STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ERNEST J. HOMEN; EDUARDO ESQUIVEL AND RICARDO ESQUIVEL dba ESQUIVEL AND SONS; AND DENNIS FRUDDEN dba FRUDDEN PRODUCE COMPANY,	)	Case Nos. 75-CE-244-M and 75-CE-249-M
Respondents,	)	4 ALRB No. 27
and	)	
UNITED FARM WORKERS OF 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 May 15, 1977, Administrative Law Officer Robert A. D' Isidore (ALO) issued the attached Decision in this case. Thereafter, the General Counsel and the Charging Party (UFW) each filed exceptions and a supporting brief and the Respondent filed a brief in response to the exceptions.[1/]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to

[1/] The Respondent argues in its brief that the UFW's exceptions should be disregarded because, unlike Respondent, it did not file a notice of intention to file exceptions and a request for transcript under § 20284 of the Regulations, and therefore its time for filing exceptions under § 20282 had expired. We do not agree. Where one of the parties to an unfair labor practice case requests a transcrip the time for the filing of exceptions is stayed for all. A contrary reading would enable the party which orders the transcript to write its exceptions with those of the opposing party before it. Treating Respondents' argument as a motion to strike the UFW's exceptions, the motion is hereby denied.

affirm the rulings, findings, and conclusions of the ALO only to the extent consistent with this opinion.

I

This is the second case to come before this Board arising out of access denials at the Little Waco Labor Camp in San Lucas, Monterey County, in the Fall of 1975. In Whitney Farms, et al, 3 ALRB No. 68 (1977) we found the employer Whitney Farms to be liable for the access denials undertaken by its labor contractor and supervisor Esquivel and Sons at the Little Waco Camp on November 12, 1975. [2/] Frudden Produce Company was also found liable for these activities because Esquivel and Sons was Frudden's agent. Frudden is also a Respondent here in Case No. 75-CE-244-M in which the complaint concerns the incidents previously adjudicated in the Whitney Farms decision. The facts may be simply stated. On November 12, UFW organizers were denied access to the Little Waco Labor Camp at approximately 4:00 p.m. and again at approximately 6:20 p.m. The record indicates that significant numbers of Respondent Homen's employees were residing in that camp. A representation election among Homen's employees, including those provided by its labor contractor Esquivel and Sons, was scheduled for the following day, November 13.

In the attached Decision, the ALO recommended dismissal of complaint number 75-CE-244-M as to Ernest Homen on the grounds that the General Counsel had failed to show any agency relationship existing on November 12 between Homen and Esquivel and Sons, Manuel Garcia (the individual who physically closed the gates at the camp

[2/] Unless otherwise specified, all dates hereafter are in 1975

in the 4:00 p.m. incident), Dennis Frudden, or Frudden Produce Co. At the request of Frudden, the ALO deferred to the Board's determination of the question of Frudden's liability in Case No. 75-CE-242-M (Whitney Farms, et al, supra.)[3/]

In our decision in Whitney Farms we found that Frudden was liable for the denials of access to the Little Waco Camp. That finding is applicable here also, but we shall not issue an additional remedial order with respect to Frudden, as it would be merely duplicative of that previously issued in the Whitney decision.

Both the General Counsel and the Charging Party have taken exception to the ALO's failure to find Respondent Homen liable for the access denials on November 12. These exceptions have merit. We find, contrary to the ALO, that Homen is liable for these violations by virtue of the terms of Section 1140.4(c) of the Act.

In Vista Verde Farms, supra, the Board found the employer

[3/] The General Counsel requested and received from the ALO a dismissal of complaint number 75-CE-244-M insofar as it alleged that Esquivel S Sons, licensed labor contractors, were employers within the meaning of Section 1140.4(c) of the Act. In most circumstances this course of action would be the natural result of the exclusionar language of that provision. However, as the Board held in the recen decision Vista Verde Farms, 3 ALRB No. 91 (1977), a labor contractor not actually or constructively engaged, or functioning, in that capacity, may be liable as one "acting in the interest of" an employer, and hence chargeable as a respondent under the Act. In the present case, for example, Esquivel & Sons was supplying employees to Respondent Homen until November 9, 1975. The denials of access occurred on November 12, 1975. If no representation petition had been filed, it would be arguable that the actions of Esquivel on November 12 occurred when it was not engaged, either actually or constructively, by an agricultural employer. Under the Vista Verde rationale, Esquivel could then be liable for these activities as an agricultural employer. This is consistent with our practice of looking behind the labels by which various entities have chosen to describe themselves, in order to analyze their actual functional status. See Kotchevar Brothers, 2 ALRB No. 45 (1976); Napa Valley Vineyards, 3 ALRB. No. 22 (1977); Jack Stowells, Jr., 3 ALRB No. 93 (1977)

liable for access denials committed by its labor contractor during a brief hiatus in the period during which the contractor provided labor to the employer. We held that the contractor was at least constructively engaged by the employer at the time of the violations because of the relative brevity of the interruption, and the clear evidence of a regular, long-term, albeit seasonally intermittent, arrangement between the parties. The record also disclosed that the contractor had been actually engaged in supplying labor to the employer during the pre-election eligibility period.

Although there are factual differences between the two cases, the logic of the Vista Verde decision is applicable here. In that case the break in the actual engagement occurred in mid-season and the relationship resumed after the commission of the unfair labor practices. In this matter the season had ended a few days prior to the commission of the alleged unfair practices. In Vista Verde, the record showed a long history of employer utilization of that particular labor contractor; here, although Esquivel and Sons had not previously been engaged by Respondent Homen, he had historically employed one labor contractor or another during his harvest season. Despite these differences, in their essence the two cases are not materially distinguishable. In both there was *a.* representation election pending in which the contractor-supplied employees, part of the bargaining unit, were eligible to vote.[4/] In both cases there was clear interference with the Section

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[4/] The union filed its petition for an election herein on November 6 As part of its response pursuant to Section 20310 of the Regulations

(fn. 4 cont'd. on p. 5)

1152 rights of the affected employees, related to their participation in the election, occurring on the day before the election was scheduled. Finally, in Vista Verde and here as well, the reality of the industry -- its seasonality and resultant dependence on contracted employees -- compels a statutory construction which provides remedial coverage to meet its actual patterns and practices.

In light of these considerations we found the Employer liable in the Vista Verde case for the contractor's acts of interference during the election period. Likewise here, we construe Section 1140.4(c) of the Act to impose liability upon Respondent Homen for violations of the Act committed against eligible voters by its labor contractor during the pre-election period that relate to the election, even though prior to that time the Respondent had ceased utilizing the services of the contractor for the season.

A contrary conclusion would create the anomaly that these workers, Homen's employees for the purpose of the election, were not his employees for the purpose of the effectuation and protection of their Section 1152 rights. The signal importance of the election process in the scheme of the Act and the peculiarities of the

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(fn. 4.cont'd.)

(1975), Homen submitted a list of its agricultural employees, including those supplied during the relevant period by Esquivel & Sons for the chili and pimento harvest. This list was received in evidence at the hearing. Thirty-nine, or approximately 30%, of those eligible to vote gave addresses in the Little Waco Labor Camp. An overall total of 83 eligible voters, or slightly more than 60% of all those eligible, show addresses in one labor camp or another in the area.

agricultural industry preclude such a statutory construction. The record in this case provides a graphic context for these observations. Although he has been engaged in farming for a substantial period of time, Homen has a very limited complement of regular workers. This group is concededly too small to harvest his crops. It is therefore essential to his operation that he procure large numbers of additional laborers at harvest time. That these workers, historically provided to Homen by labor contractors, are part of the appropriate bargaining unit at Respondent is clear from the statute and our prior cases. Labor Code Sections 1140.4 (c) and 1156.2; TMY Farms, 2 ALRB No. 58 (1976). Their inclusion is, however, somewhat complicated by the election procedures set forth in the Act.

Section 1156.4 of the Act requires that elections be conducted during peak employment periods. Section 1157 confers eligibility upon those employed during the payroll period immediately preceding the filing of the petition for certification. Pursuant to Section 1156.3, elections should normally be conducted not more than 7 days after the filing of the petition. Where, as in this case, the farming operation has a relatively short peak period (the chili and pimento harvest ran from October 24 through November 9) the implementation of these statutory provisions may frequently mean that as of the date of the election the workers supplied by the contractor will no longer be working for the Employer. Yet, as here, many of these workers will be eligible to vote in the election. Their interest in the question of unionization at the company continues after they have ceased working at the Employer, as does the interest of the Employer.

Upon consideration of the above factors, we find that the imposition of liability upon Respondent Homen during the relatively brief period between the filing of the petition and the conclusion of the election furthers the goals and policies of the Act. It focuses the remedial powers of the legislation upon the party with the most permanent interest in the ongoing agricultural operation and upon the source of future employment. Also, to the extent that benefits may potentially flow to the Employer from the interference of the contractor during the election period, this construction imposes a parallel potential liability.

If, therefore, the denials of access on November 12 are attributable to Esquivel and Sons, Respondent Homen is liable for such denials pursuant to Section 1140.4(c) of the Act.

The ALO found that the organizers were denied access at 4:00 p.m. by the actions of Manuel Garcia, who closed the gate to the camp and placed a chain and lock on it. Garcia stated at the time that he was carrying out the orders of Eduardo Esquivel to keep the UPW organizers out of the camp pursuant to a court order.[5/] As a result, no access was taken and the organizers left. At approximately 6:20 p.m. that day union organizers returned and again were denied access, on this occasion personally by Ricardo Esquivel.

The above statement by Garcia was admitted without objection and is part of the record herein. It is, however, hearsay if considered for the proposition that Garcia had in fact been

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[5/] Consonant with our treatment of the status of the court order in the Whitney Farms decision, we do not view its existence as having a bearing on the violations alleged herein.

authorized or deputized by Eduardo Esquivel to deny access to the labor camp. Our concern is therefore with the weight which should properly be assigned to the evidence. In view of the following facts, we conclude that this evidence is of sufficient reliability to establish that Garcia's denial of access is attributable to Esquivel and Sons. A copy of Garcia's driver's license application is in evidence and establishes that he claimed the Esquivel camp as an alternative address. Monterey Deputy Sheriff DeLeon testified that he had periodically observed Garcia in the fields with Esquivel employees over a period of approximately one year prior to November 12. It is undisputed that Garcia took it upon himself to close and secure the gates with a lock and chain which were within his custody and control. That a rank-and-file employee would of his own volition demonstrate such ostensible authority and take such action in these circumstances appears to us improbable. Any residual doubt regarding the fact of Garcia's prior authorization to act at 4:00 p.m. is in our view dispelled by the corroborative, virtually identical, actions of Ricardo Esquivel slightly more than two hours later. We therefore find, on the totality of the evidence, that Esquivel and Sons, by its agent Manuel Garcia, denied access to the Little Waco Labor Camp on November 12 at 4:00 p.m. This denial of access was in violation of Section 1153 (a) of the Act. Pursuant to our analysis above, we hold that Respondent Homen is liable for such denial of access by virtue of Section 114 0. 4 (c) of the Act. For the same reasons, it follows that Homen is also liable for the denial of

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access accomplished at 6:20 p.m. by Ricardo Esquivel.[6/] We shall therefore issue an appropriate remedial order.

II

The UFW has taken exception to the ALO's failure to find that Respondent Homen violated the Act by denying UFW organizers access to its employees at approximately 12:15 p.m. on October 28, 1975, as alleged in the complaint in Case No. 75-CE-249-M. The ALO concluded that the General Counsel had failed to carry its burden of establishing that Steven Beebe, the Homen employee who procured the Sheriff to eject the organizers, was acting as an agent of Homen at that time.

We affirm the ALO's conclusion, but not his entire rationale. We agree with the UFW that in some circumstances an employer may be liable for the actions of rank-and-file employees because of a failure to timely repudiate or disavow those actions; that is, under a theory of ratification. However, it is clear that Homen himself, although usually present in his fields, was absent on the day in question. There is no evidence as to when he subsequently acquired knowledge of the access denial apart from the service of the charge or complaint. The denial itself was not of the sort, e.g., violent in nature, which might be presumptively within the knowledge of Homen. It is axiomatic that the obligation

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[6/] Esquivel & Sons did not appear at the hearing. However, in the Whitney Farms, supra, litigation, Esquivel did appear by Counsel and full opportunity was accorded for presentation of relevant evidence. As previously indicated, the events at issue in the Whitney case were identical to those alleged in the complaint in Case No. 75-CE-244-M. Under these circumstances, we take notice of, and adopt, the determination in that case that Ricardo Esquivel was an agent of Esquivel and Sons at all times material herein.

to disavow arises only upon the acquisition of either timely knowledge of the event, or grounds for knowledge. See, e.g., Venus Ranches, 3 ALRB No. 55 (1977). On the state of the record here, however, we cannot find that such actual or constructive knowledge existed.

ORDER

Pursuant to Labor Code Section 1160.3, IT IS HEREBY ORDERED that the Respondent, Ernest J. Homen, his officers, agents, successors, and assigns shall:

1. Cease and desist from:

In any manner, preventing union organizers from entering labor camps or other premises where agricultural employees live or committing any like acts of interference, restraint, or coercion either in the presence of such employees or where it is reasonably likely that they will learn of such conduct.

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

a. Execute the Notice to Workers attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

b. Post copies of the attached Notice at times and places to be determined by the Regional Director. The Notices shall remain posted for 90 consecutive days thereafter. Respondent shall exercise due care to replace any Notice which has been altered, defaced, or removed.

c. Mail copies of the attached Notice in all

appropriate languages, not later than 30 days from receipt of this Order, to all employees whose names appear upon the employee list provided to the ALRB on November 10, 1975.

d. Arrange for a representative of the Respondent or a Board Agent to distribute copies of, and read, the attached Notice in appropriate languages to the assembled employees of the Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice or their rights under the 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 this reading and the question-and-answer period.

e. Notify the Regional Director in writing, not later than 30 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

IT IS FURTHER ORDERED that allegations contained in the

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complaints not specifically found herein as violations of the Act shall be, and hereby are, dismissed.

DATED: May 11, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

NOTICE TO WORKERS

After a hearing in which all parties had a chance to present evidence and state their positions, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act because our labor contractor prevented UFW organizers from entering a farm labor camp where our employees were living. The Board has told us to post and mail this Notice and to take certain other action. We will do what the Board has ordered/ and also tell you that:

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

1. to organize themselves;

2. to form, join, or help any union;

3. to bargain as a group and to choose anyone they want to speak for them;

4. to act together with other workers to try to get a contract or to help or protect each other; and

5. to decide not to do any of these things.

Because this is true we promise you that:

WE WILL NOT in the future interfere with the right of our employees to speak with union organizers who come to visit them where they are living.

ERNEST J. HOMEN

DATED: By: _____
(Representative)

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

DO NOT REMOVE OR MUTILATE.

Ernest J. Homen Case Nos. 75-CE-244-M
75-CE-249-M

ALO DECISION

This case concerns two complaints consolidated for hearing. Complaint 75-CE-244-M alleged that Respondents Frudden and Homen violated Labor Code Section 1153(a) by, through their agents, denying access to UFW organizers at a farm labor camp on two occasions on November 12, 1975. That part of the complaint alleging that Esquivel and Sons was also chargeable as a Respondent in connection with these events was dismissed by the ALO at trial upon the request of the General Counsel. Complaint 75-CE-249-M alleged that Respondent Homen violated Section 1153 (a) by denying access to UFW organizers during the noon hour on October 28, 1975.

In his Decision the ALO found that as to Complaint 75-CE-244-M the General Counsel had failed to establish that Manuel Garcia (who physically closed and locked the gates at the labor camp), Esquivel and Sons, or Frudden stood in an agency relationship to Homen on November 12. The ALO relied on traditional principle regarding agency and independent contractor status for this conclusion. The ALO found that Homen had no possessory or ownership interest in the camp? that the contractual relationship between Homen and Esquivel had ended on November 9, three days after the filing of the UFW's petition and three days before the denials of access. The ALO considered, but rejected, the General Counsel's argument that in these circumstances the terms of Labor Code Section 1140.4(c) made Homen liable for the contractor's acts of interference.

The ALO deferred any finding regarding the liability of Respondent Frudden to the Board's decision in the Whitney Farms case, where that precise issue was involved.

BOARD DECISION

The Board found that Frudden was liable for these denials of access at the labor camp on the strength of the finding previously made in the Whitney Farms case, 3 ALRB No. 68 (1977). It did not enter a remedial order, however, as it would be merely duplicative of that entered in the Whitney case.

Contrary to the ALO, the Board found that on the facts of this case, Respondent Homen was liable for the access denials committed by the labor contractor on November 12, the day before the scheduled election among Homen's employees.

The Board noted that in the Vista Verde case, 3 ALRB No. 91 (1977) it had found the Employer liable for the labor contractor's acts of interference occurring during a brief break in the engagement relationship. In that case the contractor was described as "constructively" engaged during this minor hiatus. While acknowledging that there were some differences between the two cases – the resumption of the engagement relationship after the commission of the unfair labor practices, present in Vista Verde, was absent here; the long term historical relationship between the Employer and the particular contractor was absent -- the Board found that the logic in the Vista Verde decision applied here. In both cases there was a pending election in which the contracted employees were eligible to vote; in both cases the contractor's interference was related to the participation of the employees in the election; in both cases the actual patterns, and practices of the industry required a construction of the statute to provide meaningful remedial protection to the affected employees.

The Board emphasized that, particularly where, as here, there is a short peak season, a conclusion that Homen was not liable would create a zone of no protection of employee rights, even though during the critical pre-election period. This is primarily because the peak employment (Section 1156.4), eligibility (Section 1157), and 7 day election (Section 1156.3) provisions of the Act may frequently mean that the contractor-supplied employees are no longer being supplied to that employer when the election is actually held.

The Board therefore concluded that during the period from the filing of the election petition to the completion of the election the Employer will be liable by the terms of Labor Code Section 1140.4 (c) for the unfair labor practices of the contractor directed against eligible voters which relates to the election even though the Respondent had ceased using the services of the contractor for that season. Having found that the record evidence was sufficient to establish the responsibility of the labor contractor for the denials of access, the Board found Homen liable for these violations and accordingly entered a remedial order against him.

While accepting the ALO's conclusion that the General Counsel had failed to establish the necessary link

between Respondent Homen and the October 28 access denial, the Board noted its agreement with the UFW contention that under certain circumstances an employer may be responsible for the actions of rank-and-file employees in a ratification theory, i.e., a failure to timely disavow those acts. Citing, e.g., Venus Ranches, 3 ALRB No. 55 (1977). However, on this record the Board could not find sufficient actual or constructive knowledge of the occurrence to impose liability upon Homen. Complaint 75-CE-249-M was therefore ordered dismissed.

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

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

ERNEST J. HOMEN, EDUARDO ESQUIVEL and RICARDO ESQUIVEL, dba ESQUIVEL & SONS, DENNIS FRUDEN, dba FRUDEN PRODUCE COMPANY,	)	Case Nos. 75-CE-244-M 75-CE-249-M
Respondents,	)	
and	)	
UNITED FARM WORKERS OF AMERICA,	)	
Charging Party.	)	

Lupe Martinez, Esq., of Salinas, Ca. for the General Counsel

Noland, Hamerly, Etienne & Hoss, by James D. Schwefel, Jr., Esq., of Salinas, Ca. for Respondent, Ernest J. Homen

Dressier, Stoll & Jacobs, by Wayne A. Hersh, Esq., of Salinas, Ca. for Respondent, Dennis Fruden, dba Fruden Produce Company

DECISION

Statement of the Case

ROBERT A. D'ISIDORO, Administrative Law Officer: This case was heard before me in King City, California, on April 25 and 26, 1977. The consolidated complaints allege violations of Section 1153 (a) of the ALRA. Pursuant to Section 20222 of the Board's Regulations, paragraph 8 of Complaint No. 75-CE-244-M was amended to include reference to the First Amendment of the United

States Constitution, and Article I, Section 2 of the California Constitution. Said Complaint is based on a charge filed on November 13, 1975, by the United Farm Workers of America, AFL-CIO, hereinafter called UFW. Copies of the charge and Complaint were duly served upon Respondents. Answers were filed on behalf of Ernest Homen and the Esquivels, and at the prehearing conference, the parties present stipulated that the answer for the Esquivels be deemed the answer for Dennis Fruden, dba Fruden Produce. General Counsel then dismissed the Esquivels as Respondents in the Complaint, asserting that as labor contractors, they are not agricultural employers within the meaning of 1140.4 (c) of the ALRA.

Complaint No. 75-CE-249-M is based on a charge filed by the UFW on November 19, 1975. Copies of the charge and Complaint were duly served upon Respondent, Ernest J. Homen.

The only parties appearing during the two days of hearing were the General Counsel and Ernest J. Homen. No one appeared on behalf of the Esquivels or "Fruden." In that regard we note that a "Notice of Withdrawal as Attorney" in case no. 75-CE-244-M was filed and served by Abramson, Church & Stave, by Robert M. Hinrichs, Esq., on April 25, 1977, as attorneys of record for Frudden Produce, Inc., Frudden Produce, and Frudden Produce Company (see GC 26). We further note that on May 4, 1977, Dressier, Stoll & Jacobs, by Wayne A. Hersh, Esq., served notice that as of that date, they were the attorneys for Frudden Produce, Inc. in case no. 75-CE-244-M, and Mr. Hersh filed a

posthearing brief on behalf of Frudden Produce, Inc.

All parties were given full opportunity to participate in the hearing, and all remaining parties submitted posthearing briefs in support of their respective positions.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

I find that the Ernest Homen referred to in General Counsel's Complaint No. 75-CE-244-M, and the Ernest J. Homen referred to in General Counsel's Complaint No. 75-CE-249-M is the same person and is a sole proprietor engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of Section 1140.4 (c) of the ALRA. I find that the Dennis Fruden, dba Fruden Produce Company, referred to in General Counsel's Complaint No. 75-CE-244-M is the same Dennis Frudden who is the sole stockholder of Frudden Enterprises, Inc., and the field superintendent for Frudden Produce, Inc., California corporations, and, as such, is engaged in agriculture in Monterey County, California, and is an agricultural employer within the meaning of Section 1140.4 (c) of the ALRA.

I find that the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the ALRA.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Complaint No. 75-CE-244-M alleges that Respondents Ernest Homen and Dennis Fruden, dba Fruden Produce Co., violated Section 1153(a) of the ALRA by, through their agents, denying access to UFW organizers who were attempting to engage in organizational activities at the Little Waco Labor Camp on November 12, 1975, at approximately 4:00 p.m., and again at approximately 6:00 p.m.

Complaint No. 75-CE-249-M alleges that Respondent Ernest J. Homen violated Section 1153 (a) of the ALRA by, through his agent, denying access to his field to UFW organizers who were attempting to engage in organizational activity on October 28, 1975, during the noon hour.

B. The Evidence

1. Ernest J. Homen ,

Ernest J. Homen (hereinafter Homen) and his wife Audrey Jean Homen are engaged in the production, harvest, and sale of argicultural crops grown on leased ranches in southern Monterey County. Homen employs a small steady work force of tractor drivers, irrigators, and the like, to help him with his year-round farming operations. The number of those employees varies between six and approximately 11, depending upon the time of year. Homen grows and/or harvests various crops (tomatoes, sugar beets, corn, broccoli, chilies, garlic, lettuce, peas, beans, etc.), and, depending upon the crop to be harvested, he may

either sell the crop while it is still growing, in which case the purchaser will be responsible for harvesting the crop, or Homen will harvest the crop himself and then sell it. Homen frequently utilizes various labor contractors to thin, hoe, and harvest his crops. In 1975, for the first and only time, he used the services of Esquivel & Sons to thin some tomatoes for a brief period in April, and later in October and early November, to harvest Homen's pimientos and chilies. The harvest of chilies and pimientos was completed on November 9, 1975, after which Homen ceased to utilize any field labor employees of Esquivel & Sons. Homen knew that Esquivel & Sons operated a labor camp; however, he had not visited it since "years ago when Joe Silva had it."

On November 6, 1975, three days prior to the completion of the chili harvest and the termination of Homen's use of Esquivel & Sons' labor force, the UFW filed a petition for an election with the Salinas office of the Board, encompassing all of Homen's agricultural employees. In its response to the petition, Homen included the names and addresses of 115 workers supplied by Esquivel & Sons during the payroll period of October 25, 1975, to November 1, 1975. Some of these workers lived at the Little Waco Labor Camp. The Homen election, was accomplished on November 13, 1975, as scheduled, with "no union" winning the majority of the votes cast over the UFW which was the only other choice on the ballot.

2. Esquivel & Sons

Eduardo Esquivel and Porfiori Esquivel, dba Esquivel &

Sons, have been licensed labor contractors since September 15, 1975, to the present time. Ricardo Esquivel is the brother of Eduardo Esquivel and an employee of Esquivel & Sons.

The Little Waco Labor Camp (hereinafter referred to as the "Labor Camp") is a labor camp located in southern Monterey County, owned by Frudden Produce, Inc. It contains housing units for workers and was operated and maintained by Esquivel & Sons pursuant to a lease covering the period from March 11, 1975, to March 10, 1976, between Frudden Produce, Inc., signed by Dennis Frudden on behalf of Frudden Produce, Inc., and by Eduardo Esquivel for Esquivel & Sons (see GC 15).

3. "Dennis Fruden, dba Fruden Produce Co."

Frudden Enterprises, Inc. is a California corporation whose sole stockholder is Dennis Frudden. The primary business of Frudden Enterprises, Inc. is the growing and harvesting of tomatoes for Frudden Produce, Inc., a California corporation. The stock of Frudden Produce, Inc. is owned by Dennis Frudden's parents, Maynard Frudden and Dorothy Frudden. Frudden Produce, Inc. is a grower, packer, and shipper of fresh market tomatoes. It does not own any land on which tomatoes are produced and harvested. Instead, it contracts with 10 to 15 growers in Monterey County for the purchase of their tomatoes. The grower produces the crop on his land, and Frudden Produce, Inc. harvests, packs and sells it. In 1975, Dennis Frudden was employed as field superintendent for Frudden Produce, Inc., and Frudden Produce, Inc. utilized labor contractor Esquivel & Sons to supply

the workers needed for the harvest.

4. The Events of November 12, 1975 (Complaint No. 75-CE-244-M)

On November 12, 1975, at approximately 4:00 p.m., three UFW organizers went to the Labor Camp to talk to workers and to solicit support for the UFW regarding the election at Ernest J. Homen set for the following day. Before going to the Labor Camp, the UFW had contacted the Monterey County Sheriff's Department to request that officers be sent to the camp to keep the peace. Officers Elias De Leon and Robert Hall were dispatched to the Camp. When the UFW organizers arrived at the camp, a man identified as Manuel Garcia placed a chain and lock on the gate and refused to permit the organizers to enter the Labor Camp. In the presence of the Sheriff's officers, the organizers asked Garcia to be allowed to enter the Camp to speak to the workers and to distribute literature. Garcia stated that he was enforcing the orders of Eduardo Esquivel to keep UFW organizers out of the Camp pursuant to a court order.[1/] Juanita Martinez (one of the UFW organizers) testified that during the discussion with Garcia, she saw three men approximately 75 yards away standing near a pickup truck, each of whom appeared to have a rifle with the butt end resting on the ground close to the side of his body. When the organizers told Garcia that they had a right to be present inside the Camp, Garcia

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1. See GC Exhibits No. 20 (OSC and TRO) and No. 21 (Preliminary Injunction). The Preliminary Injunction was issued on November 7, 1975, by the Monterey County Superior Court. It enjoins "Fruden Produce, Inc." and their agents, etc., from (among other things) denying access by union organizers to their employees in the Camp subject to certain conditions.

said the only way they could enter was to jump over the fence, but that if they did so, they would have to take the consequences. After several more minutes of discussion at the gate, the organizers left.

Approximately two hours later (6:00 p.m.), UFW organizers again returned to the Labor Camp to talk to workers. As before, they contacted the Sheriff's Department so that officers would be present when they arrived at the Camp. Accordingly, officers David Park and Tomas De Los Santos were at the Camp when the organizers arrived. As the organizers approached the locked gate and identified themselves, Ricardo Esquivel appeared and refused to permit the organizers to enter the Labor Camp, referring to the aforementioned court order and the fact that it was more than four hours since the workers had completed work that day.

Regarding the issue of agency, officer De Leon testified, If over hearsay objection,[2/] that within approximately one month before November 12, 1975, De Leon had a conversation with Manuel Garcia, during which time Garcia remarked that he was a foreman for Esquivel. This conversation took place at an unknown location near San Lucas and it was apparently the result of a chance meeting. Garcia was driving a van, and officer De Leon was in his patrol car.

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2. The testimony was conditionally admitted pending establishment of the preliminary facts necessary to bring it within the "admission exception." The facts were never established; therefore, the statement of Garcia that he was a foreman of Esquivel is hereby strick en pursuant to Evidence Code §1222. Declarations of an alleged agent are not admissible for the purpose of proving agency. Swinnerton v. Argonaut, 112 Cal. 375, 379, Howell v. Courtesy Chevrolet, Inc., 116 CA3d 391. The statement made to De Leon was unaccompanied by any other action or act at a time or place unrelated to any other purpose of Esquivel & Sons. See Witkin, 2d Ed., California Evidence, p. 487, quoting Wigmore, and cases cited therein.

5. The Events of October 28, 1975 (Complaint No. 75-CE-249-M)

UFW organizer Juanita Martinez testified that she had been engaged in organizing the Horaen workers during September, October, and November of 1975. On October 28, 1975, at 12:15 p.m., she and UFW coordinator Richard Ibarra arrived at a field on Central Avenue located between Greenfield and King City to talk to Homen workers about the ALRA and to solicit support for the UFW with the goal of having a representation election among Homen employees. There were approximately 50 workers (a full crew) picking peppers. About 30 of the workers were picking and the remainder were eating at various locations in and about the field. She and Ibarra went to the field at 12:15 because it was their understanding that, under the law, they could have access before work, during lunch, and after work. She had no knowledge as to when that particular crew had started work nor when they were finished. She knew that they were getting piece rate and that they didn't get breaks since they were contract workers, except for lunch. She didn't know if the workers picking had already eaten or not. She and Ibarra were wearing "work clothes." They were wearing union buttons. After talking to approximately three workers, they were prevented from further organizational activity when a young man (approximately 21 years old) identified by the witness as "Steve" drove up in *a,* pickup truck and told a Sheriff's Deputy to get them out of there. The Deputy told Martinez and Ibarra to leave, and they did.

On cross-examination, Martinez stated that she had not been prevented from talking to the Homen workers on other organizational visits to the fields; however, those visits were after work was finished.

The Homens testified that ordinarily Mr. Homen was in the fields with the workers, however, on October 28, 1975, Mr. and Mrs. Homen and their son Bruce were in Guerneville to attend the funeral of Mrs. Homen's mother. A young man by the name of Steve Beebe was working for Homen as a "checker" at the pepper field on that day. As a "checker" he, in effect, counted the buckets of peppers picked by the Esquivel & Sons laborers. Frequently, the "checker" would be one of the labor contractor employees; however, as Ernest Homen testified, for a period of several days during the pimiento harvest, he utilized Steve Beebe as his own employee to perform the task of "checker." He stated that he trusted him as a "checker" since "he didn't have any cousins."

In explaining their relationship to Steve Beebe, Mr. and Mrs. Homen testified that they had met him through their son Bruce. Steve Beebe had lost a job in Greenfield, and was temporarily living in a house on one of the leased ranches. The Homens were able to help Beebe find a job with an orchard company which was to begin several weeks hence. In the meantime, they were able to give him odd jobs to do for them. This odd job employment lasted for approximately two or three weeks and encompassed the date of October 28, 1975, when the Homens were in

Guerneville for the funeral. The Homens emphatically denied ever giving Mr. Beebe any supervisorial status and/or that he was anything more than a casual odd job worker on their payroll for a temporary period.

C. Analysis and Conclusions

1. Did the denial of access to Ernest J. Homen's field on October 28, 1975, constitute an unfair labor practice within the meaning of Section 1153 (a) of the ALRA? (Complaint No. 75-CE-249-M)

On October 28, 1975, the "access rule" (Section 20900 of the ALRB Regulations, Cal. Admin. Code, Tit. 8,) provided:

> a. Organizers may enter the property of an employer for a total period of 60 minutes before the start of work and 60 minutes after the completion of work to meet and talk with employees in areas in which employees congregate before and after working.
>
> b. In addition, organizers may enter the employer's property for a total period of one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one hour period shall include such lunch break. If there is no established lunch break, the one hour period may be at any time during the working day. . . .

The ALRB has clearly determined that violations of the access rule constitute unfair labor practices under the ALRA. Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977); Pinkham Properties, 3 ALRB No. 16 (1977).

It is also clear by virtue of the Board's ruling in the case of Jack Pandol & Sons, Inc., 3 ALRB No. 29 (1977), that in our case, General Counsel has the burden of proving that Steve

Beebe was acting either as an agent of or a supervisor for Homen when he told the Sheriff's Deputy to get the UFW representatives out of the field. Apropos of "supervisors", Section 1140.4(j) of the ALRA contained in Chapter 1, "General Provisions and Definitions," states:

> The term "supervisor" means 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 direct them, or to adjust their grievances, or effectively to recommend such act, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The evidence presented in this case compels me to conclude that General Counsel has failed to meet his burden of proving that Steve Beebe was acting as a supervisor or agent for Homen when he told the Deputy to get the UFW representatives out of the field. I find no evidence to refute the testimony of the Homens regarding Beebe's status other than the bare assertion by Martinez that "Steve" told the Deputy to get them out of there and the Deputy did. That is insufficient. No other witnesses were called, e.g., the Deputy, Beebe, other Homen workers, other UFW organizers, despite the fact that Martinez and the UFW had been engaged in organizing the Homen workers during "September, October, and November" and presumably had no access problems other than the one incident involving Beebe on October 28th. This mitigates against the contention that Beebe had supervisorial or agency status vis-a-vis Ernest J. Homen. Significantly, there is

no evidence or contention that Mr. Homen himself had ever given UFW organizers access problems or in any way manifested anti-union animus.

General Counsel relies on Section 1165.4 of the ALRA, contained in Chapter 7, "Suits Involving Employers and Labor Organizations," which states:

> For the purpose of this part, in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

General Counsel argues that "although Beebe may not have been a supervisor he was 'so closely identified with management' and was 'in such a strategic position to translate the policies and desires of management to other employees' that his conduct in ejecting the organizers should be imputed to Homen. Harrison Sheet Steel Company (1951) 28 LRRM 1012; enforced CA7, 1952, 29 LRRM 2481; Sioux City Brewing Company (1949) 23 LRRM 1683."

General Counsel's reliance is misplaced. I find that the facts in our case (which does not deal with a Chapter 7 matter) are distinguishable from the facts in the cases cited by General Counsel in that the evidence in our case does not establish that Beebe was closely identified with management and/or that he was in a strategic position to translate the policies and desire of management to other employees.

There is little precedent concerning agency under decisional law of the Agricultural Labor Relations Act. However,

California Labor Code, Section 1148 makes National Labor Relations Act precedents applicable. The fundamental rules of agency, as discussed in International Longshoremen's and Warehousemen's Union Local 6, 79 NLRB 1487 (1948), are *as* follows:

> 1. Authority to act as agent in a given manner will be implied whenever the conduct of the employer is such as to show that he actually intended to confer that authority.
>
> 2. The employer may be responsible for an act of his agent within the scope of the agent's general authority, or "scope of his employment," even though the employer has not specifically authorized or indeed may have specifically forbidden the act in question; and
>
> 3. The burden of proving the employer's responsibility is on the party asserting the agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority.

Applying the law above to the evidence in our case, I find that General Counsel has been unable to establish by a preponderance of the evidence that Homen's conduct showed an intent to confer authority on Steve Beefae to oust the organizers. Likewise, the general authority or scope of Beebe's employment was not proven to include such acts.

Based upon the findings, conclusions, and reasons set forth above, I conclude that General Counsel has failed to prove that Ernest J. Homen committed the alleged unfair labor practices set forth in Complaint No: 75-CE-249-M, and I recommend that said complaint be dismissed.

2. Did the denial of access to the Labor Camp on November 12, 1975, constitute an unfair labor practice within the

meaning of Section 1153(a) of the ALRA? (Complaint No. 75-CE-244-M)

Respondent Frudden Produce, Inc. and Homen refer to ALRB matter Whitney Farms, et. al., Case No. 75-CE-242-M and urge deference thereto with respect to "Frudden" either by virtue of principles of res judicata, abatement, or to avoid "the substantial evil of inconsistent results." I agree.

Complaint No. 75-CE-242-M and Complaint No. 75-CE-244-M are substantially the same except for the substitution of Respondent Homen in place of Respondent Whitney Farms. Both complaints allege the same set of facts and agency allegations regarding the denial of access at the Labor Camp on November 12, 1975.

On December 27, 1976, ALRB Administrative Law Officer Irving Stone issued his decision in Case No. 75-CE-242-M. That decision deals at length with the same issues and potential liability of "Frudden" with which we are here concerned. Exceptions to his decision have been filed and the matter is now pending before the Board.[3/]

The evidence in our case regarding the potential liability of "Frudden" primarily consists of documents and testimony

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3. Support for the proposition that the trial examiner may take official notice of prior proceedings involving the Respondent is found in decisions of the NLRB. (See Harvey Aluminum, 139 NLRB No. 151 fn. 6; West Point Co., 142 NLRB 1161 fn. 3; and Seine Union, 136 NLRB 1.)Additionally, the record of this hearing has incorporated the reported testimony which was given by Dennis Frudden in Case No. 75-CE-242-M; a hearing in which both the General Counsel and the UFW had ample opportunity to develop evidence to support their contentions.

presented in Case No. 75-CE-242-M.

If the Board finds Frudden Produce, Inc. liable in Case No. 75-CE-242-M, a finding of its liability in our case would be redundant since it would be exactly the same violation. If the Board finds that Frudden Produce, Inc. did not violate the ALRA in Case No. 75-CE-242-M, then such finding should be a bar to finding it liable in our case. There was substantially more evidence presented in Case No. 75-CE-242-M on Frudden Produce Inc.'s relationship to the operation of the Labor Camp and on the agency issue.

The rationale underlying the doctrines of res judicata, abatement, and collateral estoppel are applicable here.[4/] In the interest of avoiding duplication, inefficiency, unnecessary expense, vexatious litigation and the abrogation of due process, I defer to the Board's pending deliberations on Case No. 75-CE-242-M the decision of whether Frudden Produce, Inc. violated the ALRA as a result of the alleged denial of access to the Labor Camp on November 12, 1975.

As indicated above, the difference between Case. No. 75-CE-242-M and Case No. 75-CE-244-M is the substitution of Homen in place of Whitney Farms. Therefore, I will proceed to make findings regarding Homen in light of the evidence presented in

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4. See the discussion of res judicata as applied to administrative proceedings in CEB California Administrative Agency Practice, Section 1.36 (p. 32, et. seq.). Also see Witkin, Civil Procedure, pp. 2537-2539 and cases cited therein.

this case. I find that:

Ernest J. Homen had no ownership or possessory interest in the Labor Camp; he did not have occasion to visit the Camp during 1975 and he was not privy to its operation and control; his only relationship to the Labor Camp was that in 1975 he contracted with Esquivel & Sons to have them supply laborers to thin some of his tomatoes for a brief period in April, and harvest his chilies in October and early November; some of the laborers supplied by Esquivel & Sons lived at the Labor Camp; the chili harvest was completed on November 9, 1975, after which Homen never again contracted with Esquivel & Sons; Homen did not know Manuel Garcia and his only contact with Ricardo Esquivel consisted of the periodic visit of Ricardo to the chili harvest crew to pay some of the laborers while they were harvesting Homen's chilies.

I find and conclude that there was insufficient evidence to prove by a preponderance thereof that on November 12, 1975, Manuel Garcia was the agent of Homen, or that Ricardo Esquivel was the agent of Homen, or that Eduardo Esquivel and Ricardo Esquivel, dba Esquivel & Sons, were the agents of Homen, or that Dennis Fruden, dba Fruden Produce Co. was the agent of Homen.

As additional support for my conclusion that Homen had no "agents" at the Labor Camp on November 12, 1975, we note that there was no evidence that Homen had any right to control the operations of the Camp on the date in question. In that regard, the applicable NLRB precedents indicate that in determining the

status of independent contractors, the right to control test should be utilized. (See NLRB v. Sachs (7th Cir. 1974) 503 F2d 1229, 1233; Site Oil Co. of Missouri v. NLRB, 319 F2d 86 (1963).) Among the factors which have been considered relevant in applying the right to control test are: (1) who bears the risk of loss in the operation of the entity; (2) who provides the day-to-day supervision; (3) is work performed at outside operations; and (4) is the operation a distinct and separate business entity. Obviously, an application of the "factors" to the evidence in our case compels the conclusion that Homen had no agency relationship with Garcia, or any of the Esquivels, or the "Fruddens" on the after noon of November 12, 1975.

General Counsel relies on Section 1140.4 (c) of the ALRA to establish that Esquivel & Sons is an agent of Homen. That Section states:

> The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682 and any person functioning in the capacity of a labor contractor. The employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part. (Emphasis supplied.)

General Counsel then argues effectively that there are cogent reasons for making a farmer "engaging" a labor contractor

the employer "for all purposes" under the Act. However, where, as here, we have a situation in which the farmer and the labor contractor had terminated the engagement three days before the incident, it is futile to argue that Homen comes within the purview of Section 1140.4(c) in order to make him liable for the events occurring at the distant Labor Camp in which he had no interest or over which he had no control, and, most importantly, at a time when he had no "employees" therein by any definition of that term. The pending election at Homen does not change or extend the meaning of the word "engaging" nor does it alter agency principles enunciated above; therefore, it does not change my conclusions with respect to Homen's lack of culpability under the ALRA.

Based upon the findings, conclusions, and reasons set forth above, I conclude that General Counsel has failed to prove that Ernest J. Homen committed the unfair labor practices set forth in Complaint No. 75-CE-244-M, and I recommend that said complaint be dismissed as to him.

As to "Frudden", I defer to the Board the decision as to whether it is liable under Complaint No. 75-CE-244-M in accordance with the Board's deliberations and decision in Case No. 75-CE-242-M.

In view of my findings and conclusions that Homen could not be vicariously liable for the acts committed by Garcia and Esquivel at the Labor Camp on November 12, 1975, on the grounds that there was no "agency" within the meaning of established agency

principles and/or within the meaning of Section 1140.4 (c), I need not reach the question of the effect of the Preliminary Injunction. The broader issues presented by Constitutional guarantees of access to labor camps, and interpretations of the "Access Rule" and Section 1153(a) as they apply to denial of access to labor camps are also not necessarily reached herein. Those issues are presently before the Board in Case No. 75-CE-242-M. Pontification by me on the meaning of "Buak" and its progeny and Justice Mosk's language in "ALRB v. Superior Court of Tulare County" as they may or may not relate to Section 1153(a) and Reg. Sec. 20900 would not only be injudicious in light of my holding regarding Homen and my deference of "Frudden" to the Board, it would also unnecessarily thicken the "paper blizzard."

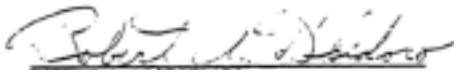
SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. Ernest J. Homen is not liable for the alleged unfair labor practices set forth in Complaint No. 75-CE-249-M, and I recommend that said complaint be dismissed.

2. Ernest J. Homen is not liable for the alleged unfair labor practices set forth in Complaint No. 75-CE-244-M, and I recommend that said complaint be dismissed as to him.

3. As to Dennis Fruden, dba Fruden Produce Co. ("Frudden" herein), I defer to the Board the decision as to whether "Frudden" is liable under Complaint No. 75-CE-244-M, and I recommend that such decision be made together and in accordance with the Board's deliberations and decision in Case No. 75-CE-2-42-M.

Dated: May 15, 1977.



ROBERT A. D'ISIDORO
Administrative Law Officer