Oxnard, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

HIJI BROTHERS, INC.,	)	
Respondent,	)	Case No. 75-CE-ll-V
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	4 ALRB No. 77
Charging Party.	)	

DECISION AND ORDER

On July 30, 1977, Administrative Law Officer (ALO) Jeffrey S. Pop issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions, with a supporting brief, to the ALO's findings and recommendations as they related to Respondent's refusal to rehire five former employees. Respondent filed a cross-exception, with supporting brief, to the ALO's finding that an individual was a supervisor during the period in question.

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

The Board has considered the record[1/] and the ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO, as

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[1/] The General Counsel' s motion to correct the transcript is granted. The transcript is corrected at Volume II, page 123, line 22 to read, "You said it; I didn't."

modified herein,[2/] and to adopt his recommended Order of dismissal.

ORDER

Pursuant to Section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: October 20, 1978

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

[2/] We do not agree with the ALO's comment that the margin of the UFW's victory in the election was significant in establishing the existence or nonexistence of anti-union animus.

CASE SUMMARY

HIJI BROTHERS, INC. (UFW) 4 ALRB No. 77
Case No. 75-CE-ll-V

ALO DECISION

The ALO concluded that Respondent did not violate Labor Code Section 1153 (c) and (a) by laying off and refusing to rehire ten employees, noting that the layoff could not constitute a violation as it occurred prior to the effective date of the Act. The ALO found that Respondent did not discriminate as to five employees who were in fact recalled, or failed to seek rehire, following the layoff. The ALO also found that, although Respondent exhibited anti-union animus and knew of the concerted or union activities of the other five employees, Respondent refused to rehire them not because of their union or concerted activities but because a supervisor had concluded, following a meeting with other crew members, that they were responsible for creating dissension in the crew. Accordingly, the ALO recommended dismissal of the complaint in its entirety.

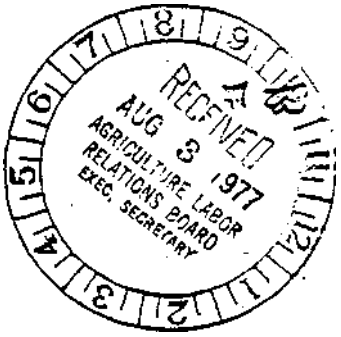
BOARD DECISION

The Board affirmed in general the rulings, findings, and conclusions of the ALO and adopted his recommended Order of dismissal, but rejected his suggestion that the margin of the UFW's victory in the election may be significant in determining the existence or nonexistence of anti-union animus.

BOARD ORDER

Complaint dismissed in its entirety.

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



STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

HIJI BROTHERS, INC. Respondent, and THE UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	CASE NUMBER: 75-CE-ll-V

Ellen Lake, Esquire for the General Counsel

George Preonas, Esquire
Seyfarth, Shaw, Fairweather & Geraldson
of Century City, California

and

Robert McMillan, Esquire
Marshall, Lowthorp, Richards & Hibbs
of Oxnard, California
for the Respondent

Gerardo Ramos, Aggie Rose and Fritz Conle
of Oxnard, California for the Charging Party

JEFFREY S. POP
Administrative Law Officer
Agricultural Labor Relations
Board

POP AND HAHN
9595 Wilshire Boulevard Suite
Beverly Hills, California
(213) 273-5462 and 272-277

STATE OF CALIFORNIA

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for the Respondent

Gerardo Ramos, Aggie Rose and Fritz Conle
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DECISION

STATEMENT OF CASE

JEFFREY S. POP, Administrative Law Officer: This case was heard before me in Oxnard, California, on February 16 and 17, March 14, 15, 16, 17, 28, 29, 30 and 31 and April 5 and 6, 1977.

The Complaint alleges violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act, (hereinafter called the Act) by Hiji Brothers, Inc. (hereinafter called Respondent). The Complaint is based on charges filed December 29, 1975 by United Farm Workers of America, AFL-CIO (hereinafter called the Charging Party). Copies of the charges were duly served upon Respondent.

During the first days of the hearing General Counsel moved to amend the Complaint to include the name of employee Alfredo Gervacio, another alleged discriminatee which had been mistakenly deleted from the Complaint. Gervacio was named in the original Charge filed by the Charging Party.[1]

The amendment at hearing was opposed by Respondent. All parties were given the opportunity of oral and written argument on this issue. Respondent has not established surprise or prejudice. In fact, Respondent's original Answer enunciated a specific defense pertaining to Gervacio as well as the nine other alleged discriminatees. Having duly considered Respondent's opposition to the Motion to Amend Complaint as well as General Counsel's Brief in support of the Motion to Amend the Complaint, the proposed Amendment is hereby allowed.[2]

1/ The original Complaint listed nine discriminatees: Alcaraz, Arenas, Gonzales, D. Hernandez, R. Hernandez, Lucio, Mendez, Canul and Somera.

2/ There is well established NLRB precedent which liberally allows amendment of a Complaint unless severe prejudice can be shown. See, e.g.; Starkville, Inc., 219 NLRB 595, 90 LRRM 1154 (1975); Jack La Lanne Management Corp., 218 NLRB 900; 89 LRPM 1836 (1975); REA Trucking Co., Inc., 1976 NLRB 520; 72 LRRM 1444 enf'd, 439 F. 2d 1065 (9th Cir.; 1971)

All parties were given full opportunity to participate in the hearing, after the close thereof General Counsel and Respondent each filed a Brief in support of their respective positions.

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

FINDINGS OF FACT

I. Jurisdiction

Hiji Brothers, Inc. is a California corporation which is owned and run by three brothers, Frank, Robert, and Tsugio Hiji. It is engaged in various farming operations in and around Oxnard, California. Accordingly, Respondent is an agricultural employer within the meaning of Section 1140(c) of the Act.

The Charging Party, United Farm Workers of America, AFL-CIO, represents and bargains on behalf of employees with respect to wages, hours and working conditions and is found to be a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The Complaint alleges that ten agricultural employees, namely: Alcaraz, Arenas, Gonzales, D. Hernandez, R. Hernandez, Lucio, Mendez, Canul, Somera and Gervacio were discriminated against by Respondent's failure and refusal to reinstate said employees to their former position of employment because of their Union activity.

Respondent vigorously denies the "moving" allegations of the Complaint. Specifically, Respondent states that its failure to rehire five employees: R. Hernandez, D. Hernandez, Arenas, Lucio and Alcaraz was not unlawfully motivated. Further, Respondent insists that Gervacio and Somera did not ask for work following the June, 1975 layoff. As to Aguilar, Gonzales and Ruiz, Respondent's position is that these employees were rehired on December 3, 1975, February 4, 1976 and January 14, 1976 respectively.

III. The Facts

A. Background--Respondent' s Farm Operations

Respondent employs several crews of workers who plant, cultivate and harvest various vegetables including celery, cucumbers, green beans, head lettuce, cabbage, bell peppers, Romaine lettuce, butter lettuce, red leaf lettuce and tomatoes. Respondent also operates packing facilities at its Richview location. Additionally, Respondent operates two greenhouse or nursery facilities located at the "ranch" which is in Oxnard near the intersection of Teal Club Road and Victoria Avenue.

In 1975 there were approximately 150 agricultural employees. On September 9, 1975 an election was conducted by the ALRB at Respondent's facility. Results from the balloting were as follows: votes cast for UFW--85; votes cast for WCT--17; votes cast for no labor organization--39; challenge ballots--19. See, Hiji Brothers, Inc., 3 ALRB No. 1 (1977).

The allegations of the Complaint herein concern Respondent's alleged discriminatory treatment of the "lettuce" and/or "cabbage" crew (hereinafter called the "cabbage crew"). The cabbage crew normally contains between 15 to 18 employees. Between November and June, Respondent's cabbage crew would plant, cultivate and harvest Romaine lettuce, cabbage, butter lettuce and red leaf lettuce on a piece rate basis. The amount of produce harvested would be determined daily, according to sales volume.

During the daily routine of the cabbage crew, "trios" (threes) of employees work together. Two employees would be responsible for cutting the crop while the third would pack. Ordinarily, employees switched trios as they wished depending on whom they desired to work with during the particular season.

In addition to the piece rate work, it was Respondent's long standing practice to offer hourly work after the cabbage crew finished the daily order. The hourly work included thinning and weeding cabbage and/or other crops, moving irrigation pipes and assisting with other general maintenance work in the fields as needed.

B. Pre-Act Events—General[3]

In late April, 1975 the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter called

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3/ Much of the evidence presented by General Counsel concerned activities by Respondent before August 29, 1975, the date the Act became effective. In fact, the primary theory propounded by the General Counsel involved the layoff of the cabbage crew in June, 1975 and the alleged failure of

"Teamsters") began organizing efforts at Respondent in addition to several other agricultural employers located in the Oxnard Plains. The Teamsters approached Respondent's manager in late March to set a meeting for negotiations. The record indicates that by April 3, 1975 the Teamsters began daily picketing of Respondent at the Richview shed.[4]

On approximately April 4, 1975 the Teamsters and Respondent met at Richview to discuss recognition. The Teamsters desired to represent Respondent's field workers as well as the workers they already represented at Richview packing. Respondent inquired whether the Union had the necessary support of the field employees. Teamster's business agent, Easley, responded that he wished to inspect a current list of Respondent's field employees. Respondent provided the Teamsters with the employee list. At that juncture the meeting caucused and never resumed. The Teamsters did not show any "authorization cards" or "authorization petitions" to Respondent.

The picketing at Richview continued during the majority of April. The Teamsters commenced organizational activity among several of Respondent's field crews, including both the celery and the cabbage crews.

Respondent to recall the employees. Nevertheless, most of the events that transpired in the pre-Act period in 1975 are factually undisputed except for minor and irrelevant details. The legal ramifications of this argument will be examined in the Legal Analysis and Conclusions of Law section, infra.

4/ Respondent's Richview packing shed employees have been represented in collective bargaining by the Teamsters for a period of approximately 10 years.

The evidence shows that in late April, 1975 the Teamster visited the cabbage crew on three separate occasions. During one of these visits Respondent admittedly informed a neighboring field owner that the Teamsters were "trespassing". F. Hiji called the Sheriff's Department; soon thereafter officers arrived and the Teamsters left. On a second occasion, Respondent instructed the employees to drive their cars into the field so that the Teamsters would be unable to "bother" them during work.

The above two incidents highlight Respondent's reaction to the Teamster organizational effort of its field workers. The record is devoid of threats, interrogations or reprisals by Respondent involving the cabbage crew during April and May, 1975 .

By late April, 1975, the economic pressure exerted by the Teamsters' picketing efforts at Respondent's Richview packing facility became more intense. Respondent then recognized the Teamsters as collective bargaining agent for all of its field workers.

Shortly thereafter, in May, 1975, Respondent held several meetings with its different field crews. Respondent (through an employer's association interpreter with both R. Hiji and Kanamori present) explained to the employees that it had signed a contract with the Teamsters and that the Teamsters represented the employees. The field employees (including the cabbage crew) were thanked for not participating in the Teamster strike activities. They were told that Respondent recognized the Teamsters to avoid possible violence and due to the economic consequences of the packing shed strike.

C. Pre-Act Events--Supervisory Status of Andrede[5]

For years prior to 1975, the cabbage crew worked directly under the supervision of its foreman who in turn reported to Arimura, Respondent's field operations supervisor, who in turn reported to Kanamori, Respondent's labor coordinator (superintendant). Prior to 1975, the cabbage crew foreman was Rillo.

Rillo's duties included hiring employees, assigning and checking on work, as well as directing the crew as necessary. Rillo would routinely ascertain whether the crew's packing of produce was uniform as to weight and size. It is undisputed that Rillo would determine which employees would be assigned the extra hourly work after the piece rate work was completed. Rillo would also determine which employees would be assigned the different types of hourly work available. During 1974 Rillo got paid an additional one-half cent (1/2) on a piece rate basis for his foreman duties. Rillo retired in December, 1974.

In the early portion of 1974, Refuerzo worked on the stitching machine and assisted Rillo with the time records. Refuerzo also was paid an additional one-half cent (1/2) on a piece rate basis for these duties. After Refuerzo retired in February, 1974, Andrede began stitching. At that time, Andrede received the premium compensation of the additional one-half cent (1/2) for operating the stitching machine.

5/ The only supervisory issue as alleged in Paragraph 4 of General Counsel's Amended Complaint and denied in Respondent's Answer, concerned whether Andrede was a supervisor as defined in Section 1140.4(j) of the Act.

Although a factual dispute exists on whether Andrede agreed to become a full time or a temporary foreman, it is undisputed that he filled Rillo's position from January to June 18, the day of the layoff.

The parties stipulated that between January and June Andrede received additional wages at the rate of one (1) cent per box. (Jt. Exhibit 3). Andrede's compensation included one-half cent (1/2) for stitching (as did his predecessor Refuerzo) and one-half cent (1/2) for keeping the records and acting as foreman (as did his predecessor, Rillo). These "extra" wages increased Andrede's pay approximately 45% over the weekly earnings of the other crew members. (Jt. Exhibit 2).[7]

There was voluminous testimony concerning Andrede's duties as "foreman" during the Spring. The discriminatees, namely R. Hernandez, D. Hernandez and Lucio, detailed Andrede's checking of piece rate work, his assignment of hourly work and his effective recommendation concerning the hiring of employees. Yet, Kanamori denied that Andrede had the authority to hire, fire or assign work to employees. Kanamori and Arimura both testified that Andrede did not have sufficient time to check the packing of the crew because he had "two" jobs to perform.

Arimura admitted instructing Andrede to check the boxes to make certain the crew's packing was satisfactory. Further, Kanamori acknowledged that he did not attempt to find a new foreman until April.

6/ All dates refer to 1975 unless otherwise indicated.

7/ The cabbage crew was paid on a weekly piece rate basis in 1975. The cartons of Romaine lettuce and cabbage packed

These facts along with the overall pay structure and past history of the "foreman" position are convincing. When Andrede assumed the foreman's role in the spring months of 1975, he had the authority to: (a) assign work; (b) effectively recommend the hiring of employees; (c) check the work of employees and (d) effectively recommend the discipline of employees. The law is well settled that actual authority even though not regularly exercised, is sufficient to classify an individual as a supervisor. See, e.g.; Ohio Power Company v. NLRB, 176 F. 2d 385 (6th Cir., 1949), Cert. Denied, 338 U.S. 899 (1950); West Penn Power Co. v. NLRB, 337 F. 2d 993, 996 (3rd Cir., 1964).

Further, it is clear under the National Labor Relations Act that when an employee takes over supervisory duties of another supervisor he is regarded as a supervisor. Birmingham Fabricating Company, 140 NLRB 640 (1963); Illinois Power Company, 155 NLRB 1097 (1965).

From January until June 18, Andrede possessed the requisite authority to be classified as a "supervisor" as defined in Section 1140.2 of the Act, however, the Agricultural Labor Relations Act

was not in effect at that time.[8]

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during the day were totalled and then multiplied by the piece rate per carton and then divided by the number of employees working in the crew during the particular day. At the end of each week, the employees would receive their corresponding amount of pay.

8/ See, legal discussion of the "pre-August 28, 1975" events in the Legal Analysis and Conclusion of Law section, infra.

D. Pre-Act Events--Cabbage Crew

Commencing in January, 1975 and continuing until the subsequent layoff, Andrede worked on the cabbage crew as both "foreman" and "stitcher". Nothing in the record indicates a variance in the amount of piece rate work performed by the 1975 cabbage crew as compared to the 1974 cabbage crew. On the other hand, with respect to the optional or extra "hourly" work, the parties stipulated that the 1975 cabbage crew worked much less than the 1974 crew. In fact, the 1975 cabbage crew worked only one-third (1/3) the number of "extra hourly paid" hours as the 1974 cabbage crew. (Jt. Exhibit 6). This reduction in hourly work was also evident in January and February, 1975 compared to January and February in 1974.[9]

During April and May, Teamster organizers visited the cabbage crew on three separate occasions. During some of these visits, the Teamsters spoke to different members of the cabbage crew for short intervals.

As stated previously herein, there is no evidence that Respondent directly interfered with the employees' rights during these incidents.

In late April, D. Hernandez circulated a Teamster petition throughout the cabbage crew. The total crew signed the petition.

9/ The 1974-1975 year to year comparisons are important because the first indication of Union activity at Respondent's farms occurred in late March, 1975. These statistics are supportive and substantiate Kanamori's expressed reasoning for the June layoff.

D. Hernandez then approached Andrede and told him that all the employees have signed a petition to have the Teamsters represent us, do you want to sign? Andrede replied that he did not want to sign the petition. The conversation then ended. There is no indication that Andrede read the petition which was in D. Hernandez' possession during this conversation.

Within a few days, Respondent held the field meeting, with the field employees including the cabbage crew, in which the employees were thanked for their support and were informed of the Teamster recognition and contract.

In late May or early June, Teamster business agent, Alonzo, met with the employees of the cabbage crew to determine their grievances.

Approximately a day later, Teamster representatives Alonzo and Amanza spoke to Arimura at the field. Several employees were present however, they could not understand the conversation since it was spoken in English. Teamsters' Alonzo and Amanza presented a grievance concerning the calculation of the foreman's pay. The Teamsters urged that the foreman should not be counted as a crew member and should not participate in the weekly piece rate distribution. Naturally, this distribution lowered the pay of all the employees since the "pie" was cut in an extra slice. At that time, Arimura agreed to compute the foreman's pay separately and to refund, retroactively during the effective period of the contract, a pro-rata share of the foreman's pay to each employee.[10]

10/ General Counsel's Exhibit 8 purports to be California Agricultural Master Agreement from 1975 to 1978. It is unclear whether this Agreement was in effect prior to July

On the payroll ending June 11, 1975, Andrede stopped receiving the additional "one cent per box". Additionally, the rate of pay per box for the entire crew prior to the division was increased one cent ($.01). Each employee received approximately $22.00 as a result of the grievance presented by Alonzo and Amanza.

On June 18th, Alonzo, Teamster business agent, arrived at the field as the cabbage crew was finishing their work. At that time Arimura told Alonzo to tell the cabbage crew that they were going to be laid off and they would be recalled when the work picked up.[11]

Prior to June, 1975 the cabbage crew had worked year around for the previous five years. In past seasons, subsequent to the end of the cabbage-cutting season in June, the crew would be assigned to perform other types of work for Respondent. During slow seasons commencing in late June, most of the work performed by the cabbage crew would be hourly work rather than piece rate work.

Respondent's Arimura and Kanamori testified in detail about the reasons for the layoff of the cabbage crew in 1975. According to these witnesses, the crew was laid off for a combination of

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16, 1975 or whether any other Agreement was in actual existance prior to July 16, 1975.

ll/ A few of the discriminatees recalled that Arimura (through Alonzo's translation) mentioned August 15th as a date for recall. In light of the total circumstances, I find it unlikely that Arimura mentioned any specific date.

reasons. The reasons specified were that: (1) the crew did not have a foreman; (2) the crew's work was below average and plagued by sporadic poor packing; (3) the crew did not reliably perform hourly work as in the past seasons; and (4) the lack of piece rate or important hourly work.

Respondent's Arimura and Kanamori testified that they discussed the possibility of a crew layoff and the necessity of findings foreman on several occasions prior to June. Apparently the earliest of these conversations occurred in April. In years prior to 1975, Rillo would be responsible for assigning and overseeing the hourly work.

Both Kanamori and Arimura testified that they received numerous complaints from the sales and distribution department that the produce was poorly packed.

Kanamori and Arimura spoke to Andrede and various employees on the cabbage crew in order to stress the importance of uniform packing. Nevertheless, in Respondent's eyes the situation did not remedy itself.

Kanamori believed that the absence of a foreman [12] encouraged the employees to be less responsible in the performance of the hourly work.

Andrede, performing both the stitcher and foreman's duties, did not have the time to inspect the packing in the fields on a regular basis. Respondent's position is that these factors led to the June layoff.

12/ Throughout the hearing Respondent's position was that Andrede, the foreman, was a foreman in name only.

13/ The merits of Respondent's contentions will be discussed in the Legal Analysis and Conclusions of Law section, infra.

As July progressed, the tomato season advanced and required pruning by additional employees. Kanamori asked Gloria Sanchez, who was employed at the ranch, whether her husband, Sanchez, Pineda and Gonzales were available for work. The parties stipulated that Gonzales, Pineda and Sanchez returned to work and continued to work for Respondent during the payroll period ending July 30.

Approximately one week later Andrede joined the other three employees. The four recalled employees worked in conjunction with the tomato harvesting or culture crew pruning the tomatoes.[14] Kanamori believed that Sanchez, Gonzales, Pineda and Andrede were the most proficient with respect to pruning tomatoes. The pruning process is quite important since cutting an incorrect shoot decreases the harvestable crop.[15]

E. Post-Act Events--Campaign

During August and early September, Respondent conducted a management oriented election campaign. General Counsel produced one witness, Martin, who testified to a series of events which allegedly occurred in the nursery as well as during the campaign.

According to Martin, Respondent's nursery supervisor, Arikara, once told the nursery employees that the Union and the Teamsters

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14/ There is no evidence that Andrede acted as foreman or performed any supervisory tasks after the recall.

15/ Respondent's practice which was followed in 1975 as well as other years was to use labor contractors for the bulk of the tomato planting and harvesting work. It should be noted that this work represents a relatively small portion of Respondent's total payroll even in July, August and September. (Resp. Exhibit 2 (a)).

with guns and that all the women were scared and had stopped working.

On another occasion, Martin recalled that Arikara stated that Chavez was a mean man who was very rich and wanted the workers' money. Arikara allegedly told the nursery employees that Chavez would cause problems for the people if the Union came in and that there would be no more freedom.[16]

Martin recalled that Arikara would listen to the ALRB election results and predict that the employers would win. Martin recalled that Arikara became angry when the UFW won and said that Mexicans had fat heads and were stupid. She stated that Arikara told the nursery employees that if the Union won, Respondent would diskup the fields, that Respondent might also sell the nursery. Arikara allegedly threatened that if the UFW won, there would only be four (4) hours of work per day for the nursery employees.

Martin estimated that Arikara rambled about the Union constantly for at least half a day almost every day for a three week period preceding the election. Arikara supposedly walked up and down the nursery muttering threats in a constant soliloquy addressed to all nursery employees.

Martin also related an incident that occurred a few weeks prior to the election when a wealthy looking Anglo inspected the

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16/ The relevance of the "alleged" threats if credited may reflect on Respondent's general animus; however, neither Martin nor any of the discriminatees testified that Arikara made any remarks in the presence of the cabbage crew or, for that matter, any of the field workers.

nursery. He was accompanied by his wife, Arikara and Kanamori. The Anglo looked at the windows, chairs, construction, foundation and measured the length of the hothouse with a tape. Martin admitted that she could not hear everything said; however, the woman did ask about the possibility of hanging baskets, house plants as well as about the average temperature of the hothouse.

A week later the same Anglo couple returned and a similar scene was repeated. Understandably, these episodes were characterized as a staged "guerrilla theaters".

Palmer explained the alleged "guerrilla theater" convincingly. He is the owner of the Greenhouse Corporation which constructs greenhouses around Oxnard. The Greenhouse Corporation had built Respondent's nursery. In the summer of 1975, as in other times, Palmer referred potential customers to Respondent's nursery to inspect the greenhouse. Palmer recalled that he had sent two prospective customers to look at Respondent's facility in August, 1975. Palmer utilized Respondent's nursery as a showcase because of its convenient location. Clearly, the "guerrilla theater" incidents were not directed toward the infringement of any employee rights.

On September 4, 1975 Respondent held a campaign meeting located at the Ranch on Teal Club Road. Present during the campaign speech were the nursery crew, tomato crew, the celery crew, the four recalled employees from the cabbage crew, the mechanics and other workers. Several of Respondent's supervisors including Kanamori were present. Speaking on behalf of Respondent was Ramos, an interpreter.

Martin testified that Kanamori spoke to Ramos in English and Ramos would then speak to the assembled employees in Spanish. Martin could not hear what Kanamori told Ramos.

As Martin recalled, Ramos told the workers that they did not need a Union. He continued that if the UFW won, the tomatoes would be discuped and the number of hours would be diminished. Ramos added that Chavez was a rich man fooling the people and that he drove big cars and took the money from the employees.

According to Martin, approximately 30 minutes after the speech began, Gardner, a Union organizer, entered the meeting. He was accompanied by R. Hernandez. At that time, Ramos and Gardner exchanged heated words concerning whether Gardner was rich and whether the Union really represented the employees' interest. Gardner then answered Ramos' accusations. Shortly thereafter the meeting ended. Martin recalled as Kanamori left he passed by R. Hernandez. Hernandez then told Gardner, why don't you ask them about the jobs because we Chavistas don't have our jobs back. According to Martin, Hernandez then asked Kanamori, What happened to the jobs? Why hasn't the cabbage crew been recalled? Kanamori supposedly answered Hernandez "There is no more cabbage right now. I'll call the cabbage crew when there is cabbage." He then left the nursery.

R. Hernandez testified for the General Counsel concerning the election campaign meeting. Hernandez' recollection of the interchange between Ramos and Gardner only partially corroborated Martin's testimony. Significantly, R. Hernandez did not recall the interchange with Kanamori as the meeting ended. R. Hernandez

specifically stated that during the heated exchange Gardner stated that Respondent may have promised more work but that they had not given work to R. Hernandez. Ramos, according to R. Hernandez, then answered Gardner by telling him that it was a business meeting and that he could not speak. According to R. Hernandez, Ramos told the employees not to believe Gardner.[17]

Kanamori did not specifically deny either R. Hernandez' or Martin's recollection of the campaign meeting. In general R. Hernandez' testimony must be credited and weighed more heavily than Martin's, Martin as a witness tended to exaggerate the facts. Further, she could not readily distinguish between different conversations. For these reasons, I find that R. Hernandez' recollection of the confrontation between Ramos and Gardner must be credited and Martin's recollection, where contradictory, must be discredited.

On September 9th, the day of the election, it is undisputed that Lucio, R. Hernandez, D. Hernandez and Arenas stood at the corner of Teal Club Road and Victoria with UFW banners and flags. During the morning, each of the Hiji brothers drove past the corner and recalled seeing individuals standing and clapping in support of the UFW. Further, T. Hiji recalls hearing the shouts "Viva Chavez" and raising his own hand inside his car in recognition and acknowledgement of the chanting campaign. Kanamori readily admitted that he

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17/ General Counsel does not allege any activities with respect to the campaign meeting to be independent violations of Section 1153 (a) of the Act. General Counsel merely relies on this interchange in part to substantiate Respondent's knowledge of R. Hernandez' Union Activities.

recognized Lucio, R. Hernandez, D. Hernandez and Arenas campaigning for the Union on election day.

F. Post-Act Events—Recall--Reapplication

The evidence indicates that there were eighteen employees on the cabbage crew that were laid off on June 18, 1975. Out of the eighteen employees, approximately ten employees were recalled and are presently employed by Respondent. Four of those employees, Gonzales, Sanchez, Andrede, and Pineda, were recalled in July and August.

Dominguez, Aguilar and M. Ruiz, three employees who were laid off on June 18, were recalled during the weeks ending November 19, December 3 and January 14, 1976, respectively. None of these three employees were alleged discriminatees in the Complaint.

Two other members of the cabbage crew, Gervacio and Rafael Hernandez, were laid off on June 18, and were never recalled by Respondent.

General Counsel admits that there was no evidence with respect to Gervacio's Union and/or concerted activities after the layoff. Further, the record concerning events prior to the layoff is devoid of any isolated Union or concerted activity with respect to Gervacio. Nevertheless, in its Brief the General Counsel argues that Gervacio's failure to reapply for employment cannot constitute a defense for Respondent because Gervacio had a right to rely on the fact that Respondent would notify him when work was available.[18]

18/ Merits of this argument coupled with General Counsel's contention that an employee illegally discharged prior to the effective date

On the other hand, Rafael Hernandez was not alleged as a discriminates in the Complaint although he apparently was laid off on June 18, 1975 and, like Gervacio, failed to reapply for work with Respondent. (Jt. Exhibit 9). The reason for this inconsistency remains a mystery. On the record, there is no evidence which differentiates between Gervacio's and Rafael Hernandez[1] "activities" either before or after June 18, 1975.

With respect to B. Gonzales and J. Canul, these employees are alleged as discriminatees in the Complaint; however, the General Counsel's Post-Hearing Brief does not seek reinstatement or back pay for these employees. Both B. Gonzales and Canul testified on behalf of Respondent during the hearing. These employees were reinstated during the week ending February 4, 1976 and are presently employed by Respondent.

Mendez, like Rafael Hernandez and Gervacio, was laid off on June 18, and never reapplied for work. There was no evidence concerning Mendez' "activities" throughout the hearing.

The remaining six employees alleged to be discriminatees: Somera, Lucio, Alcaraz, Arenas, D. Hernandez and R. Hernandez all applied for reinstatement, or at the least visited Respondent's farm subsequent to the layoff. Each of these material incidents will be discussed and analyzed.

Somera testified that in September, 1975 he went to the field and asked Kanamori for work in tomatoes. Kanamori replied that

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of the Agricultural Labor Relations Act is entitled to reinstatement and back pay will be discussed in the Legal Analysis and Conclusions of Law section, infra.

there was no work but there could be a job later. Somera did not return to request work until approximately a year later, in November, 1976.

During that occasion, Somera was at Respondent's field, eating a tomato, when he asked Kanamori for work. Kanamori replied, "Are you kidding?" Whereupon Somera said, "I need a job because I have recently married. During cross-examination, Somera testified that he was 68 years old and that he was collecting Social Security.

It is undisputed that Somera joined the other crew members and signed the petition for the Teamsters in the Spring. Somera speaks very little Spanish and readily admitted that he had engaged in no other Union activity during the period in question.

On November 28, 1975 Arenas, D. Hernandez and Alcaraz[19] went to Respondent's office along with Union representatives, Conle and Martin.[20] D. Hernandez saw Kanamori and asked him the reason he hadn't rehired the men. Hernandez asked whether they were bad workers. According to Hernandez, Kanamori replied no, they weren't bad workers. Kanamori asked Hernandez whether he represented the employees, whereupon Hernandez said no, he spoke only because he

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19/ At the November 28th incident, it is uncertain whether Lucio or Alcaraz was present. From the evidence presented, and since Lucio does not contend that he was present, while Alcaraz does, I find that *it* is more probable that Alcaraz accompanied D. Hernandez and Arenas along with the Union organizers Conle and Martin, to seek reinstatement to their former jobs.

20/ D. Martin admitted that she became an unpaid organizer for the Union following the election in September. She accompanied Conle and the three employees on November 28 when they sought reinstatement.

wanted to work and the employees who were with him wanted to work. Hernandez then asked Kanamori whether he was refusing the employees work because they were Chavistas? Kanamori replied, "You said it, I didn't."

Kanamori did not take issue with D. Hernandez' recollection of the November 28th conversation. Kanamori openly testified that he knew that he was not going to rehire Alcaraz, Arenas or D. Hernandez, although he purposely told these employees that maybe there would be a job later on. In essence, all the parties to the conversation, although translated from English to Spanish through an interpreter, have consistent recollections.[21]

On December 11, D. Hernandez, R. Hernandez, Arenas and Lucio and Union representatives Conle and Martin went to Respondent's field. The conversation was in English between Martin and Kanamori with Martin acting as a translator for the employees. According to Lucio; Conle asked Kanamori why the people were not recalled to work. Kanamori answered that he didn't have a list of the phone numbers of the employees. Lucio told Kanamori that Santos had a telephone list because the foreman always had a list of members.

Kanamori answered that he did not have the list. Kanamori said that I do not have an exact date but that I will try to get you back to work within three weeks. Martin recollects that

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21/ The only exception would be D. Martin who failed to recollect that she was present during the conversation on November 23, 1975. In all probability, Martin's recollection of the September 4th campaign meeting was faulty in that she unintentionally related the separate conversations as one event. This inconsistency is not totally unexpected considering the passage of time from the events to the date of testimony.

Kanamori took the telephone numbers of the workers and said that there was not enough work at the present time but that he would call them.[22]

G. Respondent's Defense--Recall

Kanamori testified that he first recalled Gonzales, Pineda, Sanchez and Andrede because they had previous experience working in tomato pruning. Further, Kanamori explained that Sanchez' wife worked for Respondent for a number of years and that all he had to do was ask her to have her husband and the other mentioned employees return to work. This occurred in late July and early August.

The crux of Respondent's defense centers around a conversation which occurred in the field during the second week of November, 1975, At that time Kanamori went to the field on Los Polces Road at about 10:00 in the morning. Present and working for Respondent at that time in the lettuce crew were Sanchez, Gonzales, Pineda, Roman, Andrede and several other workers. According to Gonzales, Pineda, Roman and Andrede, Kanamori started a conversation by asking whether the crew wished him to call back the other worker. After a brief discussion among themselves, the employees spoke as a group to Kanamori. Kanamori was told by Gonzales and Sanchez that they wanted Ruiz and Aguilar to be called back but they did not wish

22/ Kanamori admitted in his examination that he lied during the November 28th and December llth meetings since he had no intention of rehiring the employees. The reason and alleged justification for this action will be discussed in detail in Section G, Respondent's Defense, infra.

to work with Arenas, R. Hernandez, D. Hernandez, Alcaraz and Lucio. Kanamori then asked why the men did not want to work with these employees. He was told that there were various problems in the crew that were caused by these men. Apparently, Arenas was quite hard to get along with, constantly arguing. One day he would be happy and the next day he would be angry and he caused problems because of his moodiness. Gonzales told Kanamori that R. Hernandez almost had a fight with Andrede. This occurred in early Spring, 1975 when the crew switched locations. Kanamori was told by Gonzales that Arenas and he had problems. In fact, Arenas had brought a pistol to the field. Roman told Kanamori that he had an argument with D. Hernandez and that he had left the company in the Spring of 1975 in order to avoid problems with D. Hernandez.

Several employees said that the trouble with Alcaraz was that he was not a good worker because he did not help others out when they needed him and that he complained about his hip hurting him too much.

During the course of the conversation, the discord in the field between the recalled members of the crew and D. Hernandez, R. Hernandez, Alcaraz and Arenas was aired. The only statement concerning Lucio was that he brought either a rifle or pistol to the field and that he spent too much time with D. Hernandez.

According to Kanamori, Ramon said that he had trouble with D. Hernandez and had to quit in the Spring because of the trouble. Gonzales stated that Arenas and him almost got into a fight several times. Andrede related the situation between himself and

R. Hernandez in the field. Kanamori was told by the "group" that Alcaraz, R. Hernandez and Arenas all had brought firearms to the field. This conversation occurred in Spanish. Kanamori states that he can understand Spanish if it is spoken slowly.

The employees testified that Kanamori did not know of the problems in the cabbage crew until the early November, 1975 conversation.

The testimony of each of Respondent's employees regarding this conversation was at times sketchy, but certainly the essential details of the conversation were corroborated. All the employees except for Sanchez stated that the conversation started when Kanamori asked whether the other members of the cabbage crew should be recalled. Further, all of the participants state "that Aguilar, Luis and Canul were recommended for rehire. The record shows that each of these employees was rehired.

Kanamori recollects that the November 28th and December llth visits by the alleged discriminatees and he admits that he lied because he was trying to protect the employees who were working. He was afraid of causing trouble for the working employees.

On cross examination, Kanamori stated that he personally did not have problems with the work that was being performed by any of the alleged above discriminatees.

During the course of General Counsel's rebuttal, Alcaraz, Arenas, D. Hernandez, R. Hernandez and Lucio all testified regarding the alleged problems and/or fights with the employees.

Alcaraz stated that he had problems with his hip for three days. For his part, Arenas stated that he had problems with Gonzales but stated that these difficulties were only concerning the work. Arenas says that Gonzales did not help him with the packing of the produce. Arenas denied fistfights or that he threatened anyone with a knife or pistol but he admitted that there were difficulties and arguments. Arenas brought a pistol to work a few times in 1975, but these instances were isolated. Arenas recalled that he had a minor argument with D. Hernandez.

In rebuttal, D. Hernandez was critical of Ramon's work. D. Hernandez stated that he never had a fistfight with Ramon— just-arguments of a verbal nature. D. Hernandez said that he knew that his brother R. Hernandez had brought a rifle to work and that Lucio had brought a gun to work but so had other employees who were still working for Kanamori. D. Hernandez heard Arenas and Gonzales have a discussion after work concerning whether Gonzales participated in packing. R. Hernandez admitted having a misunderstanding with Andrede.[23] R. Hernandez stated that Arimura was present at the time and was told of the incident almost immediately. Arimura told R. Hernandez and Andrede to work it out among themselves.

R. Hernandez recalled that he brought his rifle to work for target practice in the field. According to R. Hernandez, the rifle was never used except for work when he was shooting in the canal.

23/ During the course of co-counsel's rebuttal testimony much speculation of questioning centered on the semantics of the word "argument". D. Hernandez explained simply enough that an argument is when one doesn't arrive at an agreement. This definition is certainly sufficient for the purposes of these findings.

In summary, General Counsel's rebuttal witnesses, Alcaraz, Arenas, D. Hernandez and R. Hernandez all explained the allegations regarding their disputes or arguments with their co-workers. In essence, their explanations were such as to diminish the severity of the dispute. Nevertheless, the existence of the disputes or problems was not contradicted.

Ortega, a tractor driver, was also offered as a rebuttal witness for the General Counsel. He stated that in March or April of 1976, he had a conversation at Round Mountain with Kanamori. Ortega asked Kanamori why the other members of the cabbage crew had not been recalled. At that time, Kanamori responded that the crew did not want them back. Surprisingly, this obviously supports Respondent's case!

IV. Legal Analysis And Conclusions Of Law

A. The legal effect of the 6/18/75 layoff.

General counsel has contended in its Brief and Complaint that the layoff of 6/18/75 was discriminatory and in violation of Section 1153(a), (c), and Section 1140.4(a) of the Agricultural Labor Relations Act. The Agricultural Labor Relations Act became effective on August 29, 1975. A.L.R.A. Reg. §20901.

For this reason, the question presented is two-fold. First, whether the Act was intended to be given a retroactive effect? Next, whether proscribed activity prior to the effective date of the Act places an affirmative duty on the offending party to rectify such conduct after August 29, 1975?

In analyzing the first legal issue, the constitutional safeguards of the due process clause under the 14th and 5th Amendments as well as the overall disfavor of "ex-post facto" type of laws must be weighed. Generally, it is recognized that "ex-post facto" laws apply only to criminal or penal matters. See, e.g., Bannister v. Bannister 181 M.D. 177, 29 A. 2d 287, 289; Garret Freight Lines v. State Tax Commission, 103 Utah 390, 135 P.2d, 523, 527 (1943). Nonetheless, retroactive laws not penal in nature, must be clearly indicated by directive of the Legislature. In Appalachan Electric Power Co. v. National Labor Relations Board, 93 F.2d, 985 (4th Cir., 1938), the Board found with Court approval that although the employer was opposed to unionization and the reduction of the work force evidenced discrimination due to union membership; nevertheless, since this

reduction occurred prior to the passage of the National Labor Relations Act, it could not be made the basis of a complaint against the employer. Id at 988. In Appalachian Electric Power Co. the work force was reduced in March, 1935. The National Labor Relations Act did not become effective until July, 1935.

In another case, National Labor Relations Board v. Carlisle Lumber Co., 94 F. 2d 138 (9th Cir. 1937); cert, denied, 304 U.S. 575 (1938), the employer contended that he had legally discharged the employees on June 25, 1935 again prior to July 8, 1935, the effective date of the National Labor Relations Act. The Court held that discharge prior to the effective date of the Act was not illegal, but however, employers' continued refusal to bargain with the union after the date of July 8, 1935, did violate the National Labor Relations Act. This naturally would be *a* new and separate violation of the National Labor Relations Act. In Carlisle Lumber Co., the Court stated:

> "In Swab v. Doyle, 258 U.S. to 529, 534, 66 L.Ed. 747 (1921), the court said: 'The initial admonition is that laws are not to be considered as to applying to cases which arose before their passage unless the intention is clearly declared.' See, also, White v. United States, 191 U.S. 545, 552; 48 L.Ed. 295, (1903); Brewster v. Gage, 280 U.S. 327, 74 L.Ed., 457 (1930)."
> Id at 145.

The Court then went on to say that it was not applying the Statute retroactively.

Further, as cited in Respondent's brief, this type of claim was recently rejected by the NLRB in United States Postal Service 200 NLRB No. 56 (1972). In that case, an employee was discharged just three days prior to the effective date after which postal service employees became covered under the National Labor Relations Act.[24] The Board dismissed the Complaint stating that the Postal Reorganization Act did not expressly allow the Board to remedy an alleged wrongdoing which occurred prior to the Board's gaining jurisdiction over the party. Clearly precedent under the N.L.R.A. demonstrates that it has not been applied retroactively.

Further, General counsel's reliance on Lawrence Barnyard Farming Corp., 3 NLRB No. 9 (1977) is misplaced. That case dealt with objections to an election. One of numerous challenges concerned whether two employees who were allegedly discriminatorily discharged prior to the effective date of the Act had the right to vote in the election. Since the employees had initiated suit against the employer complaining that their discharges were illegal, the Regional Director recommended deferring resolution of the eligibility of the two voters until such time as a decision was rendered by the Superior Court. Clearly, the direct action in Kern County was not based on any statutory protection under the Act. Neither the Board nor the Regional Director considered

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24/ Hereinafter referred to as the N.L.R.A.

the possibility of retroactive application of the Act. In Barnyard Farming Corp., the Board merely deferred determination of the employees' status at the date of the election to the Superior Court.

Additionally, there are numerous California holdings that Statutes are construed to have a prospective operation unless it is plainly indicated that it shall operate retrospectively. See, e.g., Safeway Stores, Inc. v. Alameda County, 51 Cal. App. 3d 783, 124 Cal. Rptr. 503 (1975), Callahan v. Department of Motor Vehicles, Cal. App. 3d, 132 Cal. Rptr 625 (1976). Further, the Legislature's intent as evidenced by annotations to the Act indicates that the Act was to be given prospective rather than retroactive effect. For all of these reasons, I find that as a matter of law Respondent's layoff of the cabbage crew in June, 1975 was not in violation of Section 1153(a), (c) of the Act since the Act was not in effect.

In the same manner, it is necessary to reflect on Andrede's alleged supervisory status. The evidence presented concerning Andrede's duties as foreman are reviewed as background facts, but again as a matter of law cannot be utilized to determine that Andrede was the supervisor within the meaning of Section 1140.4(j) of the Act unless Andrede occupied a supervisory position after August 29, 1975. As discussed in the findings of fact section, supra, the record is devoid of any evidence to support this contention. Andrede returned from layoff in early August as an employee, a position he has retained until the date of hearing.

Although the layoff on June 18, 1975 cannot be utilized to support independent findings of violations of Section 1153(a) and (c) of the Act, nevertheless, these activities can be utilized to shed light which occurred subsequent to August 29, 1975. e.g; Pennsylvania Greyhound Lines Inc. 1 NLRB 1, 1 LRRM 303, 307 (1935). For this reason I will consider the relevant evidence to determine arguendo whether the June layoff would have been discriminatory had the Act been in effect.

Throughout the hearing there was no testimony regarding Respondent interogations or threats during the spring of 1975. Further, no member of the cabbage crew testified to any proscribed conduct in the spring. Thus, General Counsel's argument is based entirely on Respondent's past practice of not laying off the cabbage crew.

Upon viewing the entire record, the cabbage crew's concerted or union activity was minimal at best. The evidence clearly indicates that Respondent had signed a collective bargaining agreement in early May. Additionally, there was no evidence that the cabbage crew engaged in any activity which induced Respondent to sign the Teamsters contract. On the contrary, the Teamsters economic pressure at Richview packing facility was totally responsible for the Teamster's recognition.

The inconsistencies of General Counsel's argument in this regard cannot go unnoticed. Simply, all the members of the crew signed the petition for the Teamsters except Andrede. All the crew was laid off. Then prior to any other union activity by

any member of the crew, four employees were recalled in July and August. It is illogical to assume that the layoff was discriminatory if three employees who signed the "petition" were recalled.

Respondent additionally offered testimony through Arimura and Kanamori that the cabbage crew needed a foreman and did not work overtime as avidly as in the past.[25] In all likelihood, Respondent needed an effective foreman who could direct the employees. As discussed in Footnote 9, supra, it is clear that there was less hourly work in 1975 than in the previous year. These statistics support Respondent's position.

Consideration of the totality of events prior to June 18, indicate that it is highly unlikely that Respondent would discriminate against the cabbage crew, a mere 18 employees, because they signed a petition for the Teamsters. This is especially true since Respondent had executed a collective bargaining agreement with the Teamsters approximately two months prior to the layoff. If Respondent harbored such animus would it have thanked the cabbage crew along with the celery crew for their support by not striking during the pre-collective bargaining agreement days? These factors totally undermine the premise of the Complaint herein.

25/ In making this finding, Kanamori's testimony with respect to Rillo's sudden quit is totally disregarded. Rillo himself testified that he gave several months notice to Respondent. Due to this, Kanamori's testimony is viewed as suspect except where there are undisputed or corroborating witnesses. Further, if the Act was in effect during the Spring, 1975, I would find Andrede to be a supervisor within the meaning of Section 1140.4(j) of the Act; however this is not the case.

The record of speculative circumstantial evidence does not justify the findings urged in the instant matter. Suffice it to say, that even if the Act was in effect in June, the General Counsel has failed to establish by a proponderance of the evidence that the layoff was discriminatorily motivated. I find that the June layoff was made for valid business reasons.

B. Respondent's Recall

Respondent's recall, albeit not according to existing labor agreement with the Teamsters, was nonetheless non-discriminatory.[26]

As previously discussed, there is no evidence in the record which indicates that Respondent knew which employees were more sympathetic to the Teamsters or the Union. Kanamori's explanation that these employees were, in his opinion, the best tomato pruners was not substantially challenged. Therefore, Respondent's early recall of Sanchez, Gonzales, Pineda, and Andrede was certainly not discriminatory.

Respondent certainly possessed knowledge of R. Hernandez' activities and sympathies on behalf of the Union. R. Hernandez accompanied the union organizer, Gardner, to the campaign meeting.

26/ The senority provisions of the Teamster contract were not followed by Respondent. Shortly after the Act went into effect both the Teamsters and the Union participated in the September 9 election. See Hiji Bros. Inc. 3 ALRB 1 (1977). No evidence was presented that the Teamsters or any employees filed a grievance concerning either the layoff or the subsequent recall.

There can be no doubt from the tenure of the campaign speech that Respondent strenuously attempted to avoid unionization. General campaign threats were uttered. Significantly no threats or interrogations were individually made towards employees. For the purposes of this decision I have taken into consideration the animus exhibited by Respondent's attitude as expressed during the September 4 meeting. For the purposes of the issues presented, the election result has far greater significance. The election was not close, Respondent only garnered 39 out of 160 votes. The recall issue with respect to Lucio, D, Hernandez, R. Hernandez, Arenas and Alcaraz ripens in November and December.

There is no doubt that Respondent had knowledge of the Union activities or sympathies of each of the aforementioned discriminatees at the time of their reapplication.

The critical portion of Respondent's defense relates to the early November conversation between Kanamori and the recalled portion of the cabbage crew, namely: Sanchez, Gonzales, Pineda , Ramon and Andrede concerning the constituency of the crew.

Significantly, there is no indication that any of the employees or Kanamori discussed the Union or the Teamsters during the conversation. Further, Kanamori did not question the recalled workers with respect to their Union sentiments or activities. Likewise, neither Arimura or Kanamori ever discussed the Union activities of Sormera, R. Hernandez, D. Hernandez, Lucio, Arenas and Alcaraz with any of the witnesses that testified.

Respondent called nine employee witnesses, several witnesses of which were alleged as discriminatees in the Complaint. All of these witnesses supported Respondent's position.

Throughout the hearing Respondent's defense never shifted. The Answer submitted in early February, 1976 reflects Respondent's defense which was offered at the hearing. Further, although minor inconsistancies appeared in the recollection of several of the employees attending the November meeting there can be no doubt that such a meeting occurred. Each of the five different employee witnesses testified substantially to the same course of events. During this conversation Kanamori first discovered the problems between the recalled faction and a portion of the laid off employees who still had not been recalled. Kanamori's decision not to recall D. Hernandez, R. Hernandez, Arenas, Alcaraz and Lucio was based on the dissension among the employees. The fact that Lucio was not disliked by the other crew members leads to the conclusion that Kanamori either made a mistake in not offering him reinstatement to or refused to reinstate Lucio because of his Union or concerted activities.

Under the totality of circumstances it is unlikely that the latter is correct. The Union activities of Lucio, Arenas, and Alcaraz are very slight. These three employees shifted sentiment from the Teamsters to the Union prior to the election. Arenas and Lucio stood on a corner holding a banner during election day. This was their complete Union activity which forms the basis of the General Counsel's complaint. Alcaraz did

not even stand on the corner election day. At most, Respondent may have been aware that Alcaraz associated with Martin, a former employee who was an unpaid Union organizer during October.

The record is devoid of any interrogations, threats or other common forms of Union animus. Certainly, with respect to Lucio, Arenas and Alcaraz, the preponderance of the evidence does not establish that these three employees were not recalled because of their Union or concerted activities. Conversely, the evidence indicates these employees were not recalled because the other members of the crew did not wish them to return.

I am completely cognizant that most Section 1153(c) cases like Section 8 (a)(3) cases of the National Labor Relations Board turn upon findings of credibility. Furthermore, it is obvious that

> "Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to unlawful motive could be brought to book." Shattuck Denn Mining Corp. v. NLRB, 362 F. 2d 466, 470 (1966).

Obviously, the basis for motive can only be ascertained upon intricate investigation of the full facts. See, Associated Press v. NLRB, 301 U.S. 103, 132 (1937). Nevertheless, it has been widely held that knowledge of an employee's Union activities is not enough in and of itself. An actual discriminatory motive for employer's action with respect to its conduct

must be proved although such proof may be available through inference in its totality of the circumstances. In the current situation, Respondent has come forward with evidence of legitimate motives for its refusal to reinstate D. Hernandez, R. Hernandez, Lucio, Alcaraz and Arenas. Further, this justification was not based on any of these employees' Union or concerted activities but rather their ability or lack thereof to get along with the employees previously recalled.

If Kanamori happened to recall R. Hernandez, D. Hernandez and Lucio instead of Sanchez, Gonzalez, Andrede and Pineda it is entirely likely that the former group of employees if asked in November would have stated that they wished that Kanamori not reinstate the other group.

In General Counsel's Brief reliance is placed on Illinois Tool Works 61 NLRB 1129, 16 LRRM 138 (1945), enf'd 153 F.2d 811, 17 LRRM 841 (7th Cir., 1946) and May Department Stores Co. 59 NLRB 976, 15 LRRM 173 (1944) enf'd 154 F.2d 533, 17 LRRM 985 (8th Cir., 1946), Cert. Denied. 329 U.S. 725 (1946) several other cases which applied the same principle. In each of these cases, the employer failed to investigate and precipitously discharged an employee on a pretextial basis. Each of these cases there was dispute between certain pro-union employees and other pro-employer employees. In each of these types of cases, the pro-union employee was discharged. For instance, in May Department Stores Co. pro-union employee was discharged for engaging in

union solicitation inspite of a "no solicitation" rule. Further, employer failed to investigate the type of solicitation involved. It cannot go unnoticed that also in May Department Stores Co., supra, there was substantial evidence of threats and interrogations of the pro-union employees prior to their discharge. By the same token in Illinois Tool Works, supra, the pro-union employee was discharged for violating a no solicitation rule when he solicited an employee for union membership.

In short, in these cases there was a strong background of union animus coupled with union activity (solicitation) at the time of the discharge.

General Counsel argues that Kanamori's failure to conduct a fair investigation evidenced his discriminatory intent. It seems that several employees corroborated each other when they complained about the possibility of recalling the alleged discriminatees. The alleged discriminatees were not present or available for Kanamori to question. Kanamori was operating to avoid dissension in the field when he went along with the nucleus of the reformed crew and refusal to reemploy the former "disliked" employees. This is a justifiable business reason for his actions on November 28 and December 11, 1975. See, Solo Cup Co. 944 NLRB Awrey Bakeries Inc. 180 NLRB No. 142 (1970); Essex Wire & Associated Machines 107 NLRB 1153 (1954).

On November 28 D. Hernandez asked Kanamori whether he was refusing to reinstate the employees because they were Chavistis? Kanamori responded "You said that, not me". This conversation according to the General Counsel reveals Kanamori's motive.

This type of conversation can lead to many different interpretations. One might be that Kanamori was agreeing with Hernandez. A second equally plausible is that Kanamori was denying Hernandez's statement and informing him that he never said such a thing. None of the alleged discriminatees were extraordinarily active in the Union. Additionally, the overriding reason for Respondent's refusal to recall these employees was their problems and arguments with other members of the crew. These arguments and problems were admitted by the employees.

Most revealing was that four employees testified that Kanamori intended to rehire the alleged discriminatees when he spoke to then in early November, 1975. This was after the time that Kanamori had knowledge of the Union activities of R. Hernandez, D. Hernandez, Lucio, Arenas and Alcaraz. Therefore, the substantial evidence indicates that, but for Kanamori's discovery of the problems between Gonzalez, Pineda, Ramon and Andrede on the one hand and D. Hernandez, R. Hernandez, Alcaraz and Arenas on the other, he would have recalled the alleged discriminatees. For this reason his failure to recall the alleged discriminatees is found to be for justifiable business and economic reasons rather than based on discriminatory motive.

Somera obviously was not active in the Union. He was 65 years old at the time of the alleged discrimination. He did not ask Respondent for a job during the 1975-76 season as suggested by Kanamori from the record. I find that Somera voluntarily quit his employment with Respondent. For these reasons, it is clear that Respondent did not violate Section 1153(a), (c) of the Act when Somera was not recalled in the fall of 1975.

Likewise, the totality of the events and the inherent probability indicates that the reason that D. Hernandez, R. Hernandez, Lucio, Alcaraz and Arenas were not reinstated was due to the problems they had with other members of the cabbage crew rather than their union activities. The record clearly indicates that most of the employees that were recalled from the 1975 cabbage crew returned to work and are still working for Respondent. It is apparent that all of these employees had signed the Teamster Petition. With an election so one sided, the amount of union activity by the alleged discriminatees being so minimal, coupled with a justifiable economic reason for the failure to reinstate these employees it is clear that General Counsel has not succeeded in proving the allegations alleged in the Complaint.

In summation then, I find the evidence presented does not show that Respondent violated Section 1153 (a), (c) of the Act in its failure to reinstate or to belatedly reinstate Alcaraz, Arenas, B. Gonzalez, D. Hernandez, R. Hernandez, Lucio, Mendez,

Canul, Somera and Grevacio. Accordingly, I find that Respondent's action herein was for cause and for good economic reasons and therefore shall recommend dismissal of the allegations of the Complaint related to the reinstatement of the above-mentioned individuals.

C. Attorney Fees Request

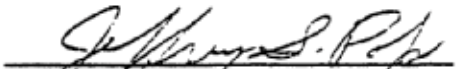
Respondent has requested attorney fees and costs. McMillan, one of Respondent's attorneys, testified that the Board agent refused to investigate Respondent's defense prior to issuing Complaint. Nevertheless, both the General Counsel and Respondent had substantial positions of a complex nature. There is no evidence that either party engaged in frivolous or unneeded litigation. Although it has been held that the Board, like the NLRB, has the discretion to award attorney fees and costs in appropriate cases this case is not of the nature due to the substantial legal and factual issues to warrant attorneys' fees to the prevailing party. See, Valley Farms and Rose Farms 2 ALRB No. 41 (1976); Tiidee Products Co. 194 NLRB No. 198 (1972); United Parcel Service 203 NLRB No. 125 enf'd. SOL F. 2d 1075 (9th Cir., 1975) .

Upon the foregoing Findings of Facts, Conclusions of Law, and entire record, and pursuant to Section 1160.3 of the Act, I hereby issue the following:

ORDER

The Complaint is dismissed in its entirety.

DATED: July 30, 1977



JEFFREY S. POP
Administrative Law Officer
Agricultural Labor Relations
Board