

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
CARDINAL DISTRIBUTING CO 7.,	)	No.5-RC-63-R
	)	
Employer,	)	
	)	
and	)	3 ALRB No. 23
	)	
UNITED FARM WORKERS	)	
OF AMERICA, AFL-CIO,	)	
	)	
Petitioner.	)	
_____	)	

Pursuant to our authority under Labor Code Section 1146, the decision in this matter has been delegated to a three-member panel of the Board.

On December 8, 1975, an election was conducted among the agricultural employees of Cardinal Distributing Co. The tally of ballots served on the parties showed the following results:

Votes Cast for Petitioner .....	6
No Labor Organization .....	8
Challenged Ballots .....	55

Because the number of challenged ballots are sufficient to affect the results of the election, the regional director of the Riverside Regional Office conducted an investigation of the challenges and issued a report on challenged ballots on February 6, 1976. Pursuant to 8 Cal. Admin. Code Section 20365(f)<sup>1/</sup> the employer filed exceptions to the regional director's recommendation that 34 of the challenges be overruled. No exceptions were filed

<sup>1/</sup>Unless specified to the contrary, all references to the regulations of the Board pertain to the regulations of August 28, 1975.

with regard to the regional director's recommendation that 21 of the challenges be sustained.

All of the challenges were made by the employer's observer on the grounds that (1) the voter was not employed in the appropriate unit for the applicable payroll period and (2) the voter was not an agricultural employee of the employer as defined in Labor Code Section 1140.4(b). <sup>2/</sup> These same reasons are the basis for the employer's exceptions to the regional director's recommendations.

The basic issue in this case is whether or not the workers supplied by Jose Ortiz, a labor contractor in the employ of Cardinal Distributing Co. are the agricultural employees of Cardinal Distributing Co. and therefore eligible to vote in this election. The employer alleges that Mr. Ortiz is a custom harvester who performs all manual harvesting for the company in green onions, parsley, beets, cabbage and bunched carrots. Mr. Ortiz has the full authority to hire, fire and direct employees in the manual harvest of the above-mentioned crops and maintains his own payroll records for those employees. Cardinal Distributing Co. . takes the position that Labor Code Section 1140.4(c) is overbroad on its face and further alleges that it is unconstitutional insofar as it precludes a labor contractor from being held an "agricultural employer" under our Act.

We have already found that Section 1140.4 (c) does not • summarily preclude a farm labor contractor from being held an agricultural employer. In Kotchevar Brothers, 2 ALRB No. 45 (1976).

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<sup>2/</sup> Section 1140.4(b) states in pertinent part: "The term agricultural employee<sup>1</sup> or 'employee<sup>1</sup> shall mean one engaged in agriculture."

Mr. Walker, a registered farm labor contractor, was found to be an agricultural employer within the meaning of Section 1140.4(c) because the total services he provided were more than those provided by a traditional labor contractor within the meaning of Labor Code Section 1682.<sup>3/</sup> It was primarily because of Walker's total services which included his abilities to supply costly equipment <sup>4/</sup> used in the grape harvesting operations, and his assumption of the responsibility for getting the grapes to the

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<sup>3/</sup> The term "labor contractor" is defined in Labor Code Section 1682(b) as follows:

(b) 'Farm labor contractor<sup>1</sup> designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products, to, for, or under the direction of. a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of 'he following services: furnishes board, . lodging, or transportation for such workers supervises, times, checks, counts, weighs or otherwise directs or measures their work; or disburses wage payment to such persons. [Emphasis added.]

Finally, the term "fee" as used in subsection (b) of Section 1682 is defined in subsection (e) to mean:

(1) The difference between the amount received by a labor contractor and the amount paid out by him to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him and the amount paid out by him for or in connection with the rendering of such services. [Emphasis added.]

<sup>4/</sup> The record in Kotchevar Brothers indicated the equipment supplied by Mr. Walker included 40 pairs of tractors and gondolas, as well as several forklifts.

winery that he was found to be a custom harvester and to qualify as an agricultural employer within the meaning of Section 1140.4 (c). Although Cardinal Distributing Co. considers Jose Ortiz to be a custom harvester, we find the facts insufficient to indicate that Mr. Ortiz is functioning in a relationship beyond that of a farm labor contractor. Unlike the services provided by Mr. Walker, the facts presented by Cardinal Distributing Co. indicate Mr. Ortiz only provides the workers who do the manual harvesting. Thus the facts presented by Cardinal Distributing Co. indicate the full extent of Mr. Ortiz's services is providing labor for a fee. The dissent argues that Jose Ortiz is a custom harvester. We believe such a conclusion misconstrues the meaning of Labor Code Section 1682 and contradicts the purposes of our Act. We find that Mr. Ortiz is a labor contractor within the meaning of Labor Code Section 1682. According to Labor Code Section 1140.4(c), Cardinal Distributing Co. is therefore deemed the employer of the workers provided by Jose Ortiz.

In TMY Farms, 2 ALRB No. 58 (1976), we found the appropriate bargaining unit included both TMY's direct employees who were supervised by TMY foremen, and the workers provided by a labor contractor even though the labor contractor's employees were paid on a different basis, worked different hours and harvested a different variety of tomato than TMY's direct employees, We found in that case that Labor Code Sections 1140.4(c) and 1156.2<sup>5/</sup> required us to place both the labor contractor's employees and TMY's direct employees in the same bargaining unit. We find

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<sup>5/</sup> Section 1156.2 states in pertinent part, "The bargaining unit shall be all the agricultural employees of the employer."

both the reasoning and holding in TMY Farms, supra, directly applicable to the instant case. Thus we find that those workers provided to Cardinal Distributing Co. by Mr. Ortiz are required by the ALRA to be a part of the same bargaining unit as Cardinal Distributing Co.'s direct employees.

#### Challenged Ballots

Because we have found those employees provided by Mr. Ortiz to be part of the appropriate bargaining unit, the crucial question to be asked in resolving the challenged ballots is whether those workers were employed during the appropriate payroll period, that is, between November 24 and 29, 1975.

The regional director found the voters listed in Schedule A appeared on the payroll records of Jose Ortiz during the appropriate payroll period and recommended that the challenges to their ballots be overruled. We find also that because of their harvesting duties they are agricultural employees within the meaning of Labor Code Section 1140.4(b). We uphold the regional director's recommendation and order those ballots be opened and counted.

The regional director recommended the challenges to the ballots of the voters listed in Schedule B be overruled. Because of inconsistencies between the regional director's findings and conclusion in his report on challenged ballots, we are unable to resolve the eligibility of these two voters at this time. Although the regional director found that Magdalena Montalvo was working for Jose Ortiz during the appropriate payroll period, his report does not indicate whether in fact that is the same person listed as Magdalena Rodriguez in his conclusion. Although

the regional director recommended that the challenge to the ballot of Rosaellia Trevino be overruled, he made no findings indicating whether or not she was employed during the appropriate payroll period. We therefore make no final disposition at this time to the challenges to the ballots of the voters listed in Schedule B.

The regional director recommended sustaining the challenges to the ballots of the voters listed in Schedule C. No exceptions to this recommendation were filed. We therefore sustain the challenges to those ballots.

### Objections

Pursuant to Labor Code Section 1156.3 (c), the employer and Teamsters Local 890 filed timely objections.<sup>6/</sup> The objections petition filed by the Teamsters listed objections relating to misconduct by the employer, UFW, and ALRB agents affecting the outcome of the election. 8 Cal. Admin. Code Section 20365 (a), in effect when the Teamsters filed this petition, states in pertinent part:

A party filing a petition under Section 1156.3 (c) of the Labor Code objecting to the conduct of the election or conduct affecting the results of the election shall file with the petition declarations or other evidence establishing a prima facie case in support of the allegations of said petition. The failure to supply such evidence in support of the petition at the time of the filing of the petition shall result in the immediate dismissal of the petition or any part thereof which is not supported by such evidence.

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<sup>6/</sup>Although our procedure with regard to the initial consideration and screening of Labor Code Section 1156.3 (c) objection petitions has been to delegate that responsibility to the executive secretary, in this case we are assuming that responsibility. Because the employer's objection is directly related to our discussion of the challenged ballots, we believe it is most expeditious and reasonable to discuss and dismiss the employer's objection at this time. Because the objections filed by the Teamsters are also to be dismissed, we again find it most expedient to dismiss these actions at the present time.

No declarations were filed supporting the listed objections. We therefore dismiss the Teamsters' objections petition in its entirety.<sup>7/</sup>

The objections petition filed by the employer alleges that the regional director erroneously invoked the presumptions of 8 Cal. Admin. Code Section 20310 (e).<sup>8/</sup> This objection is based on the same argument presented by the employer in its exceptions to the regional director's report on challenged ballots discussed above. Although the employer did file a written response to the election petition as required by 8 Cal. Admin. Code Section 20310, the employee list was inaccurate and incomplete in that it only listed the employer's directly hired employees and failed to list the names of those workers provided by the labor contractor, Jose Ortiz.

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<sup>7/</sup>The dissent argues that the results of this election should not be certified because the regional director dismissed the Teamsters' cross-petition rather than treating it as a motion to intervene. The dissent also assumes the Teamsters could have met the 20 percent showing of interest required for the intervention had it secured authorization cards from all 14 of the employees it claimed comprised the total unit. It is inappropriate for the Board to speculate with regard to one party's potential or actual showing of interest. In any event 8 Cal. Admin. Code Section 20315 provides that matters relating to the sufficiency of employee support shall not be reviewable by the Board in any proceeding under Chapter 5 of the Act. No party filed objections to the election based on the regional director's action. We therefore find it inappropriate to consider this issue in this decision.

<sup>8/</sup>The presumptions invoked pursuant to 8 Cal. Admin. Code Section 20310 (e) were:

- (A) That there is adequate employee support for the petition and for any intervention.
- (B) That the petition is timely filed with respect to the employer's peak of season.
- (C) That all persons who appear to vote, who are not challenged by any other party, and who provide adequate identification, are eligible voters.

In Labor Code Section 1157.3/ the ALRA itself imposes the obligation on employers to "maintain accurate and current payroll lists containing the names and addresses of all their employees" and to "make such lists available to the Board upon request." We have already determined that pursuant to Labor Code Section 1140.4(c) Cardinal Distributing Co., for the purposes of our Act, is deemed the employer of the workers provided by the labor contractor. Therefore, under Labor Code Section 1157.3, the agricultural employer, Cardinal Distributing Co., is responsible for maintaining and making available to the Board upon request accurate and current payroll lists containing the names and addresses of workers supplied by its labor contractor, as well as those employed directly.<sup>9/</sup> An agricultural employer utilizing a labor contractor must require that the contractor turn over such information in order that the employer may maintain payroll lists under the terms of the Act. The obligation to provide a list of employees under 8 Cal. Admin. Code Section 20310 is in no way affected by the fact that a particular employer may utilize a labor contractor.<sup>10/</sup>

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<sup>9/</sup>This obligation is congruent with existing laws and regulations administered by the California Department of Industrial Relations. Labor Code Section 1174 (c) states, in part, "Every person employing labor in this State shall keep a record of the names and addresses of all employees employed and the ages of all minors." Labor Code Section 1175 (d) states: "Any person, officer, or agent who fails to keep any of the records required by Section 1174 is guilty of a misdemeanor." The specific requirements for maintaining such records are contained in Industrial Welfare Commission Minimum Wage Order No. 1-74.

<sup>10/</sup>Under 8 Cal. Admin. Code Section 20310 (a) (2) adopted by the Board October 13, 1976, upon service and filing of a representation petition, the employer is required to provide to the regional director "a complete and accurate list of the complete and full names and current street addresses and job classifications of all agricultural employees, including employees hired through a labor contractor, in the bargaining unit sought by the petitioner in the payroll period immediately preceding the filing of the petition."



Because the employer failed to include the names and addresses of the workers provided by the labor contractor, the list he provided was incomplete and therefore did not fully comply with the requirements of 8 Cal. Admin. Code Section 20310. We therefore find it was not an abuse of discretion for the regional director to invoke the presumption of 8 Cal. Admin. Code Section 20310 (e). Accordingly, we dismiss the employer's objection.

Conclusion

The executive secretary or regional director shall open and count the ballots of those persons listed in Schedule A. If the ballots of the voters listed in Schedule B become determinative of the results of the election, the regional director shall clarify the discrepancies in his report or shall reopen his investigation and find sufficient facts to determine those challenges. If the challenged ballots remaining after the above order count are not determinative, the executive secretary shall certify the election.

Dated: March 11, 1977

Gerald A. Brown, Chairman

Ronald L. Ruiz, Member

SCHEDULE A - OPEN AND COUNT

Rogelio Avalos	Arturo Rivera
David Alaniz	Jose Rivera
Vicente Burgos	Arnolfo Rodriguez
Celestino Chavez	Dora Rodriguez
Ernestine Chavez	Flora Rodriguez Jose
Consuela Diaz.	Jose L. Rodriguez
Francisco Diaz	Maria G. Rodriguez
Felix Fuentes Lydia	Masedelia Rodriguez
Lydia Garcia Juan	Maria Guadalupe Soto
Garza Juanita Huerta	Ramon Torres
Sedonia P. Maldonado	Jerry Trevino
Jose Montalvo	Jose Trevino
Jose Juan Montalvo	Rosalio Trevino
Raquel Munoz Apolinar	Yolando Trevino
Rivera	Vasquez slio
	Villanueva

SCHEDULE B - RESOLUTION DEFERRED

Magdalena Rodriguez	Rosaellia Trevino
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SCHEDULE C - CHALLENGES SUSTAINED

Ricardo Chavez	Susana R. Alvarez	Ruben Lopez
Charles Mitchell	Leonard Orozco	Paula Carrasco
Nancy Mitchell	Norberta Rivera	Lydia Munoz
Amelia Rodriguez	Maria Becerra	
Viola Alvarado	Felix Guechara	
Marta Ramirez	Lorenzo Hernandez	
Cruz Chaidez	Elizabeth Alvarez	
Gilberto Zapata	Celia R. Carla	
Eva Pantoja	Soledad Carillo	

MEMBER JOHNSEN, Dissenting:

I dissent. In contrast to the majority, I do not find that the challenged voters were employees of Cardinal Distributing Company but rather that they were employed by Jose Ortiz, an agricultural employer within the meaning of Labor Code Section 1140.4(c). The challenged voters were therefore not eligible to have participated in this election. Furthermore, I would rule that the regional director erred in his dismissal of a cross-petition which was properly filed by the Western Conference of Teamsters and on this basis would set aside the election.

In his report on challenged ballots, adopted by the majority, the regional director merely stated that "Jose Ortiz is a state licensed labor contractor [lie. #FL183] employed by the employer for approximately the last 12 to 15 years" and then recommended that 35 of the challenges be overruled since they were cast by workers whose names appeared on Ortiz' payroll

roster for the pertinent payroll period. The regional director also recommended that 21 challenges be sustained without stating a reason. There is nothing in the report to apprise the Board of either the extent of the regional director's investigation into Ortiz' role or the basis for his ultimate findings. The fact that Ortiz holds a state contractor's license should not inevitably lead to the conclusion that he functioned as a labor contractor in this particular relationship with Cardinal.

The majority opinion also places great emphasis on the fact that Ortiz performed his services with "manual" harvesters and thus would differentiate this situation from that in Kotchevar Brothers, 2 ALRB No. 45 (1976). The question there was whether the grower or the firm hired by the grower to pick and transport wine grapes was the employer of the seasonal harvest workers. We held that the role of the labor contractor as defined by Section 1682 has been likened to that of a middleman—one who contracts with growers to provide labor when needed—but concluded that the contractor in issue therein was something more. As we said:

It is [this] contractor's ability to supply costly equipment used in the harvesting operations, and to assume responsibility for getting the grapes to the winery, which ordinarily accounts for his relationship to this employer .... In the understanding of the industry, he is a custom harvester [and] ... falls within the statutory definition of 'agricultural employer'<sup>1</sup> even though some of the functions which he performs are those typically associated with a labor contractor. Kotchevar Brothers, supra, at p. 6; see also, Napa Valley Vineyards, 3 ALRB No. 22 (1977).

The costly equipment to which Kotchevar referred consisted of the gondolas used to transport grapes to the winery.

All harvesting was done by hand.<sup>1/</sup> Since Mr. Ortiz was paid on a pack-out basis, we must presume that he provided the trucks and trailers—costly equipment by anyone's standards—by which the harvested produce ultimately reached the packing sheds.

Although Mr. Ortiz holds a labor contractor's permit under California licensing statutes, he does not function as a contractor in his business association with Cardinal. I find that Mr. Ortiz is a custom harvester who, under the facts and circumstances of this case, operates as an independent contractor and employer of the persons whose ballots were challenged. Three factors influenced my conclusion:<sup>2/</sup> the nature of the Cardinal-Ortiz agreement; supervision of the employees in issue; and the manner in which Ortiz is compensated for his services.

Nature of the agreement. According to the employer's brief, the contract between the parties is entered into in

<sup>1/</sup> The Kotchevar brothers farm 312 acres of table and wine grapes [primarily Thompson Seedless, Emperors, Carrigans and Malvasias] plus 10 acres of field crops. During the September 23 to October 3, 1975 harvest period, 45 table and 99 wine grape pickers were required. From October 11 to October 17, 1975, 25 table and 102 wine grape pickers were necessary to complete the harvest.

<sup>2/</sup> Evidence upon which I based my findings in regard to the Cardinal-Ortiz business relationship is contained in the employer's brief filed with its exceptions to the recommendations of the regional director. No hearing was held on this case. The Board's regulations provide in pertinent part that:

Notwithstanding any other provision of these rules, the Board shall have the authority acting pursuant to a petition under Section 1156.3 (c) of the Labor Code, or on its own motion, without hearing/ to issue an amended tally of ballots and appropriate certification In any election in "which the Board has acted to resolve issues with respect to challenge voters or to correct errors in the previous tally of ballots. [Emphasis added.] 8 California Administrative Code Section 20376 (1975); re-enacted in substantially the same form as Section 20360(b) (1976).

advance of harvest seasons and establishes the rate that will be paid for the harvest of each commodity grown by the company. Ortiz provides a

complete service and assumes total responsibility for the harvesting of the crops from the commencement of harvest until they enter the course of marketing, including all risks. He is paid on a "pack-out" basis, a relatively common practice in fresh fruit and vegetable harvesting, and one which is utilized primarily as a means of promoting quality field packing when a large number of workers are employed. For example, were Cardinal the employer, Cardinal would be obligated to pay wages for work actually performed even if the work product was of unmarketable quality. But, Cardinal avoids this risk by engaging a custom harvester and paying only for that produce which is commercially acceptable. Therefore, if an employee harvests unacceptable produce, Ortiz, rather than Cardinal, absorbs the loss.

Supervision of employees. Labor Code Section 1682(b), supra, provides in pertinent part that labor contractors are persons who employ workers to render personal services "... to, for, or under the direction of a third person ...". According to Cardinal's brief, there is no "third person" in this contract. Mr. Ortiz harvests the crop and in so doing handles all hirings and firings of employees, supervises their performance, maintains payroll records, and pays all benefits such as social security contributions.

Manner of payment. Labor Code Section 1682(b), supra, defines a farm labor contractor as one who provides workers to a third party for a fee, Johns v. Ward, 179 C.A. (C. A. 2, 780 (1959) ["labor contractors collect their fees and make their profits

*1.70 per kilo, all in 4/28/77*

from the laborers actually doing the [work]"]. "Fee is the difference between the amount received by a labor contractor from the third person and the amount the contractor in turn pays to persons employed to provide services for that third person. Thus/ the "fee" which a labor contractor receives is dependent upon and in direct proportion to the amount of wages the third person is obligated to pay—it is "normally a percentage override of the actual cost of labor," Kotchevar, supra. Mr. Ortiz, on the other hand, contracts for a "rate" [a profit rather than a percentage fee] to be paid for a total service and which has no relation to the number of employees or their schedule of pay.<sup>3/</sup>

In regard to the properly filed petition of the Teamsters Union, I find the actions of the regional director prejudicial and would not certify this election. An examination of our records reveals that two days after the UFW filed its petition for certification the Teamsters filed a certification petition at Cardinal which excluded the employees of the custom harvester [Case No. 75-RC-65-R]. The regional director dismissed this petition on the grounds that it did not present an adequate showing of interest in reference to the larger unit sought by the UFW. Regulations which were controlling at the time of the election herein provided that the regional director should have treated the Teamster petition as a motion to intervene without

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<sup>3/</sup>It should be noted that although the Teamsters had been party to a collective bargaining agreement with Cardinal for several years prior to the election, they had neither brought the harvest workers under contract nor included them within the unit designated in the certification petition. Yet, both of these factors—a prior bargaining history in a particular unit as well as a presumption in favor of the unit sought in the petition—influenced the majority's resolution of a unit issue in Napa Valley Vineyards Co., 3 ALRB No. 22 (1977).

consideration of the unit position advocated in the latter petition, 8 California Administrative Code Section 20330(a) (1975) ; substantially re-enacted as Section 20330 (b)(1976).<sup>4/</sup> To certify the results of this election would therefore prejudice a party whose petition was wrongfully dismissed.

Dated: March 11, 1977

Richard Johnsen, Jr., Member

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<sup>4/</sup>The UFW claimed that there were approximately 70 Cardinal employees at the time of filing while the Teamsters placed the employee contingent at just 14. Assuming that the regional director had accepted the UFW's employee estimate as governing unit size, the Teamsters could have met the 20 percent showing of interest required for intervention had it secured authorizations from all 14 of the employees it claimed comprised the total unit. An intervening union may qualify for ballot status up to 24 hours prior to an election, Labor Code Section 1156.3(b). Since the Teamsters were party to a collective bargaining agreement with the employer at the time of the election, it is probable that it held dues deduction or authorization cards from these employees as a condition of continued employment.