Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ANTON CARATAN AND SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-44-D 4 ALRB No. 103

DECISION AND ORDER

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

On November 7, 1978, the Board issued the attached Proposed Decision in this proceeding. The parties were informed that the Proposed Decision would become final if timely exceptions were not filed. As no timely exceptions have been filed, it is hereby ordered that the attached Proposed Decision in this proceeding be, and it hereby is, made the Board's Decision and that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: December 21, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT PERRY, Member

Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

ANTON CARATAN AND SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-44-D

PROPOSED DECISION

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

A hearing in this matter was held on August 22, 23, and 24, 1977, in Delano, California before Administrative Law Officer (ALO) Lawrence W. Steinberg, upon a complaint and a first amended complaint alleging that Anton Caratan and Sons (Respondent) violated Section 1153(c) and (a) of the Agricultural Labor Relations Act (the Act). The complaint was based upon a charge filed on June 9, 1977, by the United Farm Workers of America, AFL-CIO (UFW). The charge, the complaint, and the first amended complaint were duly served upon Respondent.

All parties were given full opportunity to participate in the hearing, after which the General Counsel and Respondent each submitted a brief in support of its position.

As the ALO has failed to issue a decision in this matter, the Executive Secretary transferred the matter to the Board on

July 10, 1978, pursuant to 8 Cal. Admin. Code Section 20266.

Having reviewed the entire record in this case and the post-hearing briefs of the parties, we make the following proposed findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act. The UFW is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint, as amended, alleges that on or about December 15, 1976, and on or about April 1, 1977, Respondent, through its agents, Wayne DeLay and Manuel Diaz, respectively, refused to hire Epifanio Ambris Chavez because of his support for and activities on behalf of the UFW, and that Respondent thereby violated Section 1153(c) and (a) of the Act.

Respondent denies that its refusal to hire Epifanio Ambris Chavez was unlawfully motivated.

III. Supervisors

The parties stipulated that at times material herein the following persons were supervisors within the meaning of Section 1140.4(j) of the Act: Wayne DeLay, Dan Heinrichs, Manuel Diaz, and Johnny Cabebe.

Respondent denied the allegation that Rogelio de la Rosa was supervisor. The record indicates that Mr. de la Rosa is a crew leader who is paid slightly more than other employees are who handles routine work assignments. Respondent office manager

testified that an assistant foreman (such as de la Rosa) "might", in the absence of the foreman, distribute job applications, receipt of which "generally" resulted in the recipients being hired, but there was no evidence of how often, or whether, de la Rosa performed such a function. Occasional isolated instances of actions which might otherwise be indicative of supervisory authority are generally insufficient to predicate a finding of supervisory status, Commercial Fleet Wash, Inc., 190 NLRB 326, 77 LRRM 1156 (1977). Nor do we find it determinative of supervisory status that Mr. de la Rosa assigned rows to employees, absent evidence that this function called for the exercise of independent judgment. Montgomery Ward & Co., Inc., 228 NLRB 750, 96 LRRM 1383 (1977). The evidence does not establish that at times material herein Mr. de la Rosa had or exercised any authority to hire, discharge or discipline employees, or to perform any supervisory function requiring the use of independent judgment. Therefore, on this record, we cannot conclude that he is a supervisor within the meaning of the Act.

IV. The Refusal to Hire Mr. Chavez

Mr. Chavez first worked for Respondent in 1969, and he has worked for Respondent during most of the subsequent years, including 1975, 1976 and 1977.

Although the General Counsel established that during 1975 one of Respondent's owners made an anti-union speech and that a supervisor threatened an employee with discharge for engaging in union activity, he failed to prove by a preponderance of the evidence that Respondent had knowledge of Mr. Chavez' union

activity at times material herein. By his own account, Mr. Chavez' union activity during 1975 was minimal, consisting of attending UFW meetings and occasionally pruning trees and cleaning windows at the UFW's premises, clearly not the kind of activity which was likely to have been observed by, or to otherwise come to the attention of Respondent. Mr. Chavez also testified that, during the same season, he spoke to UFW organizers at work about twice a week at noon. Mr. Chavez did not speak to the organizers at great length, however, because on one occasion, an alleged supervisor, Richard _____, called the police, who compelled the organizers to leave. The record is insufficient to demonstrate either that Richard was a supervisor within the meaning of the Act or that he was an agent of Respondent at times material herein.

Mr. Chavez' union activity during the period in 1976 when he worked for Respondent was similar to that of the preceding year. In addition, however, he discussed union matters with other workers on several occasions and, during the harvest, a "Yes on No. 14" (i.e. pro-UFW) sticker was affixed to the bumper of his car. There is no evidence that Respondent had knowledge of the bumper sticker or of Mr. Chavez' discussions with other workers. Although Mr. Chavez threatened on one occasion to go to "the union" if supervisor Johnny Cabebe did not give his son a job, his remark did not reveal any affiliation with, or sympathy for, the UFW; it could just as reasonably, or more reasonably, be interpreted to mean that Mr. Chavez intended to avail himself of the grievance procedure of the Teamster contract, which was then in effect.

Early in November 1976, after the end of the harvest, all of the harvest workers, including Mr. Chavez, were laid off. Between December 8 and 13, 1976, Mr. Chavez, according to his testimony, applied for work at Respondent's operation. On that occasion, he first spoke to Respondent's general foreman or superintendent, Dan Heinrichs. When Mr. Chavez asked him for a job, Mr. Heinrichs directed him to a supervisor, whose name Mr. Chavez did not recall. That supervisor in turn directed him to foreman Wayne DeLay, one of Respondent's crew supervisors. Mr. Chavez asked Mr. DeLay for a job and was told that no more employees were needed.

Mr. DeLay testified without contradiction that he did not know Mr. Chavez, and he did not know whether Mr. Chavez applied for work during December 1976. Mr. Heinrichs also testified that he did not remember Mr. Chavez applying for work during that month.

Mr. Chavez returned to Respondent's premises in early April 1977, and asked supervisor Manuel Diaz for a job. Mr. Diaz informed him that no positions were available. Mr. Chavez testified that Mr. Diaz told him to telephone to keep appraised of job opportunities. He further testified that he telephoned five times within the following two weeks. Although Mr. Diaz admitted that Mr. Chavez asked him for a job at the beginning of April, he essentially denied receiving the telephone calls. In view of conflicting testimony, we are unable to make a finding as to whether Mr. Chavez made any telephone calls to Mr. Diaz in April 1977.

Mr. Chavez testified without contradiction that three

or four days after asking Mr. Diaz for a job, he went to Respondent's labor camp. There he asked supervisor Johnny Cabebe for a job. Mr. Cabebe told him that no work was available.

On the basis of the above, and the entire record, we find that Mr. Chavez thrice applied for work, once in mid-December 1976 and twice in early April 1977, and Respondent failed or refused to hire him on each of these occasions.

Mr. Chavez was working for Respondent at the time of the hearing, having been rehired in July or August 1977. Mr. Chavez testified that when he resumed working in 1977, Mr. Diaz told him that Respondent no longer had a union and liked it that way, and that he should go elsewhere for work if he wanted a union, Mr. Diaz did not specifically deny having made that statement, but testified that when Mr. Chavez resumed work he gave him a handbook of company rules and insurance pamphlets. He also testified that, after the Teamster contract expired in March 1977, he customarily informed all of the new employees that there was no longer a union contract. We are unable to resolve the conflict in testimony as to this conversation.

IV. Discussion of the Issues and Conclusion

General Counsel contends that Respondent's failures or refusals to hire Mr. Chavez in mid-December 1976 and early April 1977 were discriminatory and violative of Section 1153(c) and (a) of the Act. We do not agree. Although there is evidence of Mr. Chavez' union activity, there is no evidence that Respondent had any knowledge, direct or indirect, of such activity.

Knowledge by the employer of an applicant's union acti-

vity is necessary for a finding of discriminatory refusal to hire. See NLRB v. Mid-State Sportswear, Inc., 412 F.2d 537 (CA 5, 1969), 67 LRRM 1057. General Counsel argues that Respondent's knowledge of Mr. Chavez' union activity is demonstrated by Dan Heinrich's testimony that he knew Mr. Chavez was associated with the UFW and by threats of loss of employment made to Chavez by Rogelio de la Rosa during August 1976. This is not supported by the record. Dan Heinrich testified that he did not hear of Mr. Chavez' union affiliation until after the alleged refusals to rehire had occurred. The threats made by Mr. de la Rosa cannot be attributed to Respondent because the record does not establish that he was a supervisor or agent of Respondent within the meaning of the Act.

General Counsel also argues that Respondent's knowledge of Mr. Chavez' union activity can be inferred from his participation in the 1973 strike against Respondent, his discussions with UFW organizers, his talks with other workers regarding the UFW, and the Proposition 14 bumper strip displayed on his car. It is correct, as General Counsel contends, that employer knowledge can be inferred under appropriate circumstances. S. Kuramura, Inc., 3 ALRB No. 4 (1977). However, the record in this case does not warrant an inference that Respondent had knowledge of Mr. Chavez' union activities or sympathies, notwithstanding the anti-union sentiments expressed in the past by Respondent. Evidence of animus is not an adequate substitute for independent evidence from which a finding, or an inference, of knowledge may be drawn. American League of Professional Baseball Clubs, 189 NLRB 541, 76 LRRM 1645 (1971).

In the absence of evidence that Respondent knew, or believed, that Mr. Chavez had engaged in union activity, there is no basis for finding that Respondent's refusal to hire him was based in whole or part on his union activity or sympathies.

On the basis of the above, and the entire record herein, we conclude that Respondent did not violate the Act by its failure to rehire Epifanio chavez, and that dismissal of the complaint herein is warranted.

DATED: November 7, 1978

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A, PERRY, Member

CASE SUMMARY

Anton Caratan and Sons

4 ALRB No.103
Case No. 77-CE-44-D

BOARD DECISION

As the ALO failed to issue a decision in this matter, the Executive Secretary transferred the matter to the Board pursuant to 8 Cal. Admin. Code Section 20266. The Board thereafter issued a Proposed Decision.

The Complaint, as amended, alleged that on or about December 15 1976, and on or about April 1, 1977, Respondent through its agents Wayne DeLay and Manuel Diaz, respectively, refused to hire Epifanio Ambris Chavez because of his support for and activities on behalf of the UFW, and that Respondent thereby violated Section 1153(c) and (a) of the Act. Respondent denied that its refusal to hire Chavez was unlawfully motivated.

Although there was evidence of Chavez' union activity and that Respondent had refused to rehire him, there was no evidence that Respondent had any knowledge, direct or indirect, of Chavez' union activity. In the absence of evidence that Respondent knew, or believed, that Chavez engaged in union activity there was no basis for finding that Respondent's refusal to hire him was based in whole or in part on his union activities or sympathies.

The Board concluded that Respondent did not violate the Act by its refusal to rehire Chavez, and that dismissal of the complaint was warranted.

As none of the parties filed exceptions to the Proposed Decision, the Board issued a Final Decision and Order Dismissing Complaint.