San Luis Rey, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KAWANO, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	))))))))	Case No. 76-CE-51-R 4 ALRB No. 104

DECISION AND ORDER

On January 27, 1978, Administrative Law Officer (ALO) Joel Gomberg issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed timely exceptions with a supporting brief and a reply brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO to the extent consistent: herewith, and to adopt his recommended Order, as modified herein.

Respondent submitted 137 exceptions to the ALO's Decision, many of which concerned his findings of fact and referred to testimony from its witnesses which is contrary to the ALO's

//////////////
//////////////

findings.[1/] A substantial number of Respondent's exceptions do not express substantial disagreement with the Decision, but object to the ALO's phrasing or choice of words. We have examined the record carefully in light of all Respondent's exceptions, and find that the ALO's findings of fact are supported by a preponderance of the evidence.

All of the alleged discriminatees are legal aliens (legals) from the Tijuana-San Ysidro area who worked at Respondent's ranch in 1975 and, in most cases, for several years before 1975. The "legals from Tijuana" were known among Respondent's management and supervisors as the strongest and most active supporters of the UFW. The ALO found that Respondent discriminatorily refused to rehire 53 former employees named in the complaint in accordance with a policy of not rehiring legal aliens from Tijuana-San Ysidro because of their union activity and support.

Legals from Tijuana had customarily been hired by Respondent through a "raitero," or driver, system. Certain workers with large cars or vans would contact or be contacted by foremen at the beginning of the hiring season. They would be told to bring workers to the ranch, in increasing numbers as more work became available. Foremen at the field would routinely hire the workers

---

[1/]Respondent's exceptions relate in part to credibility resolutions made by the ALO based upon demeanor. In the absence of clear error, we will not disturb such resolutions. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); Standard Dry Wall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950). We find the ALO's credibility resolutions to be supported by the record as a whole.

brought by raiteros. Decisions as to the number of workers to hire and when to hire them were made by John Kawano, president of Respondent, in consultation with foremen, but notification of the legals in Tijuana of available jobs and the selection of individuals to be hired was left to the raiteros. Raiteros generally selected and transported many of the same people year after year. Thus, workers in Tijuana depended on the raitero system to hear about job openings at Respondent's operation and to be selected and transported to the work-site.

The ALO found, and we agree, that it was Respondent's practice to hire a balanced ratio of legals to illegals (termed by Respondent "regulars" and "casuals", respectively) each year as insurance against immigration law enforcement "raids". In 1974, a year of few raids, legals made up about 40 percent of the work-force. In 1975, when there were many raids, legals comprised almost half the workforce. Legals commuting from Tijuana-San Ysidro were paid a subsidy for the ride, and legals wages were higher than the wages of illegals.

In 1976, only one raitero, Oscar Sanabia, came to San Ysidro.[2/] When asked by former workers about jobs at Respondent's

---

[2/]Respondent argues that the evidence shows that four other drivers brought workers to Respondent in 1976 and 1977. Evidence of this, however, is meager and does not show that these four were part of the raitero system. Two employees were said to have given rides to others, but there was no evidence that they recruited or selected these workers, or even transported them on a regular basis. One worker transported others regularly during the short strawberry season in 1977, but the record shows he rode in from San Ysidro with Sanabia at other times. One foreman drove some of his crew from his home in San Diego; this was clearly not part of the raitero arrangement.

operation, he said either that there was no work, or that they must now speak directly to John Kawano, or that Respondent did not want to hire legals from Tijuana.[3/] After talking to Sanabia, many employees went to Respondent's ranch to seek work. These attempts are discussed in detail in the ALO's Decision.

Applications and Availability of Work

The ALO found that, because Respondent discriminated against an entire class (legal aliens from Tijuana-San Ysidro) rather than against individuals, the General Counsel was relieved of the burden of proving, as to each discriminatee, certain elements usually necessary in a refusal-to-rehire case: (1) that a proper application for work was made; (2) that work was available at the time of the application; and (3) that the position was later filled. Respondent contends that General Counsel was required to show that each discriminatee properly applied at a time work was available and that a non-union supporter was hired in his or her place. We agree with the ALO's conclusion that on the record evidence, proof of these elements was not a necessary part of the General Counsel's case, but for somewhat different reasons.

A discriminatee will not be required to prove that a proper application was made if part of the discriminatory scheme is to prevent such applications from being made, Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575, 46 LRRM 2469 (3rd Cir. 1960), or if the employer changes the method of application without notice to

[3/] The admissibility of the latter statements to show anti-union animus is discussed below.

employees, Ron Nunn Farms, 4 ALKB No. 34 (1978). Here, former employees could not apply for work because the method by which they had applied in the past, the raitero system, had been dismantled, and no effective new method of application was made available to them. The record shows that the alleged discriminatees attempted to apply for work by speaking to Oscar Sanabia in San Ysidro, by speaking to foremen or to John Kawano at the ranch, or by asking for work at Respondent's business office, and that these attempts were either not acknowledged or were rebuffed. The discriminatees thus demonstrated, as best they could, their desire and availability for work with Respondent.[4/]

The ALO also found, again using a class analysis, that the General Counsel need not prove that work was available at the time of each application, or that each job applied for was later filled. It is obvious that if a discriminatee is prevented or discouraged from applying, it is impossible to show availability of work at the specific time the non-existent application was made. In Piasecki, supra, few jobs were actually available at the time employees attempted to apply. Proof that all positions for which the discriminatees would have applied were filled within a year after they were prevented from applying was considered sufficient.

[4/] In International Brotherhood of Teamsters v. U.S., __ U.S.___, 97 S.Ct. 1843 (1977), cited by the ALO, the Court, as Respondent points out, required that even when non-applicants are relieved of the burden of proving proper application, a showing must still be made, as to each non- applicant, that he or she would have applied but for the employer's discriminatory practices. The Court suggests that this requirement might be met by "evidence of an employee's informal inquiry, expression of interest, or even unexpressed desire ...." 97 S.Ct. at 1873, n.58.

In Ron Nunn Farms, supra, the General Counsel met its burden on this issue by showing that other workers were hired at approximately the time that the discriminatees would have been rehired had the employer not changed its method of hiring.

In Winter Garden Citrus Products Corp., 116 NLRB 738, 38 LRRM 1354 (1956), a group application by former employees for seasonal employment was rejected by the employer, who told the workers no jobs were available. The employer was found to have discriminatorily failed -to hire them for jobs which became available throughout the season after their application, even though they did not reapply after their group application was rejected.

Although the cases cited above, and others cited by the ALO, involved groups of employees, a group or "class" analysis is not necessary to a finding that, under some circumstances, specific application and job availability need not be specifically proved.[5/] In Penzel Construction Co., 185 NLRB 544, 75 LRRM 1051, enf'd 449 F.2d 148, 78 LRRM 2543 (8th Cir. 1971), a single employee was found to have been discriminatorily refused work although he filed no application, in view of the fact that he was told by a supervisor that he would never again work for the company. The employee was found to be entitled to backpay from the time he was physically able to work. No showing was made, or required, that others were hired in his stead.

[5/] We reject the ALO's conclusion that the General Counsel need not show specific application and availability of work in any case involving discrimination against a class of workers.

We find the evidence supports the ALO's conclusion that Respondent abandoned its former method of hiring legals from Tijuana-San Ysidro without notice to them, and refused to acknowledge their reasonable attempts to apply for work in other ways. The ALO found, and we agree, that the employees named in the complaint were available for work, and that the Employer hired many more than their number of employees during 1976 and 1977. Under these circumstances, we find the General Counsel was not required to prove specific application and availability of work as to each discriminatee.

"Class" Analysis of Discrimination

The Employer excepts to the ALO's use of a "class" analysis of other elements of the General Counsel's case, and generally objects to the ALO's failure to make specific findings as to each named discriminatee. It argues that the ALO's method merely indicates that the General Counsel has failed to make out a prima facie case and that it had no notice, from the pleadings or otherwise, that this was to be a class action. It points out that a class was not defined or certified in accordance with Rule 23(a) of the Federal Rules of Civil Procedure, and that the complaint and the findings dealt with discrimination against named individuals.

Clearly, this was not a "class action" in the strict procedural sense—our regulations make no provision for such an action, and no formal definition or class certification was

//////////////

//////////////

possible or necessary.[6/] It is clear from the record that the parties and the ALO were aware throughout the proceeding that the main issue was whether the Employer's failure and refusal to rehire any member of a group --53 legal workers from Tijuana-San Ysidro— constituted a violation of Section 1153(c) and (a) of the Act.

The ALO's use of a class or group analysis does not relieve the General Counsel of the burden of proving that the discrimination applied to each of the named discriminatees. Where the alleged discrimination is not directed at individuals, but at a group, the burden as to each named discriminatee may be met by a showing that the group was treated discriminatorily and that the named discriminatee is a member of the group. NLRB v. Hoosier-Veneer, 120 P.2d 574, 8 LRRM 723 (7th Cir. 1941). In such a case, relief may not be denied because no direct evidence is offered of a specific discriminatory intent as to each individual in the group. NLRB v. Bedford-Nugent, 379 F.2d 528, 65 LRRM 2475 (7th Cir. 1967). In Borg-Warner Controls, 128 NLRB 1035, 46 LRRM 1459, (1960), cited by Respondent as "the most closely analogous of all possible cases to the instant action," the Board found that the General Counsel's burden of showing that each alleged discriminatee was not rehired because of union activity was met by a statistical showing that union supporters were recalled in far smaller proportion to their numbers in the pre-layoff workforce than were non-union employees. The only individual showing required was that

[6/] We also note that, were this a real class action, the controlling statute would be California Code of Civil Procedure Section 382, and not the inapplicable federal rule.

each alleged discriminate had been employed in a classification in which some hiring was done.

When an employer is found to have been concerned more with the fact of a union majority than with individual union activities, it is not necessary to prove employer knowledge of each alleged discriminatee's union affiliation or support. The Lorimer Press, 222 NLRB 220, 91 LRRM 1379 (1976); L. B. Foster Company, 192 NLRB 319, 77 LRRM 1867 (1971). This rule is clearly applicable to the case before us, in which the most active union support came from a clearly distinguishable group of employees which the Employer could easily eliminate from its workforce by changing its hiring system.

General Counsel generally relies on statistical evidence to show discrimination against legals from Tijuana-San Ysidro. Both parties submitted numerous statistical exhibits on hiring of legals and illegals in 1974, 1975,. 1976 and part of 1977. Analysis of the statistics is made difficult by the fact that the same type of information was not offered for each year and by the fact that different documents submitted to show hiring statistics in certain years contradict one another.

The ALO relied on two kinds of statistics in finding an unlawful discrimination against the legals from Tijuana. First, he found that only 27 of the 301 workers who had received ride compensation in 1975 were employed in 1975. Employees who received this compensation were generally acknowledged to be from Tijuana-San Ysidro. The ALO suggested that this result could not be attributed merely to high turnover, because a comparison of the

total number of legals employed in the third quarter of 1975 with the number at the peak employment Of legals indicated that turnover among legals was fairly low, especially compared with turnover among illegals during the same period.[7/] Furthermore, testimony of witnesses showed that many legals from Tijuana had previously returned to work for Respondent from year to year. Evidence as to the rate of return of workers from Tijuana-San Ysidro is rendered somewhat less useful by the fact that, owing to the elimination of the ride subsidy, it is not possible to determine how many of the legals hired in 1976 and 1977 were from that area. In previous years, about 60 percent of the legals had received ride subsidies.

Other statistical evidence relied on by the ALO shows that the percentage of all legals in the workforce dropped significantly in 1976. The Employer's figures on new hires, show that from February to December it hired only 25 legals, as compare with 436 illegals. Hires in January were apparently omitted from consideration by the ALO because the record makes clear that the 1975 season extended through January; many legals worked until the end of January, at which time they were laid off. Even if we include January hires, as Respondent argues we should, we arrive at

///////////////
///////////////

[7/] Respondent argues that this turnover comparison is misleading because it focuses on a portion of the year when, according to the testimony of John Kawano, hiring of legals is low and hiring of legals high. Respondent's exhibits, however, clearly show that employment: of both legals and illegals was at its peak at approximately the same time in the third quarter of 1975.

a ratio of 49 legals to 436 illegals.[8/]

Other records submitted by Respondent compared the numbers of legal and illegal field workers per week in 1975, 1976 and 1977. The figures for 1976 show peak employment of legals at 72 in April, a figure at odds with Respondent's figure of 49 new hires of legals in that year. Even if we accept this higher figure, a comparison of the ratios of legals to illegals shown in these documents, especially during the period of June through August, when most hiring occurs, shows that the proportion of all legals in the workforce was reduced approximately by half between 1975 and 1976. This result, which is based on a high estimate of number of legals in the workforce, coupled with the statistics on the return rate of legals from Tijuana-San Ysidro and the finding that access to jobs and transportation for the Tijuana workers was practically eliminated, compels the inference that the proportion of the Tijuana group in the workforce was even more severely reduced.

Respondent argues that many illegals were also not rehired in 1976. It is undisputed that Respondent substantially cut back its acreage and consequently its workforce in that year. The significance of the statistics is not, however, that fewer legals were hired in 1976, but that legals comprised a much smaller <u>percentage</u> of the reduced workforce.

[8/] Respondent argues in its exceptions that it cannot vouch for the accuracy of its document containing this information because it was prepared from an exhibit submitted by the General Counsel. Testimony of Respondent's bookkeeper, however, indicated that she had prepared the document directly from personnel records.

Respondent also argues that the fact that some legals from Tijuana were hired militates against a finding of discrimination as to other legals. Cases in which the NLRB has found a statistical showing of disproportionate impact upon a group to be satisfactory evidence of discrimination have not required a showing of complete or absolute exclusion of the group from the workforce. NLRB v. Shedd-Brown Mfg. Co., 213 F.2d 163, 34 LRRM 2278 (7th Cir. 1954) (27% of CIO supporters recalled, 73% of supporters of company-favored union recalled); NLRB v. Hoosier-Veneer, 120 F.2d 574, 8 LRRM 723 (7th Cir. 1941)(percentage of union supporters in workforce reduced from 75% to 51%); Borg-Warner Controls, 128 NLRB 1035, 46 LRRM 1459 (1960)(ratio of recalled nonunion employees to laid-off non-union employees was 5 to 6; ratio of recalled union supporters to laid-off union supporters was 1 to 5).

Other Evidence of Discrimination

In addition to the strong inference of discrimination raised by the statistical evidence, the ALO found other evidence supporting his finding that Respondent's failure and refusal to rehire the Tijuana employees was discriminatory. The ALO found direct evidence of discriminatory motive in the statements of John Kawano and some of Respondent's foremen that Respondent did not want legals from Tijuana because they were Chavistas.[9/] The ALO

[9/] There was much discussion, at the hearing and in the briefs, of the admissibility of similar statements by Oscar Sanabia. The ALO specifically did not rely on these statements in finding Respondent's discriminatory motive, but used them only to determine

[fn. 9 cont. on p. 13.]

also found indirect evidence of discrimination in the Employer's demonstrations of anti-union animus.

Respondent argues that evidence of anti-union animus must be directly related to the discrimination charged. This argument confuses the concept of discriminatory motive with the concept of general animus toward a union. Generally, discriminatory motive must be proved for each act alleged to be discriminatory, although, as noted above, when discrimination against a group is involved, it need not be specifically proved as to each individual in the group. Such a motive, however, may be shown by circumstantial evidence, including evidence of general bias or hostility toward the union. NLRB v. Superior Sales, Inc., 366 F.2d 229, 63 LRRM 2197 (8th Cir. 1966).[10/]

Respondent's Business Justification

Respondent's explanation for the change in the number of legals workers hired in 1976 and 1977 reveals a central contradiction. It asserts, first of all, that its hiring policies did not change in 1976, that its only method of hiring had always been to

---

[fn. 9 cont.]

the effect of the statements on employees with respect to their attempts to find work. Because the statements were not considered for their truth as admissions of the Respondent, but were considered only for a non-hearsay purpose, we need not determine the issue of Oscar Sanabia's agency under Evidence Code Section 1222.

[10/] The ALO relies in part en a wage increase and benefit offer which were discussed in a previous case, Kawano, Inc., 3 ALRB No. 54 (1977). There we specifically declined to rule on whether the wage increase demonstrated anti-union animus. Because on this record we find ample direct evidence of discriminatory motive as well as general animus toward the union, we also find it unnecessary to rule en the issue here.

hire the workers it needed from among those who presented themselves for employment at the field. John Kawano testified he never gave instructions to foremen to prefer one group over another. For some reason, according to Respondent, legal workers stopped applying for work in the usual way in 1976.

Respondent contends that it needed fewer employees in 1976 because it reduced acreage and changed to a less labor-intensive irrigation system; that it had less need for legals in 1976 because it experienced fewer immigration raids; and that because legals were only desirable as insurance against raids, when it did not experience raids it hired illegals in preference to legals because they were better and cheaper workers. Respondent also argues that, because the employees generally available at the fields were illegals, and because there were more employees waiting to be hired at the fields owing to fewer raids, and in of Respondent's reduced acreage, it was natural that the proportion of illegals to legals should increase. Thus, Respondent asserts, it had no policy of hiring one group in preference to another but, in the absence of the need for "legal insurance," it preferred to hire illegals. It claims that it had always hired all of its workers, legal and illegal, at the fields and then explains its failure to hire legals by the fact that those available for hire at the fields were generally illegals, and it did not need to recruit other workers—legals—from "alternative sources."

We do not consider that either of these positions is tenable standing alone. We have upheld the ALO's finding that legal workers from Tijuana were generally hired through the raitero

system in San Ysidro, and not by appearing independently at the fields to request work. The legals in this case did not come to work in 1.976/ not because they chose not to apply, but because their accustomed method of application no longer existed. We agree with the ALO that it is inherently incredible that an entire group of employees would abandon a method of application through which they had been hired for several years and for two years persist in a futile new method which availed them nothing.

We find no merit in Respondent's second explanation. Reduced acreage and a change in irrigation systems does not explain the substantial drop in the proportion of legals in the workforce. That drop, Respondent maintains, is justified by the drop in the number of immigration raids in 1976 as compared to 1975. It claims that because there were fewer raids, it did not need to hire legals as "insurance" and more illegals were available to be hired. This explanation, however, fails to account for the fact that the evidence shows that in 1974, when there were even fewer raids than in 1976, a substantially higher proportion of legals was hired.[11/] Furthermore, the record supports the ALO's finding that in 1975 Respondent attempted to hire legals early in the growing year in order to have a legal workforce as a backup, should raids occur. It could not have known, early in 1975 when, John Kawano testified, he planted beans to attract legals, that it would experience a large number of raids that year. Nor could it have known early in

---

[11/] In its exceptions, Respondent argues that it cannot be assumed that in 1974 fewer raids led to greater availability of illegals. We note that one of Respondent's major arguments is that fewer raids led to greater availability of illegals in 1976.

1976, when it did not send raiteros to San Ysidro for workers, that the number of raids would be fewer.

Respondent points to fewer raids and reduced acreage in 1976 as the cause of greater availability of illegal workers, who camped in or near Respondent's fields and waited for work. The evidence on this point is, as the ALO points out, largely anecdotal, and indicates that some illegals were waiting to be hired throughout the growing season in every year, even though legals were being hired in San Ysidro.

Respondent argues that failure to hire legals from Tijuana in 1976 may also be ascribed to the departure of Joaquin Haro, a foreman who had been responsible for hiring many legals in past years. The record, however, shows that many legals had been hired by other foremen. Furthermore, this explanation is contradicted by Respondent's assertion that legals were not hired because of a combination of cost-cutting, reduction of acreage, and fewer raids. Had Haro been present in 1976, it can only be assumed that his hiring decisions would have been guided by these considerations. Haro testified that it was his practice to hire legals only when raids made illegals unavailable.

We find that Respondent's explanations of the drop in the proportion of legals in its workforce do not establish that it was motivated by legitimate objectives. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). Furthermore, we find the inconsistent and contradictory nature of these explanations to be further evidence of its discriminatory motive in failing and refusing to rehire legals from Tijuana. NLRB v. Superior Sales,

366 P.2d 229, 63 LRRM 2465 (8th Cir. 1966).

Cherry Tomato Crew

We uphold the ALO's finding that the isolation of a five-man cherry-tomato crew, all of whom were legals who had been extremely active in the union, was an independent violation of Labor Code Section 1153 (c) and (a) as well as evidence of anti-union animus. Although this violation was not charged in the complaint, it was fully litigated and briefed. We are not precluded from finding fully-litigated conduct to be an additional violation of the Act solely because it was not included in the complaint. Prohoroff Poultry Farms, 3 ALRB No. 87 (1977), Anderson Farms Co., 3 ALRB No. 67 (1977).

Respondent argues that the cherry-tomato crew was not, in fact, isolated. However, the record supports the ALO's finding that they were. The fact that, on occasion, the foreman's wife and son helped them, or that they sometimes passed other employees doing work in the same field, does not negate the ALO's finding that these employees were isolated to discourage union activity.

Remedy

The ALO's recommended remedy includes an order of backpay and reinstatement, or placement on a preferential hiring list, for the 53 employees he found to have been discriminatorily refused rehire by Respondent. He found that the discriminatees had shown themselves to be available for work during the 1976 and 1977 tomato seasons. Because of the uncertainty created by the fact that the discriminatees were precluded from applying and being hired in the accustomed manner, the ALO established a rebuttable presumption

that each of the discriminatees would have worked the same number of hours in 1976 and 1977 as he or she worked in 1975. He recommended that evidence to rebut the presumption could be presented by either party during ancillary backpay proceedings.

We find the ALO's method of calculating backpay appropriate and adopt his recommended remedy. In a situation in which it is unclear which discriminatees would have been hired at what times, resolving such uncertainties either during the compliance period or in ancillary proceedings is an efficient and fair method of determining Respondent's obligation to make employees whole. Piasecki Aircraft Corp. v. NLRB, 280 F.2d 575, 46 LRRM 2469 (3rd Cir. 1960).

Respondent argues that the ALO's presumption is unfounded because it is clear that not all of the named discriminatees would have been hired even if the proportion of legals in the workforce had not been reduced. This is by no means clear. The record shows that many more than 53 workers were hired by Respondent during the period of discrimination. As our discussion of statistics reflects, it is impossible to determine exactly how many legals would have been hired absent discrimination. We have found that the percentage of legals in the workforce was reduced approximately by half in 1976. We therefore conclude that at least twice as many legal workers should have worked for Respondent in 1976 and 1977 as did in fact do so. Seventy-two legal workers, peak employment for legals, were shown in Respondent's exhibits to have worked in the week of April 2, 1976. In a normal year, this number would have at least doubled by the end of July. Therefore,

we conclude that at least 72 more legal workers should have been hired by Respondent.

We need not rely on these rough calculations, however. Even if Respondent did at times have fewer jobs than the number of discriminatees, we have found that it discriminated against all of them and is therefore liable to all. Its failure to offer jobs to employees for whom it did have openings did not discharge its obligation to the others, and each is entitled to some backpay award. New England Tank Industries, 147 NLRB 598, 56 LRRM 1253 (1964). The burden is on Respondent to show diminution of its backpay obligation based on a discriminatee's unavailability for work or the lack of openings for some period, for reasons unconnected with discrimination. This burden is not met by an unsubstantiated claim that some discriminatees would not have had work for some of the backpay period. Id. Respondent is free to introduce evidence to meet its burden at backpay proceedings.

In, view of this burden and especially in view of the NLRB's policy that uncertainties in backpay calculations which are created by the employer's discrimination will be resolved against it, East Texas Steel Casting Co., 116 NLRB 1336, 38 LRRM 1470 (1956), enf'd 255 F.2d 284, 42 LRRM 2109 (5th Cir. 1958), we find the ALO's presumption to be reasonable and appropriate. Had Respondent not made the customary method of application unavailable to the discriminatees questions of when they would have or would not have been hired would not have arisen.

The record indicates that Respondent does not maintain addresses of employees. The ALO recommended that, in the event

that these addresses are unavailable in order to mail the "Notice to Employees" to former employees of Respondent, the Notice be broadcast over a south San Diego County radio station during Respondent's next peak hiring season. We agree with the ALO that the importance of informing former Kawano employees in Tijuana-San Ysidro of our decision in this case requires such a measure if these employees cannot be reached by mail, and we adopt his recommendation.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Kawano, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to hire or rehire any employee or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment to discourage membership in, or activities on behalf of the United Farm Workers of America, AFL-CIO, or any other labor organization.

(b) Discriminating against employees in regard to their hire, tenure, or conditions of employment as a result of their filing charges with, or giving testimony before, the Board; and

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 1152 of the Agricultural Labor Relations Act.

2. Take the following affirmative actions which will

effectuate the policies of the Act:

(a) Immediately offer the persons named in Appendix A, with the exception of Javier Acosta, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa, provided they are employed by Respondent when this Order becomes effective, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make each of the persons named in Appendix A whole for any losses (along with interest thereon at a rate of seven percent per annum) he or she may have suffered as a result of his or her failure to be rehired, all in the manner specified in the portion of the foregoing Decision entitled "The Remedy."

(b) Immediately assign Javier Acosta, Felix Hernandez, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa work that they have customarily performed in the past, without segregating or isolating them from other workers;

(c) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of backpay due and the rights of reinstatement of the above-named employees under the terms of this Order.

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

(e) Distribute copies of the attached Notice in appropriate languages to all present employees and to all

employees hired by Respondent during the 12-month period following issuance of this Decision.

(f) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed by Respondent between March 1, 1975, and January 31, 1976. In the event that addresses of former employees are not maintained by Respondent, Respondent shall arrange for the Notice to be broadcast in all appropriate languages on a radio station in the southern San Diego County area, once a week for four weeks during Respondent's next peak hiring season. The station and the times of the broadcasts shall be determined by the Regional Director.

(g) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 90-day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(h) Arrange for a Board agent or a representative of Respondent to distribute and read the attached Notice in all appropriate languages to its employees assembled on company time and property, at times and places 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 employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation

to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days from the date of receipt of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, the Respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

Dated: December 26, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. MCARTHY, Member

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board has ordered and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

5. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT refuse to hire or rehire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL offer Antonio Aleman, Jose Arroyo, Catalina Barrios, Ramon Bravo, Martin Conriquez, Maria Luisa Diaz, Feliberta Escobedo, Pablo David Fink, Elisa Flores, Francisco Garcia, Gregorio Gonzalez, Julian R. Gonzalez, Mario Guerreo, Luis Chavez Gutierrez, Herminio Vela Hernandez, Ignacio Hernandez, Josef a Hemandez, Aurelio Higuera, Silveria Juarez, Delfino Laras, Felipe Luna, Maria Mendez, Antonio Mendoza, Carmen Ortiz Mercado, Jose Luis Montellano, Martin Mora, Antonia M. de Ortiz, Ezequiel Pedroza, Maria Elena Perez, Jesus Ramiraz, Juan Rios, Vicenta Rios, Juan N. Rodriguez, Miguel Rodriguez, Feiiciano Rubalcaba, Francisco Rubio, Gerardo Ruiz, Josefa Ruiz, Emma Saldana, Jose Sandoval, Domingo Santos, Jose Luis Vasquez, Felipe de la Vega, Ildefonso Villa, and Monica Zamarripa their old jobs back if they want them, and will pay each of them any money they lost because we refused to rehire them.

WE WILL reassign Javier Acosta, Felix Hernandez, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa to work which does not isolate them from other workers.

Dated: KAWANO, INC.

By: _____
Representative Title

This is an official Notice of the Agricultural Labor Relations Board, an agency of the Stare of California. DO NOT REMOVE OR MUTILATE.

APPENDIX A

Javier Acosta
Antonio Aleman
Jose Arroyo
Catalina Barrios
Ramon Bravo
Martin Conriquez
Maria Luisa Diaz
Feliberta Escobedo
Pablo David Pink
Elisa Flores
Francisco Garcia
Gregorio Garcia
Juan Garcia
Luisa Garcia
Teresa Gomez
Hilario Veloz Gonzalez
Julian R. Gonzalez
Mario Guerrero
Luis Chavez Gutierrsz
Herminio Vela Hernandez
Ignacio Hernandez
Josefa Hernandez
Aurelio Higuera
Jose Aleman Juarez
Delfino Laras
Felipe Luna
Maria Mendez Antonio
Mendoza Carmen Ortiz
Mercado Jose Luis
Montellano Martin.
Mora Antonia M. de
Ortiz Ezequiel Pedroza
Maria Elena Perez
Jesus Ramirez Juan
Rios Vicenta Rios Juan
N. Rodriguez Miguel
Rodriguez Feliciano
Rubalcaba Francisco
Rubio Gerardo Ruiz
Josefa Ruiz Emma
Saldana Jose Sandoval
Domingo Santos Jose
Luis Vasguez Refugio
Vasquez Felipe de la
Vega Ildefonso Villa
Antonio Zamarripa
Monica Zamarripa

CASE SUMMARY

Kawano, Inc.

4 ALRB No. 104
Case No. 76-CE-51-R

ALO DECISION

The ALO found that Respondent violated Section 1153 (c) and (a) of the Act by its discriminatory refusal to rehire 53 former employees because of their support of the union. The ALO rejected Respondent's defense that the employees had not made a proper application for rehire or shown that jobs were available at the time they were available for rehire. He found that Respondent had refused rehire to the named employees by discriminating against a class of workers—legal aliens from the Tijuana-San Ysidro area—who were known to be strong union supporters, and that, in such cases, the General Counsel need not prove that proper application for a specific available job was made by each discriminatee.

The ALO also found that discriminatory motive was shown by statistical evidence, by statements of Respondent, and by other evidence of anti-union animus. He found the Respondent's business-justification defense insufficient to explain the decrease in the proportion of legal aliens in Respondent's workforce.

The ALO further found that Respondent had violated Section 1153(c) and (a) of the Act by isolating five union supporters from other workers in order to discourage their union activity. He also found that Respondent's refusal to hire either of the named discriminatees was motivated in part by their testimony at a previous unfair labor practice hearing, and that, in refusing to rehire them, Respondent also violated Section 1153(d) of the Act.

BOARD DECISION

The Board affirmed the findings of the ALO. It held that, in cases in which employees, whether individuals cr groups of employees, are prevented by the employer from making proper application for rehire, the General Counsel is not required to prove specific application and availability of work as to each alleged discriminatee.

The Board held that, when the alleged discrimination is directed at a class of employees, the burden of showing discrimination is met by a showing that the group was treated discriminatorily and that each named discriminatee is a member of the group. The Board upheld the ALO's finding that statistical evidence showing a disproportion are drop in the number of legal aliens in the workforce

supported a finding of discrimination. It upheld the ALO's finding that Respondent's business justification £ did not adequately explain the disproportionate impact upon legals, and found the contradictory nature of the business justifications to be further evidence of discrimination.

REMEDY

The remedial order requires Respondent to reinstate the discriminatees, to pay them backpay plus seven percent per annum interest, and to post, distribute, read and, if necessary, arrange for radio broadcast of an appropriate Notice to Employees. Because of uncertainty about the appropriate amount of backpay for each discriminatee, a rebuttable presumption is established that each discriminatee would have worked the same number of hours in 1976 and 1977 as he or she worked in 1975. Evidence to rebut this presumption may be presented by either party during compliance process or at ancillary backpay proceedings. The order also requires reassignment of the five workers who were previously isolated from others to work which does not separate them from other workers.

* * *

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

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: KAWANO, INC., Respondent , and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 76-CE-51-R DECISION OF ADMINISTRATIVE LAW OFFICER

Jorge Carrillo and Kenneth J. Schmier
of San Diego, for the General Counsel

David B. Geerdes and John M. Phelps
of San Diego, for the Respondent

STATEMENT OF THE CASE

JOEL GOMBERG, Administrative Law Officer: This matter was heard by me on September 26, October 11, 12, 13, 14, 17, 18, 19, 20. 21, 25, 26, 27, 28, and 31, November 1, 14, 15, 16, 17, 13, 21. 22, and 30, 1977, in San Diego, California. The original Complaint (GC Ex. 1-C) issued on August 25, 1977. On September 26, 1977, I granted Respondent's motion for a more definite statement and ordered the General Counsel to file a more detailed Cora-plaint. In compliance with my order, the General Counsel filed

a Second Amended Complaint (GC Ex. 1-F) on October 3, 1977. The Second Amended Complaint was amended several times during the hearing (GC Ex. 1-L through 1-P). At the conclusion of the General Counsel's case, I granted several motions to dismiss certain allegations and to amend to conform to proof. In the interest of simplification and to aid the Respondent in the preparation of its defense, I ordered the General Counsel to file a Third Amended Complaint, incorporating all amendments into one document. The Third Amended Complaint[1] (GC Ex. 1-Q) denotes amendments to the Second Amended Complaint through underlining, and dismissed allegations through the use of brackets. The Complaint and its amendments are based upon a charge filed on September 30, 1976, by the United Farm Workers of America, AFL-CIO (hereafter "UFW"). A copy of the charge was duly served upon the Respondent.

All parties were given full opportunity to participate in the hearing. The UFW intervened, as a matter of right, pursuant to Section 20268 of the Board's regulations, but did not choose to exercise this right after the first day of the hearing. The General Counsel and Respondent filed post-hearing briefs pursuant to Section 20278 of the Board's Regulations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs

---

1. The General Counsel inadvertently filed a Third Amended Complaint with the Executive Secretary before its admission into the record. Several minor changes were made subsequent to the filing but before admission. To avoid confusion, GC Ex. 1-Q is marked "Third Amended Complaint - corrected."

filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction.

Respondent has admitted in its answer (GC Ex. 1-D) that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act. I take administrative notice of the Board's certification of the UFW in Kawano Farms, Inc., 3 ALEB No. 25 (1977), and find that the UFW is a labor organization within the meaning of Section 1140.4 of the Act.

II The Alleged Unfair Labor Practices.

The Third Amended Complaint alleges that Respondent has refused discriminatorily to rehire approximately 60 agricultural employees, all of whom reside in the United States-Mexican border area encompassing San Ysidro on the United Stares side and Tijuana on the Mexican side, because of their actual or presumed support of the UFW, in violation of Section 1153(a) and (c). The General Counsel further alleges that those employees named in Paragraph 7 of the Third Amended Complaint were not rehired by Respondent as a result of their testimony in one or both of two prior proceedings involving the Respondent, Kawano Farms, Inc., Case No. 75-RC-8-R, supra, and Kawano, Inc., Case Nos. 75-CE-13-R and 75-CE-25-R, 3 ALSB No. 54 (1977), in violation of Section 1153(a) and (d) of the Act.

Respondent denies that most of the named employees properly applied to be rehired and contends that, in those cases where a

proper application was made, the employees were not rehired be-cause no work was available. Respondent generally denies that it violated the Act in any way.

A. Respondent's Farming Operations.

The Kawano family has been farming in San Diego County since 1946. The operation was incorporated, around 1960, as Kawano, Inc. Four Kawano brothers, John, Frank, Raymond, and Harry, have been Respondent's only shareholders since its inception. The three officers have been: John, President; Frank, Vice-President; and Raymond, Secretary-Treasurer.

As President, John Kawano has full control and authority over all company farming operations, including hiring of all agricultural employees. Raymond handles all of the company's financial affairs. Together, the two brothers decide the acreage to be farmed, capital investments, and other business matters which have a direct impact on farming operations. In all matters, however, John Kawano has the authority to make the final decision.

The company has its headquarters in San Luis Rey. It has farmed approximately 200 acres near its San Luis Rey office for many years. Additional land in and near the San Luis Rey area has been leased for agriculture by the company over the years; various factors, including soil conditions, cold weather, and terrain have caused John Kawano to abandon some ranches and lease others.

Kawano, Inc.'s major crop is tomatoes. Both large (round) and snail (cherry) tomatoes are grown, but the majority of acreage is devoted to the round variety. Smaller amounts of cauliflower

and strawberries are grown each year. Beans are an occasional crop. There is, in addition, a field of avocadoes, which is not involved in the issues of this case.

The company office is located next to the tomato packing shed. The office manager, Ron Mizushima, a nephew of John Kawano, supervises a clerical staff of three women, and also spends much of his time in the packing shed.

Field workers are hired and supervised by foremen. The foremen report directly to John Kawano. At times, Harry Kawano, whose primary function is to oversee farming activities at the San Luis Rey ranch, will be asked by John to supervise the work at other ranches. The foremen have authority to designate field workers as "surqueros" or crew pushers. These employees, who are paid at the same rate as other workers, direct the work of crews, guiding workers into proper row's for picking, and tell employees which tomatoes, by color, are mature enough to be picked.

B. Respondent's Hiring Pattern and Practices through 1975.

Aside from a relatively small group of essentially year-round field workers, who numbered no more than 40 or 50, most of the work force consisted of seasonal employees who were hired as required. Although substantial turnover among field workers necessitated some hiring throughout the year, the tempo of seasonal hiring would increase dramatically in June. Peak employment was usually in August. In September, the number of employees would begin to drop off.

For at least the past ten years, Respondent has consciously

classified its field employees into one of two groups of Mexican citizens. One group is composed of legal aliens possessing border crossing, or "green," cards, while the second group consists of illegal Mexican aliens. Respondent also identifies the two groups as "regular" and "casual" employees, respectively. Testimony at the hearing, by both management and field employees, indicated that a large majority of regular workers lives in the Mexican border area of San Ysidro, California, and Tijuana, Baja California, some forty miles from Respondent's fields. The casual workers live in encampments near the fields, on Respondent's property.

At the beginning of the 1975 hiring season, and for several years previously, regular employees were paid $2.25 per hour and casual employees $2.00 per hour for performing the same work. John Kawano testified that he hired the higher-paid regular workers because they provided him with a much-needed "insurance" work force in the event that raids by the U.S. Border Patrol resulted in the apprehension of a substantial number of casuals.

Casuals were hired by foremen at each ranch. They would wait near the fields until given work. According to Juan Rodriguez, foreman of Respondent's Bonsall ranch, casuals would sometimes wait up to two months before being hired.

The method of hiring of regulars was substantially different. Some came directly to the ranch and sought work from a foreman. Most, however, applied for work at the company .... by applying to other workers who drove vans or cars of employees to the ranches. These drivers, or "raiteros," would pick up their passengers around five o'clock each morning, at several locations in San Ysidro,

just over the border from Tijuana. When foremen wanted to hire regular employees, they would request the raiteros to bring them. In effect, the raiteros acted as mobile personnel offices for Respondent. Testimony from workers indicated that this system had become well established by the mid-1960's and was also used by other Northern San Diego County growers.

Employee witnesses testified that when they inquired of raiteros as to the availability of work, they were either told that work was available and immediately got into the van, or they were told that the raitero would have to ask the foreman. In the latter instance, the raitero would generally report back the next morning. Their experience in agricultural work aided the regulars in determining the most propitious times to seek work.

Some raiteros worked year-round. The number of passengers in their vans, which generally held ten to twelve persons, rose and fell roughly in keeping with Respondent's seasonal hiring pattern. Vans would generally be full during the summer harvest months, but have empty space at other times of the year. Other raiteros worked in citrus ranches in the North County area. They would generally quit or be laid off just about the time that Respondent's need for labor was rising. These raiteros would often be told by foremen to fill their vans with workers.

When the need for labor increased, foremen would request authority from John Kawano to hire. Such authorization was generally forthcoming. As a rule, John did not tell foremen what people to hire; nor did he instruct them to hire regulars or casuals in any particular proportion. However, John Kawano did

testify that he wanted to have roughly 50% of his work force in 1975 composed of regulars. And Joaquin Haro, who, until January, 1976, had been a long-time foreman, testified that John always inquired of him what geographical area employees came from.

John Kawano and several foremen testified that, in their opinion, illegals were more productive workers than legals. Therefore, illegals were preferred over legals. Legals would be hired, according to Joaquin Haro and John Kawano, only when illegals were unavailable. I cannot credit the testimony that legals were hired only when illegals were unavailable.

First, testimony of General Counsel's witnesses, uncontradicted by Respondent, indicates that large numbers of legals were hired each year through 1975. General Counsel Exhibit 17 establishes that Respondent employed 300 legals during the third quarter of 1974, accounting for approximately 40% of the payroll. Second, Respondent's Exhibit 10, U.S. Border Patrol records of apprehension of illegals at Respondent's ranches, indicates that only 78 illegals were apprehended in 1974. Of these, seven were apprehended in January, long before the 1974 hiring began, and the rest were apprehended in August, after most hiring had taken place. Respondent's own documentary evidence flatly contradicts Joaquin Haro's testimony that he hired legals only after raids had depleted the illegal work force. Third, when called as an adverse witness by the General Counsel, John Kawano said that he could not remember if he tried to maintain any particular ratio between regulars and casuals, that he could not remember how regulars were hired, and that he did not remember if he had a policy of

hiring legals before illegals. For impeachment purposes, the General Counsel introduced three portions of Mr. Kawano's testimony during the 1975 unfair labor practice hearing. Mr. Kawano was asked by his own attorney how he went about hiring legal workers. Kawano replied that: "... when I say we need some (legal) workers why the foremen (sic) tells certain drivers that they can come on ... these different drivers would know who and which foreman would be about ready to use some men. So, they let them know that he's a driver and that he's got so many workers . . . and they are notified." (GC Ex. 2.) Again, under direct examination in the prior hearing, Mr. Kawano testified that he didn't hire all legals because "... when you need them you can't get them. When you don't need them there is a lot of them. . . . When we need them, I think all ranches try to get that help and when they exhaust those then they go to the illegals." (GC Ex. 4.) Fourth, Mr. Kawano denied that he knew chat legals were hired by the carload, despite the fact that Joaquin Haro and another foreman, Felipe Castellon, testified that Mr. Kawano personally ordered carloads of legals transferred from one ranch to another when the harvest dictated such a change. Finally simple economics would suggest that legal workers would not be paid more than illegals unless they possessed some characteristic that was in high demand and short supply. The only such characteristic is immunity from deportation. Clearly, supply and demand would require that employers hire legals before illegals.

That legals were sought out as a class by Respondent is further evidenced by a $1.25 daily ride subsidy which was paid to

legal workers who were transported by raiteros. Raymond Kawano testified plausibly that the ride subsidy was paid to compete for workers. John Kawano said that he knew that some workers received ride payments, but that he could not remember when or why the policy of making the payments had begun. He said that it must have been because he wanted to help employees out. John Kawano's credibility with respect to hiring practices is made even more suspect by his testimony that he did not know where his legal employees lived. He said he suspected they came from Tijuana and that he geared his wages for regulars to wages paid in the San Diego area, but claimed that he did not know what the labor market for legal employees was. It is inconceivable that a farmer could operate a business in the same area for 30 years and not know the source of a sizeable percentage of his employees. It is even more unlikely that a successful businessman would set wage rates without knowing the source of his labor.[2]

In 1975, Respondent farmed at five separate locations: San Luis Rey, Vandergrift East and West, very near San Luis Rey, Carlsbad, to the southwest, and Bonsall, to the northeast. At peak season, in August, there were approximately 800 field workers. Approximately 300 were legals. Interestingly, John Kawano testified that he wanted to maintain a work force consisting of equal numbers of legals and illegals, but was never able to hire a suf-

---

2. Respondent's witnesses testified that the company did not maintain the addresses of employees in its records. This testimony was not disputed. I note, however, that Labor Code Section 1174(c) requires all employers to maintain such records.

ficient number of legals. Clearly, Mr. Kawano understood that legals were in short supply. Although Respondent does not maintain employment records by ranch (except for daily crew lists), testimony of foremen and workers establishes that most of the legals worked at Carlsbad under foreman Felipe Castellon and the Vandergrift ranches under foremen Joaquin Haro and Leopoldo Dagnino.

C. The UFW Organizational Campaign and Representation Election.

The UFW conducted an active organizational campaign during the summer of 1975. By the beginning of August, many legals had begun wearing union buttons at work. The most active organizers among the workers were legals from the Tijuana area. The heaviest concentration of union supporters was in the Vandergrift crews. The campaign was anything but hidden. Posters appeared; workers handed out leaflets; foremen were asked to sign authorization cards; a number of legals asked, and were granted, permission to go to the UFW convention in August; and legal workers took time off from work to try to organize illegal workers. Although John Kawano said that he only suspected that most union support came from the legals from Tijuana, and that he didn't know why he had such a suspicion, Joaquin Haro testified that everybody knew that the legals from Tijuana were the driving force behind the union campaign. Felipe Castellon corroborated this testimony.

In early August, after the organizational campaign had begun, Respondent increased the wages of legals from $2.25 per hour to

$2.75 per hour. Within a week the wages were again raised to $2.90 per hour. According to John Kawano, the second raise was given to maintain a differential between Respondent's rate and that of growers in the Chula Vista area. At first, the second raise was to have gone hand-in-hand with the elimination of the $1.25 ride premium, but the workers protested. Mr. Kawano could not explain why only legals received the raise. There was no indication that any workers had requested or demanded a raise. In support of its position, Respondent called a Chula Vista grower, Joe Owashi, who testified that he raised the wages of his employees, most of whom lived in the Tijuana area, from $2.25 to $2.75, on August 6, 1975, because there was a labor shortage. His ranch was also being organized by the UFW.

At about the same time, Respondent also offered some of its employees a health insurance policy. John Kawano testified that he offered the new benefit to remain competitive with neighboring growers. Chuck Lombardi, the insurance salesman, testified that he had approached Respondent about insurance in March, 1975, that he informed them that several other growers had bought the insurance in February and March (see R Ex. 8 and 9), and that he had been in close touch with Raymond Kawano throughout 1975.

A representation election was held on September 12, 1975. The UFW received 271 votes and No Labor Organization received 171. The UFW was certified by the Board on March 16, 1977.

D. The Prior Unfair Labor Practice Case.

In Kawano, Inc., supra, the Board upheld all of the Admin-

istrative Law Officer's (ALO) findings with the exception of his determination that the August, 1975, wage and benefit increases demonstrated anti-union animus on the part of respondent. The ALO also found that in dismissing Felix Hernandez in violation of Section 1153(c) of the Act, John Kawano stated that "there is no union here and no union is going to exist." 3 ALRB No. 54, p. 12. The ALO also found that Felipe Castellon reassigned an active union supporter, Javier Acosta, from driving a sprayer truck to field work in retaliation for his activities in support of the union. The Board ordered Acosta reinstated to his position of sprayer. The ALO specifically found that Felipe Castellon displayed strong anti-union animus against the UFW.

The ALO's general findings also indicate that Respondent was aware of union activity among the workers in the Vandergrift West crew before and after the election and that ten of the union's 14-member organizing committee worked at Vandergrift West. The ALO also credited testimony that John Kawano had ordered a raitero to transfer his van and workers from San Luis Rey to Carlsbad, but to leave two union supporters behind.

Eight of the complainants in this case testified on behalf of the General Counsel in the prior hearing. John Kawano was present in the hearing room throughout the entire hearing.

E. The January, 1976. Lay-offs.

On John Kawano's orders, all workers at Vandergrift East and West and Carlsbad were laid off between January 20 and 28, 1976. Miguel Rodriguez, whose testimony I credit, stated that

Felipe Castellon told him that although he had not yet discussed work with Mr. Kawano, he would call them back when work became available. Rodriguez, who had worked year-round for Respondent since 1968, testified that he would routinely be notified of the resumption of work by raiteros, after a vacation of several weeks. His testimony was corroborated by Feliciano Rubalcaba and Hilario Veloz Gonzalez.

Gregorio Garcia, who had worked year-round since 1971, was laid off by Joaquin Haro. Mr. Garcia testified that Mr. Haro said that he would recall workers when work became available. Francisco Garcia Zamora, another long-time employee of Respondent, corroborated this testimony.

Two employees laid off by Leopoldo Dagnino, Ignacio Hernandez and Juan Garcia Zamora, both of whom had worked year-round for many years, testified that they were told by Dagnino that they would be recalled when work became available.

There was consistent testimony from many long-term employees that they were invariably recalled directly by foremen who lived in the Tijuana area or by raiteros.

Leopoldo Dagnino denied telling any employees that he would recall them. I find his denial unpersuasive in light of his generally evasive testimony, and especially because he claimed that he could not remember anything about the hiring of legals prior to 1975. Neither Castellon nor Haro was asked whether they had made statements about recalling workers. I find that the workers who so testified were told by their foremen that they would be recalled when work became available.

F. Respondent's Hiring Pattern in 1976 and 1977.

Both parties submitted a number of summaries of Respondent's business records. Neither seriously disputes the accuracy of the opposing party's exhibits; naturally, each challenges the inferences which should be drawn from the evidence.

Respondent reduced its acreage significantly between 1975 and 1976. As a result of this cutback, and the institution of a drip irrigation system and aerial pesticide spraying, peak employment in 1976 was only about 275 persons, as opposed to 300 the year before. In addition, the Vandergrift West and Carlsbad fields were not farmed in 1976, while a new field, Rancho Santa Fe, approximately 25 miles southeast of San Luis Rey, was farmed for the first time in 1976. In 1977, farming at Vandergrift East was discontinued. A new field, the Ivey ranch, was opened in 1977.

General Counsel Exhibit 11 lists all the members of the Vandergrift West crew who worked during the payroll period of the representation election. Of the 69 names on the list, only one person, Alfredo Cardona, worked for Respondent in 1976 after the January lay-off, with the sole exception of the foreman, Leopoldo Dagnino, and a crew pusher, Jose Adame. General Counsel Exhibits 12 and 13 list all 1975 employees who were compensated for rides. Of these 321 employees, only 28 worked in 1976 after the January lay-offs. Twenty-six were employed in 1977. But perhaps the most startling evidence of a change in the composition of Respondent's work force in 1976 can be found in Respondent's Exhibit 11, which shows weekly hiring in 1976, and dis-

tinguishes between legals and illegals. This exhibit indicates that only 25 legals were hired from February through December, 1976, and that only one legal was hired in the last five months of the year. From February through December, 1976, 426 illegals were hired. Two hundred twenty-one illegals were hired during the last five months of the year.

Respondent's Exhibit 13 demonstrates that employment of legals in 1976 reached its peak at 72 during the payroll period of April 2. Employment of illegals peaked at 230 during the August 6 payroll period.

The 1977 hiring pattern, up to the date of the hearing, was very much the same. Respondent's Exhibit 11 indicates that from February through mid-August, 1977, 242 illegals and 101 legals were hired. However, Respondent's Exhibit 19 indicates that only 55 regulars were on the payroll in 1977. This figure corresponds with John Kawano's tesimony. Host of the discrepancy is accounted for by disregarding 43 workers who, according to General Counsel Exhibit 14, were regulars hired for non-field work jobs. The corrected figures would then be 242 illegals and 58 regulars.

Respondent introduced records of the U.S. Border Patrol which established that it experienced far more apprehensions of illegals during 1975 than in any other year in the past seven. The frequency of raids has declined dramatically during 1976 and 1977 (R Ex. 10). However, Felipe Castellon testified that 86 illegals were picked up in a raid during November, 1977. John Kawano and all the foremen testified that they never had advance warnings of when the Border Patrol would raid, nor did they have

any information that there would be fewer raids in the past two years. There is no discernible pattern to the Border Patrol activity. 1974 and 1976 were marked by relatively few apprehensions, while 1971, 1972, 1973, and 1975 were years of large numbers of raids and apprehensions.

Respondent also introduced evidence demonstrating that there was nearly as great turnover among illegals between 1975 and 1976 as there was among legals. However, Respondent did not introduce evidence with respect to turnover among legals between 1974 and 1975. Moreover, more than two-thirds of the named complainants in this case had worked for Respondent for at least two years. And Respondent's Exhibit 19 establishes that most of the legals hired by Respondent after 1975 had worked for several years. Clearly, legals constituted a relatively stable component of Respondent's work force.

Although Respondent maintains that it did not change its hiring procedures in any way in 1976, it is clear that one significant deviation from long-standing practice, the elimination of the raitero system, was undertaken. Only one raitero, Oscar Sanabia, a crew pusher who has worked for Respondent for eleven years and who did not take part in any union activities, was rehired as a raitero in the spring of 1976. (Another crew pusher, Jose Adame, apparently drove employees to work for several months during the strawberry season.) And, unlike any previous year, Sanabia applied for his job directly to John Kawano, rather than to a foreman. According to Sanabia, he asked Mr. Kawano if he could drive workers in his van, sometime in February

1976. Kawano told him to return in a week. At that time Sanabia was told that he could bring seven or eight workers. Sanabia told Kawano that the workers would have to come from the union. Kawano said that was fine. Kawano could remember none of the conversation pertaining to union membership. Sanabia could not explain why he felt it necessary to disclose the union affiliation of his riders to Kawano, other than to say that he felt it was important.

Aurelio Higuera, a long-time irrigator for Respondent, and a close friend of Joaquin Haro, testified that he went to the area near the packing shed and office in San Luis Rey with Haro on two occasions in January, 1976. On the first occasion, John Kawano, Harry Kawano, and Oscar Sanabia were present. According to Higuera, he was standing about two meters away from the group and overheard John Kawano saying that he didn't want the people from Tijuana there because they were Chavistas. Higuera claimed to have heard essentially the same conversation on the second occasion, with the exception that Oscar Sanabia was not present.

John and Harry Kawano denied making the statements attributed to them and further denied having any conversations whatever with Haro and/or Sanabia near the office in January. Sanabia's testimony was similar. Joaquin Haro, while denying that John Kawano ever made such statements, essentially corroborated Higuera's testimony with respect to his presence in the area during the morning hours. Haro said that he might have taken Higuera with him when he turned in his crew lists and that maybe he had a conversation with John Kawano in January at that time.

Higuera was a strong witness with a good memory who held up very well under cross-examination. John Kawano had only several months earlier told Felix Hernandez, a known union supporter, that no union was going to exist at Kawano, Inc. The statements made in Higuera's presence are perfectly consistent with his remarks to Hernandez.

Other testimony by John Kawano tends to corroborate Higuera. First, of course, Kawano was not a credible witness on hiring issues. Second, Kawano testified that, in 1976 and 1977, he did not take steps to protect himself against immigration raids. He stated that he did not feel it was necessary to do so. Although not stated explicitly by Kawano, the "steps" that were originally taken were to maintain the raitero system and hire legal employees as "insurance." Quite obviously, Respondent decided to do without insurance after 1975.

Harry Kawano's testimony was generally unconvincing. On direct examination he said that he enforced a company policy of excluding non-employees from the fields because of dust problems. He stated that this policy applied to people on foot. When I asked him if people on foot raised dust, he said that they were excluded because they carried disease. (While various management witnesses gave different reasons for the existence of the exclusion policy, Harry Kawano was the only witness to mention disease.) Mr. Kawano also said that, although he had worked for the company since its inception, he had never discussed the union with his brother John.

Aurelio Higuera testified to another incident involving

Harry Kawano. According to Higuera, he approached Harry Kawano at the Agua Caliente Dog Race Track in July, 1977, and asked for a job. Harry replied that he wasn't giving any work to people from Tijuana. Harry Kawano testified that Higuera did ask him for a job at Agua Caliente and that he replied that there was no work available'. Then Higuera said he would have to look for a job in Los Angeles because, not being a union member, he could not find work around San Diego. I find Higuera's version to be the more credible of the two, both because Harry Kawano's testimony was generally untrustworthy, and because Respondent's Exhibit 12 demonstrates that Higuera asked for work during the heaviest hiring period of the year.

G. Efforts of the Alleged Discriminatees to Get Work in 1976 and 1977.

Virtually all of the employees named in Paragraph 5 of the Third Amended Complaint worked for Respondent in 1975. Paragraph 5 contains 117 allegations of refusals to rehire, some involving one complainant and many involving groups of a half dozen or more. All of the allegations in brackets in the Third Amended Complaint have been dismissed. In its post-hearing brief, Respondent has moved to strike some additional allegations for failure of proof. Given my disposition of the issues in this case, I find it unnecessary to rule on this motion.

The remaining allegations encompass a wide range of factual situations, but they fall rather neatly into four categories: (1) Applications to raiteros; (2) applications to foremen; (3)

applications to John Kawano; and (4) visits to the San Luis Rey office to find John Kawano and to inquire about work.

In the context of the efforts of the former employees to be rehired, it will become evident that the General Counsel's case can be proven only as a case of discrimination against an entire class, not as 117 separate refusals to rehire. Therefore, I will only cite specific applications for rehiring as examples of various patterns. To enumerate and make specific findings on each of the 117 allegations would add great length, but not substance, to this decision.

(1) Applications to Raiteros.

The testimony of legals from the Tijuana area, confirmed by foremen Haro and Castellon, establishes that most legals were hired by foremen giving orders to raiteros to fill up their vans or to bring a set number of workers. Having received such an order, a raitero would generally give preference to his friends and former co-workers. It is undisputed that the foremen would routinely hire whatever workers a raitero brought to the ranch. The foremen in most cases were concerned with a given quantity of workers, not their individual identities. Some legals, however, worked year-round and had done so for many years. Although Respondent had no policy of giving weight to seniority in hiring, it is clear that there was a practice among foremen of rehiring certain workers year after year. This rehiring was accomplished by recalling raiteros who, in turn, would notify their riders of the availability of work.

When the hiring season began in 1976, the only remaining

raitero was Oscar Sanabia. In previous years, there had been ten or more. As the only representative of the Kawano hiring system, Sanabia was continually asked about the availability of work. According to Sanabia, he would routinely tell questioners that there was very little work and that he had not been told to bring more workers. He asked his foreman, Leopoldo Dagnino, several times if there was work and if he could bring more riders. Dagnino said he had enough help. Sanabia testified that he managed to fill up his van in 1976 by taking on employees already working at the ranch who had moved from the Oceanside area to Tijuana. At no time during the year did Leopoldo Dagnino ask him to bring workers in addition to those hired by John Kawano.

The Respondent also called Angel Tostado, one of Sanabia's riders. According to Tostado, Sanabia routinely told applicants for work to go to the ranch to check. Sanabia, in his testimony, made no such statements.

A substantial number of former workers testified that they inquired of Sanabia about work in 1976. Juan Garcia testified that Sanabia told him that, as a result of a new order, only John Kawano could give work. In 1977, Sanafaia said that Respondent didn't want people from Tijuana. Ramon Bravo testified that Sanabia told him that he had orders not to take people from Tijuana. Bravo said that he inquired about work almost every Monday during 1976. Miguel Rodriguez testified that he was told by Sanabia that there was no work, but that he would contact Rodriguez when work became available through Cruz Valencia, one of Sanabia's riders. Francisco Garcia testified that he was told by Sanabia

that the boss didn't want people from Tijuana. Gregorio Garcia asked Sanabia to drive him to the ranch. Sanabia said that he didn't want to because Mr. Kawano would run them off the ranch. Ildefonso Villa, who repeatedly referred to Sanabia as a foreman because he directed Villa in irrigation ,work, testified, that he asked Sanabia about work five times in May and June, 1976. Sanabia told him that the boss already had people and didn't want any more. Counsel for Respondent did not question Sanabia about his talks with Villa, although he was asked about virtually every other worker who testified to asking Sanabia about work. Ignacio Hernandez, who had been a raitero in 1974 and 1975, was told by Sanabia in April, 1976, that Mr. Kawano did not want people from Tijuana.

Most of the workers who testified to asking Sanabia about work had been employees of Respondent for several years, and many worked year-round. I find that Sanabia made the statements attributed to him. Sanabia was familiar with all these workers and it was customary for them to inquire of him about the availability of work. It seems likely that, in a year when nobody was being hired in San Ysidro, Sanabia would give an explanation for the end of a decade-old system of hiring.

(2) Applications to Foremen.

The record contains relatively few allegations of applications to foremen.

Subparagraph (s) of Paragraph 6 of the Third Amended Complaint alleges that eleven former employees of Respondent were refused work by Leopoldo Dagnino on June 24, 1976. Javier Acosta and Luis

Chavez Gutierrez testified that they and the other men had been laid off from work at a lemon ranch that day. According to Acosta, Dagnino told them that only John Kawano could hire them. Acosta testified that Harry Kawano then arrived and said that only John Kawano would know about work. Kawano then ordered the men from the ranch. Felipe de la Vega corroborated Acosta's testimony. Chavez essentially corroborated Acosta's testimony as to what Dagnino said, but did not mention any conversation with Harry Kawano. Asked on cross-examination if he had spoken to any other foremen that day, Chavez said "no." Dagnino testified that the men did not ask for work at all, but had only come to bring him lemons. He said that Harry Kawano arrived after the men had left. Kawano denied seeing the men at all. Julian R. Gonzalez indicated that the men came to the ranch in two separate vehicles.

The men came to the field after being laid off in the lemons, at a time when they generally would be seeking work at Kawano. It seems highly unlikely that they would have come just to give lemons to Dagnino. Javier Acosta, in particular, impressed me as a person who would go out of his way to establish that he had been denied work. It is inconceivable that he would have passed up this opportunity to ask about employment. He had already gone to the office to inquire several times. Nor would Acosta pass up the opportunity to confront Harry Kawano. In its post-hearing brief, Respondent stresses that no other witnesses corroborated Acosta's account of a conversation with Kawano. However, Felipe de la Vega clearly remembered the conversation. Luis Chavez Gutierrez did not place Harry Kawano at the scene: nor was he

asked specifically about Kawano's presence. No other witnesses testified in detail about this incident, because I sustained Respondent's objection that further testimony would be cumulative. I find the facts concerning this incident to be those testified to by Javier Acosta and Felipe de la Vega.

Subparagraph (p) concerns an alleged application to Leopoldo Dagnino at Bonsall in June, 1976. Only Refugio Vasquez testified about this alleged incident. Dagnino denied that he was ever at Bonsall in June, 1976. I find that no application was made to Dagnino at Bonsall.

Two significant incidents involved Maria Mendez, who had been employed by Respondent from 1969 through 1975, and Juan Rodriguez, the foreman at the Bonsall ranch. Mendez and Elisa Flores testified that they asked Rodriguez for work at Bonsall on July 19, 1976. Rodriguez said that no work was available. Rodriguez could not recall this incident, but stated that he did not need specific authorization to hire legals and that he never said work was not available if, in fact, it was. Respondent hired 64 employees during July, 1976. Seventeen were hired during the payroll period ending July 19.

In February, 1977, Mendez persuaded Jose Adame, a crew pusher and raitero, to take her to Bonsall in his van so that she could ask for work. According to Mendez, she had been told that six women were to be hired at Bonsall. When she arrived at the ranch, Juan Rodriguez asked Adame why he had brought her. Rodriguez said that he was only supposed to bring the people John Kawano had indicated that he wanted. John Kawano would be mad if he saw

Maria Mendez there. Juan Rodriguez told Mendez to wait for John Kawano to arrive. Kawano later came to the ranch and told Mendez that he only had work for those who were there. But he said that he would call her and a friend who had accompanied her when work became available.

Juan Rodriguez denied that he said that John Kawano would be mad if he knew that Adame had brought Mendez, but his testimony is actually consistent with hers. On direct examination, Rodriguez was asked if he had said to Adame that Kawano would be mad. Rodriguez said:

> I didn't - tell him because of that. I told him, "Look, I don't want you to bring people without your being ordered to because when Johnny comes and sees her here, then he can say some thing to me, that I send for people and that I don't hire them." I told Jose Adame, "don't bring people."

It was not explained by Respondent why John Kawano would "say something" because an applicant for work had been given transportation to speak directly with a foreman, which, according to Respondent, is the only proper way to ask for work. Rodriguez was not a credible witness. Although he was foreman at Bonsall at the time of the election, he testified that he was unaware of the outcome. Respondent does not dispute Mendez[1] testimony concerning her conversation with John Kawano. Kawano told her that he would call her and her friend when work became available, but neither was called.

No applications for work were made to Felipe Castellon by legals in 1976, the first year of farming at Rancho Santa Fe. Castellon testified that he made no efforts to inform legals of

the existence of the operation at Rancho Santa Fe. In April, 1977, when Castellon was at San Luis Rey, he was asked for work by Javier Acosta, Domingo Santos, and others. Castellon said that he had no authority and that perhaps one of the Kawanos or Leopoldo Dagnino could give them work. Castellon was not foreman at San Luis Rey, but he was about to return to Rancho Santa Fe, a fact which he did not mention to the applicants. On their way to look for Dagnino, the men were told to leave the ranch by two relatives of John Kawano.

In May, 1976, Juan N. Rodriguez, an employee of Respondent since 1969, went to the San Luis Rey ranch in search of Felipe Castellon or Leopoldo Dagnino, in order to apply for work. He walked into the ranch, accompanied by two sons, and was confronted by Harry Kawano. Kawano asked what Rodriguez was doing at the ranch and Rodriguez explained. Kawano said that Castellon and Dagnino were not at the ranch. Nor was John Kawano. Harry Kawano told Rodriguez that he was on private property and that he should leave. Harry Kawano could not remember this incident. I credit Rodriguez' testimony.

(3) Applications to John Kawano.

John Kawano testified that, before 1976, he rarely hired field workers. In 1976 and 1977, Mr. Kawano hired a number of workers and declined to hire others.

Those Mr. Kawano hired included Oscar Sanabia and eight or nine riders. Mr. Kawano denied that he told Sanabia who he could take in his van. Sanabia only informed Mr. Kawano that they would have to be union members. Ildefonso Villa testified that

Sanabia told him that Kawano had only given him permission to take certain workers. Neither party presented testimony concerning the union activities of Sanabia's riders.

Mr. Kawano also hired Aurelio Higuera to work at Rancho Santa Fe, despite the fact that the foreman, Felipe Castellon, had no need for workers at the time. Higuera's good friend, Benito Arellano, who was employed as a tractor driver for Respondent, interceded with Kawano on Higuera's behalf. According to Kawano and Arellano, nothing was said about Higuera's union affiliation, but Higuera testified that he was hired only after Arellano assured Kawano that Higuera would not cause him any trouble with union activities.

In February, 1977, Delfino Laras went to the Bonsall ranch to seek employment. He was told by employees that John Kawano would arrive at about 9:00 a.m.. When Laras saw Kawano approach in his car, he signalled with his hat. Kawano drove by, but returned about 30 minutes later. The following exchange occurred:

> He (Kawano) said, "Who are you?" I said, "A worker who used to work for you." He said, "Who did you work with?" I said, "I worked with Joaquin." He said, "I don't need people." He said. "Why did you come?" He said, "When I need people, I tell the foremen to bring them. Why did you come here? I don't want to see you here. Out of here." He says, "I don't want to see anybody here on the ranch. Let's go."

Mr. Laras was not cross-examined and the Respondent offered no testimony whatever concerning this incident.

Ramon Bravo testified to going to the office in June, 1977, to look for work. He said that he was driven by Refugio Vasquez,

Jose Aleman, and Antonio Zamarripa, who were working at the time. These three men were not rehired until July 18. John Kawano was in the office. Bravo asked for work. Kawano said that there was no work at the moment, but asked for Bravo's name and address and said that he would be called when there 'was work. He has not been called. On cross-examination, Bravo stated that he had given Kawano the address of Leopoldo Dagnino. Bravo explained that he had no address at the time, but that Dagnino visited him at his home every other week. Dagnino testified that he had never been to Bravo's home. While Bravo clearly was in error as to the month of his visit, Respondent has not seriously disputed the accuracy of his testimony concerning his conversation with John Kawano. Kawano was not questioned about this incident.

At the suggestion of his attorney, John Kawano rehired Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa, all strong union supporters, on July 18, 1977. He assigned the three men to the Bonsall ranch. The foreman, Juan Rodriguez, assigned them to work in a five-acre cherry tomato field. For the next few weeks the three men worked by themselves preparing ground formerly used for strawberries for the tomatoes. On August 2, 1977. Javier Acosta and Felix Hernandez were reinstated, in compliance with the Board's order in Kawano, Inc., supra. They were put to work with the other three men. Except for brief periods when Juan Rodriguez sent a few other workers to help them string the cherry tomatoes, the five men have worked alone, isolated from the other employees at Bonsall.

When asked why he had hired the first three men, John Kawano

replied that he guessed work was available. He said he assigned them to work at Bonsall because work was available there. Kawano testified that work in cherry tomatoes had generally been reserved for illegals because it was harder. None of the men had previously worked in cherry tomatoes. Kawano testified that he didn't realize that the Board order required him to offer Javier Acosta work driving a spraying truck, and stated that such work was not available at Bonsall.

There was considerable testimony concerning working conditions of the five men aside from their isolation and a pesticide spraying incident in which Felix Hernandez suffered a rash on his hand. I find that none of this evidence will support a finding of anti-union animus on the part of Respondent.

(4) Applications at Respondent's Office.

It is undisputed that Respondent never hired field workers through its San Luis Key office. 1976 was the first year in which people came to the office for the purpose of obtaining employment in the fields. The office was used as an employment office for packing shed workers. Applicants for these jobs would sign a list maintained in the office.

Witnesses who went to the office gave several reasons for doing so. First, some said that they had been told by foremen that only John Kawano could hire them and that he could be found at the office. Second, some testified that they were run out of the fields by members of the Kawano family or by foremen and that they had no other place to make their desire for employment known. There is some evidence that, at some point, the UFW was suggest-

ing that former employees make visits to the office and leave their names and addresses, apparently in an effort to build a record for this case.

There is little substantial dispute as to what transpired during these visits to the office. A spokesperson would inquire of a secretary, usually Carole Stillwell, or the office manager, Ron Mizushima, if work was available. The office staff would indicate that it had no knowledge of field worker hiring, and that they would have to speak to John Kawano. The worker or workers would be told that Kawano was not at the office and that he might or might not come that day. Sometimes the workers would ask to leave their names. Often they ended up signing the packing shed waiting list. The workers almost invariably wore union buttons to the office and elsewhere on company property. On many occasions the workers would wait for a time, sometimes for several hours, across the street from the office, in the hope of seeing John Kawano. He never arrived.

John Kawano testified that he had been informed by Ron Mizushima sometime in 1976 that people were applying for field work at the office. Kawano said that he gave no instructions to Mizushima on how to handle this new situation. Kawano had no regular office hours, and might only go by the office two or three times a week. Kawano assumed that the office staff knew that field workers were hired by foremen and that they would refer applicants to the fields.

Ron Mizushima and Carole Stillwell testified that people had come to the office seeking field work perhaps a half dozen times

each in 1976 and 1977. They did not refer people to the fields because that was not part of their job. Carole Stillwell, who speaks very little Spanish, would try to explain that the waiting list was exclusively for the packing shed, but . . people wished to sign it anyway. The office, Mr. Kawano's car, and the vehicles of the foremen were equipped with two-way radios, but the office staff never tried to contact any of them when the applicants came to the office. Although Ms. Stillwell would leave a message in Mr. Kawano's box when people called for him at the office, she never left a message for him when the field workers asked for him. Ms. Stillwell thinks that she may have informed Mr. Kawano on one occasion that field workers were coming to the office looking for work. No foreman was ever informed.

DISCUSSION. ANALYSIS, AND CONCLUSIONS

The gravamen of the General Counsel's case is that Respondent,, in violation of Section 1153(c) of the Act, discriminatorily refused to rehire an entire class of employees in 1976 and 1977, namely legal aliens from the Tijuana area, because of their dominant role in the UFW organizational campaign and election victory. In support of this theory, the General Counsel has relied heavily on statistical evidence demonstrating a sharp deviation from former practice in the hiring of legals, and on direct evidence of Respondent's anti-union animus and discriminatory motive, including Respondent's undoubted knowledge that the union enjoyed overwhelming support among the legals. There

is relatively little evidence tending to prove that Respondent discriminated against individuals apart from their class membership. Many of the alleged discriminatees did not apply for re-hiring to those with authority to hire.

A. Elements of a Refusal-to-Rehire Violation.

The Respondent correctly argues that, in most cases alleging a discriminatory refusal to rehire, the General Counsel has the burden of proving, as to each discriminatee, that (1) a proper application was made, (2) the applicant is qualified for the job, (3) work is available at the time of application, (4) the employer must fill the job position, and (5) the refusal to rehire must be motivated by the applicant's union affiliation. Clearly, the applicants in this case are all qualified to perform field work at Respondent's ranches. But it is equally clear that, in most cases, the General Counsel has failed to prove the first, third, and fourth elements as to each individual applicant, as opposed to the class, and that if the standards for an individual discrimination case are applied, the General Counsel's case must, in large measure, fall.

The NLRB has, however, for many years distinguished between refusals to hire aimed at particular union activists, and refusals intended to deny work to a whole class of employees. In the latter situation, the NLRB has held that "an employee need not follow the letter of an employer's hiring procedure where the circumstances make it clear that a rebuff would result." Sterling Aluminum Co. v. NLRB, 391 F.2d 713 (8th Cir., 1968). See also

NLRB v. Valley Die Cast Corp., 303 F.2d 64 (6th dr., 1962); and Piasecki Aircraft Corp. v. NLRB. 280 F.2d 575 (3rd Cir., 1960).

Nor is it necessary in such cases to apply when jobs are available:

> Where, as here, it is apparent from the discriminatory hiring policy that further application for employment would be futile, job applicants were not required to go through the useless procedure of reapplying for employment at a later time when jobs were actually available in order to establish that they were victims of the discriminatory hiring policy. NLRB v. Anchor Rome Mills, 228 F.2d 775, 780 (5th Cir., 1956). Cf. NLRB v. Lummus Co., 210 F.2d 377 (5th Cir., 1954).

In a recent case brought under Title VII of the Civil Rights Act of 1964, alleging employment discrimination against blacks and Mexican-Americans in promotion to better jobs within a bus company, the United States Supreme Court, citing a number of NLRB cases as precedent, determined that a victim of employment discrimination need not have made application for a job to establish a claim for relief. The Court found that:

> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as he who goes through the motions of submitting an application. International Brotherhood of Teamsters v. United States, ___ U. S. ___, 97 S.Ct. 1843, 1869-70 (1977).

To hold otherwise, the Court stated, would reward those employers whose discriminatory policies were so effective that they deterred most applications. Such a result is even more strongly dictated

where, as here, no procedure exists for filing a written application.

To establish a violation of Section 1153(c) of the Act where a discriminatory hiring policy aimed at a certain class is alleged, then, the General Counsel must establish that the affected class was disproportionately affected by the policy, that the policy was motivated by an anti-union purpose, and that job positions were being filled during the period of the discriminatory activity. For victims of the discriminatory policy to be eligible for relief, they must have applied for a job or demonstrate that if they did not apply, they would have done so but for the discriminatory policy. (Respondent does not contend that any of the named complainants was unqualified to perform field work.) The burden is on the General Counsel to prove that members of the affected class would have been rehired but for Respondent's discriminatory policy. S. Kuramura, 3 ALRB No. 49 (1977), citing NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir., 1967). The Board has not adopted the First Circuit Court of Appeal's "dominant motive" test, urged by Respondent as the proper standard for determining a Section 1153(c) violation.

B. The General Counsel's Prima Facie Case.

(1) Statistical Evidence.

The General-Counsel has established, through the admission into evidence of summaries of Respondent's business records, that only two field workers out of Leopoldo Dagnino's 70-person crew at Vandergrift West on the day of the representation election in

1975 worked for Respondent in 1976. One of those who worked was Jose Adame, a crew pusher, who was not a union supporter. It is undisputed that virtually all members of this crew wore union buttons and that many of the most active union supporters were in this crew. It is also clear beyond any doubt that Respondent was aware of these facts at the time.

Respondent argues that these statistics, standing alone, prove nothing other than high turnover in a particular crew. Yet, the Respondent has not chosen to introduce any evidence to establish that any other crew experienced comparable turnover from one year to the next. On the other hand, 21 of the named complainants, many of them members of the crew, had worked for Respondent for four years or more.

The General Counsel has also introduced summaries of Respondent's business records which establish that only 27 employees who were compensated for rides in 1975 were employed in 1976. It is clear from the record that virtually all those who were compensated for rides came from the San Ysidro-Tijuana vicinity. No other employees commuted a great enough distance to require such a subsidy for transportation costs. In an effort to minimize the impact of these statistics, Respondent has introduced summaries of its records indicating that the turnover rate among illegal employees between 1975 and 1976 was almost as large as that among legals. Approximately 14.5% of the 1975 illegal work force returned in 1976, as opposed to 8.75% of the legal work force.

Clearly, the turnover among both groups was very high. But comparing turnover between the two groups carries little weight.

First, one would expect, by the very nature of the illegals' precarious existence, that turnover would be much higher among these employees than among legals. For an illegal to return the following year, he must, of necessity, re-enter the country illegally. He must be willing to live in a make-do shelter and to run the very real risk of deportation. More than 800 illegals were apprehended at Respondent's fields by the Border Patrol in 1975. That turnover has generally been higher among illegals than among legals is evident from an examination of General Counsel Exhibit 17 and Respondent's Exhibit 12. Peak employment among illegals for any payroll period in 1975 was 495,•on August 8. Yet, during the third quarter of 1975, 880 illegals, or nearly twice that number, worked for Respondent. Peak employment among legals in 1975 was 354, on July 25, yet only 450 legals worked for Respondent during the third quarter of the year. If anything, Respondent's calculations on turnover would point to a substantial change in hiring policy.

A more useful measure of turnover would have required comparing the attrition rate of legals between 1974 and 1975 with the rate for legals between 1975 and 1976. Respondent did not seek to introduce any such evidence. The failure of Respondent to introduce more satisfactory evidence leads me to view the evidence that it did submit with distrust, Evid. Code Section 412, especially since a majority of the alleged discriminatees had worked for three consecutive years or more.

In addition to the evidence on the rehiring of individuals, the General Counsel has introduced evidence establishing that

legal aliens, as a class, were virtually eliminated from Respondent's work force between 1975 and 1976. Throughout 1976, employment of legals declined. (GC Ex. 17 and R Ex. 13.) Most of the 72 legals who worked during their peak employment period of April 2, 1976, were holdovers from 1975, because only 26 legals were hired in the last eleven months of the year. During the same period, 436 illegals were hired. And during the peak hiring months of June and July, when legals from Tijuana were usually taken on in great numbers, 152 illegals were hired as against only ten legals, three of whom were hired as floor help in the packing shed.

Statistical evidence demonstrating disproportionately harsh treatment of union supporters in hiring decisions has been considered strong evidence of discrimination in cases decided under the NLRB, where, as here, the employer had knowledge of which employees were union supporters. See Clothing Workers v. NLRB, 302 F.2d 186 (D.C. Cir., 1962); NLRB v. Sandy Hill Iron and Brass Works, 165 F.2d 660 (2nd Cir., 1947); and Sunnyside Nurseries, 3 ALRB No. 42 (1977). Nor is it necessary for the General Counsel to establish that Respondent had knowledge of each complainant's union affiliation where the discrimination was aimed at a class of union supporters. AS-H-NE Farms, 3 ALRB No. 53 (1977), and Sunnyside Nurseries,.. supra.

(2) Direct Evidence of Anti-Union Animus and Discriminatory Motive.

There is ample evidence establishing Respondent's anti-union animus.

The Board adopted the findings of the ALO in the previous case, establishing anti-union animus on the part of John Kawano in discharging Felix Hernandez. Kawano's statements at the time of the discharge demonstrate a general animus toward the union and not merely against Hernandez. The Board also found that Respondent displayed animus in reassigning Javier Acosta to a less desirable job, and in Felipe Castellon's threats to discharge illegals who voted for the union.

The Board specifically declined to adopt or reject the ALO's finding that the August, 1975, wage increase and grant of insurance benefits were motivated by anti-union animus, because it was not necessary to resolve the issue. Like the ALO in the previous case, I find that the August benefit offer and raise do establish anti-union animus. Respondent argues that wages were increased to remain competitive with South County growers, because they competed in the same labor market. (John Kawano insisted throughout the hearing that he did not know what that labor market was.) Traditionally, Respondent had paid a somewhat higher hourly rate than the South County growers, yet, at first, Respondent raised wages to a level only equal to that of the South County grower who testified, from a level equal to that grower. After workers complained, Respondent offered an additional 1 cent per hour, but withdrew the ride subsidy, which was virtually the equivalent of 15£ per hour. Finally, the raise was given and the ride subsidy maintained. Despite the timing of the raise, at the beginning of the union campaign, there is some doubt that the Respondent was motivated by the union activity. But, when the

insurance benefit is considered, the balance tips strongly in favor of finding anti-union motivation. Respondent and neighboring growers were first approached by insurance salesman Chuck Lombardi in March, 1975. Several growers purchased the plan before April 1. This fact was communicated to John and Raymond Kawano. Yet, Respondent did not choose to purchase the insurance until August, four months later, after union activity had begun. Under these circumstances, the defense of remaining competitive appears pretextual. Respondent has not met its burden of proving that benefits conferred so soon before the election were not motivated by anti-union animus. NLRB v. Panhandle Bradford, Inc., 320 F.2d 275 (1st Cir., 1975).

The General Counsel adduced evidence concerning a number of other 1975 incidents between foremen and workers for the purpose of proving anti-union animus. Respondent has represented that many of these incidents were fully litigated in the prior hearing, although they were not the subject of specific findings. Because such evidence may not by itself constitute a violation of the Act under the statute of limitations contained in Section 1160.2 of the Act, and because most of the incidents are of a relatively trivial nature, no purpose would be served in making specific findings with respect to each one.

The strongest direct evidence of Respondent's anti-union motivation in not rehiring legals is John Kawano's statements to Oscar Sanabia, Harry Kawano, and Joaquin Haro, made in the presence of Aurelio Higuera, that he didn't want the people from Tijuana because they were Chavistas. Harry Kawano, Juan Rodri-

guez, and Leopoldo Dagnino made similar statements.

Oscar Sanabia made the same statements to a number of applicants in 1976 and 1977. Respondent argues that such statements cannot be attributed to it. Sanabia's statements to applicants will be considered in the next section.

Several 1977 incidents demonstrate that Respondent's anti-union animus is continuing. When Delfino Laras asked John Kawano for work, Kawano's first question was with whom Laras had worked. When Laras mentioned Joaquin Haro, who had hired many of the union supporters, Kawano said there was no work. Kawano's statements that when there was work the foremen would bring them and that .'Laras should not be at the ranch indicate that Kawano knew he was speaking to a legal and that legals were not customarily contacted about employment at the ranches. Then Kawano brusquely told Laras to depart.

A number of Respondent's witnesses testified about their policy of excluding non-employees from the fields. It is clear that this policy was aimed primarily at neighborhood youngsters who rode their motorcycles along the dirt roads. (See testimony of Ron Mizushima and John Kawano.) Harry Kawano's reasons for the policy, carrying of disease and spreading dust by people on foot, are particularly unpersuasive. Joaquin Haro testified that he told non-employees to stay out of the fields because it didn't look right for them to be there. According to Felipe Castellon, the policy was aimed at avoiding breakage of plants, particularly by drunks. It is clear that there had been no policy of excluding applicants for work from Respondent's property, as opposed to the fields, before 1976. Laras was standing on the road.

Other non-employees were told by Harry Kawano and other Kawano family members to leave the ranch because it was private property. This was not a policy designed to encourage people to apply for work to foremen, assertedly the proper method of application, when the foremen were invariably in the fields.

After Refugio Vasquez, Jose Aleman Juarez, and Antonio Zamarripa were rehired, and Javier Acosta and Felix Eernandez reinstated, they were placed in a self-contained, isolated crew at Bonsall. All were strong union activists and Respondent was fully aware of this fact. The first three men were rehired after several incidents in which they tried to organize illegals at Rancho Santa Fe. Respondent's only reason for isolating the five workers is that' no other work was available. Yet, it is clear that other workers could have been given the work assigned to the five. Whether or not work in cherry tomatoes is in fact harder than work in round tomatoes, it is conceded by John Kawano that cherry tomato work was considered work for illegals. None of the five had worked in cherry tomatoes before. In Plains Cooperative Oil Mill, 154 NLRB 1003, 60 LRRM 1083 (1965), the NLRB considered the absence of similar assignments in the past and the respondent's hostility toward a union activist in finding that his isolation from other workers violated the NLRA. I find that Respondent isolated these five men from other workers to discourage union membership, in violation of Section 1153(a) and (c) of the Act. Although not charged as violations in the complaint, this matter was fully litigated by both parties, and both parties have briefed the issue.

There was also substantial evidence concerning attempts by a UFW negotiator, Alex Beauchamp, and several union members to talk to illegal workers at Rancho Santa Fe, pursuant to an access agreement negotiated by the UFW and Respondent. Basically, the evidence establishes that Felipe Castellbn was reluctant to let the union people enter, but did not stop them. Despite requests to leave the area, Castellon stayed where he was, although it was after working hours. While the union members were talking to the employees, Castellon reacted angrily to what he considered to be slurs against him, and engaged in arguments with the visitors. I am not able to find, as the General Counsel urges, that Castellon was engaging in surveillance in violation of Section 1153(a) of the Act, because access was taken pursuant to a negotiated agreement, rather than the Board's access regulations. The agreement is not part of the record and no violation of it has been alleged. I do find, however, that Castellon's actions clearly indicate a continuing strong anti-union animus on his part.

(3) Efforts of the Former Employees to Gain Employment in 1976 and 1977.

Respondent contends that it did not change its hiring practices in any way between 1975 and 1976. Rather, for some unexplained reason, legal employees changed their customary method of applying for work. Somewhat inconsistently, Respondent argues that it had good business reasons for not hiring legals after 1975. These justifications will be examined in detail in the next section.

John Kawano maintained unconvincingly throughout the hear-

ing that he knew little or nothing about how the raitero hiring system operated. His own prior testimony and the testimony of Joaquin Haro and Felipe Castellon, as well as common sense, discredit Kawano's disavowals of knowledge of the raitero system. And the most significant change in Respondent's hiring system in 1976 was the dismantling of the customary raitero hiring system, through which most legals were hired.

The first thing most of the legals did in 1976 was to inquire of the only remaining raitero, Oscar Sanabia, about the availability of work. This had been a custom in San Ysidro for years. Sanabia told everybody that there was little work and that he had not been told to bring additional workers. He told some applicants that he was under orders not to hire people from Tijuana because of their union activities.

Respondent argues that Sanafaia was a worker like any other and that hearsay statements attributed to him cannot be imputed to Respondent. Nor, according to Respondent, did Sanabia have hiring authority. Therefore, inquiries to him did not constitute applications for employment.

There can be little doubt that Respondent utilized raiteros as its hiring agents in San Ysidro. When foremen wished to hire legals, they directed raiteros to bring riders. Hiring by foremen was routine. The actual application for work was made to the raitero. Pursuant to Evidence Code Section 1222, statements of an agent are admissible against his principal when he is authorized to make statements concerning the subject matter of the

statement. Raiteros were necessarily authorized to speak about the availability of work. When there was only one raitero, and he said there was no work, applicants were justified in believing the. statement. The absence of other drivers was powerful mute evidence that Respondent did not intend to hire people from San Ysidro.

Certainly, Oscar Sanabia was not explicitly authorized by Respondent to tell applicants that people from Tijuana were no longer wanted because of their union activity. Nor was he authorized to speak about the subject matter of Respondent's motivation. But Section 1165.4 of the Act, like the NLRA, provides that:

> . . . in determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Under NLRB precedent, strict rules of agency do not apply. The test is "whether employees would have just cause to believe that he (the agent) was acting for and on behalf of the company." Oil. Chemical and Atomic Workers v. NLRB, 547 F.2d 575, 585 (B.C. Cir., 1976), cert., den., __ U.S. __ (1977). In a case involving employees who had close ties with management and who customarily delivered work instructions to other employees, the Sixth Circuit Court of Appeals held that:

> If there is a connection between management and the employee's actions, either by way of instigation, direction, approval, or at the very least acquiescence, then the acts of the employee will be imputed to the Company. NLRB v. Dayton Motels, Inc., 474 F.2d 328 (1973).

Sanabia has been employed by Respondent for eleven years. Although a nominal UFW member, he never wore a button at work and engaged in no activities on its behalf. As a crew pusher, he directed the work of employees. He was the only raitero to be retained. Under the circumstances, reasonable applicants for work would be justified in believing his explanation for the absence of the other drivers and the lack of work for them. In 1976, John Kawano personally hired Sanabia and must have known that he would be asked about work in San Ysidro. While I find that Sanabia's statements can be imputed to Respondent, I do not find it necessary to rely upon them for the truth of Respondent's discriminatory motive. Rather, they are admissible to explain why applicants were not more vigorous in attempting to find work in 1976 and 1977.

Many former employees, most notably long-term year-round workers, gave up after talking to Sanabia. The word spread fast in Tijuana. These employees were accustomed to being recalled each spring through raiteros and foremen. Where workers are generally rehired through a recall procedure, they need not make a formal application for re-employment to establish a violation of Section 1153(c). Capital City Candy Co., 71 NLRB 447, 19 LRRM 1006 (1946); Winter Garden Citrus Products Cooperative, 116 NLRB 738, 38 LRRM 1354 (1956). And in terms of the affected class, legals who sought work in San Ysidro, there was a clear custom of recalling class members, as a group, if not individually, through raiteros. This practice was discontinued in 1976.

A large number of former employees began asking for work

at Respondent's office in San Luis Rey. Some were told by foremen or Oscar Sanabia that John Kawano might hire them or that only John Kawano could hire them. Some were told to look for him at the office. Others evidently reasoned on their own that their boss probably spent some time at the company office. He would, after all, spend just a few minutes a day at each ranch. In fact, Kawano testified that he went to the office infrequently. In any event, it is clear that the former employees intended to apply to John Kawano for work, not to office employees.

Respondent urges that, for some unexplained reason, former workers began showing up at the office in 197G, in an attempt to change its hiring practices, rather than following accepted hiring procedures. The inference is that, had the employees only applied properly, they would have been hired. It is simply inconceivable that, after having waged a successful union campaign, a whole group of employees would perversely refuse to be rehired except at the office where they had never been hired before. If the employees were dissatisfied with Respondent's hiring procedures, and there is nothing in the record to indicate that they were, surely they would have continued working and attempted to change hiring procedures through collective bargaining. Many of the former employees were unsophisticated, but there is nothing to suggest that they were unusually stupid. I have no doubt that they were sincerely attempting to be rehired by Respondent.

John Kawano was aware that legals were applying at the office, yet he never instructed the office staff to direct them to foremen. Clearly, if the legals were making a procedural

mistake, and had Respondent wanted to employ them, the mistake could have been corrected. Nor did the office staff attempt to contact Kawano when legals came looking for him. They did not leave him messages. While the office visits cannot be considered applications they did serve notice on Respondent that its former legal work force had not disappeared from the face of the earth.

There were relatively few applications to foremen in 1976. The foremen most likely to hire legals, on the basis of past performance, were Felipe Castellon and Leopoldo Dagnino. Neither hired any legals in 1976. In 1976, Castellon was foreman at Rancho Santa Fe, which was farmed by Respondent for the first time that year. The ranch was located 25 miles from San Luis Rey. Castellon testified that no legals applied to him in 1976. He also testified that he made no effort to inform legals that there was such a ranch. Obviously, illegals were informed. It is not possible that a large number of workers would have accidentally discovered the ranch and asked for work. Clearly, there was a decision not to hire legals at Rancho Santa Fe.

There was one application to Leopoldo Dagnino, at the peak of the hiring season. He said there was no work and Harry Kawano ordered the applicants off the ranch. Meanwhile, Oscar Sanabia, who worked for Dagnino, had been telling applicants in San Ysidro that there was no work.

The General Counsel has made out a strong prima facie case that Respondent discriminatorily refused to rehire legals from the Tijuana area after the 1975 season. The evidence belies Respondent's contentions that no change was made in hiring in

1976 for the purpose of discriminating against legals. Rather, the record indicates that when John Kawano testified that he took no steps after 1975 to secure an insurance work force of legals, he really meant that he took steps not to hire legals.

C. Respondent's Business Justifications for the Change in the Composition of its Work Force.

Once the General Counsel has made out a prima facie case under Section 1153(c) of the Act, the burden shifts to the Respondent to "establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967). Although Respondent denies that it intended to reduce the proportion of its legal work force after 1975, it has asserted several reasons to explain the change.

Aside from arguing that legals simply did not apply for work after 1975, an argument which I have already rejected, the Respondent contends that illegals were more available in 1976 than previously. Various witnesses called by the Respondent testified that more illegals were living at Respondent's ranches and seeking work in 1976 and 1977 than in previous years. Because Respondent slashed its total work force by two-thirds between 1975 and 1976, it is to be expected that more surplus illegals would be present. However, according to the largely anecdotal evidence of Respondent's witnesses there were not substantially more illegals waiting to be employed in the last two years than previously. And, legals had been hired in all

previous years, even though illegals were always available.

Respondent also contends, as part of the same general argument, that because there were fewer immigration raids in 1976 and 1977, there was no need to hire legals. Reasoning by hindsight, this is an excellent argument. But, at the time that hiring decisions were made for the 1976 season, Respondent had no idea that there would be so few raids. Indeed, a prudent businessman would have had to anticipate, after a year with abnormally large numbers of raids and apprehensions, that the future would be more like the past than not. John Kawano could not have been unaware that the hiring of illegal aliens was becoming an increasingly well-publicized and emotional issue and that raids were unlikely to decrease. Furthermore, Kawano decided to eliminate the ride subsidy in February, 1976, long before he had any empirical basis for judging the frequency of immigration raids for the coming year. Elimination of the ride subsidy, in effect a cut in wages for legals from Tijuana, could only have served to discourage legals from working. Yet, none of the foremen who testified was aware of the elimination of the ride subsidy. Apparently, it was unnecessary to speak about it, since legals were not going to be working in 1976.

According to Respondent, legals were only hired as a backup to the more prized illegals. The record flatly contradicts this assertion. Legals were hired every year, regardless of immigration raids. Some were hired in the spring and the bulk were hired in June and July, before most raids occurred. It is clear that it was necessary to hire the legals, who were in

short supply, before the raids came. After all, it is inherent in the very nature of insurance that it be purchased before a loss occurs. As to the testimony that illegals were better workers than legals, true or not, the fact remains that legals were hired every year and were paid more than illegals.

Respondent also argues that Joaquin Haro's departure was responsible for the failure of legals to' be rehired. It is true that Haro hired many legals, but so did Felipe Castellon and Leopoldo Dagnino. Many of the legals hired by Haro were almost immediately transferred by John Kawano to other ranches. In its brief, Respondent refuses to grapple with the existence of the raitero system. Seemingly, Respondent wants to disown any connection to its main source of legal workers.

Finally, there is an implicit argument that legals were not hired because they were paid more than illegals. But Raymond Kawano, in testifying about cost-cutting measures to be undertaken in 1976, never mentioned cutting back on the employment of legals. Again, it must be emphasized that Respondent still claims that it gave no orders not to hire legals in 1976. To assume that the foremen, acting independently, would all decide at once to forego legal workers strains credulity past the breaking point.

It is undisputed that Respondent had a much smaller work force in 1976 than 1975, as a result of a cut in acreage, and change in spraying and irrigation methods. These changes are, of course, irrelevant to the issue of whether those who wanted work were treated discriminatorily. Respondent continued to

hire hundreds of employees in 1976 and 1977, filling far more positions than the number of applicants in this case.

Even if legitimate business factors did enter into the decision not to hire legals, it is clear that they would have been hired but for Respondent's discriminatory motive. Wages for illegals increased from $2.00 to $2.50 per hour in 1976. The cost of legals had gone from $2.25 to $2.90, an increase of only 15£ per hour more. Respondent was evidently concerned enough about keeping a legal work force in August, 1975, to grant them a raise.

I conclude that Respondent has engaged in a policy of not rehiring former employees from the San Ysidro and Tijuana area in 1976 and 1977, because of their union activities, in order to discourage such activities, in violation of Section 1153(a) and (c) of the Act.

Specifically, I find that the persons named in Appendix A desired and were available to work for Respondent in 1976 and/or 1977, and would have been rehired but for Respondent's unlawful discrimination. I further find that the General Counsel has not met his burden of proving that Manuel Diaz, Maria Jajo, Maria Luisa Martinez, Jose Lugo, and Salvador Aguilera Visena were victims of Respondent's discriminatory plan. None of these persons testified. There is no evidence that they ever worked for Respondent. Their names shall be dismissed from the Third Amended Complaint.

D. The Section 1153(d) Allegations.

Section 1153(d) of the Act makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part." Eight of the discriminatees in this case, Javier Acosta, Juan Garcia, Mario Guerrero, Josefa Hernandez, Jose Aleman Juarez, Emma Saldana, Maria Luisa Diaz, and Refugio Vasquez, testified against the Respondent in the prior unfair labor practice hearing. Respondent introduced no evidence establishing that any witness for the General Counsel was rehired. I find that Respondent's failure to rehire legal workers from Tijuana was motivated, in part, by the filing of charges and giving of testimony against it in the prior case. I conclude that in refusing to rehire the eight persons named above, Respondent has Violated Section 1153(d) of the Act.

THE REMEDY.

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153(a), (c), and (d) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully refused to rehire 53 employees because of their support for the UFW, violations which strike at the heart of the Act, I also recommend that the Respondent cease and desist from infringing in any manner upon the rights guaranteed to employees by

Section 1152 of the Act. The egregious nature of Respondent's violations requires a broad cease and desist order.

I shall also recommend that Respondent be ordered to offer reinstatement to their former or equivalent jobs to each of the persons named in Appendix A, with the exception of four employees, Javier Acosta, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa, who have previously been rehired. As to these employees and Felix Hernandez, I will recommend that Respondent be ordered to discontinue their isolation from other employees. If there are not sufficient jobs available to hire each of the named persons immediately, their names shall be placed on a preferential hiring list and they shall be hired as soon as jobs become available. The order of names on the preferential list shall be determined alphabetically, at random, by seniority, by average length of work per year, or pursuant to any other non-discriminatory method.

I further recommend that the Respondent make whole each of the persons listed in Appendix A by payment to them of a sum of money equal to the wages they each would have earned but for Respondent's unlawful refusal to rehire them, less their respective net earnings, together with interest thereon at the rate of seven percent per annum. Back pay shall be computed in accordance with the formula established by the Board in Sunnyside Nurseries, Inc., supra. As a result of the nature of Respondent's discriminatory pattern of refusing to rehire legal workers, many of the discriminatees did not or could not make applications in the customary manner. In Teamsters, supra, the Court held that non-

applicants who were discouraged from making applications because of a discriminatory hiring policy would be placed in the same position as applicants if they were qualified for the job and would have applied but for the discriminatory policy. I find that each of the non-applicants in this .case has satisfied these requirements. (Several witnesses testified that they were unavailable to work in 1976 because of illness or absence from the area. They will not, of course, be entitled to back pay for such periods.) In order best to "recreate the conditions and relationships that would have been had there been no unlawful discrimination," Teamsters, supra, 97 S.Ct. at 1873, I will establish a rebuttable presumption that each of the discriminatees would have worked the same number of hours in 1976 and 1977 as he or she worked in 1975. Either party may present evidence tending to prove that a discriminatee would have worked a greater or lesser amount in 1976 and/or 1977. Because each discriminatee worked in 1975, and because the date of "applications" in 1976 and 1977 is virtually impossible to determine, this formula will establish a fair and workable method of making employees whole.

I will order that the attached Notice to Workers be posted and read to employees in accordance with Board practice. I Till also order that Respondent mail a copy of the attached Notice, in English and Spanish, to all present and former employees employed by Respondent since March 1, 1975. John Kawano testified at the hearing that Respondent does not maintain addresses of employees. In the event that addresses are unavailable, I will require that the Notice be broadcast, in Spanish, over a South

San Diego County radio station. It is essential that former employees of Respondent in the Tijuana area be notified of the outcome of this case.

ORDER

Respondent Kawano, Incorporated, its officers, agents, representatives, successors and assigns shall:

(1) Cease and desist from:

(a) Discouraging membership of employees in the LTW or any other labor organization by unlawfully refusing to rehire, discharging, or laying off employees, by isolating UFW members from other employees, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c);

(b) Discriminating against employees in regard to their hire, tenure, or conditions of employment as a result of their filing charges with, or giving testimony before, the Board; and

(c) In any other manner interefering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code Section 1132.

(2) Take the following affirmative action which is necessary to effectuate the policies of the act:

(a) Immediately offer the persons named in Appendix A, with the exception of Javier Acosta, Jose Aleman Juarez, Refugio

Vasquez, and Antonio Zamarripa, provided they are employed by Respondent when this Order becomes effective, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make each of the persons named in Appendix A whole for any losses he or she may have suffered as a result of his or her failure to be rehired, all in the manner set forth in the section of this decision entitled "The Remedy."

(b) Immediately assign Javier Acosta, Felix Hernandez, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa work that they have customarily performed in the past, without segregating or isolating them from other workers;

(c) Preserve and make available to the Board or its agents, , upon request, for examination and copying, all payroll records, Social Security payment records, time cards, personnel records and reports, and any other records necessary to determine the amount of back pay due to the employees named in Appendix A of this decision;

(d) Post copies of the attached Notice to Workers at times and places to be determined by the Regional Director of the San Diego Regional Office. The notices shall remain posted for six months. Copies of the notice shall be furnished by the Regional Director in English and Spanish. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed;

(e) Mail copies of the attached Notice to Workers in English and Spanish, within 20 days from receipt of this Order, to all

present employees, to all employees employed from March 1, 1975, through the present date, and to all employees hired by Respondent during the period provided herein for the posting of the notice. The notices are to be mailed to each employee's last known address, or more current address if made known to Respondent. In the event that addresses of former employees are not maintained by Respondent, the notice shall be broadcast on a radio station in the southern San Diego County area, once a week for four weeks, during Respondent's peak hiring season in 1978, at times to be determined by the Regional Director;

(f) Have the attached Notice to Workers read in English and Spanish on- company time to the assembled employees of Respondent at each of Respondent's ranches by a company representative or by a Board agent, at times and places specified by the Regional Director., and accord said Board agent the opportunity, outside the presence of supervisors and management, to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act; and

(g) Notify the officer in charge of the Board's San Diego Regional Office within 20 days from receipt of a copy of this decision and Order of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

DATED: January __, 1978.

AGRICULTURAL LABOR RELATIONS BOARD

By: _____
JOEL GOMBERG
Administrative Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

(1) To organize themselves;

(2) To form, join, or help unions;

(3) To bargain as a group and choose whom they want to speak for them;

(4) To act together with other workers to try to get a contract or to help or protect one another;

(5) To decide not to do any of these things.

Because this is true, we promise that:

TO WILL NOT do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT refuse to hire or rehire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL OFFER Antonio Aleman, Jose Arroyo, Catalina Barrios, Ramon Bravo, Martin Conriquez, Maria Luisa Diaz, Feliberta Escobedo, Pablo David Fink, Elisa Flores, Francisco Garcia, Gregorio Garcia, Juan Garcia,. Luisa Garcia, Teresa Gomez, Hilario Veloz Gonzalez, Julian R. Gonzalez, Mario Guerrero, Luis Chavez Gutierres Herminio Vela Hernandez, Ignacio Hernandez, Josefa Hernandez, Aurelio Higuera, Silveria Juarez, Delfino Laras, Felipe Luna, Maria Mendez, Antonio Mendoza, Carmen Ortiz Mercado, Jose Luis Montellano, Marin Mora, Antonia M. de Ortiz, Ezequiel Pedroza, Maria Elena Perez, Jesus Ramirez, Juan Rios, Vicenta Rios, Juan N. Rodriguez, Miguel Rodriguez, Feliciano Rubalcaba, Francisco Rubio, Gerardo Ruiz, Josefa Ruiz, Emma Saldana, Jose Sandoval, Domingo Santos, Jose Luis Vasquez, Felipe de la Vega, Ildefonso Villa, and Monica Zamarripa their old jobs back if they want them, and will pay each of them any money they lost because we refused to rehire them.

WE WILL REASSIGN Javier Acosta, Felix Hernandez, Jose Aleman Juarez, Refugio Vasquez, and Antonio Zamarripa to work which does not isolate them from other workers.

DATED: _____.

KAWANO, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

APPENDIX A

JAVIER ACOSTA
ANTONIO ALEMAN
JOSE ARROYO
CATALINA BARRIOS
RAMON BRAVO
MARTIN CONRIQUEZ
MARIA LUISA DIAZ
FELIBERTA ESCOBEDO
PABLO DAVID FINK
ELISA FLORES
FRANCISCO GARCIA
GREGORIO GARCIA
JUAN GARCIA
LUISAGARCIA
TERESA GOMEZ
HILARIO VELOZ GONZALEZ
JULIAN R. GONZALEZ
MARIO GUERRERO
LUIS CHAVEZ GUTIERREZ
HERMINIO VELA HERNANDEZ
IGNACIO HERNANDEZ
JOSEFA HERNANDEZ
AURELIO HIGUERA
JOSE ALEMAN JUAREZ
SILVERIA JUAREZ
DELFINO LARAS
FELIPE LUNA
MARIA MENDEZ
ANTONIO MENDOZA
CARMEN ORTIZ MERCADO
JOSE LUIS MONTELLANO
MARTIN MORA
ANTONIA M. de ORTIZ
EZEQUIEL PEDROZA
MARIA ELENA PEREZ
JESUS RAMIREZ
JUAN RIOS
VICENTA RIOS
JUAN N. RODRIGUEZ
MIGUEL RODRIGUEZ
FELICIANO RUBALCABA
FRANCISCO RUBIO
GERARDO RUIZ
JOSEFA RUIZ
EMMA SALDANA
JOSE SANDOVAL
DOMINGO SANTOS
JOSE LUIS VASQUEZ
REFUGIO VASQUEZ
FELIPE de la VEGA
ILDEFONSO VILLA
ANTONIO ZAMARRIPA
MONICA ZAMARRIPA

APPENDIX B

The following exhibits ARE in evidence:

1. General Counsel Exhibits 1-A through 1-Q, 2, 3-A through 3-F, 4, 5, 7, 11 through 23.

2. Respondent's Exhibits 1 through 5, 7 through 19.

The following exhibits ARE NOT in evidence:

1. General Counsel Exhibits 6, 8, 9, 10. Exhibit 10 was withdrawn.

2. Respondent's Exhibit 6.