

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

FRUDDEN PRODUCE, INC.,)	
)	
Respondent,)	Case No. 75-CE-138-M
)	
and)	
)	
UNITED FARM WORKERS OF)	4 ALRB No. 17
AMERICA, AFL-CIO,)	
)	
Charging Party.)	

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On August 12, 1977, the Board issued the attached Proposed Decision in this proceeding. Thereafter, Respondent and the Charging Party each filed timely exceptions and a supporting brief.

The Board has considered the record and the attached Proposed Decision in light of the exceptions and briefs and has decided to affirm the findings, conclusions and recommended Order of the Board as modified herein.

Respondent excepts to the finding that it was responsible for labor contractor Esquivel's conduct at the labor camp, contending that it was required by law to obtain a license for the operation of the labor camp,^{1/} that there was nothing in its lease

^{1/} We do not rely on the fact that Frudden Produce had a labor camp permit in our finding of liability.

with Esquivel to indicate that it retained any control other than that of a typical lessor, and that it did not give any directions to Esquivel as to the events which transpired at the labor camp on September 23, 1975. Thus, the thrust of Respondent's argument is that it did not exercise sufficient control over the labor camp so as to be held liable for Esquivel's conduct.

Regardless of the degree of control which an employer may exercise over a labor camp,^{2/} this Board has held that an employer engaging a labor contractor, who is actually or constructively functioning as such, is the employer for all purposes under the Act and is therefore liable for the contractor's unfair labor practices, just as the employer would be liable for the unfair labor practices of its officers, agents and supervisors. Vista Verde Farms, 3 ALRB No. 91 (1977).^{3/} Moreover, the violation does not have to occur on the employer's premises for such liability to attach. Whitney Farms, 3 ALRB No. 68 (1977). Thus, in Whitney Farms the employer was held liable for the actions of its labor contractor even though the unfair labor practice occurred at a camp not owned by the employer. Accordingly, we affirm our conclusion that Respondent is liable for Esquivel's conduct at the labor camp on September 23, 1975, which violated Section 1153(a) of the Act.

Respondent excepted to our conclusion that it violated

^{2/} It should be noted that the Board found that Frudden did in fact retain control of the labor camp.

^{3/} During the relevant period, Esquivel was employed by Frudden to supply workers and to supervise the harvest of tomatoes.

Section 1153 (a) and (c) of the Act by interference with the Garibays' distribution of leaflets, by threatening and assaulting them, by discrimination against the Garibays as to the terms and conditions of their employment, and by constructively discharging them. Respondent contends that the Garibays voluntarily quit, that Noe Garibay testified that neither he nor any member of his family had been fired, and that consequently the Board is precluded from finding a constructive discharge.^{4/}

Contrary to Respondent's contention, the record clearly establishes that the Garibays were in effect forced to quit as a result of changes in their working conditions which made continued employment intolerable. Noe Garibay testified that attempts by him and his brothers to distribute union leaflets, prior to the commencement of the working day, were stopped, that they were forced to work harder than other workers, and that buckets of tomatoes they picked were rejected for no apparent reason. Noe Garibay also testified that his and his brothers union activity was subject to surveillance by Respondent and Esquivel and that on one occasion Esquivel attempted to run him off the road. His testimony concerning the incident on the road was uncontradicted.

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^{4/} Respondent relies on NLRB v. Cosco Products Co., 280 F.2d 905, 46 LRRM 2549 (1961), to support his argument. However, that case does not clearly set forth the state of the law regarding constructive discharges. According to Cosco, one could never find that a constructive discharge was an unfair labor practice. This proposition is contrary to both ALRB and NLRB precedent.

That incident precipitated their leaving the job.^{5/}

Respondent argues that it should not be held liable because it took no part in any harassment, had no knowledge of the leaflet distribution and, in any event, did not make any attempt to stop it. However, as noted above, Respondent is liable for Esquivel's conduct. We therefore conclude that Respondent is liable for Esquivel's conduct, which violated Section 1153(c) and (a) of the Act.

The UFW excepted to the Board's failure to provide for posting and distribution of a meaningful notice and requested a remedial order requiring Respondent to allow expanded access and to provide periodic employee lists to the UFW. We consider that the proposed notice and remedial order are entirely adequate and appropriate in this matter.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the Respondent, Frudden Produce, Inc., its officers, agents, successors and, assigns, shall:

1. Cease and desist from:

(a) Preventing union organizers from entering the premises where employees live.

(b) Harassing employees for the purpose of

^{5/}We find merit in Respondent's exception to the Board's reliance on the tire-slashing as one of the several incidents that led to the Garibays¹ leaving. However, this was just one of the many incidents which in effect forced the Garibays to leave their employment and is not essential to our finding the constructive discharges.

discouraging their union activity.

(c) Discriminating as to the terms or conditions of employment of particular employees for the purpose of discouraging their union activity.

(d) Interfering in the distribution of union materials.

(e) Threatening or intimidating employees.

(f) Assaulting persons involved in an attempt to unionize its employees.

(g) In any other manner interfering with the exercise of rights guaranteed by the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its premises copies of the attached "Notice to Employees". Copies of said Notice, on forms provided by the appropriate Regional Director, after being duly signed by the Respondent, shall be posted by it for a period of 90 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said Notices are not altered, defaced or covered by any other material. Such Notices shall be in both English and Spanish.

(b) Respondent Frudden shall mail a copy of the Notice, in both English and Spanish, to every person who was an agricultural employee who resided at the Little Waco labor camp on September 23, 1975, and for all persons supplied to him by Esquivel and Sons during the payroll period encompassing

September 9, 1975.

(c) A representative of the Respondent or a Board Agent shall read the attached Notice to the assembled residents of the Little Waco camp at a time specified by the Regional Director. A similar reading shall be made to the employees of the Respondent. These readings shall be in English, Spanish and other appropriate languages. Following these readings, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have regarding the Notice and rights under the Agricultural Labor Relations Act. The Regional Director shall determine a reasonable rate of compensation to be paid by the Respondent to all non-hourly wage employees to compensate them for time lost at the reading to the Respondent's employees, as well as at the question and answer period. In addition, Frudden shall hand a copy of the Notice to each new resident of Little Waco in 1977.

(d) Offer the Garibays [Noe, Alejandro and Francisco] immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole for any losses they may have suffered by reason of their discriminatory discharge including interest measured thereon at seven percent per annum.

(e) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back

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pay due and the rights of reinstatement under the terms of this Order.

Dated: April 5, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;
2. To form, join or help unions;
3. To bargain as a group and choose whom they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect one another;
5. 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 prevent union organizers from entering the premises where employees live.

WE WILL NOT harass employees for the purpose of discouraging their union activity.

WE WILL NOT discriminate as to the terms or conditions of employment of particular employees for the purpose of discouraging their union activity.

WE WILL NOT interfere in the distribution of union materials.

WE WILL NOT threaten or intimidate employees.

WE WILL NOT assault persons involved in an attempt to unionize our employees.

Dated:

FRUDDEN PRODUCE, INC.

By: _____
Representative Title

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

Frudden Produce Co.

4 ALRB No. 17

75-CE-138-M

PROPOSED BOARD DECISION

Due to the unavailability of the Administrative Law Officer who conducted the hearing herein, and pursuant to 8 Cal. Admin. Code Section 20266 (1976), the Board, on August 12, 1977, issued a Proposed Decision and Order in this matter.

In its Proposed Decision, the Board found that Respondent had violated Section 1153(a) and (c) of the Act by interfering with the distribution of union leaflets, by discriminating against known UFW supporters in the terms and conditions of their employment, and by threatening and assaulting them, and by constructively discharging members of the Garibay family. The Board also concluded that Respondent had retained control of the labor camp despite the fact that the camp was leased to the labor contractor engaged by Respondent and that Respondent had promulgated the labor camp's no-access policy.

BOARD DECISION

The Board affirmed the findings of its Proposed Decision that Respondent had retained control of the labor camp, adding, however, that regardless of the degree of control retained by Respondent, it was nevertheless liable, as an employer engaging a labor contractor who is actually or constructively functioning as such, for the contractor's acts. Vista Verde Farms, 3 ALRB No. 91 (1977). Moreover, the Board found it immaterial that the violation did not occur on Respondent's premises. Whitney Farms, 3 ALRB No. 68 (1977).

The Board also affirmed the findings in its Proposed Decision that the Garibays had been constructively discharged and that by its acts and conduct, Respondent had violated the Section 1153 (a) rights of employees.

REMEDIAL ORDER

Remedial Order requires Respondent to offer full reinstatement and back pay to the Garibays, and to post, distribute and read an appropriate Notice to all employees.

This summary is furnished for information only and is not an official statement of the Board.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

FRUDDEN PRODUCE, INC.,)	
)	
Respondent,)	No. 75-CE-138-M
)	
and)	
)	
UNITED FARM WORKERS OF AMERICA,)	3 ALRB No.
AFL-CIO,)	
)	
Charging Party.)	
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Proposed Decision and Order

This decision has been delegated to a three-member panel.
Labor Code Section 1146.

This case was heard on four days in 1975 and 1976. All parties were represented and given full opportunity to participate in the proceedings. Due to the unavailability of the administrative law officer and pursuant to 8 Cal. Admin. Code Section 20266 (1976), the matter has been transferred to the Board for the purpose of issuance of a proposed decision and order. If no exceptions are filed within 20 days after service of this proposed decision and order, it shall become final.

Having reviewed the entire record in this case, including a post-hearing brief filed by the respondent,^{1/} we make the following findings and conclusions.

^{1/}The ALO ordered briefs to be filed on January 17, 1977, the general counsel mailed its brief on that date, and it was not received by the Board until January 19. The mailing in this case is in conformance with the standards set forth in Section 20480 (b) of our regulations. The respondent's motion to strike the brief is denied.

The charging party is a labor organization. The respondent, Frudden Produce, Inc., is an agricultural employer. Eduardo Esquivel is a farm labor contractor doing business as Esquivel & Sons. Esquivel was employed by Frudden during 1975 to supply workers and to supervise the harvest of tomatoes. He is a supervisor of Frudden Produce, Inc., within the meaning of Section 1140.4(j). Esquivel also operated the Little Waco labor camp owned by Frudden.

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On the morning of September 9, 1975,^{2/} prior to the start of work, three members of Esquivel's crew, Noe, Alejandro and Francisco Garibay, attempted to distribute UFW literature.' Upon reading one of the union leaflets, Eduardo Esquivel flew into a rage. He cursed the men, declared that he did not want any "Chavistas" working for him, and threatened to shoot union members. The men ceased their activity and hid the remaining materials in their truck.

A sister of the Garibays testified that she overheard Esquivel instruct Mr. Vala, his foreman, to pressure the Garibays in an attempt to make them quit their jobs. That same day the

^{2/} The respondent objected to the introduction of evidence involving incidents occurring on September 9, 1975, and moved to strike all testimony in support thereof on the ground that he had not been served with a charge as to those parts of the complaint. The respondent was served with a copy of a charge alleging a violation of the Act occurring on September 23, 1975, and with a complaint involving both the incidents alleged to have occurred on September 9 and 23, 1975. The complaint was served on October 6, 1975, and the respondent answered it by way of a general denial on October 16, 1975. He first raised this objection at the hearing, and failed to show that he was in any way prejudiced by the charging party's omission. Accordingly, his motion is denied.

field checker began rejecting tomatoes picked by the Garibay family. They were told their work was not up to quality. Noe Garibay testified that he had been picking tomatoes for seven or eight years on other farms and that he had received no adverse comments as to the quality of his work. From September 9, 1975, until the time the Garibays left Esquivel's crew, better work was demanded of them than other workers. According to Noe Garibay, his family attempted to comply with Esquivel's demands by picking better quality fruit, but this fruit, too, was arbitrarily rejected at times. Once Mr. Garibay asked the checker why she was refusing to credit his work. She did not explain her conduct but merely stated, "When you come back next time, I'll take another bucket away." The foremen also required the Garibays to pick over work which other employees had improperly harvested.

On September 25, 1975, Noe Garibay met UFW organizers at the field where he was picking. Dennis Frudden, field superintendent for Frudden Produce, Inc., was standing a few feet behind him as he explained to the union representatives the pressure which had been placed upon him and his family as a result of their union activity. When he attempted to leave work about an hour later he noticed that three tires on his truck had been slashed. Mr. Garibay testified that the only persons in the vicinity of the vehicle were Dennis Frudden and Eduardo Esquivel. While the evidence is insufficient to establish that either Frudden or Esquivel slashed Garibay's tires, this incident is nevertheless relevant as one of the several incidents that finally led to the Garibays' leaving the-respondent's employ.

On October 3, 1975, Noe Garibay, while driving his truck, was followed in a pick-up driven by Eduardo Esquivel. When Garibay attempted to turn into the field, Esquivel swerved in front of him blocking his path and almost causing a collision. The Garibays left the employ of Frudden and Esquivel that day.

Respondent offered no evidence to refute these charges, but did introduce the leaflets distributed by the Garibays on September 9. It claimed that since the leaflets were false and libelous and encouraged illegal activity, the Garibays were not engaging in protected activity under Section 1152. We reject this defense. The leaflets were routine campaign materials, claiming that the UFW would help illegal aliens resist deportation, and claiming that a rival union was run by thieves. The distribution of this material is protected by the Act. The respondent further claims that it neither instigated nor controlled Esquivel's conduct. The respondent is liable for its supervisor's conduct, even if the conduct was not specifically ordered. H. J. Heinz Co., 311 U.S. 514, 7 LRRM 291 (1941); NLRB v. Solo Cup Co., 237 F.2d 521, 38 LRBM 2784 (8th Cir. 1956).

We therefore conclude that respondent did violate Sections 1153(a) and (c) of the Act by interfering with the distribution of leaflets, by discriminating against known UFW supporters in the terms and conditions of their employment, by threatening and assaulting them, and by constructively discharging the Garibay family. Merzoian Brothers Farm Management Company, Inc., 3 ALRB No. 62 (1977).

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II

On September 23, 1975, at approximately 4:30 p.m., UFW organizers entered the Little Waco camp owned by Frudden Produce, Inc. and leased to Esquivel and Sons. There were employees present at the time. Law enforcement officers had been summoned at the union's request because previous attempts to organize at the camp had been met with, physical resistance. Minutes after the organizers' arrival, Eduardo Esquivel drove into the camp. He demanded that the organizers leave immediately, cursed them, struck one organizer and threw a bottle at another, Esquivel then, threatened to kill the organizers, ordered that the camp be armed, and directed one person to get his weapons from his truck. That individual was stopped by a Monterey County deputy sheriff who testified that the vehicle contained two shotguns and a rifle, all fully loaded.

The respondent offers various defenses. First, it claims that the organizers did not display identification as required by a preliminary injunction in the case of ALRB v. Frudden Produce, Inc. (Monterey Superior Court Civ, No. 720851. However, the record shows that the respondent's agents knew very well who the organizers were, and that their motive in assaulting them had nothing to do with a failure to display identification. In any case, the injunction was not issued until November 7, 1975, more than a month after the events in this case. It is difficult to see how the organizers could be faulted for failing to abide by the terms of a court order that was non-existent at the time. The respondent also claims that it had the right to exclude

organizers in order to protect some building materials that were being stored at the labor camp. There was no evidence of any threat to the respondent's property, and we accordingly reject the defense.

Finally, the respondent argues that it was Esquivel, and not Frudden, who controlled the camp and that Frudden was merely a lessor. However, the record is replete with evidence that respondent retained control of the camp and promulgated the no-access policy. It was Frudden Produce, Inc. that held the license to operate the labor camp. The lease signed by Dennis Frudden on behalf of Frudden Produce, Inc. required Esquivel to provide 24-hour supervision, and retained the right of inspection to make certain the camp was properly maintained and operated. In a sworn declaration dated September 29, 1975, Dennis Frudden stated he supervised the camp and Esquivel managed it for Frudden Produce. Frudden testified he visited the camp weekly.

According to Frudden's further testimony at the hearing, he participated in the establishment of the company's access policies. Those policies were stated in two letters to the District Attorney. The letters were prepared by Frudden Produce's attorneys at the direction of Dennis Frudden.

Based on our findings, we conclude that respondent was responsible for Esquivel's conduct at the labor camp on September 23, 1975, and accordingly violated Section 1153 (a) of the Act and that this conduct interfered with the employees' Section 1152 rights.

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ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the respondent, Frudden Produce, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Preventing union organizers from entering the premises where employees live.

(b) Harassing employees for the purpose of discouraging their union activity.

(c) Discriminating as to the terms or conditions of employment of particular employees for the purpose of discouraging their union activity.

(d) Interfering in the distribution of union materials.

(e) Threatening or intimidating employees.

(f) Assaulting persons involved in an attempt to unionize its employees.

(g) In any other manner interfering with the exercise of rights guaranteed by the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its premises copies of the attached "Notice to Employees". Copies of said notice, on forms provided by the appropriate regional director, after being duly signed by the respondent, shall be posted by it for a period of 90 consecutive days thereafter, in conspicuous places, including all places where

notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that said notices are not altered, defaced or covered by any other material. Such notices shall be in both English and Spanish.

(b) Respondent Frudden shall mail a copy of the notice, in both English and Spanish, to every person who was an agricultural employee who resided at the Little Waco labor camp on September 23, 1975, and for all persons supplied to him by Esquivel and Sons during the payroll period encompassing September 9, 1975.

(c) A representative of the respondent or a Board agent shall read the attached notice to the assembled residents of the Little Waco camp at a time specified by the regional director. A similar reading shall be made to the employees of the respondent. These readings shall be in English, Spanish and other appropriate languages. Following these readings, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have regarding the notice and rights under the Agricultural Labor Relations Act. The regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees to compensate them for time lost at the reading to the respondent's employees, as well as at the question and answer period. In addition, Frudden shall hand a copy of the notice to each new resident of Little Waco in 1977.

(d) Offer the Garibays [Noe, Alejandro and Francisco] immediate and full reinstatement to their former or

substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole for any losses they may have suffered by reason of their discriminatory discharge including interest measured thereon at seven percent per annum.

(e) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this Order.

Dated: August 12, 1977

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

RONALD L. RUIZ, Member

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

- (1) to organize themselves;
- (2) to form, join or help unions;
- (3) to bargain as a group and choose whom they want to speak for them;
- (4) to act together with other workers to try to get a contract or to help or protect one another;
- (5) 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 prevent or interfere with your communications with union organizers at the Little Waco Labor Camp.

Dated:

FRUDDEN PRODUCE, INC.

By:

Representative

Title