existed. Every one of the replacement workers signed a form which indicated that his employment would be permanent. Respondent submitted signed forms to that effect. Moreover, Montelongo and fourteen replacement workers credibly testified to such a signing. The same replacement workers credibly testified that they had read and/or had read to them the contents of such forms. There is credible evidence that Montelongo or Taylor had informed all the job applicants that there was a strike in progress and with the exception of friends, neighbors etc. that they would replace strikers on a permanent basis.[19]

Respondent admits that on May 12 the strikers tendered an unconditional offer to return to work.

General Counsel contends that even though Respondent hired replacements on a permanent basis, Respondent failed to

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[18]In Seabreeze Berry Farms (1981) 7 ALRB No. 40 the ALRB stated that Respondent had to prove that the only way it could obtain sufficient replacement workers so as to continue its operations was to offer permanent employment. However in subsequent cases, the Board has not mentioned this prerequisite.

[19] General Counsel points out that many forms were signed by people who were temporary replacements and by classifying them as permanent workers it was a deliberate attempt by Respondent to manufacture a defense for not reinstating the strikers. Respondent does not contend that these friends, neighbors and relatives etc., who helped out during the first few days of the strike, were permanent replacements. Respondent asserts the reason Respondent asked these replacements to sign the employment forms was to make sure they knew that a strike was in progress. The fact that temporary replacements signed these forms does not detract from the fact that Respondent hired all the other replacement workers with a mutual understanding that their jobs would be permanent.

show that their employment continued to the present time.[20] General Counsel does not cite any legal authority that Respondent has the burden to make such a showing. The important fact is. the replacement worker's status on May 12, the date the strike ended and not at the hearing date.[21]

Record evidence indicates that the temporary replacements, the friends etc. only worked during the first days of the strike, so no temporary replacements were working at the end of the strike on May 12 . It follows that only permanent replacement employees were working on May 12. Consequently there were no openings on that date and Respondent had no legal duty to terminate these replacement workers and replace them with strikers. Moreover, Respondent's witnesses have credibly testified that Respondent has honored the preferential list and has rehired strikers to fill all job openings since May 12.

General Counsel points out that even though the replacement workers testified that they were Taylor Farms employees, it was clear on cross examination that they did not know what company they worked for because some of them received checks from other entities. General Counsel contends that Respondent should have

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[20]Thirteen of the fourteen replacement workers who testified stated that they were presently working at Respondent's or it can be easily inferred from their testimony on other points that they continued to work there to the present time. Only Silverio Tinajero failed to so testify as the subject was not broached in his testimony.

[21]Although continued employment at Respondent's could be a factor to consider in determining a replacement worker's status on May 12.

presented evidence as to each job slot, whether it was a job with Taylor Farms or with another entity and Respondent's failure to do so permits an adverse inference that the Respondent did not replace each Taylor Farms striker with a Taylor Farms worker and therefore their jobs had not been filled and thus the strikers were entitled to reinstatement immediately at the end of the strike.

It was agreed at the time of the proceedings, that the striking workers were Taylor Farms employees. There was a common labor pool of irrigators and general laborers from which Taylor Farms and the other entities drew labor.[22]

Respondent has proven that it replaced strikers with permanent workers as evidenced by the testimony of Taylor, Bettencourt, Montelongo, the fourteen replacement worker witnesses and the 46 employment forms signed by replacement workers.

Whether the replacement workers were paid by Taylor Farms or another entity is irrelevant. If there had been no strike, the strikers would have continued to work at Respondent's and would have performed the same work and been paid in the same manner as

[22]The existence of a common labor pool merely demonstrates that Taylor Farms' irrigators and general laborers work at times for entities other than Taylor Farms and therefore receive paychecks from Taylor Farms and at times work for other entities such as Triple T. Farms etc. and receive paychecks from them.

the replacement workers were paid...some paid by Taylor Farms, some paid by a combination of Taylor Farms and the other entities such as Triple T. Farms and perhaps some just by another entity.

On May 12, .Respondent stopped hiring because it had an adequate work force to perform all its work.
So it is evident that by that date, it had hired enough permanent replacements to perform the work the strikers would have done if they had not gone on strike and in effect replaced each striker with a replacement. Therefore it was not necessary for Respondent to present additional evidence on this point.

I find that Respondent has a legitimate and substantial business justification to hire replacement workers on a permanent basis since that was the mutual understanding between Respondent and the replacement workers.

In view of the foregoing, I find that Respondent had no legal obligation to dismiss replacement employees and reinstate strikers to their former positions at the end of the strike.

General Counsel argues that subsequent to the strike Respondent had openings in June and July to weed cotton and failed to recall strikers who were on the preferential hiring list.

Respondent contends that no such openings existed as Respondent has used annually the services of an outside labor contractor, Valle Dorado and others, to do such work and did so again this Summer. Taylor and Bettencourt credibly testified that the reasons for so doing, such as speed, was in order to

have the fields available for pesticide spraying, refashioning furrows etc. as quickly as possible after weeding. Moreover, Respondent did not have sufficient foremen to supervise the rapid weeding of the cotton fields. The weeding work performed by the strikers was done on an occasional basis so as to provide employees with a full day's work.

The cotton weeding work was all done at Respondent's Hanford Ranch. The striking workers had not worked at the Hanford Ranch and in fact workers at the Hanford Ranch had not gone on strike. Moreover temporary work of one to four weeks in duration does not constitute substantial equivalent employment that must be offered to economic strikers on a preferential hiring list. (Certified Corporation (1979) 241 NLRB 369 100 LRRM 1632.)

In view of the foregoing, I find that Respondent did not commit an unfair labor practice by contracting out the cotton weeding work rather than rehire striking employees.[23]

C. Respondent's Alleged Discriminatory Discharge of Antonio Rangel

1. Facts

On May 6 at approximately 6:10 p.m. Ranch Foreman, Jose Lomeli and his assistant, Antonio Rangel, each drove his company truck into Respondent's equipment yard. As they descended from their vehicles, two access takers, Erasmo Ramirez

[23]There was testimony taken on the alleged misconduct of the strikers. Since *I* have decided that Respondent committed no unfair labor practices, the issue of striker misconduct in irrelevant.

and Pablo Lomeli [24] approached them and handed them UFW flags and pinned UFW buttons on their shirts. They told Jose Lomeli and Rangel that if they took the buttons off they would not be Mexicans. They told them that the trucks would be damaged if they drove them home.[25]

Lomeli and Rangel left the trucks parked and walked out of the equipment yard each carrying a large UFW flag.[26] Taylor and Bettencourt testified that they had seen Lomeli and Rangel walk to the picket line some 300 yards away. On the other hand, Lomeli and Rangel testified that they walked through the picket line and continued on to Rangel' s residence at Five Points and from there Rangel drove Lomeli to his residence.[27]

Taylor was in the yard and observed the access takers approach Lomeli and Rangel but did not see them talk to Lomeli and Rangel. Taylor drove away at the same time they began to walk out of the yard.

Bettencourt was also present in the yard and observed what took place. His version is similar to Taylor's. Lomeli and Rangel crediblly testified that the reason they left without

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[24]Ramirez and Pablo Lomeli were also strikers and Pablo was Jose Lomeli's nephew.

[25]Earlier that same day, Lomeli and Ramirez had heard strikers saying that the trucks would be damaged if Lomeli and Rangel drove them to their respective homes.

[26]Customarily, Lomeli and Rangel drove the company trucks to and from work.

[27]The most direct route to Rangel's house was through the picket line area.

informing either Taylor or Bettencourt was because they did not see them in the yard.[28] Bettencourt parked and locked the trucks and retained the keys.

On the morning of May 7, Lomeli and Rangel reported for work at the equipment yard. They walked over to Bettencourt's truck and Lomeli told Taylor, who was sitting in the passenger seat, that he and Rangel were going to work and asked what were the orders of the day.[29] Taylor told the two that he thought they had quit their jobs the day before because they had left the trucks in the yard and had walked off toward the picket line.

Lomeli said they had not quit and the reason they had left the trucks in the yard was because they had heard of threats by strikers to damage them if they drove them home. Taylor asked Lomeli why he had not warned him of such danger so he could protect his investment. Lomeli did not reply. Lomeli then asked Taylor to give him a paper "for me to quit". Taylor rolled up the window and he and Bettencourt conversed for a few minutes. Taylor rolled down the window, asked Lomeli why did he carry a UFW banner and said it wasn't right what Lomeli had done. Lomeli

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[28]Rangel testified that perhaps Bettencourt was in the yard and they did not see him. The equipment yard is 300 by 700 feet, so it is evident that Bettencourt was in the yard but Lomeli and Rangel did not see him because of the size of the yard and the presence of various vehicles and farm equipment.

[29]According to Taylor's and Bettencourt's testimony Lomeli and Rangel were covered with Union "paraphernalia". Lomeli testified that he was wearing three small UFW buttons on his shirt pocket. Rangel testified that he was wearing two medium size UFW buttons on his shirt pocket. Although their jackets partially hid the buttons, both Taylor and Bettencourt could see what they were.

explained that the workers had given them the buttons and banners and obliged them to take them. Taylor asked them to give him a few minutes to make a telephone call. Taylor closed the window and made a telephone call to Montelongo. Taylor and Bettencourt testified that during the call, Lomeli and Rangel walked off. Observing this, Taylor assumed that they did not want to work for Taylor Farms anymore. On the other hand, Lomeli and Rangel testified that Taylor rolled down the window and told them to go home and that he would talk to them later.

At about noon, Lomeli and Rangel sent a message to Taylor that they wanted to pick up their tools from the trucks. Arrangements were made for them to come to the equipment yard shortly after 6 P.M. the same day.[30]

That same afternoon, Respondent had decided to issue a disciplinary notice to Rangel for "inappropriate conduct". Bettencourt carried the notice in his pocket and intended to deliver it to Rangel.[31]

At approximately 6 P.M. Lomeli and Rangel drove into the yard and each one retrieved his tools. While Lomeli was putting away his tools, Irene Van Tassel told him that she could not believe what was happening with all his years at the Company.

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[30]Lomeli and Rangel asked striker, Agostin Lomeli, to relay their request through the deputy sheriff on the picket line to Taylor.

[31]Somehow Taylor and Bettencourt changed their minds about Rangel and his intention to quit as they prepared a disciplinary notice for him.

Lomeli replied "I can't help it, you know, like pressure, and I just, you know.. . . . "

While Rangel was placing the tools in his van, Bettencourt asked him whether he was quitting. Rangel answered, "Too much pressure here, too much pressure out there."[32] "I've worked here nine, ten years. " Bettencourt asked him again whether he was quitting and Rangel responded, "I'm sorry I have to go." Bettencourt interpreted his comments coupled with his removing his tools as quitting and kept the disciplinary notice which he had planned to deliver to Rangel in his pocket. Bettencourt returned the notice to Van Tassel.

Bettencourt walked over to Lomeli and handed him a dismissal notice and his final check.

Rangel testified that he had not quit his job.

2. Analysis, Further Findings of Fact and Conclusion

The initial question is whether Rangel was a supervisor under the definition of the Act. Respondent contends that Rangel was a supervisor and therefore is not entited to protection under the Act.

The definition of supervisor under the Act is as follows:

> "...any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or

[32]Rangel testified that the pressure he mentioned to Bettencourt had to do with his having to go out to the fields at 10:00 and 11:00 P.M. to turn off the water. He denied that it had to do with pressure from the outside.

clerical nature, but requires the use of independent judgment."

Although Respondent paid Rangel a salary and provided him with the use of a truck, he was not the irrigation supervisor but merely an assistant to Ranch foreman Lomeli. He had no authority to exercise or the responsibility to effectively recommend to hire, fire or to exercise any of the other duties listed in the definition of a supervisor. Ranch Foreman Lomeli was in charge of the irrigators and assigned them their duties and work sites. Rangel transported irrigators to the work sites and supplied irrigators with materials (pipes, couplings etc). Rangel also made sure the irrigators moved the main lines and set the water properly. He reported the irrigators' work hours to Lomeli. These tasks were of a routine nature and did not require independent judgment.

At times Rangel transferred irrigators to other fields but in compliance with his superiors' instructions. Rangel replaced Lomeli every other Sunday but credibly testified that that whenever Lomeli was absent he would consult with Bettencourt.

On occasion, Rangel drove a tractor and helped in the 'picking of the cotton.

In view of the foregoing, I find that Rangel is an agricultural employee and not a supervisor under the definition of the Act and is entitled to the protection of the Act.

General Counsel contends that Respondent discharged Rangel for his support of the UFW and the strikers. The first question to be decided is whether Respondent terminated Rangel or whether

Rangel quit of his own accord.

In the evening of May 6, Lomeli and Rangel parked their trucks inside the equipment yard, left the keys in their respective vehicles and walked out of the yard in the direction of the picket line and further on to Rangel's residence. Taylor and Bettencourt assumed that because of such action, the two had quit their jobs.

On the morning of May 7, Lomeli and Rangel returned to the equipment yard and Lomeli and Taylor conversed. Taylor expressed his displeasure with Lomeli's and Rangel's actions in support of the Union the day before and added that he thought that the two had quit because they had left their trucks in the yard. Lomeli explained Rangel's and his reasons for their actions. Taylor closed the window of the pickup in which he and Bettencourt were seated as he made a phone call to Montelongo. Taylor and Bettencourt testified that before Taylor finished the telephone call, Lomeli and Rangel walked away. On the other hand, Lomeli and Rangel testified that Taylor opened the window and told them that he would contact them later. The question of which version is accurate is not essential to determine whether Rangel quit or was fired.

Taylor testified that he interpreted their alleged walking away as an indication that they did not want to work at Respondent's anymore. It is true that such alleged conduct by Lomeli and Rangel was indicative of their abandoning their employment. However, Respondent should not consider such an

action as a definite resignation by Lomeli and Range1, two high ranking and long serving employees. An inquiry into their exact intentions would be in order.

By noon of the same day, Lomeli and Rangel had not heard from Taylor. They testified that by then they had decided to go to the equipment yard and pick up their tools from their Company trucks. Although neither Lomeli or Rangel testified what prompted them to make such a decision, it can be inferred from such a decision that either they had decided to quit or had interpreted Taylor's actions, whichever they were, as an indication that he had discharged them.

That evening they drove to the equipment yard. Bettencourt tried to clear up the situation by asking Rangel whether he was quitting or not. Rangel testified that he did not understand what Bettencourt said but I do not credit his testimony. Rangel and Bettencourt had been communicating for months and perhaps years in English is respect to the work activities at Respondent's.[33] On such an important subject as dismissal I am sure there was no difficulty for the two to communicate to each other. Bettencourt asked the question twice [34] and Rangel

[33]Bettencourt credibly testified that all his conversations with Rangel were in English. On the other hand, Rangel, at first testified that his communications with Bettencourt were in English and later testified that an interpreter was necessary for their conversations.

[34]On cross examination, Rangel was asked whether Bettencourt wanted to know whether Rangel had quit and Rangel answered,"He might have." This answer, hedging in nature, indicates that Rangel was not completely frank in his testimony about this episode.

answered about the pressure and concluded with "I'm sorry I have to go".

I conclude from Rangel's answers to Bettencourt, coupled with the removal of his tools, that he, in effect, quit his job and Bettencourt had every reason to believe so. Further proof of Bettencourt's sincerity in this belief is the fact that he did not deliver the disciplinary notice that he had planned to give Rangel but returned it to the office.

In view of the foregoing I find that Respondent did not discharge Antonio Rangel and therefore did not commit an unfair labor practice.

D. Respondent's Alleged Discriminatory Unlawful Detainer Action

1. Jurisdiction to Consider the Issue.

Respondent in its Answer to Consolidated Second Complaint plead as an affirmative defense that General Counsel is collaterally estopped and also barred by the principle of re judicata. In May, a Superior Court in Fresno County had decided in an unlawful detainer action certain issues identical to the ones in the instant case.

Respondent filed an unlawful detainer action action to evict the striking employees from company housing. General Counsel filed with the Superior Court for an injunction to prevent the court from ordering such eviction. The Superior Court, in determining that no injunctive relief was warranted, determined that the striking employees' rights to reside in

company housing was conditioned on their actually working, that the eviction proceedings were not commenced because of the workers' strike and that permanent replacement workers had been hired.[35]

Section 1160.9 of the Act grants to the Board the exclusive authority to adjudicated unfair labor practices. In court proceedings initiated by the Board, the court is limited to decide only whether reasonable cause exists to believe that the Act has been breached and that an injunctive remedy is reasonable necessary to preserve the status quo or to avoid frustration of fundamental remedial purposes of the Act. However, in those cases where a court proceeds with an unlawful detainer action prior to an ALRB resolution of a related unfair labor practive charge, the court decision has no res judicata or collateral estopped effect on the ALRB's ultimate ruling. Vargas v. Municipal Court (1978) 22 Cal. 3d 902.

A superior court cannot adjudicate the merits of an unfair labor practice charge. In the instant case, the Superior Court did just that but it had no authority to do so. Since the Superior Court exceeded its jurisdiction, the judgment and order have no effect and are not binding on the Board.

[3S]I take administrative notice of Respondent's exhibit 1, which is a Superior Court (County of Fresno) order denying the Board injunctive relief and Exhibit 2 an exerpt from the Reporter's transcript in the court's injunctive relief order. Case NO. 487059-8 .

2. Facts.

Respondent provided its employees with housing facilities at its Five Points Ranch. It leased three houses, a trailer and a bunkhouse from Dr. Buford, a neighboring farmer. Workers with families occupied the houses and the trailer and the single men the bunkhouse. Respondent permitted its workers who had been laid off for a few days or even for a period of months to continue to reside in the housing facilities. Respondent expected that the laidoff employees would eventually return to work for it.

However, there was an ongoing problem in preventing non-workers from living in the bunkhouse. Lomeli and Bettencourt would periodically pass by to verify whether non-workers were occupying the premises. It was difficult to ascertain such occupancy unless Lomeli or Bettencourt happened to pass by just at the moment such a non-worker was present. At times, Bettencourt would find a non-worker in residence. He would explain the Company policy and ask the individual to leave. Some times they would leave and sometimes they would stay.

Respondent alleges that although the Company had knowledge that non-workers were living at the housing, it made no serious effort to dislodge them. After the strike began, Respondent filed unlawful detainer actions against the striking employees who resided on the premises. Respondent alleges that 'it took such action because it needed the housing for the replacement workers.

Four of the fourteen replacement workers, who testified, stated that they had informed Respondent that they would like to have housing because of the long distance they would have to travel to and from work. Montelongo and Taylor replied that they would, supply them with housing once the occupying strikers had vacated the housing.

3. Analysis and Conclusion

General Counsel alleges that Respondent filed an unlawful detainer action against strikers because of their union activities...engaging in a strike.

Respondent denies such motivation and asserts that it took steps to evict the striking employees because they were no longer entitled to receive any further benefits for their work such as wages, etc. and free housing. Respondent points out that free housing is a working condition, the same as wages, medical coverage, pension contributions etc.. See Felice Estate Vineyards (1978) 4 ALRB No. 81. The Board stated that where an employee provides company housing rent free or at a nominal rate or at less than the usual rage in the area, the housing is considered a working condition.

General Counsel points out that Respondent claims it filed the unlawful detainer action because housing was needed for the replacement workers. General Counsel argues that there was no such need. Whether the housing was needed for replacements is beside the point. General Counsel's additional argument that Respondent's laxness in making sure that only its employees

resided at the company housing is also irrelevant. Respondent's purpose in maintaining housing was to provide its employees with adequate housing for those employees who desired to live near their place of work and this was accomplished. The fact that one or two individuals, who were not Respondent's employees, resided there from time to time did not interfere with the realization of its purpose. Respondent's employees received free housing among other benefits for their work. Once they ceased to supply such work, they were no longer entitled to receive compensation whether wages or free housing. That was the reason Respondent initiated legal action against the strikers and not in retaliation against them for their union activities.

Therefore, I find that Respondent did not commit an unfair labor practice when it filed an unlawful detainer action against striking employees.

I recommend that the complaint be dismissed in its entirety.

Dated: December 7, 1993

ARIE SCHOORL,
Administrative Law Judge