Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SEABREEZE BERRY FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 78-CE-14-V 7 ALRB No. 40

DECISION AND ORDER

On January 12, 1979, Administrative Law Officer (ALO) James Wolpman issued the attached Decision in this proceeding.[1/] Thereafter, Respondent, the Charging Party, and the General Counsel each timely filed exceptions and a supporting brief. Respondent and the General Counsel each filed an answering brief.[2/]

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 as modified

[1/]Respondent withdrew its objections to the election in Case No. 78-RC-5-V at the hearing before any evidence on the objections had been taken. The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on April 10, 1979.

[2/]Respondent's Answering Brief to the exceptions filed by the General Counsel and the Charging Party argues that their exceptions did not comply with section 20282 of the Board's regulations, and that therefore the Board should not consider them. Both the General Counsel and the UFW adequately stated the grounds for their exceptions, identified the relevant portions of the ALO's Decision, and cited to the record when necessary to support their arguments. We therefore reject Respondent's contention and include General Counsel's and Charging Party's exceptions and briefs in the record.

herein.

Respondent's employees went on strike for a wage increase on the morning of April 21, 1978, during the strawberry harvest, Shortly thereafter, United Farm Workers of America, AFL-CIO (UFW), representatives visited the fields and spoke with the strikers about their rights to union representation. That afternoon, UFW representatives filed a representation petition with the Regional Director, requesting a 48-hour expedited election. That evening the UFW representatives and about 12 strikers met with Respondent to discuss the expedited election and the wage demand. From that point on, the strike had, as the parties stipulated at the hearing, a dual purpose: to obtain a representation election and to demand a wage increase.[3/]

An expedited election was held on Saturday, April 29, 1978. On Sunday, some of the strikers sought reinstatement, but were told that they had been permanently replaced. On Monday, May 1, when a greater number of strikers reported for work, Respondent's representatives told them that permanent replacements had been hired, but that eight jobs were still available. One striker accepted reinstatement, but the rest of the strikers took the position that unless all were offered work, none would accept reinstatement. Respondent hired replacements every day from the

---

[3/]The ALO found that the strikers abandoned their wage demand on the evening of April 27, citing a letter delivered that evening to Respondent from a UFW representative, which provided that the employees would return to work "once an election is held." However, a General Counsel witness testified that, after April 27, a leaflet stating that workers had struck for better wages and working conditions was handed out during the picketing. We find that a wage demand was still being made after April 27.

beginning of the strike until May 3, 1978, the day on which the picketing ceased. No new workers were hired for the harvest season after that date. On May 10,. 1978, Respondent received a letter signed by 39 strikers tendering their unconditional application for reinstatement.

We are faced here with the issue of reinstatement rights of economic strikers under the Agricultural Labor Relations Act (Act). To determine whether an employer has violated section 1153(c) and (a) by refusing to rehire economic strikers upon their unconditional offer to return to work, we must balance the legitimate but conflicting interests of employer and employees. NLRB v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375 [66 LRRM 2737). We must weigh the employer's interest in continuing to do business during an economic strike against the employees' section 1152 rights to engage in concerted activity, evaluating the consequences of the employer's conduct on employee rights in light of the policies of the Act.

The National Labor Relations Board (NLRB) and the federal courts developed the principle of balancing these conflicting interests to decide the question of reinstatement rights under the National Labor Relations Act (NLRA). In striking the balance, they have determined that economic strikers who unconditionally apply for reinstatement have a right to reinstatement until permanently replaced; thereafter they have a continuing right to preferential hiring and full reinstatement upon the departure of the permanent replacements. NLRB v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375; Laidlaw Corp., (1968) 171 NLRB 1366 [68 LRRM 1252], enf' d

(7th Cir. 1969) 414 F.2d 99 [71 LRRM 3054], cert. den. (1970) 397 U.S. 920 [73 LRRM 2537], An employer is not required to make jobs available to returning economic strikers by discharging permanent replacements whom .it has hired in order to continue its business operations during the strike. NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610].

In interpreting and applying the broad unfair labor practice provisions of the Act to the issue before us, we shall look to applicable NLRA precedent for guidance. Labor Code section 1148. However, rigid application of NLRA principles to issues raised by economic strikes within our jurisdiction might be unsuitable to the complex realities of California agriculture. We shall, therefore, consider the particular characteristics of agricultural labor relations in making our decisions. The Act, which contains representation provisions substantially different from those found in the NLRA, shows legislative recognition of the predominantly seasonal nature of agricultural work. The California Supreme Court has recognized the relevance of conditions peculiar to the agricultural setting for the proper interpretation of our Act. See ALRB v. Superior Court (1976) 16 Cal.3d 392, 414, 415 [128 Cal.Rptr. 183, 546 P.2d 687].

Consideration of the reinstatement rights of economic strikers, an issue which involves employees' right to strike and employers' opportunities to hire replacements during a strike, necessarily focuses our attention on the employment patterns and hiring practices in the agricultural setting. Agriculture is predominantly a seasonal industry; the duration of the work for

each season and for each day within the season depends on the type of crop, the daily and seasonal weather conditions, and the market situation. Sosnick, Hired Hands; Seasonal Farm Workers in the United' States, C19781 pp. 12-17, 20. Employers' labor needs fluctuate on a seasonal basis and on a daily basis.

The constantly changing needs for workers have resulted in a variety of employment patterns, some of which have been described in regulations hearings and in the cases that have come before us. Many farm workers travel throughout the state, obtaining work during peak harvest seasons with several different growers. See ALRB v. Superior Court., supra, 16 Cal.3d 392. Examples are lettuce-harvest workers who migrate from the Imperial to the Salinas Valley, and grape-harvest workers who migrate from the Coachella to the San Joaquin Valley. Some of these migrant workers may find work for the entire season with one grower, while others may work only during the most lucrative peak periods before seeking other employment. There are also farm workers who remain in one general area of the state, usually working for several growers, not only in the harvest but also in other agricultural operations such as pruning or thinning. An examination of these various work patterns reveals that there often exists a mobile pool of workers available to respond to employers' shifting needs for labor.

Fluctuating labor needs have also resulted in informal hiring practices. Some employers hire and lay off workers in accordance with weather or market conditions; such changes in employment may take place rapidly, Workers are often employed on

a first-come, first-served, daily basis by appearing at a customary pick-up point at the start of the work day. Hiring at the boundary of an employer's field also occurs. Moreover, labor contractors are frequently used to supply growers with labor or to supplement a regular labor force, and farm workers often work for a labor contractor who provides workers to several growers within one season.

Informality in the hiring process reflects a general lack of continuity in agricultural employment. Although some workers return to the same employer in successive seasons, employees generally try to obtain work wherever it is available and therefore work for different growers from season to season. The lack of continuity from season to season also stems in part from the fluidity of ownership in agriculture. See Herman & Zenor, "Agricultural Labor and California Land Transactions" in California State Bar Journal, Jan./Feb. 1978, pp. 48-57. Land leases for agricultural purposes, harvesting contracts, and other agricultural business arrangements may change hands rapidly, so that in many instances workers are simply unable to return to the same employer in subsequent seasons.[4/]

It is apparent, therefore, that the employment practices followed in agriculture differ significantly from employment practices usually found in other industries. The ease of replacing agricultural workers is one of many factors which distinguish

---

[4/]The facts of this case serve as an illustration. Respondent's first year of operation was 1978. Apparently another employer harvested strawberries in that location in 1977. After the 1978 harvest, Respondent went out of business.

farming from industrial operations. Furthermore, farm workers are less likely to expect continuing employment with a particular employer than are most employees in other industries.

With the above considerations in mind, we turn to the question of reinstatement rights of economic strikers under our Act. An agricultural employer has a legitimate interest in continuing its business operations during an economic strike, and a concomitant right to fill positions left open by strikers, in order to continue its business. NLRB v. Mackay Radio & Telegraph Co., supra, 304 U.S. 333. On the other hand, agricultural employees have a right to strike, which is protected generally by section 1152 of the Act and specifically by section 1166:

> Nothing in this part, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on such right.

As the strike is a legitimate economic weapon of labor, recognized as such by the Act, we must guard against any unnecessary diminution in the right to strike.

To accommodate these conflicting interests, and realizing the serious consequences on employees' section 1152 rights which may result from an employer's refusal to rehire returning economic strikers, we shall follow the Supreme Court's analysis in NLRB v. Fleetwood Trailer Co., supra, 66 LRRM at 2738:

> If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by section 7 and 13 of the Act (29 U.S.C. sections 157 and 163). Under sections 8(a)(l) and (3) (29 U.S.C. section 158(1) and (3)) it is [an] unfair labor practice to interfere with the exercise

> of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justification," he is guilty of an unfair labor practice.

One such justification recognized by the NLRB is that the jobs claimed by returning strikers are occupied by permanent replacements hired during the strike in order to continue operations. See NLRB v. Fleetwood Trailer Co., supra, 66 LRRM at 2738. We believe that, if an employer needs to offer replacements permanent employment in order to obtain workers during an economic strike, it may do so. Furthermore, an employer does not violate the Act by refusing to discharge the permanent replacements in order to rehire the strikers. See NLRB v. Mackay Radio & Telegraph Co., supra, 304 U.S. 333.

The NLRB generally accepts an employer's characterization of replacement workers as permanent employees. For the reasons indicated above, such deference may not be appropriate in California agriculture. Even the meaning of the term "permanent employment" is highly uncertain in this industry, where shifting, flexible employment patterns prevail. We believe we can best reach an equitable balance between the conflicting rights of employers and employees under our Act if we resolve, on a case-by-case basis, the question of whether it was necessary for the employer to offer continuing or permanent employment in order to obtain replacements for economic strikers. Given the seasonal nature of the agricultural industry in this state, we believe that we can most accurately and fairly determine whether such offers were necessary by considering the employer's situation in the season during which

the employees went out on strike and in subsequent seasons.[5/]

We share our dissenting colleague's concern for the difficult position of an employer whose employees strike during a harvest season. The perishability of an agricultural employer's products leaves the employer especially vulnerable to a harvest-time strike. However, the harvest season is not the only critical period in an agricultural operation. Certain crops require thinning, pruning or tying to insure successful growth. If an employer is engaged in any such task when the employees begin their strike, it is often imperative, in order to preserve the crop, that the employer be able to hire replacement workers to complete the task with minimal disruption. Therefore, we find that, in a strike situation, it is generally necessary for an employer to hire replacement workers to continue through the end of the season. An employer's right to continue its operation during a strike would be unduly restricted if the employer were required to terminate replacement workers in the middle of the season upon an unconditional offer by economic strikers to return to work. For the season during which the employees go on strike, therefore, we shall accept an employer's characterization of its replacement workers as "permanent" and we shall not require the employer to prove that such offers of employment were necessary in order to

---

[5/]For a discussion of the reinstatement rights of economic strikers in non-seasonal industries, such as nurseries, see Kyutoku Nursery, Inc. (Apr. 5, 1977) 3 ALRB No. 30, where we held that the employer did not violate the Act by refusing to hire the returning economic strikers since the strikers had been permanently replaced. The economic strikers had a right to preferential hiring at the nursery upon the departure of any of the replacement workers.

induce applicants to accept employment as strike-replacements. See NLRB v. Mackay Radio & Telegraph Co., supra, 304 U.S. 333.[6/]

We find, however, that different conditions prevail with respect to subsequent seasons. Crop perishability and the need to complete a harvest or other task, with minimal work disruption are not weighty factors when the employer hires employees to begin work in a subsequent season. Therefore, an employer who refuses, at the beginning of a subsequent season, to rehire former economic strikers who have made an unconditional offer to return to work will be found in violation of section 1153(c) and (a) of the Act unless the employer can demonstrate that at the time when replacement workers were hired during the strike, it was necessary to offer the replacement workers employment which would continue in the following season.[7/]

In future cases, we shall base our determination of whether there was a necessity for the employer to offer striker replacements employment extending beyond the season, or beyond the end of the economic strike, on evidence available to us as to past employment patterns and practices of the employer, including: its use, if any, of labor contractors; the market, weather and labor conditions facing the employer and the employees at the time of

---

[6/]After making an unconditional offer to return to work, the economic strikers have a right to preferential hiring and full reinstatement upon the departure of the replacement workers during the season. NLRB v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375.

[7/]This does not foreclose the employer from presenting evidence of another legitimate justification for refusing to rehire returning strikers. See, for example, Seminole Asphalt Refining, Inc. (1973) 207 NLRB 167 [85 LRRM 1153].

the strike; the duration of the season; the skills involved in the agricultural operation; and all other relevant factors.[8/]

Our dissenting colleague asserts that we are applying a rule which is unwarranted and contrary to applicable NLRA precedent. On the contrary, we seek to apply the rules set forth in NLRB v. Mackay Radio & Telegraph Co•, supra, 304 U.S. 333 and NLRB v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375, in the agricultural context. In doing so, we find that the unique characteristics of the agricultural industry require us to carefully interpret the term "permanent replacement" in a manner appropriate to that setting, precisely because these cases make important legal consequences flow from that term. We must avoid a rigid, mechanical approach which would distort the complex factual and practical situations presented in cases coming before us.

We reject the dissent's suggestion that we should engage in a balancing of the economic strengths of the parties in order to insure that strikers, replacement workers and employers are all equally disadvantaged by a strike. An attempt to achieve such a balance would, as a practical matter, be doomed to failure. Strikes put at risk so many diverse economic interests in any industry that calculation of their costs is extremely difficult. This is all the more true in agriculture, where volatile markets

---

[8/]The necessity of offering employment which is to continue during a season subsequent to the season in which the strike began is relevant only if the employer begins the subsequent season by hiring returning replacements rather than economic strikers who have made an unconditional offer to return to work. The employer would violate the Act by hiring any new employees before hiring the returning economic strikers. NLRB v. Fleetwood Trailer Co., Inc., supra, 389 U.S. 375.

and uncertain weather frequently upset even the most careful calculations and make assessment of "what might have been" a particularly speculative endeavor.

Even more to the point is the difference between our view of the interests which we must take into account and the view of those interests implicit in the dissent. In our view, this Board does not sit as an "economic handicapper" trying to parcel out economic burdens and risks, but as a quasi-judicial administrative board charged with vindicating legal rights whose substance is not limited to their economic ramifications. While the strike is clearly an economic weapon, the statutorily protected right to strike has a value immeasurable in dollars and cents. This right provides an ultimate guarantee of the dignity of free, uncoerced labor, which is an essential element of democracy in our industrialized society. By ignoring this dimension of the right to strike and addressing only the economic risks faced by strikers and employers, the dissent reveals a truncated view of the interests we must assess.

There may be circumstances in which an employer hires replacements for economic strikers on a temporary basis. For example, an employer may utilize the services of a labor contractor on a daily basis or hire workers daily in the fields. Under such circumstances, we see no reason to depart from NLRB precedent regarding replacements hired on a temporary basis during a strike, Returning economic strikers who have been temporarily replaced will have a continuing right to reinstatement commencing upon their unconditional offer to return to work. NLRB v. Murray Products,

Inc. (9th Cir. 1978) 584 F.2d 934 [99 LRRM 3272]; W. C. McQuade, Inc. U9781 237 NLRB 177 198 LRRM 1595]; NLRB v. Fleetwood Trailer Co. , Inc., supra, 389 U.S. 375.

By taking into consideration the practical problems encountered by employers, we treat the reinstatement rights of economic strikers differently from those of unfair labor practice strikers, who have a clear right to immediate reinstatement upon their unconditional offer to return to work, regardless of whether they have been replaced and regardless of any inconvenience to the employer or the replacement employees. See NLRB v. Mackay Radio & Telegraph Co., supra, 304 U.S. 333.

Turning to the facts of this case, we note that the economic strikers sought reinstatement during the same season in which the strike began and were informed by Respondent that permanent replacements had been hired. By the time the strikers made their unconditional offer to return to work. Respondent had replaced all of them and there were no available openings for them, Respondent did not hire any new employees during the remainder of the harvest season. Respondent was not required to prove that it was necessary to replace the strikers for the remainder of the season, and Respondent did not violate the Act by failing or refusing to rehire the replaced economic strikers when they made their unconditional offer to return to work during the same season, There is no evidence that the replacement workers were in fact hired on a temporary basis. There is also no evidence concerning subsequent seasons, apparently because Respondent went out of business. The parties stipulated that "the partnership known as

Seabreeze Berry Farms has been dissolved, after the events in question." On the basis of these facts, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: November 16, 1981

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE, Member

MEMBER McCARTHY, Concurring and Dissenting:

I agree that the complaint in the instant case should be dismissed in its entirety, but I find the rule which the majority intends to apply in subsequent cases to be unwarranted and contrary to applicable National Labor Relations Act precedent. I would adhere to the rule which the NLRB and the courts have found to be equitable and have uniformly applied in cases where economic strikers have sought reinstatement: that economic strikers whom the employer has permanently replaced may obtain reinstatement upon the departure of their replacements or when new job openings occur, at which times the economic strikers have a right to preferential hiring. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-346, [2 LRRM 610] (1938); NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, [66 LRRM 2737] (1967); Laidlaw Corp., 171 NLRB 1366, [68 LRRM 1252] (1968), enf'd 414 F.2d 99, [71 LRRM 3054] (7th Cir. 1969), cert, denied, 397 U.S. 926, [73 LRRM 2537] (1970).

The majority would alter the federal rule by requiring the

employer to create job openings for returning economic strikers by not allowing the replacements to continue their employment at the beginning of the next season, unless the employer could prove that it was obliged to offer continuing employment in order to obtain replacement workers. An employer is thus made to act at his peril when during the next season he continues to utilize replacement workers in the face of a demand for reinstatement by returning economic strikers. In order to retain the replacement workers, the employer would have to risk incurring and defending itself against an unfair labor practice complaint, gambling that it had sufficient evidence to satisfy this Board that the replacements would not have accepted job offers during the strike unless the offers were of permanent employment. The case-by-case approach adopted by the majority would make it extremely difficult for an employer to know whether it stood a reasonable chance of success.1/

As the basis for its significant departure from NLRA precedent, the majority cites differences between agriculture and industry which they believe make it easier for the agricultural employer to obtain replacements for economic strikers. Their reasoning appears to be that economic strikers in agriculture

---

1/The rule adopted by the majority presupposes that employers whose offers of permanent employment were made out of necessity would be willing to run this risk. Rather than having to contest an unfair-labor-practice complaint, many such employers might decide to discharge the replacements and rehire the returning economic strikers. This situation could easily lead to the filing of charges by the disappointed replacements that the employer's action violated their own right under the ALRA to be free from discrimination, with respect to job tenure, on the basis of their exercise of their statutory right to refrain from engaging in union or concerted activities.

somehow require greater reinstatement rights in order for there to be an equitable balance between the employees' right to strike and the employer's interest in operating his business during a strike. However, a more comprehensive examination of the differences between agriculture and industry shows that the rule adopted by the majority will, if anything, create an imbalance between the conflicting interests of the employees and the employer.[2/]

I agree with the majority's assertion that farmworkers' expectations of continuing employment with a particular agricultural employer are generally not so great as the expectations of industrial employees. As pointed out by the majority, most hiring in agriculture is carried out on a seasonal basis, with varying crop, market and climatic conditions causing considerable employment uncertainty and instability. Thus, when compared to industrial workers, the average agricultural worker's claim on a particular job with a particular employer is far more tenuous. Yet the majority's new rule would give the striking agricultural worker a firmer hold on the job he left than he had before the strike, or than that possessed by his counterpart in industry. To reiterate, the rule adopted by the majority would reward the returning agricultural economic striker by guaranteeing him the right to displace his permanent replacement at the beginning of any season subsequent to the one during which the strike began, so long as the employer cannot prove that an offer of permanent employment was the only way

---

[2/]I find the majority's characterization of this dissent to be a form of doubletalk. It cannot hide the fact that the right to strike in agriculture suffers no impairment under a straightforward application of NLRA precedent as discussed herein.

it could obtain the services of the replacement worker.

This added protection for economic strikers in agriculture is even less warranted when one considers some other basic flaws in the majority's analysis. If we assume, as the majority does, that the agricultural work force is highly mobile and accustomed to irregular periods of employment with different employers, the NLRB reinstatment rule is even more beneficial in agricultural employment than it is in industrial employment. These assumed characteristics of agricultural employment create rapid turnover. The same turnover which is said to aid the employer in obtaining replacements for economic strikers also creates two advantages for economic strikers. First, at the struck employer's operation, turnover creates earlier and more frequent openings for returning economic strikers as replacements leave, for one reason or another. Second, turnover creates jobs with other employers and thereby helps provide alternative employment opportunities for the economic striker.

Given the aforementioned circumstances, it is evident that, on the whole, the agricultural worker who goes out on strike incurs a lesser risk than his counterpart in industry. It is subject to argument whether, in and of itself, this advantage outweighs the presumed ease with which an agricultural employer can replace an economic striker. However, the majority has overlooked yet another major consideration, which, when coupled with the lesser risk incurred by the agricultural employee, makes it abundantly clear that the policy announced by the majority will upset, rather than maintain, the balance between the employees' right to strike and the employer's right to continue operating during the course of a

strike. That consideration is the perishability of the agricultural employer's product. Unlike his counterpart in industry, the agricultural employer must operate within a highly constricted time frame and without the benefit of an inventory; crops must be harvested and readied for market by a certain time or the whole year's production may be lost. A harvest-time strike by agricultural employees can leave the employer in an untenable position, with crops awaiting harvest and insufficient time to obtain an adequate replacement work force. Striking employees, on the other hand, incur little or no risk, especially where the strike occurs just a short time before the scheduled completion of harvest. Under the majority's policy, the striking employees might be off the job for only a week or a few days and cause the loss of a substantial portion of their employer's crop. Under these circumstances, employees can go out on strike with little or no economic loss while the employer bears an inordinate risk. The employees might lose only a few days employment at the end of the season and yet, under the majority rule, they would be virtually assured of reemployment at the beginning of the following season. By removing a significant deterrent to economic strikes, without providing a concomitant reduction in risk for the employer, my colleagues have not acted in accordance with their professed goal of striking an equitable balance between the competing rights of employer and employees in a strike situation.

In addition, the rule adopted by the majority will create a confused situation leading to more unfair labor practice charges and difficult problems of proof. Uncertainty will arise from such

questions as whether the promise of permanent employment was ultimately necessary, whether the employer must make room for returning economic strikers at the expense of replacements whom he had to hire in advance of the new season, and whether a labor contractor whose services were engaged in mid-season would have been willing to help out the struck employer without some assurance of work in the following season. Under the majority's rule, the Board would be second-guessing decisions which the grower had to make under the pressure of production time-tables and fluctuating labor supply.

In contrast, the reinstatement rule used under the NLRA is straightforward and easily applied; workers and employers alike know where they stand. More importantly, it provides a long-accepted and equitable balancing of rights that need not be adjusted for use in the agricultural setting. As demonstrated above, even if one fully accepts the majority's characterization of agriculture, it is unnecessary to expand the reinstatement rights of economic strikers beyond those they enjoyed before the strike or beyond those provided for in the NLRB rule.

I would find that Respondent's hiring and retention of permanent replacements in this matter was in accordance with applicable NLRA precedents, and that the complaint herein should be dismissed for that reason.

Dated: November 16, 1981

JOHN P. McCARTHY, Member

CASE SUMMARY

Seabreeze Berry Farms (UFW)

7 ALRB No. 40
Case No. 78-CE-14-V

ALO DECISION

Shortly after Respondent's employees went on strike during the harvest because they were dissatisfied with their wages, the UFW filed a representation petition and an election was conducted among Respondent's employees. After the election, a substantial number of the economic strikers made an unconditional offer to return to work, and Respondent refused to reinstate any of the strikers because permanent replacements had been hired. The ALO found that the seasonal nature of the agricultural industry required a modification of the NLRB's rule concerning the reinstatement rights of economic strikers, as set forth in NLRB v, Mackay Radio & Telegraph Co. C1938) 304 U.S. 333 [2 LRRM 61(5T and NLRB v. Fleetwood Trailer Co., Inc. (1967) 389 U.S. 375 [66 LRRM 2737] . The ALO held that, where the work is seasonal, the employer may hire permanent replacements to complete the season, but economic strikers who unconditionally seek reemployment must be informed at the time they apply for reinstatement that: (1) they will have preference for new job openings for the remainder of the season; and (2) if they present themselves for work in the following season, they will be employed in preference to all other applicants, including those hired as replacements during the preceding season. However, since Respondent had ceased doing business after the season during which the strike occurred, the ALO recommended that the complaint be dismissed.

BOARD DECISION

The Board balanced the legitimate but conflicting interests of employer and employees, weighing the employer's interest in continuing to do business during a strike against the employees' section 1152 rights to engage in concerted activity, and decided to follow the Supreme Court's analysis in NLRB v. Fleetwood Trailer Co., supra, 389 U.S. 375. An employer violates section 1153(c) and (a) of the Act by refusing to reinstate economic strikers who have made an unconditional offer to return to work, unless the employer can show that such refusal was based on a legitimate and substantial business justification. One such justification recognized by the NLRB is that the jobs claimed by returning economic strikers are occupied by permanent replacements hired during the strike in order to continue operations. However, the Board found that the NLRB's general acceptance of an employer's characterization of replacement workers as "permanent" employees may not be appropriate in California agriculture, in view of the seasonal nature of the work and the shifting, flexible employment patterns. If an employer is engaged in a harvest or other seasonal

work when the strike begins, it is generally necessary for the employer to hire replacement workers to continue through the end of that season. Therefore, during the season or seasons when the employees are on strike, the Board will accept the employer's characterization of its replacement workers as "permanent" for the duration of the season, and will not require the employer to prove that such offers of employment were necessary in order to induce applicants to accept employment as striker-replacements. However, an employer who refuses, at the beginning of a subsequent season, to rehire former economic strikers who have made an unconditional offer to return to work will be found in violation of section 1153 (c) and (a) of the Act unless the employer can demonstrate that, at the time when replacement workers were hired during the strike, it was necessary to offer the replacement workers employment which would continue in the following season.

The economic strikers in this case made their unconditional offer to return to work during the same season in which they went on strike, after Respondent had replaced all the strikers. No new employees were hired during the remainder of the harvest season, and Respondent went out of business sometime before the next season. On the basis of these facts, the Board dismissed the complaint in its entirety.

DISSENT

Member McCarthy agreed with dismissal of the complaint but disagreed with the Board's rule that economic strikers who make an unconditional offer to return to work are to be reinstated at the beginning of the next season if the employer cannot prove that an offer of permanent employment was necessary to obtain the strikers' replacements. He considers the rule to be contrary to NLRB precedent and unnecessary in the agricultural setting, where he believes it will upset, rather than maintain, the balance between the employees' right to strike and the employer's right to continue operating during a strike. He bases his conclusion on two factors: (1) agricultural workers who go out on strike generally incur a lesser risk than their counterparts in industry; and (2) the perishability of the agricultural employer's product creates an inordinate risk for the agricultural employer in a strike situation. He believes that no need has been shown for giving agricultural economic strikers an advantage not enjoyed by their counterparts in industry. He also believes that the rule adopted by majority will create a confused situation leading to more unfair labor practice charges and difficult problems of proof.

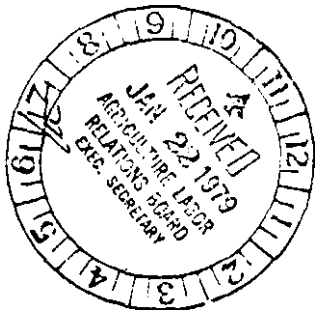
***

***

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



SEA BREEZE BERRY FARMS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 78-CE-14-V 78-RC-5-V

Robert Farnsworth, for the General Counsel

Jordan L. Bloom and Michael J. Hogan, Littler, Mendelson, Fastiff & Tichy, of San Francisco and Fresno, for the Respondent

Curt Ullman and Linton Joaquin (on Brief), of Oxnard, for the Charging Party

DECISION

STATEMENT OF THE CASE

JAMES WOLPMAN, Administrative Law Officer: This case was heard before me on October 23 and 24, 1978, in Oxnard, California; all parties were represented. Consolidated for hearing was a complaint alleging that Respondent had violated Sections 1153(a) and (c) of the Agricultural Labor Relations Act (hereafter called the "Act") and certain objections filed by Respondent to the conduct of the election

held April 29, 1978.

During that portion of the hearing dealing with the unfair labor practice complaint and before any evidence had been taken with respect to the objections, Respondent with-drew its objections, thus eliminating the need for further hearing or for a decision thereon.

The unfair labor practice complaint, which was amended in certain respects at the hearing, is based on a charge filed by the United Farm Workers of America, AFL-CIO (hereafter called the "UFW"), a copy of which was served on the Respondent May 1, 1978. Briefs in support of their respective positions were filed after the hearing by the General Counsel, the Respondent, and the UFW.

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

FINDINGS OF FACT

I. Jurisdiction.

Respondent Sea Breeze Berry Farms was, at the time of the events which gave rise to the complaint, 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.

Further, it was admitted by the Respondent that the UFW is a labor organization representing agricultural employees within the meaning of Section 1140.4 (f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices.

The complaint alleges Respondent violated Sections 1153(a) and (c) of the Act by hiring permanent replacements for striking employees and by refusing to reinstate those strikers who requested reinstatement.

Respondent denies that it violated the Act either by hiring permanent replacements or by refusing reinstatement to striking employees; Respondent further denies that certain of the requests for reinstatement were unconditional in nature.

III. The Facts

A. Background

At the time of the alleged unfair labor practices, Sea Breeze Berry Farms was a partnership engaged in the cultivation and harvesting of strawberries in the Oxnard area. The partnership has since been dissolved and is no longer engaged in farming operations.

B. The Facts Surrounding the Strike

The events in question arose during the 1978 Harvest, a Season which began in March and extended into June. By late April, the work compliment had reached a peak of approximately 80 employees. They became dissatisfied with their wages, and on the morning of April 27, 1978, struck for increases. Later that morning, two Representatives of the UFW came to the fields and spoke with the strikers, explaining their right to union representation. A short while later, the Union Representatives left and, at 2:14 p.m., the UFW filed an election petition requesting the Regional Director to exercise the discretion granted him under §1156.3(a) of the Act to hold a 48 hour, expedited election. The strike continued with the additional object of securing such an election.

At approximately 4:30 p.m. that afternoon, a meeting was held on the Company premises. Present were members of management; Mr. Joe Sanchez, a labor consultant; the two UFW Representatives; and a number of workers. The employer was asked to agree to a 48 hour election and there was some discussion of the wage issue.

Two of the employees present testified that workers were promised their jobs back after the election. Company witnesses emphatically denied that such a promise was made, and I credit their testimony. These witnesses were able to furnish a much more coherent account of the course of the meeting. Besides, the Regional Director had not yet determined that an expedited election would be held, so there was a definite possibility of delay. It is, therefore, unlikely that Sea Breeze, faced with the urgent need to harvest its strawberries, would have made such an open ended promise.

There is also a conflict over whether, during the course of the meeting, the strikers made the resolution of the wage dispute a condition of their return to work.

This conflict need not be resolved since the terms upon which work would resume were spelled out later that evening in a letter delivered both to the employer and to the ALRB Regional Office by the UFW; it provided that: "...employees will return to work once an election is held ..." (emphasis supplied). No other qualifications or conditions were attached.

The following morning, Friday, April 28th, some strikers did appear for work but were told that no positions were available. At the hearing the parties stipulated that no one – either on April 28th or thereafter – was denied a job who had not been permanently replaced.

A pre-election conference was held Friday afternoon and Sea Breeze, acting in good faith, raised the issue of an election bar. The Regional Director gave the company until Saturday afternoon to provide evidence of such a bar but determined that, unless the bar was upheld, the election would take-place between 5:00 p.m. and 7:00 p.m. on Saturday, April 28, 1978. Meanwhile, the eligibility list had been submitted and the showing of interest verified.

On Saturday, the Regional Director found that there was no bar to the election and so it was held as scheduled.

The next morning, Sunday, April 30, 1978, some strikers sought reinstatement but were told that they had been permanently replaced. Apparently, many strikers did not believe Sunday to be a work day, and so, on Monday, May 1, 1978, a much larger number reported. The Company representatives told them and the UFW Representatives who accompanied them that permanent replacements had been hired, but that eight jobs were still open. The Company offered those jobs and one striker accepted. The rest took the position that unless all were returned to work, no one would accept a job.

Picketing continued through May 3, 1978; and, on May 10, 1978, un unconditional request for reinstatement – without the "all or none" qualification – was submitted to the employer on behalf of a considerable number of strikers.

C. Relevant Economic Data

The strikers here were seasonal employees, engaged in picking strawberries during the four month harvest Season which funs from March through June. At the time of the strike the work compliment had reached its peak.

While the work force appears to be mobile, there is a cyclical element in that 75% to 80% of the workers who return year after year to work for the same grower during the picking season.

Because strawberries are easily bruised, their picking requires some skill. An employer witness testified that it takes three months to become a proficient picker.

The strawberry plant is not simply picked once. It must be picked repeatedly every three or four days if it is to continue to produce healthy berries. Even if the berries become overripe and cannot be sold, they still must be picked — or "stripped" — because the plant- will suffer if they are left on the vine.

At the time of the events in question, adverse weather had affected the entire strwberry crop in the Oxnard area, and so there were many skilled pickers out of work l/. At Sea Breeze, there had been rain early in the week of the strike and so there was a considerable amount of "stripping" to be done. Also, because of the rain, work had fallen behind schedule. The Sea Breeze General Manager testified that the Company would have lost between $45,000 and $50,000, if it had not hired replacements during the four days between the strike and the election. While his figures are subject to criticism as loose, extemporaneous calculations, it does appear that the harvest season was a critical time, that picking and stripping were behind schedule, and that shutting down production for three or four days would bring on significant financial losses.

DISCUSSION AND CONCLUSIONS

I. Whether Recognitional Strikers Are Entitled to Special Job Protection.

At the outset the General Counsel, relying on the expedited election procedure created in §1156.3 (a) of the Act, argues that once striking workers have availed themselves of that provision, they should be immune from permanent replacement while the election is pending.

This argument has already been considered and rejected by the Board in Kyutoku Nursery, Inc., 3 ALRB No. 30 (1977). In accordance with that ruling, I must conclude that recog-

---

l/ This, of course, greatly facilitated the hiring of replacements.

nitional strikers are not entitled to special preference or status. They are economic strikers and are to be treated as such.

II. The Rule to Be Applied in Determining Whether Economic Strikers" Are Entitled to Reinstatement.

Next the General Counsel and the Charging Party, after analyzing the relative interests involved, argue that the long standing, oft announced rule that an employer is entitled to hire permanent replacements for economic strikers cannot be justified, at least where the work is seasonal and the work force highly mobile.

Such a balancing test has its origins in the many Supreme Court decisions interpreting Section 8 (a)(3) of the NLRA 2/. I agree that this matter should be resolved by

---

2/ NLRB v. Jones & Laughlin Steel Corp., 301 U.S.l (1937); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Radio Officer s '_ Union v. NLRB, 347 U.S . 17 (1954); Truck Drivers Local 449 v. NLRB (Buffalo- 'Linen Supply Co.), 353 U.S. 87 (1957); America Ship Building Co. v. Brown, 380 U.S. 278 (1965); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); NLRB v. Erie ResistQr Corp., 373 U.S. 221 (1963); NLRB v. Burnup_&_Sims,Inc., 379 U.S. 21 (1964); Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263 1065) ; NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967),. And see Christensen a Svanoe , ^Motive and Intent in the Commision of Unfair Labor Practices: The Supreme Court and the Fictive Formality", 77 YALE L. J. 1269 (1968).

This balancing of interest analysis is really only a portion--here the only relevant portion — of a more extended analysis which may be applied to any §1153 (c) violation. That test, and the attendant evidentiary burdens, may be stated as follows: The initial burden is on the General Counsel to produce substantial evidence of conduct which interferes with union membership, sympathy or activity. In most cases this entails proof that the discriminatee (s) was engaged in protected activity, that the employer was aware of it, and that adverse action was taken against the worker(s). Once this has been established, the employer must come forward with some justification for his action; namely, that he was pursuing a legitimate business interest. At which point the General Counsel must rebut this either (a) by offering substantial evidence that the asserted interest was a pretext and the employer was actually motivated by hostility toward unionization and/or (b) by accepting the justification offered and establishing that, even if it was not pretextural, the societal interest in allowing the employer to further his business interest by such conduct does not outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming and maintaining a union.

such an analysis and I conclude that those decisions do indicate that where, as here, the employer engages in conduct which does adversely effect those engaged in protected activity, then it must be determined whether the societal interest in allowing employers to further their business interests by such conduct outweigh the harm which that conduct inflicts on the ability of workers to pursue the legitimate and important goal of forming unions and engaging in concerted activity to better their wages, hours and conditions.

In order to accurately assess the force of this analysis, it is necessary to consider for a moment the underpinnings of the permanent replacement rule.

The rule cannot find its justification in the obvious fact that it deters strike activity. That is an unwanted side effect. It is a cornerstone of our collective bargaining system that employees have every right to engage in concerted activity to better their wages, hours and conditions, and both the NLRA and our Act recognize this. It goes without saying, therefore, that unnecessary obstacles which inhibit or interfere with that right should not be tolerated.

Allowing permanent replacement of strikers is, without question, an obstacle which does, in many instances, inhibit the exercise of the right to strike; so the question becomes: Is it a <u>necessary</u> obstacle?

In N.L.R.B. v. Mackay Radio and. Tel. Co., 304 U.S. 333, 345 (1938), the Court found that it was because every employer had the right" to protect and continue his buisiness."

Few would quarrel with the importance of extending to employers the right to protect and continue their business during strikes. To prevent them from so doing would, after all, inhibit the same play of economic forces which furnishes the justification for the strike itself. But what is not so clear is whether employers need to be able to hire permanent replacements in order to continue in business. The Mackay Court did not really face up to that issue; it simply held — as a matter of law — that permanent replacements could be hired. Such a holding amounts, in effect, to a legal judgment that in strike situations employers cannot operate unless they hire permanent replacements. As a factual matter, this may or may not be true, or — what is more likely — it is true in some instances and not in others. But, under the Mackay rule, the factual truth is irrelevant; it is simply a matter of law.

Forclosing factual inquiry as to whether,in a particular situation, the employer needs to offer permanent employment, in order to attract workers and continue in business does have the virtue of predictability: the rule is straight forward without exception or qualification; the employer need not worry that he has miscalculated. Moreover, it does allow him to act quickly without first attempting to hire temporary workers; and quick action can, in many instances, be important to continued production.

It may be questioned, however, whether clarity and predictability are too high a price to pay for the obviously inhibitory effect which the rule has on legitimate concerted activity; especially in view of the fact that the hiring of permanent replacements is most often associated with economic strikes which occur at the onset of the collective bargaining relationship, or, as here, even earlier. As such, the brunt of injury falls on those least able to withstand it – newly organized workers or those engaged in spontaneous collective action 3/.

It is for these reasons that the commentators who have considered the problem have found little to recommend the Mackay rule. Note,"Replacement of Workers During Strikes" 75 Yale L.J. 630(1966); Getman, "The Protection of Economic Pressure By Section 7 of the National Labor Relations Act," 115 U. Penn. Law Review 1195, 1203-1205(1967); Schatzki, "Some Observations Concerning a Misnomer - 'Protected Concerted Activities'", 47 Texas L.Rev. 378, 382-95 (1969)4/.

Our own Board, in Kyutoku Nursery, Inc., supra, after weighing the countervailing considerations, did – at least in the factual situation there presented – accept the Mackay rule. It left open, however, the question of whether that rule should apply to situations where the work is seasonal and the work force highly mobile.

Since both of these factors are present here, the General Counsel and the Charging Party argue that the Mackay rule should be modified or discarded.

3/ It should also be noted that when an employer hires a "permanent" replacement, he seldom, if ever, offers him a contract of employment which is any more than a typical "terminable at will" agreement. So to say he is committed to retain replacements is not accurate. He need do no more than classify them as such at the point when his strikers seek to return to work; he has no legal commitment to provide "indefinite" or "permanent" employment to the replacements.

If this is to be done, it must be because situations involving seasonal work and a Highly mobile work force give rise to circumstances which shift the balance struck in Kyutoku between the need of employers to continue in business and the right of workers to engage in protected activity. Such a shift could occur if the imposition of the permanent replacement rule were more onerous to seasonal, mobile workers or if the use of permanent replacements was less of a necessity for seasonal employers.

In a seasonal industry the permanent replacement, rule does, by and large, operate more harshly on workers than where there is a constant level of production. Once the seasonal peak in employment is reached, the right of preferential rehire is worth little or nothing. There is simply no work left. Furthermore, since seasonal work -- again "by and large" 5/ -- calls for somewhat less skill than industrial work, it is more likely that the employer will quickly find permanent replacements, thus diminishing the value of the right of reinstatement prior to replacement.

On the other hand, seasonal work is very often performed in situations of considerable urgency. A harvest will not wait; replacements must be found; and, because the work is seasonal, not just a few, but many.

what this means is that with seasonal work the employer has, if anything, an even greater need for a rule which allows him maximum latitude in quickly securing replacements; while, at the same time, employees who resort to legitimate economic behavior suffer even more by being permanently replaced since reinstatement and preferential rehire rights verge on being inconsequential. Thus seasonal work, rather than shifting the balance from one side to the other, simply intensifies each side of the equation.

What of the highly mobile nature of the agricultural work force: Does that make any difference?

4/ After considering the inadequacies of the Mackay rule, Professor Getman nervertheless concludes, with a perceptable degree of cynicism, that:

> "In view of the rule's long duration, it is most unlikely that such an evaluation (of its factual necessity] will be undertaken in the future or that the Mackay rule will be abandoned in the interest of consistent application of sections 8(a)(1) and 8(a)(3)."

5/ There will, of course, be exceptions to any generalization concerning the agricultural industry. However, since we are concerned with a rule which applies throughout the industry, we must resort to such generalizations.

An economic striker who seeks to return to his job and finds himself permanently replaced will, if he is a member of a mobile labor force, be much more inclined to move on to a new area looking for work and is therefore less likely to exercise preferential rehire rights than an industrial worker who would remain in the area looking for other work and be available for rehire. So, the more mobile the work force, the harsher the permanent replacement rule.

At this juncture it is important to note that the pattern of labor mobility in agriculture is not one of random movement from place to place; rather it has a definite cyclical pattern: workers tend to specialize in a few crops and move in a set pattern from one to the other, returning to the crop and area worked the previous season. This is especially true in strawberries. The testimony indicates that 75% to 80% of the workers return to work for the same grower each season. Given this cyclical pattern and given the critical importance of getting seasonal work done quickly without interruption or delay, there does begin to emerge the outline of a rule protecting the employer, while still mitigating -- to the extent possible — the harsh effect which permanent replacement has on mobile, seasonal workers. It is this: Where, unlike Kyutoku, the work is seasonal, the employer may hire permanent replacements to complete the season, but economic strikers who unconditionally seek re-employment must be informed at the time they apply for reinstatement, (1) that they will have preference for new job openings for the remainder of the Season; and (2) that, when the following season comes, if they present themselves for work, they will be employed in preference to all other applicants, including those hired as permanent replacements during the proceeding season.

Such a rule does allow the employer the inducement he presumably needs to secure workers, while giving the fullest possible recognition to the preferential rehire principle ennunciated by the Supreme Court in N.L.R.B. v. Fleetwood Trailers, Inc. 389 U.S. 375 (1967).

The alternative to this rule would be one which called for a factual inquiry, in each instance, as to whether the employer could obtain temporary replacements until such time as the strikers chose to seek reinstatement. Such a factual inquiry might well rule out, in the context of this case, the use of permanent replacements, since the employer here conceded that, due to layoffs in the Oxnard Area, a pool of skilled replacements was easily obtainable.

The problem with such an alternative is that in many — if not most — situations, it will be difficult for an employer, operating in the heat of the moment, to know whether there is a sufficient labor supply such that he must first seek temporary replacements or whether he can go right ahead and offer permanent employment. Since the potential back-pay

liability which would attach to a miscalculation is large, he would almost always have to first seek temporaries, then and only then could he hire permanent replacements. This would be a time consuming process and should not be lightly imposed on an employer facing the critical demands of seasonal work.

III. Whether, Prior to the Hiring of Permanent Replacements, There Was an Unconditional Offer to Return to Work.

The Parties stipulated that no one was denied a job who had not been permanently replaced. This should have forclosed any contention that available jobs were withheld from strikers seeking reinstatement. Nevertheless, General Counsel and Charging Party do make some such argument. Rather than simply rely on the stipulation, it might be well to consider the legal status of (1) the offer made Thursday night to return once the election was held and (2) the offer on Monday morning to return only if all strikers were reinstated.

The time qualification contained in the Thursday night letter can fair no better than any other condition. It makes no difference that it is a "condition certain" [if indeed it is], It still has the effect of delaying the resumption or production and, as such, interferes with the employer's need to protect and conduct his business. See New Orleans Roosevelt Corporation, 132 NLRB 248 (1968),

As for the "all or none" qualification, that too has been consistently rejected under the NLRA. Bargain Town of Ponce, Inc., 200 NLRB No. 149 (1972); Sawyer Stores, Inc. 190 NLRB No. 129 (1971). No policy reason has been "advanced to justify its rejection here.

IV. Conclusions and Recommendation.

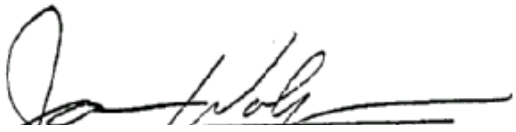
I do find that on May 10, 1978, an .unconditional offer to return to work was made for certain of the striking employees. Based upon my determination that in Seasonal situations, such employees are entitled to preference over all other applicants in the succeeding season, including replacements, I would normally recommend an order that the employer inform those persons of their preferential status and honor that commitment the following season. Here, however, the employer is no longer in business and no purpose would be served by such an order.

I would, however, suggest to the Board that, should

it be in agreement with the rule here specified, it should announce its intentions so that employers will be aware of their obligations. That way the unfortunate situation will not arise where the rule is applied to an employer who has, in good faith, followed the traditional NLRB rule, but failed to take the additional step of informing his economic strikers that they will be preferred to all other applicants in the season to come.

Based on the above findings and considerations, I therefore conclude that the employer did not violate Section 1153 (c) of the Act either by hiring permanent replacements for those workers who engaged in the economic and recognitional strike which began April 27, 1978, or by refusing to reinstate strikeing employees upon their unconditional request. Furthermore, because the violation of Section 1153 (a) of the Act as alleged is essentially derivative in nature, I likewise conclude that the hiring of permanent replacements did not interfer with, restrain or coerce employees in the exercise at their rights under section 1152. I therefore recommend that the Complaint be dismissed.

DATED: January 12, 1979.



JAMES WOLPMAN, Administrative Law Officer