STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

JOE MAGGIO, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-86-E 4 ALRB No. 37

DECISION AND ORDER

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

On January 4, 1978, Administrative Law Officer (ALO) Robert LeProhn issued the attached. Decision in this proceeding. Neither party filed exceptions to the ALO's recommendation that the complaint be dismissed in its entirety; however, Respondent filed an exception, with a supporting brief, to the ALO's failure to discuss and grant its motion for attorney fees and costs. Thereafter, the General Counsel filed its opposition and a supporting brief.

Respondent requests that the Board either remand the case to the ALO for a decision on attorney's fees and costs or review the record and make that determination itself. Since the record provides sufficient evidence upon which to base a decision, we find that remanding this case to the ALO on this issue would cause needless delay.

This Board has the power to award attorney's fees and costs to a charging party and/or the General Counsel where a respondent's litigation posture may be characterized as frivolous. Western Conference of Teamsters, Locals 1173 and 946 (V. B. Zaninovich & Sons, Inc.), 3 ALRB No. 57 (1977); Teamsters Local 865, 3 ALRB No. 60 (1977). We have left open the question of whether this Board also has the power to make such an award to a respondent following a hearing in which the unfair labor practice complaint was dismissed. See S. L. Douglass, 3 ALRB No. 59 (1977).

After a review of the record, we find it unnecessary to resolve that issue in this case. The ALO recommended dismissal of the complaint for lack of sufficient evidence showing violation of Labor Code Section 1153(a) and (c) based on his weighing *of* credited testimony and evidence. Assuming for the sake of argument that this Board has the power to award litigation cost to a respondent exonerated of an unfair labor practice complaint[1/], we do not find the complaint so clearly lacking in merit that its prosecution could be characterized as frivolous.

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[1/] In A.B.C. Florida State Theatres, Inc., 221 NLRB 782, 90 LRRM 1687 (1975"), cited by Respondent, an award of litigation costs was rejected with no discussion of whether the NLRB is empowered to grant such awards. We are aware of no other case in which the NLRB has ruled that it has this power nor of any case in which the NLRB made such an award.

Accordingly, pursuant to Labor Code Section 1160.3, the complaint is hereby dismissed in its entirety and the Respondent's request for remedies denied.

Dated: June 15, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Joe Maggio, Inc. (UFW) — 4 ALRB No. 37
Case No. 76-C2-86-E

ALO DECISION

The ALO recommended dismissal in its entirety of a complaint charging the Respondent with a violation of Labor Code Section 1153(a) and (c).

BOARD DECISION

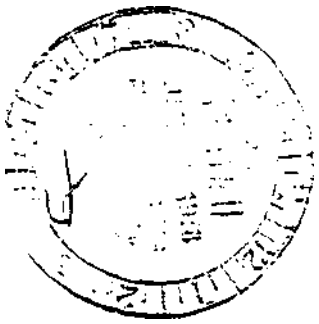
The Board dismissed the complaint in its entirety and the Respondent excepted to the ALO's failure to grant and discuss its motion for attorney's fees and costs. The Board held that assuming it had the power to award litigation costs to a respondent exonerated of an unfair labor practice complaint, this complaint was not so clearly lacking in merit that its prosecution could be characterized as frivolous.

This summary is furnished for information only and is not an official statement of the Board.

STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD



JOE MAGGIO, INC.	)	
	)	
Respondent	)	
	)	
and	)	Case No. 76-CE-86-E
	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO	)	
	)	
Charging Party	)	
	)	

Appearances:

Lorenzo Martin Campbell of Oxnard, California", for the General Counsel

Byrd, Sturdevant, Nassif & Pinney, Thomas A. Nassif appearing, of El Centro, California, for the Respondent

Anita Morgan of Calexico, California, for the Charging Party

DECISION

STATEMENT OF THE CASE

Robert LeProhn, Administrative Law Officer: This case was heard before me in El Centro, California, on September 14, 15, 19 and 20, 1977. Complaint issued on July 14, 1977, alleging that Respondent, Joe Maggio, Inc., violated Sections 1153(a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by discriminatorily laying off six employees on or about March 4, 1976 The complaint resulted from a charge filed by the United Farm Workers" of America, AFL-CIO, herein called the UFW, on March 15, 1976. The charge and the complaint were duly served upon

Respondent. A motion to intervene mace by the UFW, as Charging Party, was granted.

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

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

FINDINGS OF FACT

I. Jurisdiction

Joe Maggio, Inc., is engaged in agriculture in Imperial County, California, and is an agricultural employer within the meaning of Section 1140. 4(c) of the Act.

The UFW is an organization in which agricultural employees participate. It represents those employees for purposes of collective bargaining, and it deals with agricultural employers concerning grievances, wages, hours of employment and conditions of work for agricultural employees. The parties stipulated, and I find, that the UFW is a labor organization within the meaning of Section 1140. 4 (f) of the Act.

II. Prior Representation Proceedings

A representation election was held on December 23, 1975, for a unit of all agricultural employees of Respondent in the State of California. On January 16, 1976, an Amended Tally of Ballots issued. The result of the election using a November voter eligibility list was UFW 60, Teamsters 47 and No Union 1. The tally using December as the relevant period was UFW 207, Teamsters 53, No Union 4.1/ The UFW was certified by the Board as bargaining agent for the Respondent's agricultural employees on December 21, 1976.

III. The Alleged Unfair Labor Practice

The complaint alleges that Respondent violated Sections 1153(a) and (c) of the Act by discriminatorily laying off Gilberto Cano Nevarez, 2/ Arnoldo Alvarez, Cirilo Solis, Benjamin Silva Martinez, Juan Huertero and Miguel Gomez Cruz on or about March 4,1977.

1/ The dual tally resulted from a dispute regarding the appropriate eligibility period.

2/The complaint erroneously named Mr. Cano Nevarez as Mr. Cano Solis. The complaint was amended during the course of the hearing to reflect the correct name.

The Respondent denied the layoffs were discriminatory and offered proof that the layoffs were motivated by economic considerations and were made in a manner consistent with the terms of its collective bargaining agreement with the Western Conference of Teamsters.

The Employer's Operations.

During the 1975-1976 crop year Respondent was engaged in growing and harvesting lettuce, carrots, alfalfa, wheat, milo, broccoli, sweet corn and cauliflower. 3/ As part of this operation, Respondent employed 24 persons classified as irrigators. On February 28, 1976, Respondent's foreman, Enrique Nevarez, announced that eight irrigators were to be laid off effective March 4.4/ It is this layoff which gave rise to the present litigation.

While the irrigation crew, is primarily engaged in irrigating, irrigators perform such other duties as cleaning out irrigation ditches, laying and picking up sprinklers used for irrigation, spraying and burning the grass in the fields and marking fields for flat irrigation.

The crops grown by Respondent are planted, irrigated and harvested at various times during the crop year. Carrots are irrigated from the middle of August until early May of the following year. The carrot harvest begins in December; from that point on the acreage to be irrigated steadily declines. During the 1975-1976 crop year the carrot market was so bad Respondent did not harvest 700 to 900 acres of the 1,460 acres it had under cultivation. The acreage was disced up or turned to pasturage and required no further irrigation. 5/

Alfalfa is irrigated on a year-round basis and was irrigated during the March to August layoff period. Respondent had 741 fewer acres in alfalfa during the 1975-1976 crop year than during the two preceding crop years. 5/

3/A crop year runs from August 1 to August 1. The crop year in which the unfair labor practices are alleged to have occurred is the 1975-1976 year.

4/The parties stipulated that Enrique Nevarez was at all times material a supervisor within the meaning of Section 1140.4(j) of the Act. The stipulation is supported by the evidence, and I find Nevarez to be a supervisor within the meaning of the Act.

5/This finding is based upon a summary of Respondent's crop acreages admitted in evidence.

During 1975-1976 Respondent raised 1,250 fewer acres of wheat than during the 1974-1975 crop year. The reduction in wheat acreage was a result of the depressed market caused by the over-supply of wheat in the world market. Respondent's wheat acreage reduction was characteristic of action taken by other Imperial County wheat growers. Since the main labor involved in raising wheat is that required to irrigate, irrigators were the group of workers mainly affected by the acreage reduction of the wheat crop. 6/

Milo is planted from March through May and is irrigated until July or August. Respondent increased its milo acreage from 75 acres in 1974-1975 to 48 acres in 1975-1976. Irrigating department employees are the employees mainly involved in the raising of milo.

1975-1976 was the first year in which Respondent planted sweet corn. It was irrigated from middle March until the first week of June. Neither broccoli nor lettuce are irrigated from March | until September.

Respondent had approximately 1,300 fewer acres under cultivation during the 1975-1976 crop year than during the 1974-1975 12 crop year. The total hours worked by irrigators during the period of the 1976 layoff, March 8 until July 29, was 4,579 less than; during the same period in 1975. In 1976 Respondent sustained a less; of $1,174,733.00 from its farming operations; the only year since 1970 in which a loss was incurred. 7/

The Layoff.

Sometime prior to February 28, 1976, Carl Maggio directed his department heads to cut back on all costs and to neglect doing unimportant work. Pursuant to this direction, George Sturgis, Respondent's head grower, told the irrigator foremen to cut back on 10 personnel and to skip doing any work which could be postponed. He told the foremen to keep only the minimum work force necessary to take care of the irrigating and keep things running. Sturgis did not tell his foremen whom or how many to lay off. 8/

On February 28 Nevarez announced that eight irrigators were to be laid off for lack of work effective March 4. They were told they would be off until early August. Six of the eight laid

6/These findings are based upon the uncontroverted and credited testimony of George Sturgis.

7/These findings rest upon summaries admitted into evidence without objection from the General Counsel.

8/These findings are based upon the uncontradicted testi-inony of head grower Sturgis.

off are alleged discriminatees. The remaining two [Mario N. Diaz and Frederico Martinez] were students. When Tirado, Alvarez and Huertero questioned Nevarez about the layoff, he suggested they com plain to their union. He did not specify the union to which he was referring. The statement was made in a normal tone of voice, and there is no evidence it was made in a manner to convey disparagement of the UFW. 9/

Nevarez testified his reference was to the Teamsters sine that was the union with whom his employer was doing business. Huertero testified he understood the reference to be to the UFW. I credit the testimony of each witness regarding what he understood the "union" reference to be. 10/

When the layoff was announced, Tirado and Ruiz, two em- ployees scheduled for layoff, complained to irrigator foreman Diaz because they did not agree with their placement on the seniority list.ll/ Diaz contacted Teamster Business Agent Herrera to ascer tain Eow to resolve the problem. Herrera told him to find out the original dates of hire with the Company for all the irrigators and to use those dates in determining who to lay off. Diaz did this. He then revised the seniority list by placing Tirado and Ruiz on the seniority list in accord with their length of Company service.12/ The revision of the seniority list led to complaints from other irrigators who had less Company service but more classification service as irrigators. One employee, Gomez, not initially scheduled for layoff, was laid off as a result of revising the list.

When the layoff occurred, Respondent was party to a con tract with the Teamsters union. 13/ Article VII of the agreement provides in pertinent part:

9/This finding rests upon credited testimony of Juan Huertero.

10/ Tirado did not testify, but since he thereafter went Co the Teamsters, it may be inferred that he understood the reference to be to that union.

11/ The complaint does not allege that Diaz is a supervisor within the meaning of the Act, and no stipulation was offered to that effect. The testimony establishes that he does the same work and has the responsibilities as Nevarez. I find Diaz to be a supervisor.

12/ These findings are based upon credited testimony of Diaz.

13/In July, 1975, Respondent became covered by the 1975-1978 California Master Agreement between the Employer Negotiating Committee and the Western Conference of Teamster.

> In the event an employee works for the Company at least thirty (30) days within the preceding ninety (90) calendar days he shall acquire seniority on the thirtieth (30th) day of work with the Company retroactive to the original date of hire. Seniority shall prevail in layoffs , recall, and filling of job vacancies; provided however, the employee is able to do the work.
>
> * * * *
>
> Seniority ... is defined as Company seniority which means length of service with the Company. However, when a dispute arises, the senior employee within a geographical area of operation shall have preference.
>
> * * * *
>
> Seniority shall not be applied so as to displace (bump) any employee within an established crew, commodity or geographical area.

As spelled out in the contract, irrigators were laid off in inverse order of Company seniority. During the period of the layoff no new irrigators were hired, and no persons were hired to perform work customarily performed by irrigators. Consistent with the practice in previous years , the daily shifts of the remaining work force was, on occasion, reduced to six hours per day from eight hours per day. 14/

Mr. Gomez testified that he made a practice of going to the fields three or four times a week during the period he was laid off and on occasion saw people weeding com and carrots and that this was work customarily performed by irrigators. Gomez asserted these workers were not from the irrigation crew and that they had less service with Maggio than the laid off irrigators. No evidence was offered regarding how Gomez reached this conclusion, nor was " his testimony in this regard corroborated.

Enrique Diaz and Jesus Nevarez, each a high school student and the son of a foreman, returned to work the week of March 25 after having been laid off since the week of February 19. Each worked for the balance of the year. Neither appears on the seniority roster of irrigators. They worked in the pipe crew which is not part of the irrigators crew. The pipe crew does not appear

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14/These findings are based upon the uncontradicted testimony of Foreman Nevarez which I credit.

on the irrigators seniority list. 15/ There were two students on the irrigation crew who were laid off on March 8.16/

In 1975 three irrigators were off work from early June until the end of August. One irrigator was off from early July until early October; one was off from July 17 for the balance of the year and two were off during the month of July.

In 1974 two irrigators were off from early June until some time in September. An additional irrigator was off from early July until early September, and another was off during the month of July

During 1973 an irrigator was off from the middle of February until the end of March. In 1972 there was apparently a lay off which started about July 1 and continued until the middle of August.

Union Activity And Employer Knowledge.

During the period preceding the representation election, UFW organizers frequently came to the irrigators' pre-work gathering place to distribute handbills, secure authorization cards and to speak to the workers. Foreman Nevarez was customarily in the area on these occasions. Gilberto Cano signed an authorization card on one such morning, but he did not remember whether Nevarez was present.

Juan Castro Huertaro signed an authorization card at the pre-work gathering place on a morning when many irrigators and sprinkler workers were present as well as Foremen Nevarez and Diaz. Several other irrigators signed cards on the same occasion, including Miguel Gomez, Anastasio Gomez, Manuel Figueroa and Cano Nevarez Neither Anastasio Gomez or Figueroa were among those laid off. 17/

Cirilo Solis, Huertero, Arnoldo Alvarez Cueva and Miguel Gomez each wore a UFW button at work on one occasion. Cueva, together with a majority of the irrigators, wore his on the day of th- election. Foreman Nevarez was in the field the day Solis wore his button. He was also in the fields the day Huertero wore a button;- however, there is no testimony he approached or talked with the par ticular crew in which Huertero was working that day.

Gomez wore his UFW button on one day when he was working placing sprinklers. Nevarez saw the button and asked him for one with Chavez's picture on it. Gomez also served as a UFW election.

15/The General Counsel accepted the representation of Respendent's counsel that this recitation of the facts was accurate.

16/Nario N. Diaz and Frederico Martinez.

17/This testimony was elicited during the cross-examination of Huertero.

observer. 18/ Nevarez denied seeing anyone wear buttons; however, he admitted seeing the majority of the irrigators sign authorization cards. He also admitted seeing Gomez receive a button.

Many of the irrigators had UFW bumper stickers on their cars prior to the election. These were observed by management representatives .

Employer Anti-Union Animus.

Miguel Gomez testified that Nevarez on one occasion told the workers that Maggio was not going to plant vegetables any more, that he would plant alfalfa if the UFW won the election and that the Company was going to bring workers in from Arizona. No testimony was offered with respect to the date, time and place these statements were made and Gomez's testimony is uncorroborated. The Respondent's Arizona crew is customarily brought to Imperial Valley for the lettuce harvest. In light of this fact, the statement regarding the crew which Gomez attributes to Nevarez makes no sense, and I find it unlikely such a statement was made. Moreover, since alfalfa is a crop irrigated on a year-round basis, an increase in alfalfa acreage would not be likely to decrease the amount of. work available for irrigators. It is unlikely that such an utterance was made to irrigators, for it could, not reasonably be regarded as a loss of work threat to irrigators. I do not credit this portion of Gomez's testimony. "

Cano and Alvarez each testified that Nevarez told the I workers that "Carlos" said he would rather not plant than sign with ' Chavez. Such a statement has the ring of truth. I find that; Nevarez made such a statement.

Prior to 1975 every irrigator received a ham and a bottle of wine from Respondent at Christmas time. At Christmas, 1975, each received only a ham. Cano testified that Nevarez told him he received no wine because he was a Chavista. Since there was no disparate treatment of Cano, it does not seem reasonable that Nevarez would make such a statement. The likelihood this conversation never occurred is strengthened by the absence of any affirmative evidence of Employer knowledge that Cano signed an authorization card, the one overt piece of protected activity in which he engaged. I do not credit Cano's testimony on this point.

After receiving questions from irrigators regarding the manner in which they were being paid, Foreman Carillo told Nevarez and Diaz to gather all the irrigators together to discuss the

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18/These findings are based upon credited testimony of Gomez.

problem. The contract provided for a rate of 363.84 per 24-hour daily shift. Since this produced less money than if the irrigator were paid at his hourly rate of $2.95 for 24 hours, the irrigators wanted a change. Carillo also arranged for the Teamster business agents administering the contract to be present. At the meeting the business agents explained to the workers that the contract did not require they be paid at the hourly rate and that the workers had to obey the contract. They also told the workers that if the Employer raised their wages in the face of the pending election that the UFW might argue the Company was trying to bribe the workers 19/

When the meeting was over everyone chipped in for beer an carne asada. This is a frequent noon time practice. At some point during the course of the meeting Carillo told the workers that the Company was good and the Teamsters were good. Carillo also said the Teamsters won the election, they would solve all the workers' problems and that the workers would earn better wages. No mention was made of what would happen if the UFW won the election 20/

The Respondent's statements and conduct at this meeting were not alleged in the complaint as independent violations of the statute nor was any motion to amend to conform to proof or to amend to include this incident as a violation of §1153(a) or §1153(b) offered during the course of the hearing.

ANALYSIS AND CONCLUSIONS

In his brief, the General Counsel correctly points out that proving a violation of §1153(c) requires a showing that the subject layoffs were effected for the purpose of discouraging membership in the UFW. The finding of such a violation normally turns on whether the employer's action, i.e., the layoff in the present case, was motivated by an anti-union purpose. See N.L.R.B. v. Gres Dane Trailers (1967), 388 U.S. 26, 33, 65 LRRM 2465, 2468.

A prima facie case of unlawful motivation is made when there is substantial evidence of (1) employer knowledge of a discriminatee's union activity, N.L.R.B. v. Witkin Machine Works (Cir. 1, 1953), 204 F.2d 883, 32 LRRM 2201; N.L.R.B. v. Amplex Corp. (Cir 7, 1971), 442 F.2d 82, 77 LRRM 2072; (2) employer animus vis-à-vis the union, Maphis Chapman Corporation v. N.L.R.B. (Cir. 4, 1966), 368 F.2d 298, 63 LRRM" 2462; and (3) that the employer's act had the effect of discouraging union activity. Radio Officers Union v. N.L.R.B. (1954), 347 U.S. 13, 33 LRRM 2417.

19/These findings are based upon credited testimony of Carillo and Teamster representative Herrera.

20/These findings are based upon credited testimony of General Counsel witness Solis.

Except for Gomez, the record establishes no more than a suspicion of Employer knowledge of the Union "activity" of any discriminatee. Nevarez was aware the Union was engaging in an organizing campaign, that it was meeting with the irrigators daily, that irrigators were signing authorization cards and probably that UFW buttons were worn on election day. But, there is not substantial evidence that Nevarez or any other representative of Respondent was aware of the Union activity of any particular discriminatee. Knowledge of the crew's general reaction to the UFW organizing campaign does not suffice to establish the knowledge of a specific discriminatee's Union activity which is requisite to proving his layoff was discriminatory. See Howard Rose Company (1977), 3 ALRB No. 86.

Unless it can be established by substantial evidence that Respondent was aware of the Union activity of each discriminatee prior to his layoff on March 8, such activity could not have motivated his layoff. N.L.R.B. v. Klaus (9th Cir. 1975),523 F.2d 410,j 413. Circumstantial evidence is sufficient to establish such awareness, but there must be substantial evidence supporting the inference of awareness as opposed to evidence which merely creates a suspicion of such awareness. Torrinzton Company v. N.L.R.B. (4th Cir. 1974), 506 F.2d 1042, 1047.

The minimal and passive acceptance of the UFW by discriminatees is not the sort of conduct which marked any of them, Gomez aside, as persons acting on behalf of the UFW or as persons exercising an influence on fellow workers on behalf of the UFW. Their conduct was not the sort of "union activity" which tends to establish a prima facie case that the layoff herein violated §1153(c). Lu-Ette Farms (1977), 3 ALRB No. 38.

Turning to the element of Union animus, the General Counsel finds the record "replete" with testimony of statements by Foreman Nevarez evidencing animosity toward the UFW. He cites testimony which has not been credited. Assuming arsuendo the statements were made, it is apparent they would have been made prior to the representation election on December 23, 1975, not less than two months before the layoff. The record does not establish the nature and extent of the Employer's anti-UFW election campaign beyond the statements adduced. In view of the lapse of time between Nevarez's statements and the date of the layoff, the statements if accepted as having been made would not establish the anti-Union animus necessary to prove the layoffs violated §1153(c).21/ See Howard Rose Company

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21/The complaint does not allege the cited statements to be independent violations of Section 1153(a). While the absence of such allegations does not prevent finding a violation of the statute when the matter has been fully litigated, the absence of evidence establishing that the statements were made within the §1160.2 period makes their substantive consideration inappropriate.

(1977), 3 ALRB No. 86. Assuming arguendo chat the pre-election statements manifested a general animosity toward the UFW during the pre-election campaign, there is no evidence warranting even a suspicion of such animosity during the interval between the election and the layoff. Moreover, as noted by the court in Metal Processors' Union, Local No. 16, AFL-CIO v. N.L.R.B. (D.C. Cir. 1964), 337 F.2d 114, 117, general "animosity toward the Union is insufficient standing alone to provide the basis for inferring a wrongful discharge.

The General Counsel points to two other incidents as manifesting Union animus: modification of its Christmas bonus polic toward irrigators, and Respondent's participation with Teamster representatives in a meeting aimed at explaining to the irrigators the contract pay provision relating to a 24-hour shift.

Respondent explains the modification of its gift policy in terms of the added cost of being required under its contract to grant Christmas as a paid holiday. Discriminatee Cano testified Nevarez told him he was not receiving wine because he was a Chavista. I do not credit Cano on this point. First, there is no evidence from Cano himself that Nevarez was aware of any Union activity by Cano, and second, since Cano was not being treated differently from other irrigators, it is unlikely that Nevarez would have spoken the words attributed to him.

The meeting of Teamster representatives,Respondent's foremen and the irrigators was called by supervisor Carillo for the purpose of answering questions raised by workers regarding why they were not paid on an hourly basis when working a 24-hour shift. The General Counsel's witnesses who testified regarding this meeting did not attribute any anti-UFW remarks or threats of reprisals for UFW support to any Respondent representative present at the meeting At worst, there was a statement by Carillo to the effect that workers would be better off with the Teamsters. After the meeting there was a "carne asada," the cost of which was shared by all present.

There simply is no basis for concluding that Respondent's attitude toward the UFW at the time the layoffs occurred was one of animosity and hostility. The presence of such animosity and hostility is a significant factor in determining an employer's motive for effecting discharge or layoff. The National Labor Relations Board and the courts have recognized this significance in finding violations of National Labor Relations Act Section 8(a)(3), the federal act counterpart of Agricultural Labor Relations Act §1153(c). See N.L.R.B. v. Amprex Corporation (Cir. 7, 1971), 442 F.2d 82; Maphis Chapman Corporation v. N.L.R.B. (Cir. 4, 1966), 368 F.2c25 298; N.L.R.B. v. Dan River Mills, Inc. (Cir. 5, 1960), 274F.2d 381; N.L.R.B. v. Chicago Apparatus Co. (Cir. 7, 1941), 116 F.2d 26 753. The absence of an environment of UFW animosity is equally

significant as a determinant of motivation for Employer conduct particularly when the Union activity of the discriminatees is indistinguishable from that of their fellow workers, a fact which makes uncertain whether there was Employer awareness of discrimina-tees as UFW adherents as opposed to an Employer awareness of the general attitude of its irrigators toward the UTW. In view of the UFW's overwhelming victory at the polls, it was apparent to Respondent that all its irrigators preferred the UFW. In short, the record fails to establish facts upon which one can conclude the laid off irrigators were singled out for discriminatory treatment.

The above conclusion is applicable even to Miguel Gomez, the most visible UFW adherent among the discriminatees. It is uncontradicted that Gomez was initially not scheduled to be laid off and that two employees having longer Company service than Gomez who were scheduled for layoff protested the fact to management. The seniority roster was revised to reflect properly their seniority. The revision caused Gomez to be among those laid off. The accuracy of the revised seniority roster is uncontroverted as is the fact that the layoffs were consistent with the terms of the Respondent's collective bargaining contract. Such an adjustment does not suggest any discriminatory motivation.

Having concluded that the evidence does not support the; inference that Respondent knew of the Union activities of the particular discriminatees and having concluded there is an absence of an atmosphere of hostility and animosity toward the UFW or the individual discriminatees, there is no need to examine the Respondent' s economic motivation defense. The burden is upon the General Counsel to establish an illegal motive for the layoff rather than upon Respondent to establish its innocence. N.L.R.B. v. Klaus, supra, p. 414. However, it is appropriate to deal with certain arguments made by the General Counsel in his attempt to establish the pretextual nature of the layoff.

The General Counsel argues that because irrigators who were not laid off averaged more hours of work per week during the period of the layoff than during a comparable period in 1975, the layoff was unlawfully motivated. Koller Craft Plastic Products, Inc. (1955), 114 NLRB 990, 37 LRRM 1084; and Acme Waste Paper Company (1958), 121 NLRB 18, 42 LRRM 1270, are cited for the proposition that an increase in hours worked by those not laid off rebuts an economic justification defense raised by an employer. In both cited cases, unlike here, there was a pervading atmosphere of employer hostility toward the union manifested by independent violations of Section 8(a)(1) of the NLRA juxtaposed time-wise to the disputed layoffs. 22/ In Acme the economic defense was further

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22/ Section 8(a)(l) of the NLRA is the federal statute counterpart of Labor Code §1153(a) .

undermined by the fact the employer immediately replaced the laid off employees and began to work his then normal work force on an overtime basis. It is apparent none of the elements which led to *a* rejection of the economic defenses raised in Koller or Acme are present here. It is also apparent from a reading of those cases that the increase in work hours was a minor consideration in rejecting the economic defense put forth by the employer.

The General Counsel argues that students were worked on a full-time basis while year-round workers were laid off, thus evidencing a discriminatory layoff. The facts do not support this argument. It is uncontroverted that the Respondent-Teamster contract required that layoffs occur in reverse order of company seniority in the department in which a layoff takes place. It is uncontroverted there were 24 irrigators on the seniority roster as of March 8. Two of those irrigators were Mario N. Diaz and Frederico Martinez, both of whom were students and both of whom were laid off as of March 23/ Thus, there were no students on the seniority list who were not laid off. There were two students who were not classified as irrigators who worked during the layoff, J. Nevarez and E. Diaz, each being the son of a foreman. It may be that such utilization manifests a nepotismic discrimination which is beyond remedy under the ALRA, but in the context of the present case it does not contribute to establishing a discriminatory lay-off.

Regarding the Respondent's economic defense argument, it suffices to note that at the time of the layoff it was incurring net losses for the first time since 1969-1970. As a result of the bad carrot market and reduced acreage in other crops for which irrigators were the primary work force, Respondent needed fewer irrigators. An obvious reaction was reduction of the irrigator work force. This was done in a manner consistent with the contract. Even absent the restriction of a contract, layoff in accordance with seniority is generally regarded as an equitable and fair method of solution. 24/ While the irrigators who remained worked more than they did In 1975, had there been no layoff it appears they would have worked substantially less 25/

23/ It is not contended by the General Counsel that the layoff of either Diaz or Martinez was discriminatory.

24/ While not articulated, it appears that the General Counsel's theory of the case is that the discrimination lies in which was selected for layoff as opposed to the theory the layoff itself was discriminatory. As noted above, the Respondent was not charged with discriminatorily laying off Diaz and Martinez.

25/This observation is somewhat speculative, being based upon the assumption that the total hours worked during the March-July, 1976, period could have remained the same.

The most that can be said regarding the circumstances herein is that they create a flicker of suspicion of unlawful motivation on the part of Respondent. This flicker of suspicion is not sufficiently substantial to support a finding that Respondent has violated Labor Code §1153(c).

The layoffs are also alleged to violate Labor Code §1153 (a). Since they did not occur under circumstances which manifested to employees the idea that it was not an ordinary layoff, but rather was punishment for their Union activities, the layoffs were not violative of §1153(a). Lu-Ette Farms, Inc. (1977), 3 ALRB No. 38; Vacuum Plating Co. (1965), 155 NLRB 820; Cooper Thermometer Co.(1965) , 154 NLRB 502.

ORDER

Having found that the layoffs of Gilberto Cano Nevarez, Arnoldo Alvarez, Cirilo Solis, Juan Huertero and Miguel Gomez did not violate either Section 1153(a) or Section 1153(c) of the Act, the complaint is dismissed in its entirety.

Dated: January 4, 1978.

AGRICULTURAL LABOR RELATIONS BOARD

By 

Robert LeProhn
Administrative Law Officer