Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

TANAKA BROTHERS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 75-CE-165-M 4 ALRB No. 95

DECISION AND ORDER

On September 7, 1977, Administrative Law Officer (ALO) Victor S. Palacios issued the attached Decision in this matter. Thereafter, Respondent and the Charging Party, the United Farm Workers of America, AFL-CIO (UFW), each filed exceptions and a supporting brief.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO only to the extent consistent with this opinion.

The ALO concluded that Respondent "constructively discharged" about 80 employees in October 1975, a few days after they had refused to work at piece-rate rather than at an hourly wage-rate. We do not agree. A constructive discharge is effected when an employer imposes such onerous or intolerable working

conditions on an employee, because of the employee's union activity or other protected concerted activity, that the employee is, in effect, forced to quit the job. Trumbull Asphalt Co. of Delaware, 136 NLRB 1461, 50 LRRM 1071, 1072-1073 (1963); Merzoian Brothers Farm Management Company, Inc., 3 ALRB No. 62 (1977). That was not the situation'in this case. Here, the Respondent elected to lay off those workers who declined its piece-rate offer because there was insufficient work for all the workers. Although the 31 workers who accepted Respondent's piece-rate proposal continued in its employment, there was no evidence that the retention of these employees, rather than the 80 who were laid off, was based on considerations of union activity or protected concerted activity. The record discloses that the UFW had won an election during the week before the layoffs by a large margin. Moreover, Respondent knew that its field workers overwhelmingly supported the UFW, and there is no evidence that those employees who continued working until the end of the tomato harvest were any less supportive of the UFW than those who were laid off. Accordingly, we conclude that the 80 employees were laid off for valid business and economic reasons.

The UFW excepted to the ALO's failure to recommend an award of damages to the laid-off employees based on their eviction from Respondent's labor camp. In view of our findings and conclusions herein, and as the eviction was not alleged in the complaint to be an unfair labor practice and was neither litigated by the parties nor argued in the post-hearing briefs, we can make no findings or conclusions as to that matter.

ORDER

As the record here does not support a conclusion that the 80 employees were discriminatorily or constructively discharged in violation of Section 1153 (c) and (a) of the Act, the Agricultural Labor Relations Board hereby orders, pursuant to Labor Code Section 1160.3, that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: November 30, 1978

RONALD L. RUIZ,

Member ROBERT B. HUTCHINSON, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

Tanaka Brothers

4 ALRB No. 95
Case No. 75-CE-165-M

ALO DECISION

The Administrative Law Officer (ALO) found that, after a representation election among Respondent's workers on September 24, 1975, which the United Farm Workers of America, AFL-CIO (UFW) won by a large majority, Respondent constructively discharged 80 workers by laying them off after they refused to work at piece-rate rather than at an hourly wage-rate, in violation of Section 1153 (c) and (a) of the Agricultural Labor Relations Act. Accordingly, the ALO ordered Respondent: to offer full reinstatement to the said employees; to make each of them whole for any loss of earnings suffered by reason of their layoff; and to post, read, and mail to its employees an appropriate remedial Notice.

BOARD DECISION

The Board reversed the ALO, finding no evidence that either the layoff of the 80 employees or the retention of 31 workers who accepted Respondent's piece-rate proposal was based on considerations of union activity or protected concerted activity. Respondent knew that its field workers overwhelmingly supported the UFW, and there was no evidence that the employees who were retained were any less supportive of the UFW than those who were laid off. Accordingly, the Board concluded that the 80 employees were laid off for valid business and economic reasons.

The Board made no findings or conclusions as to the ALO's failure to recommend an award of damages to the laid-off employees based on their eviction from Respondent's labor camp, as to which the UFW excepted. The eviction was not alleged as an unfair labor practice in the complaint, and was neither litigated at the hearing nor argued in post-hearing briefs.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	
TANAKA BROTHERS,	
Respondent	Case No. 75-CE-165-M
and	Volume II
UNITED FARM WORKERS OF AMERICA, AFL-CIO	
Charging Party.	

Guy N. Jinkerson of San Jose, California,
for the General Counsel

David P. Schwartz of Oxnard, California,
for the Charging Party

Charley M, Stoll of Newport Beach, Calif.,
for Respondents

DECISION

Statement of the Case

VICTOR S. PALACIOS, Administrative Law Officer: This case was heard before me in Ventura, California on December 8, 9, 10, 11, 12, 22 and 23 of 1975. The hearing had been scheduled to continue on February 1, 1977 for presentation of rebuttal by General Counsel and intervenor United Farm Workers, but the latter parties subsequently elected to forego same. On February 1, 1977 respondent made a motion to re-open. Said motion was denied.

The complaint herein issued on October 21, 1975 alleging violation of Section 1153(a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by Tanaka Brothers hereinafter called Respondent. The complaint being based on charges filed by the United Farm Workers of America, AFL-CIO (hereafter the Union).

All parties were given an opportunity to participate in the hearing. Upon the entire record, including my observation of the demeanor of the witnesses and after consideration of the arguements and briefs submitted by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Tanaka Brothers is a partnership engaged in agriculture in Ventura County, California, and was admitted to be by the Respondent. Accordingly, *I* find that Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I further find the Union to be a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complainant alleges that the Respondent violated Sections 1153 (a) and (c) of the Act by the discriminatory discharge and refusal to re-employ seventy (70) employees. Respondents deny -the discharge of said employees to have been unlawfully motiviated or that any failure to re-hire said employees is related to their union activities.

Farm Operation and Workers' Labor Activities

The general partnership of Tanaka Brothers is engaged in agriculture in Ventura County — and has been engaged in the production. of tomatoes for the last six years. In 1975 they had cultivated tomatoes en two 80-acre parcels of land: One parcel called the "Pleasant Valley" field, and another the Gonzalez Road" field. Henry and Shigeo Tanaka run the business.

Tanaka Brothers obtains its field workers from the Ventura County Farm labor Association. The latter operates the Buena Vista Camp from which farm laborers have been supplied to Tanaka Brothers since 1952. Although the camp is owned by respondent and 95 other farmers, of the latter, only 9 have occasion to obtain labor from the camp. The camp population oscillates at approximately 195 at the peak of the tomato season, of these approximately 100 to 106 are employed by respondent who acknowledges them to be his employees.

Respondent became aware of United Farm Workers organizational activity among his employees during August of 1975. Prior to this Tanaka Brothers had had dealings with the Brotherhood of Teamsters Union, whom, as he states, threatened and coerced them and their employees to favor said union through the threat of the use and the use of physical violence to persons and property with the further threat of economic retaliation (refusing to take Tanaka Brothers[1] produce to market), Tanaka Brothers and the Teamsters had entered into a contract covering field workers in April, 1975.

Testimony was elicited to the fact that United Farm Workers organizers were denied lunch time access to Respondent's ranch while their Teamster counterparts were allowed same.

An election was conducted among respondent's workers on September 24, 1975 resulting in the United Farm Workers receiving a marked majority of ballots cast. On October 3, 1975 respondents advised the workers that they would have to work piece-rate. Approximately 80 workers would not accept these terms and were informed that there would be no work for them. Many of these employees had lived in the Buena Vista Camp for several years or more and had worked for respondent — insane instances exclusively. The record further indicates the respondent's foremen in the operation of the labor camp discriminated against those being denied employment because of their opposition to working piece-rate by totally disregarding the pertinent seniority system whereby the person with the longer period of residence in the labor camp would be given preference over those with less time residing therein.

Discussion of the Issues and Conclusion

Contrary to respondent,'s contentions this writer finds that the workers ware given a clear alternative, ultimatum — if you will, to the effect that either they accepted to work piece as offered, or quit. The record is indicative of worker sentiment towards working piece-rate — in fact respondent had on several occasions in the past attempted to change over to a piece-rate basis but his efforts to effect the change had always proves unsuccesful because of worker recalcitrance to accepting said method of computation. This fact must be considered in light of the additional fact that respondent was fully aware of strong pro-United Farm Workers union sentiment among the workers in question, i.e. , many were members and others supporters as manifested, by their activities and by the open display of United Farm Workers insignia, emblem and other symbols.

When the two above facts are further considered in view of the chronological succession of the salient events around which this case turns, i.e. , the election of September 24, 1975 wherefrom the United Farm Workers emerged victorious and respondent's unilateral - decision to change the method of pay on October 3, 1975, one must of force conclude that under such overall set of circumstances failing as they do .into a highly suspect chronology — at least a "constructive discharge" did in fact occur.

Respondent's justification for the decision to change the method of pay is that this was prompted by economic exigencies brought on by the fact that the tomatoes were ripening very quickly and had to be picked at a much faster pace if the crop were to be marketable and the field salvaged. It was intimated that this situation was further exacerbated by the fact that respondent was of the opinion that the workers had slowed down their pace of picking tomatoes sub-sequent to the election. The record does not contain any concrete evidence sub-stantiating any unlawful "slowdown" on the part of the workers. The record indicates that approximately 30 workers decided to work piece-rate, but were not assigned to the field wherein the said emergency is said to have existed. Moreover, if there was a lack of work — the record indicates that in the past the hours had been reduced "pro-rata" among the workers and lay-offs would occur only when work was so lacking that this would no longer be feasible. Furthermore, there is ample authority for the proposition that under the Act one could obtain the unlawful handling of a lawful lay-off, i.e., had the record corroborated (which it does not) that a lay-off was indeed warranted for economic reasons arc hence lawful, where such a lay-off is handled in such a way as to give employees the idea that it was no ordinary lay-off but was punishment for union activites,

it becomes unlawful. In any event, objectively considering the facts of this case that, at least, can be said to have occurred.

Crucial to the outcome of this case is the issue of whether the workers at the Buena Vista Camp are to be considered employees of Tanaka Brothers. The term "agricultural employer" is defined in Labor Code Section 1140. 4 (c) to mean:

> (c) "The term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of any 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 persons 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 added.)

Labor Code Section 168 2 (b) defines the term "labor contractor" as follows:

> (b) "'Farm labor contractor' designates any person, who for a fee, employees 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, 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 the 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 payments to such persons." (Emphasis added.)

Finally, the term "fee" as used in subsection (b) of Section 1632 is defined in subsection (e) to mean:

> (e) "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 by him and the amount paid out by him for or in connection with the rendering of such service."

The role of the labor contractor defined by Labor Code Section 1682 has been likened to that of a middleman — one who contracts with growers to provide labor when needed. The fee is normally a percentage override of the

actual cost of labor. Thus, a labor contractor is one who collects his fees and makes his profits from the laborers actually doing their work. Accordingly Section 1140.4(c) of the Act provides that all of the Buena Vista Camp payroll are to be considered employees of Tanaka Brothers.

Moreover, Tanaka Brothers obtained all of the workers in question from the Ventura County Farm Labor Association's Buena Vista Camp, an enterprise of which respondent is part owner. The camp dispatcher testified that most of the camp's business comes from Tanaka Brothers. In fact more than half of the labor supplied annually by the 'Buena Vista Camp is used by respondent. Also, many of the discharged workers were persons who had resided at the Buena Vista Camp and worked for respondent for years, i.e., Sabas Guzman — three years; Fructuoso Valencia — four years; Felix Castillo — six years, etc.

The record further indicates that employees of the Buena Vista Camp should be considered respondent's agents consistent with the provisions of Section 1165.4 of the Act. Indeed, Mr. Jose Velasco and Mr. Ceja were "supervisors" within the meaning of Section 1140.4(j) of the Act as they acted as in their capacity as camp employees and Tanaka Brothers' foremen. The said foremen received direct instructions from respondent regarding access of union organizers; Mr. Velasco refers to Henry Tanaka as "the boss"; Jose Velasco, on instructions from Henry Tanaka "offered" the employees the piece-rate wages; Jose Velasco kept the time records for the employees in the field; Henry Tanaka told Jose Velasco directly about the lay-off. Indeed, Jose Velasco has only worked for respondent Tanaka Brothers during the six year period in which he has been a foreman of the Buena Vista Camp.

In addition to Velasco's strong identification with respondent, there likewise appears to be a similarly strong identification between Enrique Gomez and Jose Armas (the camp dispatcher) with respondent. At the instigation of respondent Mr. Annas called a meeting of Tanaka Brothers' workers to urge them to sign Teamster Union authorization cards. Armas was the person who formed the crew from among those that accepted to work piece-rate after October 3, 1975; Armas told .the workers in question to bring in their blankets and to pick up their last paycheck. Armas informed the workers directly that there would be no more work for them at the camp. In fact Armas testified that Henry Tanaka instructed him after the discharge of October 3, 1975, to dispatch for work only those people who would work piece-rate. Indeed, the finality of the discharge is more evident and negates any proferred justifications based on economic exigencies if one, recalling that many of the workers had worked for respondent for several years had grown accustomed to continuing to work the celery crop once work on the tomato harvest had ended — in fact testimony indicates that the custom was to give the workers who had worked on the tomato crews priority in the celery harvesting that begins shortly after the end of the tomato harvest. None of the workers in question were told that they could expect work in the celery harvest as they had in previous years. It is agreed by both the workers and Mr. Armas that the latter[1] s announcement to the effect that they were to "get their checks" and "bring in their blankets" was tantamount to saying "leave the camp" or "there is no more work for you."

In view of the above it *is* concluded that respondent changed the terms and conditions of employment for the purpose of discouraging membership in and support for the United Farm Workers.

Remedies

Having found that respondents have engaged in certain unfair labor practices within the meaning of Sections 1153(a) and 1153(c) of the Act, I hereby make the following order:

Order

Respondent, their officers, their agents, and representative shall:

A. Generally.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of their union activities or to discourage membership in or support for a labor organization;

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Labor Code Section 1152.

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

(a) Offer full reinstatement with all seniority rights to all those employees who on or about October 3 were terminated from their employment because of a refusal to work piece-rate.

(b) Make each of those employees whole for any loss of earnings suffered by reason of their discharge, with backpay to bear interest at a rats of 7 percent.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due and the right of reinstatement under the terms of the order.

B. Notice.

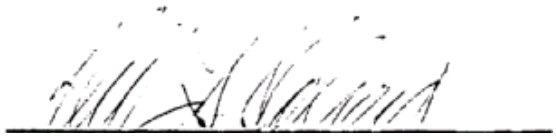
1. Post in conspicuous places on respondent's property, including but not limited to any offices, portable toilets, or transport buses or trucks used by respondent, notices printed in English and Spanish reflecting the disposition of this case and promising to comply with the Board's order.

2. It is also requested that this notice be also read in English and Spanish at the commencement of the 1977 tomato harvest, on company time, to all those then employed, by a company representative, and that a Board agent be accorded the opportunity to answer questions which employees might have regarding the notice and their rights under Section 1152 of the Act.

3. The notice should also be mailed by respondent to all of the employees listed on the Buena Vista's payroll for the payroll period immediately following the election held at respondent's ranch on September 24, 1975.

4. The General Counsel also believes that the facts of this case warrant an order from the Board directing respondent to have the above-mentioned notice posted in conspicuous locations including but not limited to any mess hall and offices on the Buena Vista Camp.

Dated: September 7, 1977



Victor S. Palacios
Administrative Law Officer