

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SUTTI FARMS,)	
)	
Employer,)	Case No. 79-RC-6-OX(SM)
)	
and)	
)	
)	
INTERNATIONAL UNION OF)	8 ALRB NO. 63
AGRICULTURAL WORKERS,)	(6 ALRB NO. 11)
)	
Petitioner.)	

DECISION AND CERTIFICATION

On April 28, 1982, Investigative Hearing Examiner (IHE) Joel Gomberg issued the attached Decision in this proceeding. The Employer timely filed exceptions and a brief in support of exceptions.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the Employer's exceptions and brief and has decided to affirm the IHE ' s rulings, findings, and conclusions, and to adopt his recommendation that the International Union of Agricultural Workers (IUAW) be certified as the exclusive collective bargaining representative of all agricultural employees of the Employer.

Although we have affirmed the IHE's Decision in its entirety, we deem it appropriate to comment on Respondent's exception that the ALO failed to adhere to the standard expressly

set forth in our remand Order. Respondent urges the application of Sutti Farms (Nov. 23, 1981) 7 ALRB No. 42, wherein we remanded the labor contractor/custom harvester issue for an evidentiary hearing and the taking of evidence concerning the "totality" of operations of Sutti Farms and Felipe Zepeda, the latter a supplier of a thinning/harvesting crew to Respondent, and the manner in which the whole of their activities related to the Zepeda workers at the Sutti Farms operations. (Sutti Farms, supra, slip opn. at p. 4.)

Respondent contends that the IHE's analysis is fatally flawed in that he found that each of the many factors which he considered, in and of itself, was sufficient to support a conclusion that Zepeda was a labor contractor within the meaning of Labor Code section 1140.4(c). As a labor contractor, Zepeda could not fall within the statutory definition of an agricultural employer and therefore Sutti Farms was the employer of the Zepeda crew. Respondent advances the argument that the IHE rejected the prescribed test in derogation of our Order, and thus failed to compare and/or balance the operations of Sutti Farms and Zepeda vis-a-vis the affected workers. However, that test would apply only if, as Respondent contends, Zepeda is a custom harvester.

At page 14 of his Decision, the IHE observed that:

It is important to emphasize that, when a person is acting within the confines of his duties as a farm labor contractor, the Board has no discretion to consider the 'whole activity' of the contractor and the grower to determine the statutory employer. The legislature has already made a policy choice, by statute, that the farm labor contractor is excluded from being an employer. It is only when the contractor is acting outside the scope of the

duties normally performed by a contractor that the Board may engage in a balancing test.

In Kotchevar Brothers (March 2, 1976) 2 ALRB No. 45, we held that once it has been determined that an entity which provides workers to an employer was acting as something more than a mere labor contractor, we shall consider the "whole activity" of both entities in order to determine which of them can provide the more stable relationship for purposes of collective bargaining. We do not read the IHE's quoted language as inconsistent with Kotchevar Brothers, supra, or our remand Order. The IHE found that Zepeda supplied labor for a fee and, following the customary practice among labor contractors, his compensation was a percentage override of the actual cost of labor. He found, specifically, that Zepeda's services to Sutti Farms did not exceed those contemplated by Labor Code section 1140.4(c).^{1/}

The IHE did not have benefit of our Decision in Tony Lomanto (June 18, 1982) 8 ALRB No. 44 which issued subsequent to his Decision. Tony Lomanto, supra, presented a clear custom-harvester situation, i.e., both entities were possible employers. We suggested therein certain broad areas of inquiry, and a "totality of operations" test, which we felt would be useful to the Board in determining whether it would better serve the purpose and policies of the Act to designate the grower or

^{1/}We note that the IHE, of necessity, examined the "totality" of Zepeda's operation in order to determine that he was a statutory labor contractor. Therefore, since Zepeda could not be an employer within the meaning of the Act, it was not necessary to balance the "whole activity" of the two participants.

the harvester as the employer of the affected employees. Tony Lomanto, supra, is not applicable where, as here, the question addressed therein need not be reached.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the International Union of Agricultural Workers (IUAW), and that, pursuant to Labor Code section 1146, the said labor organization is the exclusive representative of all agricultural employees of Sutti Farms in the State of California, including all agricultural employees provided by Felipe Zepeda and other labor contractors, for purposes of collective bargaining, as defined in Labor Code section 1155.2(a), concerning employees' wages, hours, and working conditions.

Dated: September 15, 1982

HERBERT A. PERRY, Acting Chairman

JOHN P. McCARTHY, Member

ALFRED H. SONG, Member

CASE SUMMARY

Sutti Farms

8 ALRB No' 63

Case No. 79-RC-6-OX(SM)

BACKGROUND

This representation proceeding began on July 16, 1979, when the IUAW served a petition for certification on an employer designated as Sutti Farms, Flying S Cattle 'Co., and Sutti Dairy. The election was held on July 23, 1979. Sutti Farms contested the "Employer" designation at the outset and, accordingly, challenged the ballots of employees of Flying S Cattle Co. and Sutti Dairy who had participated in the election. In addition, the Employer challenged approximately 60 ballots cast by workers provided by Felipe Zepeda, allegedly a custom harvester, contending that these workers as well were not employees of Sutti Farms. In his Report on Challenged Ballots, the Regional Director recommended that the challenges to the ballots of voters who were employed by Sutti Dairy and Flying S Cattle Co. be upheld. The Regional Director also recommended that the challenges to the ballots of the Zepeda workers be overruled, on the basis that Zepeda is a labor contractor.

Thereafter, in Flying S Cattle/Sutti Farms (Feb. 19, 1980) 6 ALRB No. 11, the Board affirmed the Regional Director's findings, in particular, that Zepeda is a labor contractor and thus overruled the Employer's challenges to the ballots cast by the Zepeda crew. Pursuant to Flying S Cattle/Sutti Farms, supra, the challenged ballots were opened and counted and a revised tally of ballots was issued. On June 11, 1980, the IUAW was certified by the Board as the exclusive collective bargaining representative for all agricultural employees of Sutti Farms, including workers provided by Zepeda.

Still contending that Zepeda was a custom harvester, and that the inclusion of his workers in the unit affected the results of the election, Sutti Farms rejected the IUAW's invitation to commence negotiations. An unfair labor practice charge alleging bad-faith refusal to bargain was filed by the IUAW. The General Counsel issued a complaint but no hearing was held, the parties having agreed to submit the question of Zepeda's status to the Board on stipulated facts. The Board determined that its initial Decision on Challenged Ballots in Flying S Cattle/Sutti Farms, supra, insofar as Zepeda was concerned, had been based on an inadequate record. Accordingly, in Sutti Farms (Nov. 23, 1981) 7 ALRB No. 42, the Board revoked the certification it had awarded to the IUAW and remanded the matter to the Executive Secretary to conduct a hearing on the issue of whether Zepeda is a labor contractor or a custom harvester.

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ALO DECISION

Pursuant to the Board's remand Order in Sutti Farms, supra, 7 ALRB No. 42, the ALO conducted an evidentiary hearing in which he examined the nature of Zepeda's duties, the extent to which he exercised supervisory and/or managerial control vis-a-vis such duties, and the manner in which he was compensated for his services by Sutti Farms. The ALO concluded that Zepeda was a labor contractor within the meaning of Labor Code section 1140.4(c) and thus was excluded from "employer" status under the Act.

BOARD DECISION

The Board affirmed the ALO's findings, rulings and conclusions that Sutti Farms, rather than Zepeda, was the employer of the workers provided by Zepeda. Accordingly, the Board affirmed the result of its Decision in Sutti Farms, supra, 7 ALRB No. 42 and certified the International Union of Agricultural Workers (IUAW) as the exclusive bargaining representative of all agricultural employees of Sutti Farms.

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

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STATE OF CALIFORNIA
BEFORE THE
AGRICULTURAL LABOR RELATIONS BOARD

SUTTI FARMS,)
)
Employer) Case No. 79-RC-6-OX (SM)
)
and) INITIAL DECISION OF
) INVESTIGATIVE HEARING
INTERNATIONAL UNION OF) EXAMINER
AGRICULTURAL WORKERS,)
)
Petitioner)

APPEARANCES:

Michael J. Hogan
Littler, Mendelson, Fastiff & Tichy
Fresno, California
For the Employer

Arturo Castro
Santa Maria, California
For the Petitioner



STATEMENT OF THE CASE

Joel Gomberg, Investigative Hearing Examiner: This case was heard by me on January 12, 1982, in Oxnard, and on March 9, 1982, in Santa Maria, pursuant to a Notice of Investigative Hearing issued by the Executive Secretary on December 4, 1981.

A petition for certification was filed on July 16, 1979, by the International Union of Agricultural Workers (here after "IUAW"). An election was held on July 23, 1979, in a unit

encompassing all the agricultural employees of Sutti Farms^{1/} in the State of California. At the election, the Employer challenged the ballots of about 60 agricultural employees on the payroll of Felipe Zepeda. These workers harvested, thinned, and hoed broccoli and cauliflower grown by the Employer. The Employer contended that the employees in question were employed by Zepeda.

In Sutti Farms (1980) 6 ALRB No. 11, the Board overruled the Employer's challenges to the ballots of the employees on Zepeda's payroll, determining that the declarations in support of the Employer's exceptions were insufficient to make out a prima facie case that Zepeda was a custom harvester, rather than a labor contractor, in relation to the Employer. The challenged ballots were subsequently counted and, on June 11, 1980, the IUAW was certified as the exclusive collective bargaining agent for all the agricultural employees of the Employer. The Employer, in order to test the legality of the certification in the courts, refused to bargain with the IUAW. The General Counsel issued a complaint alleging that the Employer, by refusing to bargain, had violated Sections 1153 (a) and (e) of the Act. The case was submitted to the Board on stipulated facts. On review of the matter, the Board determined that its initial decision had been based upon an inadequate record. In Sutti Farms (1981) 7 ALRB No. 42, the Board revoked the IUAW's certification, and remanded the matter to the Executive Secretary to hold a hearing on the issue of whether Zepeda was acting as a

^{1/}Employees of Flying "S" Cattle Company and Sutti Dairy voted in the election, but the challenges to their ballots were upheld by the Acting Regional Director.

custom harvester or a farm labor contractor while under contract with the Employer. Specifically, the Board directed that evidence be taken "concerning the totality of Zepeda's and Sutti's operations and the manner in which the whole of their activities relates to the employees supplied by Zepeda to work at [the Employer's] operations."

THE FACTS

In early 1979, Ed Sutti, then a partner in Sutti Farms along with his father, Emilio, decided to seek out a freezer company in the Santa Maria area with whom he could contract to grow broccoli and cauliflower on some land owned by the Employer. He succeeded in arranging a contract with the John Inglis Company. Under the terms of the contract, John Inglis was entitled to buy all the broccoli and cauliflower grown by the Employer, but was not obligated to purchase any of it. In the event that John Inglis refused to purchase some of the crop, the Employer was free to attempt to sell it in the fresh market. Fred DeVad, the head field man for John Inglis, determined when the seed would be planted and when it would be harvested. Both crops must be harvested within a period of several days once they reach maturity.

At the time that Ed Sutti entered into the contract to grow broccoli and cauliflower for John Inglis, he had no experience in farming these crops. Most of his agricultural experience had come from operating a family cattle business. In the course of seeking advice from Fred DeVad, Sutti asked him to recommend a harvesting company which could thin, hoe, and harvest the crops. DeVad recommended several people, including Zepeda

a labor contractor who had done this kind of work for seven or eight years.

Sutti entered into an oral agreement with Zepeda for the performance of weeding and harvesting (hoeing and thinning) services. For weeding, Zepeda was paid on a per-acre basis plus a 30% commission. Zepeda's compensation for harvesting freezer broccoli or cauliflower was determined by the number of pounds of produce taken to the freezer company (1.87/per pound). When produce was diverted to the fresh market, Zepeda was paid by the number of cartons packed at the packing house (\$.37 per carton). In each case, Zepeda received a commission of 30%. Zepeda's compensation was tied directly to his costs for supplying labor. He paid the members of his crew on a piece-rate basis, at a level which equaled what he received from Sutti pursuant to the contract. Zepeda apparently paid his crew members an hourly wage for their thinning and hoeing work. The terms of Zepeda's compensation were fixed when the contractual agreement was reached. If the market price rose or fell, Zepeda's compensation remained the same. If produce was harvested and not sold to any packing house, Zepeda's crew would still have been compensated on an hourly wage basis.

Ed Sutti testified that he understood the prevailing commission for harvesters like Zepeda to be approximately 26% over cost. He stated that he was willing to pay Zepeda a premium because he was inexperienced in farming and needed someone with Zepeda's expertise who could make important decisions, and because Zepeda was able to provide some harvesting equipment which the Employer did not have. Sutti felt that Zepeda would

have to have a little more involvement at Sutti Farms than he did with other growers. Zepeda stated that, in 1979, he charged some of the growers with whom he had a long-standing relationship a commission of 28%, while "new" growers, like Sutti, were required to pay 30%. Zepeda denied that he increased the commission because he was required to perform more functions for the Employer than he did for other growers. According to Zepeda, he provided essentially the same services to the Employer as he did to other growers.

Zepeda was entirely responsible for the internal administration of his crew. He hired, fired, disciplined, and set the terms and conditions of employment for the members of his crew. Zepeda selected a foreman to handle the day-to-day supervision of the employees.

In addition to the employees on Zepeda's payroll, the Employer had approximately 14 direct employees who worked under the supervision of a Company foreman, Chuck Kolding. These employees were primarily responsible for ground preparation, planting, fertilization, and irrigation. They worked separately from the employees on Zepeda's payroll and there was no interchange between the two groups of employees.

Zepeda testified that he generally attempted to clear decisions with Sutti before performing work. For example, when a field needed to be weeded, Zepeda would get Sutti's permission before performing the work. Zepeda testified that, on several occasions, Sutti told him not to go ahead with his weeding plans, because of the cost involved. Zepeda stated that Sutti was not the only grower to decide that he could manage without

all the weeding that he recommended. Sutti could not recall ever disagreeing with any recommendation of Zepeda's concerning weeding. Zepeda was an honest witness with no interest in the outcome of this case. I credit his testimony on this issue.

On one or more occasions during the 1979 harvest, broccoli was ready to harvest which John Inglis did not wish to buy. According to Zepeda, prices on the fresh market were favorable at the time. On at least one occasion, Zepeda arranged for the broccoli to be bought by a packing house without first getting Sutti's approval, because Sutti was unavailable. There was a clear economic advantage to Sutti, because the only alternative was to lose the crop. Similarly, there was an apparent advantage to Zepeda, in that his crew earned more when picking for the fresh market than for the frozen market. Zepeda's commission would be larger as a result. Of course, if no buyer had been found for the broccoli, it would not have been harvested, and there would have been no commission for Zepeda.

Aside from these few unusual events, the decisions concerning hoeing and thinning were generally made by Zepeda, subject to Sutti's veto, while the decisions concerning when to harvest rested with DeVad. At times Kolding would complain to Zepeda about the quality of work performed by his crew. It is not clear whether Kolding was simply relaying complaints from the packing shed or was acting on his own observations.

DeVad testified that Zepeda's ability to provide tractors for the harvest was a factor in his recommendation of Zepeda to Sutti. Sutti also claimed that he relied on Zepeda's access to such equipment. Zepeda testified that he no longer

had tractors at the time of the 1979 harvest, but was sometimes able to borrow them. Whether he ever supplied tractors for use at the Employer's fields is unclear. Sutti also had two tractors. Beyond the possible provision of two tractors, Zepeda only furnished simple hand tools to his crew for use in the harvest. Boxes and bins were provided by John Inglis.

At the conclusion of the 1979 harvest, Sutti terminated his contract with Zepeda. Since that time, he has continued to grow broccoli and cauliflower, but he has hired harvest labor directly. For a time, Sutti's uncle served as an expert consultant to Sutti. Sutti is in full control of the vegetable operation now and considers himself to be a competent farmer.

ANALYSIS AND CONCLUSIONS

The Board has frequently been called upon to determine whether a person holding a license as a farm labor contractor should be deemed the employer of the agricultural employees on his payroll for collective bargaining purposes. Although §1140.4 (c) of the Act^{2/} excludes "any farm labor contractor as defined

^{2/}Labor Code §1140.4 (c) provides that:

- (c) 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 persons supplying agricultural workers to an employer, any farm labor contractor as defined--[continued]

by Section 1682"^{3/} from the definition of an agricultural employer, the Board has consistently held that a person's status as a labor contractor will not automatically bar him from being deemed an agricultural employer in situations where the services provided by the contractor to the grower in question went beyond those generally performed in the ordinary course of the labor contractor-grower relationship. Kotchevar Brothers (1976) 2 ALRB No. 45. Once it has been determined that the person holding a farm labor contractor's license was acting as something more than a mere labor contractor, i.e., as a custom harvester, the Board will consider the "whole activity" of both possible employers in order to determine which should be deemed the employer to provide the most stable bargaining relationship. Napa Valley Vineyards Co. (1977) 3 ALRB No. 22, and Gourmet

2/[continued]—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.

3/Labor Code §1682 (b) provides that:

(b) "Farm labor contractor" designates any person, who for a fee, employs workers to render personal services in connection with the production of any farm products, to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of 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 payment to such persons.

Harvesting and Packing (1978) 4 ALRB No. 14.

There is little doubt that Zepeda was acting as a farm labor contractor in his work for the Employer. He supplied labor for a fee and, following the customary practice among labor contractors, his compensation was a percentage override of the actual cost of labor. Kotchevar Brothers, supra. The more difficult question is whether Zepeda supplied services to the Employer which went substantially beyond those normally provided by farm labor contractors. If he did, then Zepeda crossed the line between labor contractor and custom harvester. As a custom harvester, there would be no statutory bar to Zepeda being deemed an agricultural employer. Unfortunately, the dividing line between a typical farm labor contractor and a custom harvester is not brightly marked.

The fact that Zepeda supervised, directed, and checked the work of the employees he provided to the Employer does not give rise to an inference that he was performing services beyond those typically provided by farm labor contractors, because those functions are explicitly included in the statutory definition of farm labor contractor. See Vista Verde Farms v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, at p. 323; and Cardinal Distributing Co. (1977) 3 ALRB No. 23.

The Employer has stressed Sutti's inexperience in growing cauliflower and broccoli in an attempt to establish that Zepeda must have performed services for Sutti beyond those typically provided by labor contractors. Why else, argues the Employer, would Sutti have paid Zepeda a 30% commission when he could have hired another labor contractor for less? I cannot

find that Sutti's willingness to pay Zepeda's price is evidence that Zepeda was a custom harvester. Clearly, Sutti wanted to be sure that he was hiring a responsible, competent, and experienced person to oversee the harvesting and weeding of his vegetable crops. In essence, Sutti was looking for a labor contractor who would act as a responsible supervisor who did not himself need much supervision. Surely, labor contractors are not transformed into custom harvesters simply because they are very good labor contractors, or because they have more experience than the growers who hire them.^{4/} The farm labor contractor licensing statute recognizes that contractors are often experienced in farming practices and typically direct the work of their crews.

The Employer's reliance on Jack Stowells, Jr. (1977) 3 ALRB No. 93, is misplaced. The farm labor contractor in that case was paid a per-acre management fee. Here, Zepeda was paid a commission based on the piece rate earned by the employees in his crew, except in the case of hoeing and thinning work. Because such work cannot be measured on a piece-rate basis, Zepeda's commission was a percentage override of the per-acre cost. However, it is clear that Zepeda's per-acre charge was

^{4/}If the Board were to consider the relative expertise of the grower and farm labor contractor in determining which should be considered the statutory employer (assuming that it is possible for an administrative agency to establish which is the more experienced party) , a person like Zepeda might be deemed a labor contractor when working for an experienced grower and a custom harvester when under contract to a relative novice, even though he supplied exactly the same services to both. In addition, the statutory employer might change from season to season as either the grower or the contractor acquired greater expertise relative to the other. The Board cannot develop clear and consistent legal rules based on such factual quicksand.

based on his actual labor costs for each time a field was hoed or thinned. In no sense was Zepeda paid a management fee. Furthermore, Sutti exercised his right not to have thinning and hoeing work done. While Sutti had much to learn about growing broccoli and cauliflower, he was a resident farmer. His situation is not analogous to that of absentee landlords who turn over the entire management of their acreage to land management companies, which typically charge their customers a per-acre per-year management fee.

The Employer also argues that Zepeda's ability to supply needed equipment to Sutti demonstrates that Zepeda was a custom harvester. There is some conflict in the testimony of Zepeda and Sutti as to whether or not Zepeda actually supplied any equipment. (None of the bills from Zepeda to Sutti attached to the Employer's objections petition includes any charge for tractors). At most, Zepeda supplied two tractors to Sutti, for which he was apparently compensated separately from his standard commission. In addition, Zepeda supplied hand tools to the harvesters. If in fact Zepeda was able to make two tractors available to Sutti, it would not serve to alter Zepeda's status a farm labor contractor. In Kotchevar Brothers, supra, the custom harvester was able to supply costly, specialized equipment in the harvest of grapes (40 pairs of tractors and gondolas) , and this service was included in his charges to the grower. Here, it cannot be said that tractors are specialized or are unusually costly to rent.

The Employer next contends that Zepeda's action in making arrangements for the sale of broccoli to a packing shed, when

John Inglis refused to take the produce, demonstrates that he exercised managerial judgment and was acting as a custom harvester. The record establishes that Zepeda took such action only when he was unable to contact Sutti in time for a decision to be made. Because broccoli is highly perishable, the decision had to be made quickly. Further, Zepeda acted only in the clear economic interest of Sutti. The only alternative would have been to lose the crop. While Zepeda would have earned no commission had the broccoli not been harvested, only Sutti had the opportunity to make a profit or loss on the crop. Again, Zepeda was acting as a responsible supervisor would have acted in such a situation. There is absolutely no indication that Sutti hired Zepeda because he had the ability to make arrangements for the sale of broccoli or that his compensation was based on such a skill. I cannot find that Zepeda's exercise of initiative on behalf of Sutti to dispose of broccoli on favorable terms where the only alternative was loss of the crop was sufficient to transform Zepeda from a farm labor contractor to a custom harvester, where such instances were few, undertaken spontaneously, and not part of Zepeda's compensation.

In sum, I conclude that Zepeda was acting as a farm labor contractor, rather than a custom harvester, in his relationship with the Employer. He provided labor to the Employer for a fee, was responsible for the internal administration of his crew, and carried out his duties competently and with a great deal of autonomy. But, unlike the custom harvesters in the Napa Valley, Jack Stowells, and Gourmet Harvesting and Packing cases, Zepeda did not have complete control of the

harvest. The major decisions concerning the harvest were made by the John Inglis Company. Zepeda simply reacted to the decisions of John Inglis in the few instances in which he exercised his independent judgment in the disposition of broccoli. But, while Sutti took Zepeda's expertise in harvesting broccoli into account in his decision to hire him, he did not hire Zepeda or compensate him for his ability to make arrangements for the sale of broccoli when the freezer company did not purchase it. Such decisions were not a central part of Zepeda's job. With respect to thinning and hoeing, Sutti retained and exercised the authority to reject Zepeda's recommendations when he felt that paying the labor costs was not financially justified. Finally, unlike the custom harvesters in most of the other Board cases, Zepeda's responsibilities generally stopped at the harvest stage. With the few exceptions noted previously, Zepeda had nothing to do with the sale and marketing of the crops he harvested. Because the Legislature has concluded that "the bargaining process under the act should occur between unions and growers rather than between unions and labor contractors, and that bargaining units should be established on a grower-wide . . . basis," Vista Verde Farms v. Agricultural Labor Relations Bd. , supra, at p. 323, a labor contractor should be considered a custom harvester only if the evidence clearly establishes that his primary relationship with a grower called for him to provide services substantially beyond those customarily performed by labor contractors. The Employer has failed to make such a showing here.

Because I have found that in his relationship with the Employer, Zepeda was acting primarily as a farm labor contractor,

I conclude that Sutti Farms, and not Zepeda, must be deemed the employer of the agricultural employees on Zepeda's payroll, in accordance with §1140.4 (c) of the Act. It is important to emphasize that, when a person is acting within the confines of his duties as a farm labor contractor, the Board has no discretion to consider the "whole activity" of the contractor and the grower to determine the statutory employer. The Legislature has already made a policy choice, by statute, that the farm labor contractor is excluded from being an employer. It is only when the contractor is acting outside the scope of the duties normally performed by a contractor that the Board may engage in a balancing analysis. The Employer has made a number of arguments to support its contention that Zepeda would be a more appropriate agricultural employer of the employees on his payroll than would Sutti Farms. Under the facts presented here, I need not consider those arguments.

Finally, the Employer argues that, even if it is found to have been the employer of the employees on Zepeda's payroll, the Board should decline to certify the results of the election because of changed circumstances. The most significant changed circumstance is, of course, that Sutti terminated his contract with Zepeda after the 1979 harvest and hired different employees to perform the harvesting work. In support of its argument, the Employer has cited L'Eggs Products, Inc. v. N.L.R.B. (9th Cir. 1980) 619 F.2d 1337, in which the Court of Appeals held that it would permit evidence of changed circumstances to be introduced before the NLRB in bargaining order cases when the case was to be remanded to the NLRB by the Court on other grounds.

Regardless of the precedential effect of this decision on the Board, it is clearly inapplicable in the context of this case. Here, it is the Employer which has unilaterally created the changed condition by terminating its contract with Zepeda. If the Board were to take notice of such a changed circumstance and refuse to certify the results of an election because of the Employer's action, there would be no protection for the employees on a farm labor contractor's payroll. The Board would, in effect, be inviting employers to discharge workers in order to avoid being subjected to a duty to bargain with a certified union.^{5/}

RECOMMENDATION

I recommend that the certification of the International Union of Agricultural Workers as the exclusive bargaining representative of all the agricultural employees of Sutti Farms in the State of California be reinstated.

Dated: April 28, 1982

AGRICULTURAL LABOR RELATIONS BOARD

By



Joel Gomberg
Investigative Hearing Examiner

^{5/}While an employer may decide to terminate his relationship with a farm labor contractor, Vista Verde Farms v. Agricultural Labor Relations Bd., supra, he will be required to bargain about such a decision affecting the terms and conditions of employment of his workers. If the decision to end the contract is made after a representation election is held, but before a certification has issued, the employer acts at his peril. If the union is subsequently certified, the employer may be found to have committed an unfair labor practice. Highland Ranch v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 848. Because the Employer may have violated its duty to bargain with the IUAW by terminating its contract with Zepeda, it can hardly seek to use its action to argue that the Board ought to refuse to certify the election results.