Terra Bella, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

GRAND VIEW HEIGHTS CITRUS ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party	)	Case Nos. 83-CE-37-D 83-CE-38-D 83-CE-160-D 83-CE-266-D 83-CE-267-D 12 ALRB No. 28

DECISION AND ORDER

On December 12, 1985, Administrative Law Judge (ALJ) Matthew Goldberg issued the attached Decision in this matter. Thereafter, Respondent timely filed exceptions to the ALJ's Decision along with a supporting brief, and the General Counsel filed a response to Respondent's exceptions.

The Agricultural Labor Relations Board (Board) has considered the record and the ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the ALJ's rulings, findings, and conclusions to the extent consistent herewith and to adopt his Order as modified herein.[1/]

Respondent excepts to the ALJ's finding that it discriminatorily failed or refused to rehire Francisco Luna and

[1/]The signatures of Board Members in all Board decisions appear with the signature of the Chairperson first, if participating, followed by the signatures of the participating Board Members in order of their seniority.

Juan Jalil in violation of Labor Code section 1153(c) and (a).[2/] We find no merit in the exception.

Both Luna and Jalil had been long time members of the citrus harvest crew provided by labor contractor Victor Cruz and supervised by Carlos Casas. It is undisputed that Luna and Jalil, as well as other members of their crew, participated in union activities with Respondent's knowledge six months prior to the events at issue herein.[3/] It is also undisputed, as explained by Jalil, that the entire Casas crew was laid off on August 18, 1983, and advised at that time that work would resume in approximately two weeks.

Respondent accords employees crew-wide rather than plant-wide seniority. Following a layoff, employees who desire to continue working are hired before new employees are added. Cruz

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[2/]All section references herein are to the California Labor Code unless otherwise specified.

[3/]In finding that Respondent displayed union animus, the ALJ relied, in part, on Duke Dungan's and Lee Horton's questioning employees about the UFWs organizing drive. We note, however, that while there was credited testimony that Horton asked employees Francisco Berrones and Francisco Luna about the union organizing, there is no similar evidence concerning Dungan. Furthermore, we reject the ALJ's finding that Horton's conduct constituted evidence of Respondent's union animus. Luna testified that Horton observed him passing out authorization cards and asked to see one, and Luna responded that he did not have anymore, but would bring one the next day. Horton's exchange with Berrones was of similar import. The ALJ opined that Horton's conduct might have constituted unlawful interrogation, in violation of section 1153(a), had it been charged and pleaded within the limitations period. Without determining whether we would have found the conduct described above to be an unfair labor practice after a full hearing on the matter, we do not find that the conduct was clear evidence of union animus. Respondent's union animus is established, however, by its supervisors' statements that the discriminatees were blacklisted because of their union activities, as discussed more fully below.

testified that although Luna and Jalil may not have been at the top of the seniority rankings/ they were "close" to the top. Although, on occasion, a foreman has sought out employees who failed to appear, the evidence will not support a finding that Respondent followed a formal recall practice. Rather, employees are expected to contact their crew foreman when work resumes.

According to Luna's credited testimony, he returned from a leave of absence on either August 24 or 25, 1983, and immediately contacted Casas who explained to him that there was no work because his entire crew had been laid off for about two weeks. Casas did not tell Luna that he (Casas) had been terminated by Respondent and, thus, would no longer be in a position to lead a crew.[4/] Luna returned a day or so later; Casas told him, "I already told you, a few more days, I don't know when [work will resume]." A few days later, Luna, this time accompanied by Jalil, again contacted Casas at the latter's home which he shared with Jesus Sifuentes, another

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[4/]Cruz testified that Respondent had asked him to replace Casas because the Company felt he had lost control of his crew and that the quality of its work overall had declined. Cruz made Casas manager of various Cruz owned or managed ranches and on occasion continued to utilize him as a crew supervisor, but for other growers for whom Cruz provided labor. Thus, in September 1983, both Luna and Jalil continued to work in a Casas-led crew for labor contractor Cruz although in the olive harvest of different employers. By the time of the instant hearing, Casas had resumed working for Respondent but in a nonsupervisory capacity.

The ALJ ruled that Carlos Casas, who no longer worked for Respondent during the period in question, nevertheless was an agent of Respondent under the standards set forth in Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, and the discriminatees therefore effectively sought rehire when they asked him for work. However, since each of the discriminatees credibly testified that they also asked foreman Sifuentes for work, we need not reach the question of whether Casas was Respondent's agent.

crew foreman. Luna testified that Casas informed both men on this occasion that there would be no further work for either of them because they had been "blackballed." Luna testified that Sifuentes was present.[5/]

Although no precise date was proffered for the latter incident described above, both Luna and Jalil testified that they subsequently, on September 5, 1983, learned that Aparicio had replaced Casas as crew foreman, that an Aparicio crew had commenced work that day, and that other members of the former Casas crew had been absorbed into the Sifuentes crew. Notwithstanding this knowledge, Luna said he asked Casas for work again the following day. When asked at hearing why he would continue to seek work from Casas, knowing that he had been replaced by Aparicio, Luna explained that Casas, although terminated, "was putting in some people and relatives to work in Sifuentes' crew."

Luna said he never sought work from Aparicio "because he never offered us work. He looked for people but not for us."[6/] However, both Luna and Jalil credibly testified that they did

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[5/]In a declaration which he executed on September 7, in support of an unfair labor practice charge filed on September 14, Luna made no reference to the "blackball[11] statement but did declare that on the preceding day Casas told him the packing shed did not want him or Jalil because they were "huelguistas." Because Luna stated only that Sifuentes was present, we cannot conclude therefrom that Sifuentes was privy to Casas' comments to Luna and/or Jalil.

[6/] Although packing shed manager Duke Dungan intended that Aparicio head the former Casas crew and fill his employee contingent from that crew, he did not give specific instructions to that effect to either Aparicio or labor contractor Cruz, indicating further that he actually left the matter entirely up to Aparicio. However, it was Cruz[1] testimony that Aparicio was supposed to hire

(fn. 6 cont. on p. 5)

thereafter contact Sifuentes for work. Luna recalled specifically asking Sifuentes for work, possibly around September 6, but certainly prior to the time he began working in the olive harvest for a different grower on September 12 or 15. Luna believed that Sifuentes had hired new employees at a time when he knew that Luna had not yet been placed. Accordingly, he asked the foreman why he was hiring persons with less seniority than he. He said Sifuentes told him the packing shed did not want to give him work. Luna did not thereafter attempt to obtain work with Respondent, "Because I knew that I was dismissed. There was too much asking for work by now." Luna filed an unfair labor practice charge on September 14, in which he alleged that he had been denied employment because of his union and other protected concerted activities.

Jalil, on the other hand, described three separate visits to Sifuentes[1] house, two times before and once after commencing work in the same olive harvest as Luna in mid-September. On one of the earlier occasions, Sifuentes told him that the Company "didn't want us because they knew we were organizing [for the Union]."

(fn. 6 cont.)

from members of the Casas crew and that he so advised him. But, Cruz also explained that since Aparicio had a preference for certain employees, particularly family groups, there was a shifting of employees into the Sifuentes crew in order to accommodate Aparicio's wishes. Yet, Cruz also testified that the entire Casas crew nevertheless should have been absorbed by Aparicio and Sifuentes, according to seniority, and that those foremen "called whoever they could get a hold of." That apparently was not Aparicio's understanding of the hiring practice. He testified that Cruz made no reference to the Casas crew when he asked him to assemble and supervise a crew. He made no attempt to contact anyone from the Casas crew but assembled his own crew from friends, relatives and newly hired employees.

As a general rule, when attempting to establish an unlawful refusal to hire, General Counsel must first establish that the alleged discriminatee made a proper application for work at a time when work was available.[7/] (Prohoroff Poultry Farms (1979) 5 ALRB No. 9.) We find that both Luna and Jalil made proper applications for work when they applied to Sifuentes on or about September 6. Although General Counsel did not establish an availability of work on that date, it is well-established that applications for work must be treated in a nondiscriminatory manner. When an employer/ as in the manner displayed by Sifuentes, conveys to employees a clear message that further applications would be futile, the employee is excused from again making an application for work. The question of job availability then becomes relevant only with respect to the employer's backpay obligations. (Shawnee Industries, Inc. (1963) 140 NLRB 1451 [52 LRRM 1270], enforced in relevant part (10 Cir. 1964) 333 F.2d 221 [56 LRRM 2567].) Accordingly, we shall order Respondent to offer Luna and Jalil immediate reinstatement to their former, or substantially similar, jobs, with backpay. Such backpay will accrue from the first availability of work following Respondent's discriminatory response to their application for work on or about September 6, 1983, as determined in the compliance phase of this proceeding.

Respondent excepts to the ALJ's finding that it

[7/]We do not find on the record herein that Respondent had an affirmative recall policy but we do find that when employees sought further employment following a layoff, preference in placement was accorded on the basis of seniority.

discriminatorily failed or refused to rehire Alberto Bedolla and Jesus Carmona because of their union activity. We find merit in the exception.

Bedolla and Carmona testified that crew foreman Casas observed them sign union authorization cards in the field during January or February 1983. Bedolla also testified that Casas warned him that he would be dropped from the crew if he signed a card. In response, Bedolla told him he had already signed a card. Carmona testified that Casas warned him that the Union would "just waste our time in the field." Both employees continued to work in the Casas crew until the entire crew was laid off in mid-August 1983.

Bedolla described three efforts to seek work from Casas during the remaining weeks in August. Two weeks following the layoff, he and Jesus Carmona went to Casas[1] house. No one else was present. Casas told him the crew was terminated and that "they were not going to give him [Casas] a job." One week later, Bedolla encountered Casas in a local store. Casas told him that although he no longer had a crew, he would try to place his former crew member in another crew. Bedolla saw Casas two days later and was informed that Casas was not able to place him "because [there are] a lot of people in crew." It is not clear whether Casas had reference to a particular crew or a lack of work generally.

Bedolla then sought work from Sifuentes on three separate occasions. On November 9 and 20, by telephone, he was advised that the foreman "had a lot of people." On January 16, Bedolla went to the orchard where the Sifuentes crew was working only to learn that there were no openings. Bedolla similarly asked Ruben Aparicio for

work three times. On September 7 and 11, he telephoned the foreman and was told the first time that he had "a lot of people" and the second time that he had "no ladders," both comments indicating a lack of available openings. Aparicio's uncontroverted testimony was that he had completely assembled his crew prior to the end of August, before Bedolla sought work from him. On October 22, Bedolla sought out Aparicio in the field and was given work, but for that day only. As Aparicio explained, Bedolla had obtained a ride to the work site with a crew member and, rather than have Bedolla just wait around until his ride completed work, he decided to give him something to do. At the end of the day, when Bedolla asked about future chances for work, Aparicio promised to send word to him if an opening arose.

Jesus Carmona sought work from both Casas and Sifuentes. He went to Casas[1] house with Bedolla before the end of August and, as Bedolla testified, learned that Casas had been terminated. Later, but still in August, he again went to Casas[1] house, but this time alone. Casas told him he did not know when work would resume. One week later, Casas suggested to Carmona that he contact Sifuentes. Carmona did so several times at Sifuentes[1] house, in person or by telephone. He testified that Sifuentes told him either that he did not have any work for him, or that he was giving preference to those employees who had seniority,[8/] but also

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[8/]The record does not permit a comparison of the seniority standings of either Bedolla or Carmona with those of the employees who were in fact rehired. The record reveals only that Bedolla began working for Respondent in 1979 and Carmona one year later. (Luna, on the other hand, commenced work with Respondent in 1973 and Jalil in 1974.)

encouraged him to call back. On January 11, 1985, almost 16 months following his layoff, Carmona learned that Sifuentes was hiring new workers, applied to the foreman at the work site and was hired.

As a threshold matter, we adopt the ALJ's findings that both Bedolla and Carmona sought work in the manner which they described and that their applications for work were consistent with Respondent's hiring practices. However, unlike the situation which prevailed with resp'ect to Luna and Jalil, neither Bedolla nor Carmona testified, nor did any other witness, to any circumstances which would indicate that they were being denied rehire because of their union activity or that further applications for work by them would be futile. Therefore, General Counsel has failed to establish a prima facie case of discrimination with respect to either Bedolla or Carmona.

Accordingly, for the reasons set forth above, we hereby dismiss the complaint insofar as it alleges therein that Respondent failed or refused to rehire Alberto Bedolla and Jesus Carmona in violation of section 1153(c) and (a).

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent, Grand View Heights Citrus Association, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire, or otherwise discriminating against, any agricultural employee in

regard to hire or tenure of employment or any other term or condition of employment because he or she has engaged in union activity or other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to Francisco Luna and Juan Jalil immediate and full reinstatement to their former or substantially equivalent position(s), without prejudice to their seniority or other employment rights or privileges.

(b) Make whole the above-named employees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay and interest due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from September 6, 1983 to September 6, 1984.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within

30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved. Dated: December 12, 1986

JYRL JAMES-MASSENGALE, Chairperson JOHN

P. McCARTHY, Member JORGE CARRILLO,

Member

GREGORY L. GONOT, Member

MEMBER HENNING, dissenting and concurring:

Like the ALJ, I would find that Respondent had a policy of recalling seniority workers, that Respondent changed that recall policy to avoid recalling the four discriminatees and failed to recall those individuals due to their union activities. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.)

I would thus conclude that Respondent's refusal to rehire Bedolla and Carmona was unlawful.

Dated: December 12, 1986

PATRICK W. HENNING, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Grand View Heights Citrus Association, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to rehire two employees because they participated in activities in support of the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT interfere with, restrain or coerce you in the exercise of your right to join and engage in activities in support of the UFW or any other union.

WE WILL NOT hereafter refuse to rehire or otherwise discriminate against any employee for joining or supporting the UFW or any other union.

SPECIFICALLY, the Board found that it was unlawful for us and our labor contractor Victor Cruz to have refused to rehire Franciso Luna and Juan Jalil.

WE WILL offer Francisco Luna and Juan Jalil reinstatement to their former jobs without loss of seniority and WE WILL reimburse them for all losses of pay and other money they have lost because we unlawfully discriminated against them.

Dated: GRAND VIEW HEIGHTS CITRUS ASSOCIATION

By:

_____

(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 627 Main Street, Delano, California 93215. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Grand View Heights Citrus Association (UFW)

12 ALRB No. 28
Case Nos. 83-CE-37-D,
et al.

ALJ DECISION

Following a full evidentiary hearing, the ALJ found that Respondent had failed or refused to rehire four citrus harvest workers because each of them had participated in union organizing activities among their fellow crew members.

BOARD DECISION

The Board agreed with the ALJ's finding of unlawful refusal to rehire for discriminatory reasons in violation of Labor Code section 1153(c) and (a) but only with respect to two of the discriminatees. Contrary to the ALJ, the Board did not find that Respondent had a policy of affirmatively recalling employees following a layoff, only that employees are expected to contact crew foremen for placement when work is scheduled to resume and that returning employees are given preference in hiring according to their respective seniority rankings. The Board further found that although two of the discriminatees made proper applications for work, the applications were not handled in the required nondiscriminatory manner. Instead, as both of these applicants credibly testified, a foreman advised them that the Company did not want them back because of-their union sympathies. Since such a statement could reasonably cause them to believe that further applications for work would be futile, the Board held that they need not have again applied for work. Accordingly, the Board ordered Respondent to offer them immediate reinstatement to their former, or substantially equivalent, employment with backpay. The amount of backpay due them will be determined in the compliance phase of this proceeding and will be measured from the date of the first job opening which they were qualified to fill.

As to the two remaining alleged discriminatees, the Board found that General Counsel had failed to establish a prima facie case that they were being rejected for available work because of reasons proscribed by the Act or that further applications would be futile. They were advised either that the crew positions had been filled or that Respondent was filling openings with employees with more seniority. As to the seniority factor, General Counsel failed to establish their seniority status vis a vis employees who were hired in order to permit the Board to consider whether seniority was used as a pretext to shield a discriminatory motive on the part of Respondent.

DISSENTING OPINION

Member Henning dissented from the failure to adopt the ALJ's finding that Respondent altered its established recall policy so as to discriminate against two harvesters because of their union activities. He would have adopted the ALJ's analysis entirely.

* * *

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 AGRICULTURAL

LABOR RELATIONS BOARD

In the Matter of:	
GRAND VIEW HEIGHTS CITRUS	Case Nos. 83-CE-D 83-CE-38-D 83-CE-160-D 83-CE-266-D 83-CE-266-D[1]
Respondent,	
and	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	
Charging Party.)	

Appearances:

William Lenkeit, Esq., for the General Counsel

William S. Marrs, Esq., of Gordon and Marrs, for the Respondent

Margaret Reyes, for the Charging Party

Before: Matthew Goldberg

Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

[1] The parties reached an informal, bilateral resolution of charges 83-CE-37-D and 83-CE-3S-D prior to the opening of the hearing. These charges, and the allegations in the complaint which incorporate them, will accordingly not be discussed.

I. STATEMENT OF THE CASE

On July 1, 1983,[2] the United Farm Workers of America, AFL-CIO (hereafter referred to as the "Union"), filed charge number 83-CE-160-D, alleging that Grand View Heights Citrus Association (hereafter referred to alternatively as the "employer," "respondent," the "company," or "Grand View") violated section 1153(a) of the Act. The charge was served on the company on June 24. Subsequently, charges 83-CE-266-D and 83-CE-267-D were filed by the Union and served on the company on September 14, alleging violations of sections 1153(a), (c), and (d).

On April 19, 1985, the General Counsel for the Agricultural Labor Relations Board caused to be issued the complaint in this case incorporating matters alleged in the aforementioned charges.[3] Beginning July 23, 1985, a hearing was held before me in Porterville, California. All parties appeared through their representative representatives and were given full opportunity to examine and cross-examine witnesses, to present argument and documentary evidence, and to submit post-hearing briefs. Having read and considered those briefs, and, based upon the entire record in the case, including my observation of the

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[2]All dates refer to 1983 unless otherwise noted.

[3]Respondent's counsel moved to dismiss certain allegations on the basis that they were not specifically referred to in the charges. This issue is discussed below.

General Counsel did not allege a violation of section 1153(d) in the complaint.

demeanor of each witness as he/she testified, I make the following:

II. FINDINGS OF FACT A.

A. Jurisdiction

1. The respondent is and was, at all times material, an agricultural employer within the meaning of section 1140.4(c) of the Act, doing business within the State of California.

2. The Union is and was, at times material, a labor organization within the meaning of section 1140.4(f) of the Act.[4] B. The Unfair Labor Practices Alleged

1. Preliminary Statement.

The respondent is a San Joaquin Valley cooperative which harvests, processes and markets citrus: specifically, navel oranges, mandarins and mineolas. The cooperative consists of between 120 and 130 individual grower members. The season for navel oranges, its principal crop, generally runs between late October until the following June or early July. During the peak of its season, respondent employs nine crews through three labor contractors and has two grower crews harvesting citrus. Between thirty and forty individuals work in each crew. Peak employment therefore ranges from 280 to 350 workers.

2. Threats to and Harassment of Francisco Luna

a. The Facts Presented

General Counsel alleged that "on or about May

[4]In its answer, respondent admitted the jurisdictional allegations contained in the complaint.

21, 1983, respondent, through its agent Victor Cruz, threatened and harassed Francisco Luna because of his protected, concerted and union activities."

Luna was employed by respondent as a picker since November of 1973. In the 1983 season he worked in the crew of foreman Carlos Casas, who in turn worked under the general supervision of contractor Victor Cruz.

In February, 1983 Luna was active in the Union's organizational campaign. He distributed authorization cards, solicited signatures for them, and encouraged his fellow workers to attend Union meetings. All these activities were carried on openly, in the presence of supervisors Casas and Cruz. At one point, field superintendent Lee Horton asked Luna for an authorization card so that he might take it to the shed.[5]

Subsequently, on or about May 20, Luna and his crew, numbering about thirty, gathered at the shed to protest the wage rate they were receiving. Four or five from the crew, including Luna, actually went inside the shed to discuss the matter with "Duke" Dungan, the packing shed manager. Francisco Berrones, another crew member, was the spokesman for the group.

The following day, while Luna was engaged at his work, Cruz confronted him and told him, according to the worker, that

[5]Horton admitted that he asked to see the card because, having been informed of their distribution, he had ". . .no idea what kind of cards they were," and presumably wanted to find out more about them.

he "had found out that I wanted to screw him up."[6] Luna added that Cruz wanted to fight him.[7]

On cross-examination, respondent's counsel'elicited from Luna more specific details about the confrontation. Luna admitted that when the foreman approached him, he accused the worker of talking to others about him. "He told me that I wanted to screw him up, but that was not going to be possible. And if I was talking about him, for me to go over to the side of the orchard. Up to today we've been friends and now we're going to screw each other up." Luna added that he was somewhat puzzled by the foreman's accusation that the worker had been talking behind his back, that "whenever I said something about him, I did it in his presence."[8] Luna noted that Cruz "continued very angrily and kept on challenging me to come outside the orchard."

Victor Cruz, called as a witness by respondent, stated that he was a field foreman for the employer in charge of three crews. He has known Francisco Luna for about thirty-five years. In the morning of the incident in question, when Cruz arrived to check the crew, foreman Carlos Casas reported to him that Luna was talking about the field man, saying that "you're going to get it, you're in for it." Cruz decided to investigate and

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[6]Luna used the Spanish word "chingar" in his testimony describing the exchange with Cruz.

[7]The evidentiary value of such characterizations is minimal, Direct testimony from Luna concerning this encounter was extremely sketchy.

[8]Luna also denied on cross-examination that he had been speaking about Cruz with his fellow workers.

approached Luna. Cruz gave the following account:

> "I told him I wanted him to get off the ladder and I wanted to know . . . what the hell was going on . . . ., what are you talking about that I'm going to get mine? .... And we started arguing there and --Well, I was pretty close to really losing my temper but I just held myself back because I didn't want any problems. But I still wanted to get . . . what was meant by that I was going to get mine, that my time has come."

Luna then told Cruz that the field foreman should have been with the crew more often: "How come you're not here? What do you think you're getting paid for?" to which Cruz responded that it was the job of the foreman in the field to stay with the crew. Cruz admitted that he was angry with the worker and told him that "the next time I hear this again . . . there's going to be trouble . . . because you're not doing to do it again to me."

When asked directly by respondent's counsel whether Cruz had been mad at Luna for protesting the previous day, Cruz replied that he was angry because "it was a personal matter," Luna had been talking about him, "trying to say that I'm going to get mine, that my day has come. What I wanted to find what he meant that my day was coming."

b. Analysis and Conclusions

General Counsel argues that Cruz' remarks to Luna constituted unlawful threats in violation of section 1153(a). In reaching this conclusion, General Counsel heaps inference on inference, rather than pointing to explicit record evidence. He states, in essence, that Cruz was aware of Luna's union activities "and the comments allegedly made by Luna may have had

reference to the union's campaign"; and that the incident the day following Luna's participation in a wage protest at the shed was in response to Cruz's perceptions that Luna was "stirring up trouble by going over his head ... to ask for a raise."

Unfortunately for General Counsel's position, the record does not contain sufficient direct support for these conclusions in order to sustain his burden of proof. Significantly, in neither the account of Luna or of Cruz does there appear specific reference to Luna's union activities or to his participation in the wage protest. Luna's union activities preceded by some months the incident in question, and appear too remote in time to have provided its provocation, or to have warranted a response designed to inhibite or threaten such conduct.

Regarding the wage protest, while Luna may have participated in it along with the other members of his crew, it was Francisco Berrones who acted as spokesperson. It might be argued that Cruz's long-standing acquaintance with Luna led the fieldman to approach that particular worker on this subject. However, without any direct mention of the protest in their conversation, it seems just as likely that Cruz, as he characterized the situation, was taking umbrage at Luna's remarks about him to fellow workers, and that he regarded it as a "personal matter" between men who had hitherto been friends for many years. On the basis of the record evidence, either inference is equally supportable.

Consequently, it is determined that General Counsel's burden of proof on this issue has not been sustained and it is recommended that this allegation be dismissed.

3. Refusals to Re-hire

General Counsel alleged that respondent refused to re-hire workers Francisco Luna, Juan Jalil, Albert Bedolla and Jesus Carmona because of their participation in union and other protected, concerted activities.[9]

a. Timeliness of the Bedolla and Carmona Allegations

As a preliminary matter, in regard to Bedolla and Carmona, respondent's counsel moved at the hearing that their cases be dismissed since the underlying charges (83-CE-266 and 267-D) do not specifically refer to them, respondent was not put on notice at the time of the filing of the charges that the two workers were seeking relief from alleged unlawful conduct, and that their inclusion in the complaint, dated April 12, 1985, is tantamount to alleging an unfair labor practice occurring more than six months before the filing of the charge, in contravention of Labor Code section 1160.2.[10]

Admittedly, there are certain equitable considerations

[9]As originally worded, the pertinent allegation in the complaint noted that the four workers were "laid off" and then refused rehire for discriminatory reasons. During the course of the hearing, General Counsel stated that he was no longer contending that their layoffs were unlawful.

[10]Counsel's motion was denied. While respondent's counsel argued that the issue be treated in this decision, he curiously did not address it in his brief.

weighing in favor of respondent's position. Had respondent been aware that it was potentially subject to liability for conduct involving Carmona and Bedolla, it might have, as it did in the Jalil and Carmona matters, offered Carmona and Bedolla their jobs back at an earlier date, thus limiting said liability. Respondent also contended that it may have suffered prejudice in the preparation of its defense regarding those two workers.

Nonetheless, at the hearing, it was ruled that respondent suffered no demonstrable prejudice resulting from the addition of two specifically named discriminatees. There was no showing that witnesses became unavailable or documents had been destroyed in the period between charge and complaint. Respondent had adequate opportunity to prepare its defense in the period between the issuance of the complaint and the convening of the hearing. Charge number 83-CE-266-D stated that discriminatory acts were perpetrated against "Juan M. Jalil and other workers," thus giving notice that employees other than Jalil might be involved.

This Board has held that matters alleged in a complaint may not be barred by the six-month limitation period in section 1160.2, even though the charges giving rise to the complaint do not specifically refer to the matters later alleged therein, and the complaint issued more than six months following the filing of the charges. Where allegations in a complaint are "closely related to the subject matter of the original charge" and are "based on facts discovered during the investigation thereof" they

may properly be considered. John Elmore Farms (1978) 4 ALRB No. 67; see also Anderson Farms (1977) 3 ALRB No. 67. In Elmore, the Board quoted with approval language from the U.S. Supreme Court case of N.L.R.B. V. Fant Milling Co. (1959) 360 U.S. 301, where it was held that in formulating a complaint and in finding violations of the NLRA, the National Board could consider events occurring after the filing of the charge as the basis for alleging additional unfair labor practices:

> Once its jurisdiction is invoked, the Board must be left free to make full inquiry under its broad investigatory power in order to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confirming such an inquiry to the precise particularizations of a charge. 360 U.S. at 307.

Here, it is obvious that the discriminatory treatment of the respective tenures of Carmona and Bedolla was "closely related" to the discriminatory acts alleged in charges referring to "Juan Jalil and others" in his crew. As discussed below, all four of the alleged discriminatees were unlawfully refused rehire after the Casas crew two-week layoff period. Accordingly, inclusion in the complaint of these two additional individuals as discriminatees not named in the charges was proper and not time-barred by section 1160.2.

b. Events Following the August 1983 Layoff and Company Recall Practice

Each of the four alleged discriminatees was employed in the crew of Carlos Casas, who in turn worked under the supervision of Victor Cruz. In August of 1983, the crew was placed on layoff status for about two weeks. During this period

respondent's manager "Duke" Dungan ordered Cruz to terminate Casas, since Dungan felt Casas had demonstrated a problem with drinking on the job, and had "lost control of the crew as far as performance." Foreman Ruben Aparicio was retained to "replace" Casas.

It is the foreman's responsibility to hire the members of his particular crew. Workers are to be recalled following a layoff according to their seniority. Dungan stated that he did not specifically tell Aparicio to hire those individuals who were in Casas[1] crew. Victor Cruz testified, however, that Aparicio "was supposed to hire the same members that we had." Cruz noted further that Aparicio was told to hire former members of the Casas' crew, and that these workers were to be absorbed into Aparicio's crew and the crew of Jesus Sifuentes, another of his foremen.[11]

When the Aparicio crew was put to work following the August layoff,[12] the four alleged discriminatees were not recalled to work in that crew, despite Cruz's orders and Dungan's characterization that Aparicio was hired to "replace" Casas.

Nevertheless, other workers from the Casas crew were placed in two other crews employed by respondent. Out of a total of twenty-seven employees in Casas' pre-layoff complement, seven

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[11]Dungan stated that it was the company's practice to recall people according to seniority, as did Aparicio and Cruz.

[12]Payroll records appear to indicate that the Aparicio crew began to work for respondent on or about September 6, 1983.

were hired shortly thereafter to work under foreman Joe Cruz,[13] while an additional eight were employed to work under foreman Jesus Sifuentes. Thus, work was available to the laid off members of the Casas crew, and it was the company's practice to place members of the defunct crew in other crews still employed.

C. The Union Activities of the Discriminatees

Each of the alleged discriminatees participated in union and/or other protected, concerted activities in varying degrees. The activities of Francisco Luna are recounted ante. Juan Jalil, who had worked for respondent since 1974, distributed authorization cards and spoke to workers about the union during the early 1983 organizational campaign. These activities, like those of Luna, took place in the presence of supervisors Casas, Cruz and respondent's field superintendent Lee Horton.

Francisco Berrones was another of respondent's long-term employees. During the organizational drive Berrones was asked by superintendent Lee Horton who had been passing out authorization cards and whether he could be shown one of the cards. Berrones responded that Jalil and Luna were distributing them and that Berrones had signed a card, which the worker produced for Horton's inspection. On the day following this conversation, Berrones was asked by Horton whether the people wanted a union. Berrones replied that "we did want a union because the union did a lot for us. . ."

[13]Joe Cruz is another contractor engaged by respondent.

Alleged discriminatee Albert Bedolla signed an authorization card in the presence of Lee Horton, and solicited signatures from other workers during the campaign. Foreman Casas also became aware of Bedolla's activities. At one point the foreman told Bedolla that if he signed a card, he would be "out of the crew." The worker replied, "I had already screwed myself up because I already signed."

Jesus Carmona began working as a picker for respondent in 1980. Carmona signed an authorization card while Victor Cruz and Carlos Casas were standing nearby. The worker testified that the two saw him sign. At one point, Casas remarked to this worker that "the union was just going to waste our time in the field." Carmona responded that "the union was there to talk to us so that our work would get better and for the prices to get better because they were paying us very cheap. ..."

Respondent does not dispute that it was aware of the union activities of Luna and Jalil. However, while conceding that certain supervisors[14] had knowledge of the activities of Bedolla and Carmona, respondent argues, in effect, that the foremen who would be involved in the rehiring of these two workers, i.e., Aparicio and/or Sifuentes, did not possess such knowledge.

General Counsel need not prove that a specific

[14]As may be recalled, Horton and Casas were aware of Bedolla's activities, while Cruz and Casas were present when Carnona signed his authorization card. Neither Horton nor Casas were employed by respondent when Bedolla was allegedly denied rehire.

supervisor with the authority to effectuate the personnel decision in question had direct knowledge of an employee's union activities. As a general proposition, a supervisor's knowledge of an employee's protected activities will be imputed to the employer as a whole. An exception to this rule exists where credited testimony reflects that such knowledge was not relayed to higher management officials who ultimately made the decision for disciplinary or personnel action. (George Lucas & Sons (1985) 11 ALRB No. 11, p. 4 and cases cited therein; see also Montgomery Ward & Co. (1956) 115 NLRB 605, 647, aff'd (C.A.2d 1957) 242 F.2d 497, 501.) Neither Casas nor Horton testified this to be the case.[15] It is therefore found that respondent had knowledge of the Union activities of Carmona and Bedolla.[16]

d. Efforts to Obtain Re-hire

As noted above, despite respondent's stated policy of contacting laid off crew members by seniority and informing them of their recall, none of the four alleged discriminatees was called back to work following their two-week layoff. While the discriminatees each testified that they sought work with respondent on a number of occasions, company witnesses uniformly stated that not one of them asked for their jobs back. Respondent also attempted to demonstrate that following the

[15]Casas did not testify despite the fact that at the time of the hearing he was employed by respondent, and hence available to be called as a witness.

[16]Significantly, both Aparicio and Sifuentes worked under Victor Cruz, Casas' supervisor, and Casas and Sifuentes, at the time of the events in question, were living in the same house.

receipt on or about September 20, of unfair labor practice charges involving Jalil and Luna, efforts were made, without success, to contact them about returning to work. It was not until after certified letters were sent to these two workers on December 12, informing them that they "must report to work" or "the job will be filled," that these two workers contacted the company.[17] Simply stated, it is respondent's position that none of the discriminatees were denied rehire: rather, none of them sought to return to work following the layoff.

Each of the alleged discriminatees gave detailed accounts of their respective efforts to be rehired. Francisco Luna stated that he obtained a leave of absence from Casas in July to travel to Mexico, and returned to the area about the last week in August. Upon his return, he asked Casas for his job back, and was told that the crew was on a two-week layoff. In the days following, Luna repeatedly asked Casas for work; the foreman replied "in a few more days," that he did not know when work would begin again. Luna persisted, and asked Casas for a job on several more occasions. On one such occasion Casas told the worker that "there was no work for us because we were black balled, and because the packing shed didn't ask for us."[18]

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[17]Both Jalil and Luna were actually rehired in December.

[18]At the time the statement was allegedly made, Casas was no longer working for respondent. Luna admitted that about one week after his return to the Porterville area, he was told that this was the case. On cross-examination Luna testified that Jalil and Sifuentes were present when the "black-balled" statement was made. In the declaration Luna executed on September 7 in support of his unfair labor practice charge, Luna made no reference to

Even after Luna had been told this, he went back to Casas once or twice more to request employment. Sifuentes was present with Casas during one of these exchanges.[19] Luna testified that he also requested that Sifuentes give him a job, and asked that foreman "why as it that he was putting in people with less seniority [than us] in the crew." Sifuentes responded by saying that "the packing shed did not want to give us work."[20] After being rebuffed in his attempts to secure employment from respondent through Casas and Sifuentes, Luna began working in the olive harvest.[21] while so employed, he again asked Casas for work, only to be told by Casas that he would not be getting a crew from respondent.

On cross-examination, Luna admitted that while he was aware that Ruben Aparicio had been put in charge of Casas' crew, the worker never asked Aparicio for a job. The reason Luna gave was that "he never offered us work. He looked for people but not for us." Luna also stated that he knew that Sifuentes, not

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the "black ball" remark although he did recite that on September 6, when he asked Casas for work the former supervisor stated that "the packing house had told them that there was no work for me or Juan Jalil because we were ' huelgistas . ' " I did not find this variance so serious as to reflect adversely on Luna's credibility.

[19]AS noted previously, Sifuentes was staying at the same house as Casas.

[20]Luna conversation took place. Jalil essentially corroborated Luna's testimony, as detailed below. Sifuentes also made a similar remark about the packing shed's wishes to Jalil on the telephone

[21]Respondent does not pick olives.

Aparicio, was hiring workers from the Casas crew. Luna admitted asking Casas for work even after he found out that Casas had been "replaced" by Aparicio.

Juan Jalil testified that following the two-week layoff, he asked Sifuentes and Casas for work. They[22] informed Jalil "that the company didn't want us because we were blackballed."[23] Jalil also maintained that he asked Victor Cruz for work, who told him he would check with the foreman, but did not call the worker back.[24] Jalil subsequently telephoned Sifuentes to ask for work. Sifuentes repeated that on occasion that the

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[22]On direct examination, Jalil did not make clear who made the statement which follows. Jalil testified on cross-examination, however, that it was Casas who told him he was "black-listed."

[23]Jalil thus somewhat corroborated testimony of discriminatee Luna about this remark. Jalil[1]s declaration, similar to Luna's, asserts that "on or about September 6," Casas made the statement "the packing house didn't want us there working, because we were Huelgistas." It further notes that "on couple occasions (sic) Carlos Casas told us that the packing house was just waiting for a chance to fire us, that we were in black list." Jalil also revealed on redirect examination that a Mr. Lee [Horton] had also told him in February that he was "black balled." Respondent's counsel reacted this assertion with incredulity, asking whether Jalil was "remembering things, . . . or making them up." Jalil replied that he had witnesses to the statement and named worker Francisco Berrones. Berrones, subsequently called by General Counsel, corroborated the statement Jalil attributed to Horton. Jalil's credibility was thereby enhanced. Horton denied making such a statement, although he did admit asking Berrones to show him one of the Union cards being distributed during the organizational drive, as noted above.

[24]Jalil modified his testimony on cross-examination regarding his inquiry to Cruz about work. Jalil stated that he spoke with Cruz in Terra Bella, who told him that "the entire crew was stopped" and further "referred something about the activities of the union, that we had cards and were passing them out."

"company didn't want us because we were black-balled." During an additional conversation with Sifuentes Jalil was told that "the company didn't want us because they, knew we were organizing." Jalil also asked for work from Sifuentes in October without success, when he happened upon him at a store. On another date, Jalil saw Sifuentes in Terra Bella and tried to stop him to talk, but was unsuccessful.[25]

Jalil denied that Sifuentes or his wife called him .about work during the period from September to December 12, when he received the certified letter telling him to report back for work. Jalil testified that he contacted Sifuentes immediately after receiving the letter, but that Sifuentes told him that "he knew nothing about the letter," "he had no orders to give me work due to the organizing matter and all of that." Two days later, however, Jalil was actually rehired to work in Sifuentes' crew.

After the two-week layoff period had elapsed, alleged discriminatee Alberto Bedolla went to Casas' home to request rehire. He stated that he asked Casas for work a total of three times. The first time he asked he was told by Casas that the foreman no longer had a crew. The second time, about one week later, Casas told Bedolla that he would try to place him in another crew. Bedolla stated that he met Casas on that occasion at a store. The third time Bedolla asked Casas for work he was

[25]Jalil was rigorously cross-examined about the number of occasions he went to Sifuentes' house to ask for work. His testimony remained consistent: three times he visited Sifuentes, with Casas being present on two of those occasions. Co-worker Luna was with him on each occasion.

told that "he [Casas] could not place me because he had a lot of people in the crew."

Bedolla further testified that he asked Jesus Sifuentes for work on three separate occasions. He remembered the dates distinctly: November 9, November 20 or 21, and January 16. The first two of these he telephoned Sifuentes; the last time he went to the field. On each occasion, Bedolla stated that he was told by Sifuentes that "he had a lot of people."

Bedolla also averred that he asked foreman Aparicio for work on three occasions, the first two being via telephone on September 7 and September 11, respectively. The third time, October 21 or 22, Bedolla came to the fields and worked for one day. He was then told by Aparicio that he would be called when work became available. He was subsequently hired by Aparicio sometime later after Francisco Luna informed him of a vacancy in the crew.

Bedolla was questioned extensively on cross-examination about the dates he sought work. He reiterated those dates he had noted during direct without inconsistency.

Alleged discriminatee Jesus Carmona testified that he asked Casas for rehire on three occasions. The first was after the two week layoff, and Carmona was told that Casas "didn't know when they were going to start." In the course of his second request for work, about one week later, Carmona was told that Casas no longer had a crew. On the third occasion, Carraona was told to contact Jesus Sifuentes about work. Carmona was

eventually rehired in January of 1985. He testified initially that in the interim between September 1983 and his rehire, he called Sifuentes "daily." Carmona then modified his testimony to state that he would call the foreman who, after telling him there were no openings, would instruct him to call back some days later. Carmona would do so. Finally, during January of this year he would call the foreman "every third day." On January 11, 1985, Carmona went to the field and was hired.

Respondent's evidence was radically divergent from that preferred by the workers themselves regarding their attempts to be rehired. As noted, respondent's witnesses maintained that either the workers did not actually apply for rehire with appropriate individuals or that respondent tried without success to contact the workers about their returning to work.

Packing house manager "Duke" Dungan stated that he received copies of charges 83-CE-266-D and 83-CE-267-D on or about September 21. After receiving this documents, he contacted counsel[26] who instructed him to "immediately" contact the alleged discriminatees to hire them back. Dungan stated that he relayed these instructions to Victor Cruz.[27] Dungan additionally testified that also acting on instructions from counsel, he wrote the December certified letters discussed above, informing Luna

[26]The same firm that represented respondent at that time also appeared on their behalf at the hearing.

[27]Interestingly, on cross-examination Dungan could not recall whom he called first, counsel or Cruz, after receiving the letters. If, as Dungan maintained, he was acting on advice of counsel, calling Cruz first would make little sense.

and Jalil that they needed to report back to work or the job slots ""left open" for them would be filled. The letters noted specific dates when Jalil and Luna purportedly were contacted via telephone about work.

On cross-examination, Dungan testified inconsistently on several points. Dungan initially stated that it was either Cruz or his foreman that left the messages about work referred to in the letters. When asked if he had verified the information about the telephone calls with anyone, Dungan answered that he had talked with Cruz, and added that Cruz indicated that it was the foremen, Sifuentes and Aparicio, who called the workers. Dungan was also asked when he was first informed that there had been no response from the workers after the September 21 call. Dungan stated that "we let it go for a week or two or whatever, and then we made a second effort." Then Dungan said that "we were monitoring this day by day." Dungan then testified that around the second attempt at contacting Luna (October 9) and Jalil (October 22), he telephoned Victor Cruz. In his next response, Dungan changed this assertion, saying that "Vie and I had been talking about it and he took it upon himself to call these people to try to make contact .... I can't remember giving him the direct order to do that, no. Maybe I had maybe I hadn't. I don't know."

Dungan stated that Cruz reported back to him after the purported calls but couldn't remember whether Cruz indicated whether there was a response from the workers. Obviously, if

there had been a positive or negative response, no need would exist for sending the subsequent letter. Dungan's inconsistent and inherently unbelievable testimony cast serious doubt on his credibility.

Nonetheless, Victor Cruz testified that he was informed by Dungan of the filing of charges by Luna and Jalil and told that the two should be called back to work. Cruz in turn ordered Sifuentes to call Jalil and Aparicio to call Luna, and also told the foremen to record the date, time and to whom they had spoken. The supervisor noted that the foremen reported back to him that the calls had been made, and gave him information as to when the workers were called, which he in turn passed on to Dungan for inclusion in the December 12 letters.

Cruz denied that Jalil or Luna had called him to ask for work, and likewise denied that Jalil stopped him in Terra Bella to make such an inquiry.

Jesus Sifuentes testified that although he was told by the packing house to call "Carlos[1] workers" about employment, he stated that no one told him to call Jalil.[28] Sifuentes stated that his wife, not he, tried to contact Jalil "once when I had [a] ladder that was vacant." Sifuentes denied that Jalil ever called him or came to his house to ask for work."[29]

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[28]This statement directly conflicts with Cruz' testimony. Shortly thereafter, Sifuentes testified that "on one occasion, the packing shed, Victor, told me that when I had work to call Jalil."

[29]Sifuentes could not initially remember why Jalil came back to work in December 1983.

Similarly, Sifuentes denied that Albert Bedolla ever telephoned him or visited his house to inquire about a job. Sifuentes also denied that Carmona contacted him around the time of the events in question but admitted that Carmona did call him in January 1985 and was eventually rehired.[30]

On cross-examination, Sifuentes stated that he did not attempt to contact anyone from Casas' crew, but that he hired only those who called him. After stating that he did not remember everyone who has called him to ask for work, Sifuentes noted that he could remember specifically that Jalil, Luna, Bedolla and Carmona never called him "because I know them well."

Ruben Aparicio stated that Luna never called about work. However, Cruz did order him to call this worker. Aparicio testified that he made two such calls, one on September 21, the other on October 9. Both times he spoke with a woman, and left the message that Luna should call him about work.

Similarly, Aparicio denied that Bedolla called him about work, and also denied that he has ever refused to hire anyone from Carlos Casas[1] crew.

Despite testimony that in some instances Aparicio's hiring practice after a layoff was to telephone employees to

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[30]Interestingly, Sifuentes stated that when Carmona called him in 1985, he told Carmona that he would be contacted as soon as the foreman had a vacant or extra ladder. Thereafter Carmona called back and was told there were no vacancies, but that he should call back in three days. Carmona was hired the third time he'called. Sifuentes[1] account of the worker's efforts in January 1985 is therefore not altogether dissimilar from Carmona's.

inform them to come to work,[31] Aparicio admitted that he did not attempt to contact anyone who had worked in the Casas crew, and that he hired workers who had not previously been employed by respondent.

Marta Sifuentes, the wife of the foreman, when testifying about efforts to contact Jalil, required prompting from counsel in the form of leading questions and her being shown a "document" which purported to reflect the dates and times when she called the worker.[32] Her testimony cannot be utilized as a reliable means to find such specific facts. Nevertheless, Ms. Sifuentes testified that her husband told her to call Juan Jalil and notify him about work. She stated that she did so, and spoke with Lupe, his wife, and left a message for Jalil "that there was work." After getting no response, Ms. Sifuentes called Jalil again. This time she spoke directly with him. She testified that the worker told her that he was working in the olives and would let them know if he was interested in coming back to work for respondent. Ms. Sifuentes stated that Jalil never did so.

As a rebuttal witness, General Counsel called Lupe Jalil. The worker's wife denied receiving any telephone calls from Marta Sifuentes. She further stated that she was attending

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[31]Aparicio also stated that workers contacted him seeking work.

[32]The "document" could not be admitted in evidence since there was no foundation established that it was either a business record or "past recollection recorded." [Ev. Code section 1200, 1237, and 1271.]

classes at the time when Ms. Sifuentes asserted that she made the first call (8:10 p.m.,) and would not have been home to receive it.

e. Analysis and Conclusions

In order to demonstrate an unlawful refusal to rehire, General Counsel must prove that workers participated in protected concerted activities, that their employer knew of such activities, and because of them, failed to rehire the workers. See, generally, Nishi Greenhouse (1981) 7 ALRB No. 18, Yamano Farms, Inc. (1985) 11 ALRB No. 16. In the specific instance of a refusal to rehire, General Counsel must also show that "an alleged discriminatee made a proper application" (George Lucas (1979) 5 ALRB No. 62), and that work was available at a time when the application was made (J.R. Norton (1982) 8 ALRB No. 76). An exception to these general propositions arises where an employer "has a practice or policy of recalling, or giving priority in hiring employees." In that instance, work availability need not be shown. (Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98.

I have found that each of the alleged discriminatees participated in union activities, and that the employer was aware of such participation. I further find that respondent displayed union animus. In worker testimony that went unrebutted, respondent's supervisors were curious as to who was behind the organizational drive, and who was interested in it. Conduct by Duke Dungan and Lee Horton in this vein might have constituted unlawful interrogations, in violation of section 1153(a), had it

been charged and pleaded within the limitations period. Nonetheless, these acts may be used as background evidence to establish respondent's attitudes about the union. (Sumner Peck Ranch (1984) 10 ALRB No. 24; Holtville Farms (1981) 7 ALRB No. 15.)

Further, there are the remarks by foreman Casas about black-balling or black-listing workers. Testimony on these statements went unrebutted, despite the fact that Casas was employed by respondent on the date of the hearing, and thus available to testify. Casas made the statements to Bedolla ("if he signed he would be out of the crew"); and to Jalil and Luna when they applied for work.[33] Sifuentes made a similar remark to Luna and Jalil.[34] There are also the comments by Lee Horton, testified to by Jalil and Berrones, to the same effect.[35] Credited testimony thus establishes that respondent, through its

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[33]Despite Casa's not being employed by respondent at the time such remarks were made, counsel did not raise a hearsay objection to this testimony. Such statements may be used to support a finding. (Frudden Enterprises, Inc. v. ALRB (1984) 153 Cal.App.3d 262.) Casas made the remark to Bedolla when employed by respondent as foreman. This statement would constitute an admission by an agent.

[34]As more fully discussed below, I find that Jalil did speak to Sifuentes about work. Sifuentes did not directly deny making the statement; he merely denied that Jalil contacted him about employment.

[35]On this issue, I credit the testimony of Jalil, corroborated by Berrones, and do not credit Horton's denial. The testimony of a worker currently employed by the respondent, counter to respondent's interests, is entitled to greater weight than that of a former supervisor. See Georgia Rug Mill (1961) 131 NLRB 1504, fn. 2; National Survey Service (C.A. 7, 1966) 361 F.2d 199, 206.

agents, manifested an anti-union attitude.

I have found, as discussed supra, that the company had a practice of recalling its seniority laid off workers and that foremen would attempt to call or speak to workers about returning if the workers had not already inquired themselves.[36] Dungan and Cruz both stated that former members of the Casas crew were supposed to have been absorbed in other crews. Work was obviously available. Nonetheless, jobs were filled in the Aparicio crew by people who had never worked for respondent. None of the alleged discriminatees was recalled immediately following the August 1983 layoff. The discriminatees participated in union activities, the employer knew of that participation, and demonstrated an anti-union attitude. The employer's departure from its own stated recall policy in failing to recall these particular workers can only be explained as the result of unlawful, anti-union motivation, in violation of section 1153(c) of the Act, and it is so found.[37]

Respondent's evidence to the effect that attempts were subsequently made to contact Luna and Jalil does not detract from

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[36]Sifuentes, Aparicio and Cruz all testified on this specific point.

[37]Respondent offered no explanation as to why the four were not recalled, i.e., why attempts were not made by foremen to contact them when work became initially available in September of 1983. Once General Counsel has established, as he did here, that protected activity was a motivating factor in the employer's decision not to rehire, the burden shifts to the employer to show that it would have taken such action even absent that activity. (Nishi Greenhouse, supra.) Respondent failed to sustain that burden.

this finding. Even assuming for the sake of argument that these attempts were in fact made, according to the evidence, it was not until Jalil and Luna filed charges, some two weeks after the layoff was scheduled to end, that they were telephoned about work. Such efforts would, if established, serve to mitigate the employer's backpay liability, but would not militate against a finding of an unlawful refusal to rehire.

The testimony itself regarding attempts to contact Jalil and Luna was highly suspect. • Based on her demeanor, Lupe Jalil, the wife of the worker, was a far more credible witness than Marta Sifuentes, when Jalil testified about her unavailability to receive the telephone calls Sifuentes purportedly made. Marta Sifuentes was a confused witness who needed to be "fed" her responses, as contrasted with Ms. Jalil, who offered her testimony without hesitation. I similarly credit Luna's denial that he spoke with Aparicio about work in October.[38] Interestingly, neither the testimony of Sifuentes or of Aparicio referred to the telephone number each dialed to convey the offers of work. While taking great pains to adduce evidence of the dates and times of the calls,[39] this seemingly significant information was omitted.[40] On balance, I find it

[38]Respondent maintained that Aparicio spoke with Luna's "daughter" about work in September. Luna stated that his daughters do no live at his home.

[39]Both Aparicio and Sifuentes were allegedly told to make note of these facts.

[40]of which numbers were called might tend to show that the proper parties had been reached.

illogical that two workers who had long-standing employment relationships with respondent, and who had earnestly sought rehire, would simply ignore offers to return to work.

Notwithstanding the foregoing analysis, it has been held that a letter offer of reinstatement which does not reach a discriminatee is not the equivalent of a valid reinstatement offer. Under certain circumstances, the offer, if made in good faith, might serve to toll an employer's back pay liability. The employer has the burden of proving that such an offer has been made. (Abatti Farms (1983) 9 ALRB No. 59, ALJD pp. 57 and 58.)

As per the above-cited case, under the NLRB, the "good faith" aspect of an offer of reinstatement is examined in light of the efforts made to contact the discriminatee. (Monroe Feed Store Co. (1959) 122 NLRB 1479, Jay Company, Inc. (1953) 103 NLRB 1645, enf'd (CA 9, 1954) 227 F.2d 416; Gladwin Industries, Inc. (1970) 183 NLRB 290.) In this case, two telephone calls were made to each of the alleged discriminatees. The first was made two weeks (at minimum.) after the season started; the second nearly one month later.[41] Respondent knew their addresses, which were in Porterville, and also knew that they could be contacted through Casas or Sifuentes. The company was recalling other workers after the layoff, and ordered that former Casas crew members be hired into other crews. The minimal efforts of Marta Sifuentes, or Ruben Aparicio, even assuming they were made, were

[41]Accepting respondent's evidence, during the first call neither Jalil nor Luna was actually spoken to.

not "bona fide" offers to return to work. They had other means of contacting Jalil and Luna and did not use their best efforts to do so.[42]

I further note that credibility resolutions of this type, where opposite sides convey opposite views, cannot be made with a high degree of certainty. External indicia relied upon in finding the "facts" can often be explained in ways other than lack of veracity. Nonetheless, the burden resulting from any such uncertainties connected with an offer to return to work after an employee has been discriminatorily denied rehire more properly lies with the wrongdoer. (Abatti Farms, supra; Kyutoku Nursery, Inc. (1982) 8 ALRB No. 73; Robert H. Hickam (1983) 9 ALRB No. 6). This proof allocation is commensurate with the employer's burden of proving that a valid, bona fide offer of reinstatement has been made (see discussion, infra).

Respondent's overall defense seems to focus on the alleged discriminatees' failure to make an application for rehire. Notwithstanding the findings above that failing to hear from them, respondent's foreman should have made efforts to contact them, it is found that the four actually did seek

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[42]I have already found that Jalil and Luna were discriminatorily denied re-employment. Ordinarily, issues such as date of reinstatement are litigated in the compliance phase. (See Abatti Farms, supra,; cf. Kelly Bros. Nurseries 445 NLRB 285 (1964).) I conclude the issue was fully and fairly litigated and therefore make the above finding. (Cf. Prohoroff Poultry Farms (1977) 3 ALRB No. 87, aff'd in pert, part Prohoroff Poultry farms v. ALRB, 107 Cal.App.3d 622; Paul Bertuccio (1982) 8 ALRB No. 103, mod. (1983) 9 ALRB No. 17, aff'd 156 Cal.App.3d 312; George A. Lucas and Sons (1981) 7 ALRB No. 47.)

employment after the two-week layoff period expired. Each of the four withstood rigorous cross-examination regarding their efforts to seek work, and-their respective testimonies were, for the most part, internally consistent. Their testimony is therefore credited on this issue.

Casas was not called as a witness. Testimony that Luna and Jalil made inquiries to him about work were unrebutted.[43] While the argument could be made that Casas no longer worked for respondent, and could not rehire them on its behalf,[44] it is clear that the workers still viewed their foreman as a conduit through which employment for the company might be obtained. Although terminated by respondent, Casas still worked as a foreman for contractor Cruz at that time. He also lived with Jesus Sifuentes, then employed as a foreman by respondent. Absent from the workers' testimony, save that of Carmona, were any statements from Casas referring them to other foremen, or that he could not help them, or words to that effect. When Jalil and Luna visited Casas, Sifuentes was present on certain occasions.[45] Sifuentes did nothing to disabuse the workers of

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[43]Bedolla and Carnona also asked Casas for work.

[44]Accordingly, applications to Casas for rehire would not be a "proper" application.

[45]I credit their testimony in this regard rather than Sifuentes[1] statement that when the workers came to Casas' house "I did not see them." Sifuentes testimony was peppered with inconsistencies and lapses in memory, some of which were described above. His blanket denial that any of the four alleged discriminatees contacted him following this layoff was not credited in the face of consistent, credible testimony on this point from the workers themselves. Thus, Sifuentes' overall

the notion that Casas was no longer in a position to affect their employment status.[46] Further, I find that contrary to testimony

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credibility was called into question: "Testimony of a witness found to be unreliable as to one issue may be disregard as to other issues." (San Clemente Ranch Ltd. (1982) 8 ALRB No. 50, p 3; see also George A. Lucas & Sons (1984) 10 ALRB No. 33, ALJD pp. 62-63.

[46]The issue might be framed whether Casas could be deemed an "agent" of respondent under ALRA principles of agency, and the respondent thereby rendered liable for his acts and conduct, despite the fact, that some of these acts may have occurred subsequent to his termination as supervisor for respondent. Curiously, neither party addressed this issue in its brief. Vista Verde Farms v. A.L.R.B. (1981) 29 Gal. 3d 307, 322, sets forth the applicable rule of law. In determining whether an agricultural employer would be liable for the acts of a labor contractor it engaged, the Court noted:

> ... it is clear that in general an employer's responsibility for the coercive acts of others under the ALRA . . . , is not limited by technical agency, doctrines or strict principles of respondeat superior but rather must be determined, ... , with reference to the broad purposes of the underlying statutory scheme. Accordingly, even when an employer has not directly authorized or ratified improperly coercive actions directed against its employees, under the ALRA an employer may be held responsible for unfair labor practices (1) if the workers could reasonably believe that the coercing individual was acting on behalf of the employer; or (2) if the employer gained an illicit benefit from the misconduct and realistically has the ability either to prevent a repetition of such misconduct in the future or to alleviate the deleterious effects of such misconduct on the employees' statutory rights.

Here, Luna and Jalil could both reasonably believe that Casas still had some control over their jobs with respondent: they were not told otherwise, despite the fact that they were aware that Casas no longer worked with respondent. Luna and Jalil continued to seek employment through Casas even after being so informed. Casas[1] "black ball" remark echoed a similar statement made by Horton. Additionally, respondent had the "ability . . . to alleviate the deleterious effects" of Casas' statements to them by offering Luna and Jalil their jobs back, Casas' remarks notwithstanding .

of respondent's witnesses, inquiries about work were made to Cruz and Sifuentes, who ostensibly had the authority to effectuate there hires.

As an additional rationale for crediting the workers testimony that each sought rehire, it is patently illogical that employees with the tenure of the alleged discriminatees would abruptly leave long-standing employment, and fail to make efforts to secure their jobs after a layoff. Jalil and Luna had worked for respondent for about ten years; Bedolla and Carmona for four and three years, respectively.

It is therefore determined that in September, 1983, unlawfully refused to rehire Francisco Luna, Juan Jalil, Jesus Carmona, and Francisco Bedolla, in violation of sections 1153(a) and (c) of the Act.

RECOMMENDED ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board. (Board) hereby orders that Respondent, Grand View Heights Citrus Association, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire, or otherwise discriminating against any agricultural employee in regard to his or her hire or tenure of employment or any term or condition of employment, because he or she has engaged in union

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It is therefore determined that Casas can be considered an "agent" of respondent even following his termination.

activity or any other concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer to Francisco Luna, Juan Jalil, Jesus Carmona and Alberto Bedolla immediate and full reinstatement to their former or equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Make whole the four above-named employees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay and interest due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached

hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Mail copies of the attached Notice, in all appropriate languages, within- 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 24, 1982 to May 24, 1983.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

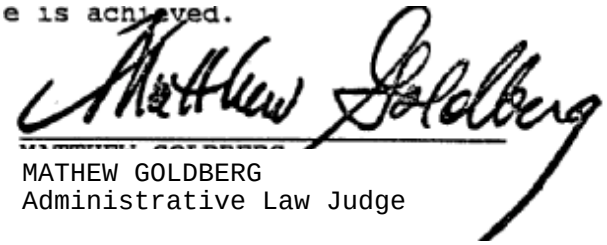
(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice of their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30

days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achived.

DATED: December 12, 1985

e is achieved.



MATHEW GOLDBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Grand View Heights Citrus Association, had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to rehire four employees because they participated in activities in support of the United Farm Workers of America, AFL-CIO (UFW). The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT interfere with, restrain or coerce you in the exercise of your right to join and engage in activities in support of the UFW or any other union.

WE WILL NOT discriminate against you for participating in Union activities.

SPECIFICALLY, The Board found that it was unlawful for us and our labor contractor Victor Cruz to have refused to rehire Francisco Luna, Juan Jalil, Jesus Carmona, and Alberto Bedolla.

WE WILL NOT hereafter refuse to rehire or otherwise discriminate against any employee for joining or supporting the UFW or any other union.

WE WILL offer Francisco Luna, Juan Jalil, Jesus Carmona and Alberto Bedolla reinstatement to their former jobs without loss

of seniority and we will reimburse them for all losses of pay and other money they have lost because we unlawfully discriminated against them.

Dated: GRAND VIEW HEIGHTS CITRUS ASSOCIATION

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(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations board. One office is located at 627 Main Street, Delano, California. The telephone number is (805) 725-5770.

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

DO NOT REMOVE OR MUTILATE