Brawley, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN ELMORE, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-75-E(R) 76-CE-75-1-ECR) 76-CE-75-2-E(R) 76-CE-75-3-E(R) 76-CE-77-E(R) 77-CE-115-E 77-CE-115-1-E
	)	4 ALRB No. 98

DECISION AND ORDER

On May 17, 1977, Administrative Law Officer (ALO) Herman Corenman issued the attached Decision in this matter. Thereafter Respondent and the General Counsel each filed timely exceptions and a supporting brief. United Farm Workers of America, AFL-CIO (UFW) and General Counsel each filed a brief in reply to Respondent's exceptions, and Respondent filed a brief in opposition to the General Counsel's exceptions.

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 and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO and to adopt his recommended Order, as modified herein.

Respondent excepts to the ALO's failure to dismiss the allegations contained in paragraphs 11 (a), (c), (d), and (g) of the Second Amended Complaint as barred by Labor Code Section

1160.2.[1/] We affirm the ALO's refusal to dismiss those allegations, as we find them to be closely related to the subject matter of the original charge filed herein and based on facts discovered during the investigation thereof. In NLRB v. Fant Milling Co. (1959) 360 U.S. 301, 44 LRRM 2236, the United States Supreme Court held that in formulating a complaint and in finding a violation of Section 8 of the National Labor Relations Act, the Board could take cognizance of events which occurred subsequent to the filing of the charge upon which the complaint is based. In Fant Milling, supra, 360 U.S. at 307 the Supreme Court stated:

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

The original charge herein alleged that on or about December 10, 1975, Respondent temporarily laid off workers for having joined, assisted, and supported the UFW and, when the workers were rehired, Respondent, for the same reason, reduced the number of days they worked by hiring additional crews to do the work. The four amended charges allege that: (a) Respondent, through its agents, made promises of benefits to induce its employees to vote no-union; (b) Respondent engaged in reprisals against its employees by forcing them to use small knives to work instead of the standard long-handled hoe; (c) Respondent, on

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[1/] Labor Code Section 1160.2 states in pertinent part: "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board ...."

December 17, 1975, through its agent, discriminatorily refused to rehire Jesus Sandoval because of his activities in support of the UFW; and (d) that in December 1975 and continuing thereafter Respondent, through its foreman, changed the conditions of employment by denying work-breaks to its employees because of their union activities. We find these charges are related, in nature and in time, to the subject matter of the initial charge, and that Respondent was not prejudiced by the inclusion, in the complaint, of allegations based on amended charges. We note that at the hearing the ALO indicated to Respondent he would entertain a motion for postponement to allow Respondent more time to prepare its defense to these allegations. As no motion was made by Respondent, and as the issues relating to the allegations were fully litigated at the hearing, the ALO properly made findings of fact and conclusions of law based thereon.

The General Counsel excepts to the ALO's failure to determine whether the Respondent violated Section 1153 (c) and (a) of the Act by discharging an entire crew on or about January 5, 1976. Because the complaint makes no allegation concerning this discharge and because this issue was not fully litigated, we are not able to conclude whether Respondent's conduct constituted a violation of the Act.

Respondent excepts to the ALO's finding that the discontinuation of the weeding and thinning crew's ten-minute work-breaks in the morning and afternoon violated Labor Code Section 1153 (c) and (a). The ALO found, and the record establishes, that these breaks were granted to the weeding-and-thinning crew

sometime during October, 1975, in an effort to induce the employees to vote against the UFW in the approaching November 21, 1975, election. These breaks were continued until about December 22, 1975, at which time they were discontinued without any explanation. The ALO found the institution and discontinuation of these breaks constituted unfair labor practices, citing the United States Supreme Court's decision in NLRB v. Exchange Parts, 375 U.S. 409 (1964), and that the discontinuation of these breaks was in reprisal for the employees voting for union representation in the election. We affirm the ALO's conclusion that the discontinuation of the work-breaks interfered with, restrained, and coerced employees in the exercise of their Section 1152 rights and constituted a violation of Section 1153 (c) and (a) of the Act.

As a remedy for this violation, the ALO recommended Respondent be ordered to make whole all agricultural employees who were denied such breaks by payment at the rate of time-and-a-half to each of them for the twenty minutes of work that would have been used as break periods for each day from December. 22, 1975, to March, 1977.[2/] Respondent excepts to this proposed remedy and contends that a monetary award is an inappropriate remedy for the discontinuation of breaks. Respondent argues that, according to NLRB precedent, the proper remedy for this violation is a cease-and desist order. The General Counsel argues that the workers in effect suffered a loss in wages when their paid breaks were eliminated and the result was analogous to a discriminatory

[2/] The record indicated that the work breaks were reinstituted in March 1977.

demotion.

The cases cited by the UFW [3/] in support of its position that a monetary remedy is appropriate involved unilateral changes by the employer in violation of Section 8(a)(5) and (1) of the National Labor Relations Act. In both cases cited those changes caused the employees to have reduced working hours and, therefore, reduced income. The NLRB's remedial order included reinstatement of original working hours and a make whole remedy for the working hours lost. The UFW argues that the effect of Respondent's discontinuation of the breaks was to extend the working hours with no corresponding increase in pay. Therefore, the UFW argues, the employees have lost this extra income and should be made whole. Under the somewhat unusual facts of this case, including the finding that the breaks were both instituted and discontinued in violation of the law, we reject the ALO's recommendation that the employees be compensated for the period during which they were deprived of breaks. Instead, we shall order Respondent to cease and desist from unlawfully discontinuing work breaks.

ORDER

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

1. Cease and desist from:

[3/] See Abingdon Nursing Center, 197 NLRB No. 123, 80 LRRM 1470 (1972) and Missourian Publishing Co., 216 NLRB No. 34, 88 LRRM 1647 (1975).

(a) Discouraging membership of any employee in the UFW or any other labor organization by imposing more onerous working conditions, discontinuing work-breaks, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153 (c); and

(b) In any other manner interfering with, restraining or coercing any employee in the exercise of rights guaranteed by Labor Code Section 1152.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Immediately offer Jesus Sandoval, Jesus Castellanos Cortez, and Isidro Huerta full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, and make them whole for any economic losses they have suffered as the result of Respondent's discrimination, plus interest thereon at seven percent per annum.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records, and other records necessary to determine the amount of back pay due and the rights of reinstatement under the terms of this Order.

(c) Sign the Notice to Employees attached hereto which, after translation by the Regional Director into Spanish and other appropriate languages, shall be provided by Respondent in sufficient numbers in each language for the purposes set forth

hereinafter; and

(d) Within 31 days from receipt of this Order, mail a copy of the attached Notice in appropriate languages to each of the employees on its payroll during the payroll period immediately preceding the November 21, 1975, Board election, as well as to all employees it has employed during 1978.

(e) Post copies of the attached Notice in all appropriate languages for 60 days in conspicuous places on its property, the timing and placement to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed ; and

(f) Arrange for a representative of Respondent or a Board Agent to distribute and read this Notice in all appropriate languages to its employees assembled on company property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(g) Notify the Regional Director within 30 days from the issuance of this Decision and Order of the steps Respondent has taken to comply herewith, and continue to report

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periodically thereafter at the Regional Director's request until full compliance is achieved.

Dated: December 4, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

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

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

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

1. To organize themselves;

2. To form, join, or help unions;

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

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

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

this is true, we promise that:

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

Especially:

WE WILL NOT institute and discontinue work breaks or change working conditions to discourage membership in a labor organization.

WE WILL NOT refuse to hire or rehire any employee, or otherwise discriminate against any employee in regard to his or her employment, to discourage union membership, union activity, or any other concerted activity by employees for their mutual aid or protection.

WE WILL offer Jesus Sandoval, Jesus Castellanos Cortez, and Isidro Huerta their old jobs back, and we will pay each of them any money each may have lost because we did not rehire them, plus interest thereon computed at seven percent per year.

JOHN ELMORE, INC.

Dated: _____ _____

(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

John Elmore, Inc.

4 ALRB No. 98
Case Nos. 76-CE-75-E(R)
76-CE-75-l-E(R)
76-CE-75-2-E(R)
76-CE-75-3-E(R)
76-CE-77-E(R)
77-CE-115-E
77-CE-115-1-E

ALO DECISION

The UFW engaged in an organizational campaign among the Respondent's employees in the fall of 1975. The ALO found that during that campaign the -Employer hired a "public relations" representative who promised and conditioned employment benefits on employees remaining non-union, thus violating Section 1153 (a) of the Act.

The ALO found the Respondent violated Section 1153 (c) and (a) of the Act by refusing to permit Jesus Sandoval to board the bus for work on December 17, 1975, because of his union activities, and by refusing to hire Isidro Huerta one day in early March, 1977. The ALO found that Respondent discharged Jesus Castellanos Cortez on February 20, 1976, because of his union membership and activity and thereby violated Section 1153 (c) and (a) of the Act.

The ALO found that the Respondent instituted work breaks in October, 1975, to gain employee support and as a means of defeating the union in the upcoming November 21, 1975, election and that the Respondent discontinued these breaks without any explanation on December 22, 1975. The 'ALO found the institution of the breaks as well as their discontinuation constituted violations of Section 1153 (c) and (a) of the Act. The ALO recommended that the employees be made whole for the time period they were denied the breaks by compensating them at the rate of time-and-a-half plus interest at seven percent per annum.

The ALO found that subsequent charges filed in 1977 referring to 1975 violations are not barred by the six-month statute of limitations referred to in Section 1160.2 of the Act.

The ALO recommended dismissal of allegations that Respondent violated the Act by: 1) the layoff of the weeding and thinning crew between December 10 and 16, 1975; 2) the reprisal against the workers by requiring them to use asparagus knives rather than long handled

hoes; 3) the failure to permit Gumercindo Villalobos to board the bus to go to work one day in mid-February, 1977; 4) the failure to permit Jose Munoz to board the bus to go to work one day in January or February, 1977; 5) the failure to give work to Hector Sotello on March 22, 1976; 6) the failure to hire Isidro Huerta one day in late March or early April, 1977.

BOARD DECISION

The Board decided to affirm the findings, rulings, and conclusions of the ALO and to adopt his recommended order with some modifications.

The Board made no finding regarding whether the Respondent violated Section 1153 (c) and (a) of the Act by discharging an entire crew on or about January 5, 1976, because the complaint made no allegation concerning this discharge and because this issue was not fully litigated.

Although the Board upheld the ALO's finding that the institution and discontinuation of the work breaks violated Section 1153 (c) and (a) of the Act, it reversed the ALO's remedy, finding that under the circumstances present in this case, a back pay award was not appropriate. The Board instead ordered the Respondent to cease and desist from unlawfully discontinuing work breaks.

REMEDIAL ORDER

In addition to a cease-and-desist order, the Board's order required Respondent to offer immediately to Jesus Sandoval, Jesus Castellanos Cortez, and Isidro Huerta full reinstatement to their former positions without prejudice to their seniority or other rights and privileges, and to post, read, and mail a notice to employees.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

John Elmore, Inc.,	
Respondent	Case No's. 76-CE-75-E(R)
	76-CE-75-l-E(R)
	76-CE-75-2-E(R)
and	76-CE-75-3-E(R)
	76-CE-77-E-(R)
77-CE-115-E	
United Farm Workers of America, AFL-CIO	77-CE-115-1-E
Charging Party	

APPEARANCES:

Betty 0. Buccat, Esq. — For the General Counsel

Lydia M. Villarreal, — For U.F.W. ALF-CIO

Marion I. Quensenbery, Esq. for

Respondent, John Elmore, Inc.

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DECISION OF ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

HERMAN CORENMAN, ADMINISTRATIVE LAW OFFICER; Based upon charges filed by United Farm Workers of America, AFL-CIO (UFW or the Union) in the aforesaid case numbers set forth in the caption above, and duly served on John Elmore, Inc. (Respondent) on various dates from February 20,-1976 to March 21, 1977, alleging that the Respondent engaged in unfair labor practices within the meaning of Section 1153 and Section 1140 of the Agricultural Labor Relations Act, (the Act).

The General Counsel of the Agricultural Labor Relations Board (the Board) on behalf of the Board, pursuant to Section 20220, contained in Part II of Title 8 of the California Administrative Code issued its complaint and amended complaints herein.

By its Answer filed herein, the Respondent denied that it had engaged in any unfair labor practices.

Pursuant to notice, a hearing was held before the undersigned Administrative Law Officer at Calexico, California

on April 11, 12, 13, 14, 15, 19, and 20, 1977. Appearances were entered by each of the parties. All parties were given full opportunity to call, examine and cross-examine witnesses, to argue orally on the record and to file briefs. Post-hearing briefs submitted by Counsel for the General Counsel and by Counsel for the Respondent have been carefully considered.

Based upon the record in the case, the evidence produced, the post hearing briefs submitted by the General Counsel and the Respondent, and my observation of the witnesses and their demeanor on the witness stand, I make the following:

FINDING OF FACTS

I. JURISDICTION

Respondent John Elmore, Inc., is a California Corporation with its principal office and place of business at Brawley, California and is now and has been at all times material herein an agricultural employer within the meaning of Section 1140.4(c) of the Act. Among other agricultural products, the Respondent grows lettuce, sugar beets, melons and cotton within the vicinity of Brawley. The Union is now at all times relevant herein, has been a labor organization within the meaning of Section 1140.4(f) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union began organizational activities of Respondent's agricultural employees in the fall of 1975. It filed a Petition for Certification with the Board on November 14, 1975. An election conducted by the Board *was* held November 21, 1975 which the Union won by a vote of 49 to 28. Coincident with Union organizational activities, the Respondent on October 17, 1975 discontinued its previous practice of using a labor contractor to provide its weeding and thinning crews and instead carried the employees comprising the weeding and thinning crew on its own payroll under the supervision of its crew foreman, Pedro Cuevas who continued to pick up the crew at Calexico as he had in the past for the labor contractor, and transport them by bus to the Respondent's ranch, departing from Calexico about 4:30 a.m.

B. Respondent's Promise of Benefits and Threats of Reprisal

At the same time as it began carrying the weeding and thinning crew on its own payroll, the Respondent engaged William Grima to be its "public relations" representative. Among Grima's duties was one to apprise the employees of the wage and other benefits they were receiving from the Respondent and another to adjust their grievances. In the

course of his duties Grima made several speeches to the members of the weeding and thinning crew during October and November preceding the November 21, 1975 Board election outlining their employment benefits and Grima caused flyers in Spanish and English to be passed out setting forth those benefits. (See G. C. Exhibit No. 4 and 4(a) and 4(b))[1]

Several employees testified and I find that they were promised permanent employment by Grima on condition that there was no Union.[2]

I find that Grima was Respondent's agent as well as supervisor within the meaning of the Act and that his promise of benefits and his conditioning employment benefits on their remaining non-Union interferred with restrained, and coerced agricultural employees in the exercise of rights

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1 G. C. Exhibit No. 4(b) informed employees that some of the benefits voluntarily provided by the Respondent were medical and hospitalization benefits, a Christmas Bonus based on 4 percent of the employee's annual earnings, a Retirement Plan and six paid holidays at time and one-half for all hours worked.

2 I do not credit Grima's denial that he told employees that permanent employment and benefits were conditioned on their remaining non-Union. The evidence establishes that "permanent employment" meant preference in employment to the existing thinning and weeding crew, and not necessarily continuous year round employment. By its very nature, a thinning and weeding crew is seasonal.

guaranteed in Section 1152 of the Act, and thereby violated Section 1153(a) of the Act. NLRB v. Gissel Packing Co. 395 U.S. 575; Ohio Power Co. v NLRB 176 F 2d 385, 387 (C.A. 6), Cert, denied .338 U.S. 899.

C. The Layoff of the Weeding and Thinning Crew From December 10 to 16, 1975.

The weeding and thinning crew was laid off December 10, 1975 and recalled December 16, 1975. There is an absence of evidence that the layoff was based on anti-Union considerations. The evidence shows that similar layoffs were made of the weeding and thinning crew in 1973, 1974 and 1976. Additionally, it was established through the credible testimony of Mr. Ralph W. Yocum, the Respondent's "grower", who supervises all the work in the husbandry of the crops, and who ordered the layoff, that the lettuce plant growth was diminished so that it became prudent to let the plant mature more before weeding. Contrary to the contention of the General Counsel that the December 10 to 16, 1975 layoff violated Section 1153(a) and (c) of the Act, I find that such layoff was based solely on economic considerations and prudent plant husbandry and was not discriminatorily motivated. Moreover, there is no evidence to support the General Counsel's claim that the thinning and weeding crew was replaced by additional crews in December 1975. I would therefore dismiss paragraph 11(b) of the Complaint.

D. Use of the Asparagus Knife

Paragraph 11(e) of the Complaint alleges that in about December 1975, the Respondent engaged in reprisal against the workers by forcing them to use small knives to work instead of the standard long handled hoe.

The evidence establishes that in 1975 and continuously to date, the Respondent requires the weeding and thinning crew to use the asparagus knife to cut weeds in the second weeding process when the sugar beet or lettuce plant is mature and large because of the increased risk of damaging the plant with a long handle hoe whereas the asparagus knife can cut the weed without damaging the plant. The asparagus knife has been voluntarily used when the plant is big as early as the year 1972. It is true that use of the asparagus knife requires more stooping by the worker than would be required by use of the long handled hoe. I am satisfied that use of the asparagus knife is not intended as a reprisal against the workers, but is motivated exclusively by prudent growing considerations. Moreover the asparagus knife does not require continuous stooping and requires a stoop only to the knee because the knife is 18 to 24 inches in length and does not require stooping to the foot of the worker. I would therefore order dismissal of paragraph 11(c) of the Complaint.

E. The Refusal to Hire Jesus Sandoval in December 1975

Sandoval began employment in the weeding and thinning crew in September 1975 for labor contractor El Don. Like the others his employment was taken over by the Respondent placing the weeding and thinning crew on Respondent's payroll in October 1975.

Sandoval was active in Union organizational activities preceding the November 21, 1973 3oard election. He campaigner for the Union. He alone distributed all the Union buttons to his fellow workers on the bus and asked them to vote for the Union. He was a Union observer at the Board election.

Sandoval was involved in the December 10, 1975 layoff of the crew. He reported to the crew foreman, Pedro Cuevas, on December 17, 1975 at the usual place in Calexico where the bus leaves with the crew for the Respondent's ranch. Sandoval credibly testified that when he reported at the bus, his foreman, Pedro Cuevas, told him "there was no more work for me because Elmore had so ordered, because I was an organizer for the Union." Sandoval testified he had learned from fellow workers on December 15, 1975 when Pedro Cuevas came around that his name was not on the list of workers and that "they were not going to give him work." Sandoval testified further that he was on the bus steps when Pedro Cuevas

told him that Elmore ordered no more work for him. Sandoval credibly testified that he asked Cuevas the reason, and Cuevas replied that Sandoval had been organizing for the Union in the morning before going to work about 3:30 or 4:00 a.m.

Cuevas testified he knows Sandoval and he never stopped him from boarding the bus, although he does recall stopping him from boarding the bus because the crew was full, but he does not remember the year. Cuevas testified further, "I did not say anything, nor did Sandoval -- I do not know whether or not he wanted to work that day, the crew was full -- I did not mention Union to him." Cuevas denied that he told Sandoval he could not get on the bus because he was a Union organizer. He further testified he never saw them pass out anything in the bus, no Union buttons. He also testified that on that occasion, Sandoval had arrived late and the bus was already complete and no one else was permitted to board the bus.

Cuevas testimony that no one else was permitted to board the bus is contradicted by Sandoval and another worker named Jose Mata. Sandoval testifies that on December 17, 1976, he arrived at the bus on time and seats were still available. Sandoval testified that Jose Mata boarded the bus after he did. Jose Mata who had been employed by

Respondent for seven years and who recalled the layoff from December 10 to 15, 1975, testified that two or three days after his return to work on December 16, 1975, he arrived at the bus and saw Sandoval and Cuevas talking in a loud voice while they were standing outside the bus. Cuevas said to Mata, "get on" and they left without Sandoval. Mata's testimony is corroborated by Sandoval who testified that Jose Mata arrived at the bus after he was refused and was told by Cuevas to board the bus.

I am convinced that Cuevas was instructed by the Respondent not to hire Sandoval. Initially it is noted that Sandoval's fellow workers told him on December 15 that his name was- not on the list and that the Respondent was not going to give him work. Nevertheless he reported for work on December 17 and was stopped from boarding the bus by Cuevas who told him he had orders not to hire him because of his Union organizational activity. I do not credit Cuevas's testimony, because, among other things, it is vague and inconsistent. Cuevas not even remembering the year. Additionally Cuevas advanced the bizarre observation that he did not know whether or not Sandoval wanted to work that day, in self contradiction of his other testimony that he stopped Sandoval from boarding the bus. Additionally, Cuevas's testimony that no one was permitted to board the bus after he stopped Sandoval is contradicted by Mata as

well as Sandoval who both testified that Mata arrived at the bus after Sandoval was stopped and was nevertheless urged to board the bus as they were ready to go.

I therefore find that the Respondent's refusal to permit Sandoval to board the bus for work on December 17, 1975 in its context constituted a discharge and thereby discriminated against him because of his Union activity and coerced and restrained employees in the exercise of rights guaranteed under the Act; and the Respondent thereby violated Section 1153(a) and (c) of the Act.[1]

F. Refusal to Permit Gumar Cindo Villalobos to Board 3us One Day in February 1977

Villalobos started working for the Respondent in October 1975. He was hired by foreman Pedro Cuevas. Villalobos testified that he agreed with other employees to vote for the Union in November 21, 1975 Board election. He wore his Union button while working in the field and. was so observed by supervisors Pedro Cuevas and Manuel Cajegas. Villalobos also testified that the aforesaid two supervisors also saw him sign a Union authorization card in the field in November 1975.

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1 I find that Pedro Cuevas is a supervisor within the" meaning of the Act. He hires and he responsibly directs the work of the weeding and thinning crew which usually comprises 35 to 40 workers. Section 1140.4(j) of the Act; Ohio Power v. NLRB 176 F 2d 385, 387 (C.A. 6) Cert, denied 338 U.S. 899.

Villalobos testified that about 10 to 15 days before the November 21, 1975 Board election foreman Pedro Cuevas engaged him in conversation while he was working in the field and in the course of the conversation told him that he feared that if the Union wins the election he (Cuevas) would be fired. Villalobos testified he told Cuevas that it wouldn't happen, that he would keep his job as supervisor as long as he got along with the workers.

One day in mid-February 1977, Cuevas refused to permit Villalobos to board the bus to go to work. Villalobos testified that Cuevas told him there was no more space, but to return the next day. Villalobos did return the next morning to the bus and Cuevas hired him. Villalobos testified that he learned later from fellow workers Sotello and Huerta that another man came to the field that same morning and he was given work. Villalobos testified further that both the timekeeper , Pablo and Cuevas told him that morning that "it was already filled up."

Hector Sotello testifies he heard both the timekeeper and Cuevas tell Villalobos that the bus was full, but another worker, a new man, was occupying the place that belonged to Villalobos. This other person had arrived ahead of Villalobos. Sotello also testified that about 8 a.m. that same morning "another companion arrived at the field, and he (Cuevas) gave a job to that companion."

Cuevas testified concerning this incident that the crew was complete when Villalobos arrived and Cuevas so told him. Cuevas further testified that the "Union had nothing to do with not letting Villalobos on the bus and he did not hire anyone after Villalobos was refused, nor did he hire anyone at the field." Cuevas testified credibly that his superior Hector Torres tells him how large a crew to take each morning. Cuevas testified that supervisor Manuel Cajegas calls his house and tells Cuevas how many people the company needs, and he complies with that request. Cuevas testified further that in order to pick up the people, he comes to an agreement that all will report at the same place. He leaves for the fields at 4:30 a.m. whether on the El Don payroll or the Elmore payroll, "almost always the same time."

Cuevas testified credibly further that he picks up the bus about 3:15 a.m. and reaches the pick-up point about 3:34 a.m., and most workers are there by this time. He picks up the people available first. Cuevas testified further that when working directly for Elmore, only those who worked for Elmore could get on the bus, just those who were on the list. The list at the time of the election was "people who worked regularly."

I am of the opinion, and I conclude, that there is insufficient evidence to establish that Villalobos was denied employment on one day in February 1977 because of his Union membership or activity. Initially it is noted that the incident occurred about 15 months after the Board election. It occurred when the workers were no longer on the Respondent's payroll, when the bus complement was full, and at a time when some preference was given to early arriving workers. The evidence is clear and undisputed that Cuevas entertained no hostility against Villalobos. He merely told Villalobos the bus was filled and to return the next day. Even if it were true that another worker who drove to the field was permitted to work, that would not establish that the quota for the bus was not full when Villalobos was denied employment on that one morning. Villalobos makes no further claim of discrimination. He concedes that he did return to the bus the next day and was hired by Cuevas.

I would find that Cuevas's refusal to hire Villalobos on that one day in February 1977 did not violate the Act.

G. Cuevas's Refusal to hire Jose Munoz One Day in January or February 1977

Jose Munoz had worked for labor contractor El Don and as a member of the weeding and thinning crew was placed

on Respondent Elmore's payroll in October, November and December 1975 and then returned to labor contractor El Don's payroll in January 1976.

While on labor contractor El Don's payroll in January or February 1977, for work on the Elmore property, he was refused employment on one day. Munoz testified that in January or February 1977, he got to the bus as was his custom, and Pedro Cuevas said "no more seats." Munoz took Cuevas's word and went home. Munoz testifies that at noon he waited for his companions returning from work at the port of entry. As they passed, they asked why he had not worked. He told them "no more seats" and they told him that a friend of theirs "had gotten on the bus after I left." Munoz testified that one of the companions was Hector Sotello, and he told him two more people were hired. Munoz testified that this was the only time he had been refused employment.

Hector Sotello, a fellow worker testified he was sitting in the bus at the time and saw and heard the incident. He testifies that both Munoz and Cuevas were inside the bus, and he heard Cuevas tell Munoz that it was already filled up and he could not take him, but the bus was not full; some seats were unoccupied. Munoz got off and said "until tomorrow." After Munoz got off the bus, Sotello saw Cuevas take on one more person. Sotello's testimony

is inconsistent with respect to who was hired after Munoz left the bus. At one point he testified that after Cuevas told Munoz the bus was full, "he then gave the job to two other boys," but at another point, he testifies that "Cuevas did not give Jose Munoz work but later gave a friend work."

Concerning the general practice of hiring, Sotello testified that he was on the El Don (labor contractor) payroll for many years, and "the foreman always selected the people. He always say, you, you, you, you, either off or on the bus."

Sotello further testified that on the Elmore payroll, the workers were selected by the foreman usually taking the same people, but sometimes he would take friends to work.

Cuevas testified he remembers an occasion in the last four months (before the hearing) when Jose Munoz came to the bus and the crew was full. Cuevas did not let Munoz on the bus "as my crew was already complete." "When Munoz arrived, I told him the bus was already full -- as others arrived who wanted to get on, I told them the crew was complete. I did not hire anyone after Munoz had been refused on that day."

I am of the-opinion, and I conclude that there is insufficient evidence to establish that Cuevas's refusal to take Munoz on one day in January or February 1977 was in any manner related to Munoz's Union membership or activity. The incident in 1977 was extremely remote in time from the Union Campaign in 1975. Munoz has continued working for Respondent and does not claim he was discriminatorily denied employment on any other occasion. Moreover, Sotello's testimony as to some one being hired after Munoz was refused is unclear, and in addition indicates that Cuevas gave employment to a friend after Munoz was refused, a practice which Sotello testified was engaged in by the foreman who "sometimes would take friends to work." Additionally it is pointed out that Cuevas denies hiring anyone else that morning after Munoz was refused employment.

I find therefore that Cuevas's refusal of employment to Jose Munoz on one day in January or February 1377 was unrelated to Munoz's Union membership or activity and therefore did not violate the Act.

H. Refusal to Hire Hector Sotello

Sotello had worked for Elmore about 5 or 6 years on the payroll of a labor contractor all the time except

for the few months he was on Elmore's payroll in October 1975 to January 1976.

Sotello testified that he used the Union emblem, wore the 'Union button and signed a Union authorization card, passed out Union buttons given to him by fellow employee Jesus Sandoval, and that Pedro Cuevas and Manual Cajegas saw him wearing the Union button. Sotello served as a company observer in the November 21, 1975 board election.

At one point in his testimony, Sotello testified that he was never denied employment after the election, but at another point, he testifies he was absent for two weeks with permission from his foreman, but when he returned March 22, 1976, his foreman, Pedro Cuevas, refused him, telling him the crew was complete. Sotello testified when he was refused, he remained sitting on a table and saw Cuevas give the job to two others after he had talked to Cuevas, about 4 or 4:30 a.m.

Cuevas conceded that sometime in March 1976, he refused to let Sotello on the bus, but he testified, "well I was already complete when he arrived seeking employment. Nothing was said." Cuevas testified he did not let Sotello on the bus "because I was already full -- I did not hire someone else after I barred him."

Respondent points out in its post hearing brief, that on the previous day's direct testimony, Sotello was asked if he ever had been refused work, and he testified he had not. Counsel for the Respondent comments, "It took a break in the hearing to enlighten Mr. Sotello's memory. When asked what made him remember this denial of work, he said, "what made me remember was due to the many complaints of my companions." Counsel argues, "certainly such a memory must be suspect."

In any event I must note that Sotello's testimony concerning the circumstances surrounding Cuevas's refusal to give him work on March 22, 1976 lacks corroboration and is contradicted by Cuevas who testified that he denied employment on that day to Sotello because his crew was full and no one else was allowed on the bus after Sotello was refused. Moreover Sotello continued working for Elmore and no claim is made that he was ever denied employment except on this one occasion in March 1976. Under all of the circumstances above outlined, I am of the opinion, and I find, that there is insufficient evidence to support the General Counsel's burden of proof that Sotello was denied employment on that day because of his Union membership or activity. On the contrary the evidence more likely establishes that Sotello was denied employment on this one day in March 1976 because the bus was full. I find that such denial of employment on this one occasion to Sotello did not violate the Act.

I. Refusal to Hire Isidro Huerta

Isidro Huerta had been employed since 1960 for different labor contractors on the John Elmore property. He had worked for El Don, labor contractor more than 10 years and for several months in the fall and winter of 1975, was employed directly by John Elmore as a member of the weeding and thinning crew.

Huerta's Union activities consisted in wearing the Union button, talking Union with his fellow workers as he worked in the fields and signing a Union authorization card prior to the November 21, 1975 Board election.

Huerta testifies that he was denied employment on two occasions in March or April 1977. Huerta testified that on the first occasion when Cuevas was picking up people at the parking lot in Calexico, Cuevas said, "stop here, up to this point only," Huerta testified he asked Cuevas why he was taking men with less time than him, and Cuevas replied he took people he wanted to and not people from the Union. At that moment, Huerta testified, "Cuevas was at the steering wheel and I was on the step -- the timekeeper took down three names while I was standing there -- I then left."

On cross examination, Huerta testified that on this first occasion when he was denied work, he was at the El Don

office at 2:30 a.m., when he arrived the bus was already there; people started getting on the bus at 1:30 a.m. -- I was outside the bus when I was denied work. I didn't want to get into the crowd of men because I had been pulled down and big people stepped on me." Elaborating further concerning this incident, Huerta testified "when the bus come out of the large fenced area, I was standing there with about 40 to 50 people; there wasn't enough work, about 100 to 150 people were there." There Mr. Don would fill up 15 to 20 buses. There were so many buses that people trampled on. A lot of people were getting on through the back door and through the windows, and one man fell down on the ground and his face was injured and it was one month before he could work again."

Huerta testified further that on this first occasion newer people were there, but they had gotten on the bus before him. There was a timekeeper on the bus and three or four people were helping Cuevas taking down names -- "when 25 to 30 people were on the bus, Pedro (Cuevas) would say "stop" and would write down the names; when he finishes, he lets more on the bus and he writes their names." Huerta testified further that "on this day, Pedro's exact words to me were, "I am not taking the ones from the Union, I am taking the ones I want to; people from the Union are nothing to me" -- Huerta testified further "a lot of people got in

ahead of me and was sitting on the bus -- Pedro said to me, "its already full."

In apparent corroboration of Huerta's testimony, fellow worker Hector Sotello testified that one morning in early March 1977, Cuevas refused Huerta, but after Euerta left, Cuevas hired two more, a married couple.

However, Huerta's own testimony was inconsistent, and on cross examination, when asked if he saw anyone hired after him, he said no, that he couldn't see, that there were a lot of people there, a lot of crowding around and he couldn't see. He further conceded that there were Union workers on the bus on that occasion.

With respect to this first incident where he stopped Huerta from entering the bus, Cuevas testified that he remembers he did not let Huerta on the bus because the crew was already complete. He told this to Huerta and Huerta made no reply. Cuevas testified further that he did not hire anyone after Huerta that day and that his decision had nothing to do with the Union, only that the crew was complete.

Viewing the circumstances attending this refusal of Cuevas to take Huerta on March 1977, I credit the

testimony of Huerta, as corroborated by Sotello that subsequent to his refusal to take Huerta, Cuevas took on two more persons.

I further credit Huerta's testimony concerning Cuevas's anti-Union remarks made to him when Cuevas refused to permit Huerta from boarding the bus, and I find that Cuevas's refusal to take Huerta that day violated Section 1153(a) and (c) of the Act.

On a second occasion in late March or early April 1977, Huerta testified that Cuevas told him he had a full crew on the bus, but to wait, Hector was going to send a car to take Huerta to do some weeding. Huerta testifies he waited till 7 a.m. but Cuevas did not come back. Huerta did not see anyone else hired after he left the bus. Fellow worker Sotello corroborates Huerta's testimony. Sotello testified that Cuevas told Huerta the bus was full, but to wait for him and he would send a car for another five people. Sotello testified that after Huerta left the bus and waited for the car, he doesn't remember whether a new man was hired, just that Huerta lost the day waiting for the foreman.

Cuevas remembers this incident where he wouldn't let Huerta on the bus and promised to send a car for him. Pedro

testified that the bus was complete, and when Huerta came over and asked if he could work, "I told him *I* was complete. So I told him to wait a few minutes because another fellow was going to fill another crew. I wanted to check if he had room in his car — wait 15 minutes, and if I don't return, then you will know they will not be able to take you." It is undisputed that Cuevas did not return, presumably because this other crew was complete.

I am persuaded, and I find that there is insufficient evidence to establish that the refusal of Cuevas to take Huerta on the bus on this second occasion was discriminatory, It is clear and undisputed that Cuevas did not take Huerta as the crew was complete. Cuevas's voluntary offer to possibly find a weeding job for Huerta in a small crew traveling by car can hardly be considered discriminatory. Apparently he was unable to fulfill his promise and did not return in the 15 minutes he suggested that Huerta wait for word. I find that in this second instance, Cuevas's refusal to take Huerta on the bus did not violate the Act.

J. The Layoff of Jesus Castellanos Cortez Jesus Castellanos Cortez (Cortez) was hired as a tractor operator by Respondent's general foreman, Lee Rutledge, June 25, 1975. Prior thereto he had about three years experience as a tractor driver, employed by Desert

Ranch, as a tractor driver. Among other things he prepared the land with the caterpillar, planted beets, picked cotton, thinned sugar beets and cultivated melons. After his employment, he worked every day, seven days a week and holidays, ten and a half hours a day. In 1975, Respondent employed about 17 tractor drivers. Lee Rutledge was Cortez's foreman. At times Rutledge would send Cortez to help other foreman. Cortez credibly testified that when Rutledge hired him, he told him he had a permanent job. Rutledge told him "you are a tractor driver but when you are not busy, there is work in the shop and we will find other work for you."

Cortez actively campaigned for the Union in anticipation of the Board election. He signed an authorization card, passed out Union campaign leaflets and talked up the Union to his fellow tractor drivers. He was observed by Rutledge and the other tractor foreman passing out leaflets for two to three days. He was a Union observer at the Board election and the representative of the tractor drivers. Having received permission from one of the foreman, he attended the pre-election conference at 10:30 a.m.

Cortez testified that the tractor foremen knew of his Union activity and that he represented the tractor drivers, and as a consequence they considered him a problem

and wanted to avoid him and did not want to give him work. So Cortez testified, "they worked me only in the shop; they kept me in the shop until Lee (Rutledge) fired me."

Cortez testified that Rutledge "fired" him February 20, 1976. Rutledge told him that there wasn't much work and they were going to reduce the number of workers; this year John (Elmore) is going to give some of the field to his son Howard, so there is less work. Cortez testifies further "So I asked how many tractor drivers he was going to reduce besides myself, but he laid off only me." Cortez learned later that he was the only one laid off.

Cortez testified credibly and with corroboration from fellow tractor driver Olegano Perez that it had not been the practice to layoff tractor drivers. Cortez credibly testified that when there is not enough tractor driving, there is work in the shop. They keep the tractor drivers. We asked for permanent employment, so the tractor driver job is permanent. The foreman tells us when the job is done in the fields, we work in the shop. "The company doesn't want to look for other drivers, because if a worker is laid off, he will seek employment elsewhere when not driving a tractor. Tractor drivers work in the shop, replace equipment, help the mechanic, paint equipment, check machinery, clean up equipment."

Following Cortez's termination of employment, the Union on February 27, 1976 served upon the Respondent by United States Mail an ALRB charge alleging that on February 20, 1976, the Respondent laid off Cortez because of his Union activity. Subsequently on about March 1, 1976 general foreman Lee Rutledge went to Cortez residence to ask him to return to work. Cortez told Rutledge he was working and he would need three days to give his foreman notice, and he returned to work as a tractor driver with the Respondent March 4, 1976.

Cortez testified that following his return to work on March 4, 1976, all the Respondent's foremen have put pressure on him to make him quit the job, "for example, a foreman stops you and says can't you work faster, put in another gear, or hurry and finish your work -- on one occasion I was disking over 30 acres. They put another tractor driver "behind. I am being injured physiologically, so I would get angry and leave; I did not let it make me quit; they tell me to work faster; they push me and bother me. The foreman (Lee Rutledge) comes by every ten minutes." Cortez testified that "before the election, I worked as I wanted; no one bothered me."

The General Counsel contends that there was no economic justification for laying off Cortez; that it is

contrary to the Respondent's practice; that there was in fact no lack of work, and no other tractor driver was laid off, nor their hours of work reduced. (See G. C. Exhibit No. 6) Additionally four tractor drivers -hired subsequent to the hire of Cortez were not laid off. The General Counsel asserts that Cortez's layoff must be attributed to his active leadership in advancing the Union cause among the crew of tractor drivers.

The Respondent takes the position that it chose Cortez for layoff rather than four other tractor drivers who had less seniority based on their date of hire after Cortez hire, because he had not had as much experience in some of the tractor driver skills, particularly in bedding or beet digging.

Cortez's foreman, Rutledge, who laid off Cortez concedes that he had no complaint with Cortez's work, and it was entirely satisfactory. Rutledge testified that when he laid off Cortez, he told him that "we were just caught up with work and as soon as it opened up, I would let him know." Rutledge testified that at the time of Cortez's layoff "we were repairing equipment, and there was not enough equipment to be repaired." Cortez testified that at the time of his layoff in February 20, 1976 work was available disking lettuce and all the fields were

available for planting cotton, work which he was able to perform. Cortez also testified that "bedding or listing" is making rows, and he concedes that although this work requires greater skill, he is competent to do it.

Rutledge testified that he supervises 12 to 14 tractor drivers, but only two or three can "bed" and "dig beets," and those who can bed and dig beets can do anything. Rutledge, a general foreman, incredibly testifies that although he remembers the November 21, 1975 Board election, he did not see Cortez pass out leaflets, he never discussed Union with fellow workers, he did not know Cortez supported the Union, he did not know he was a Union observer, he did not know Cortez attended a pre-election conference, he never told Cortez he had a permanent job, no one gave him orders to layoff Cortez, he did not pressure him to work faster on his return to work, and he never put one machine behind Cortez to speed him up.

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1 Describing his work as a tractor driver, Cortez testified that the tractor driver, in order to prepare the land begins by disking the land, then chisel, then disking again, then prepares for irrigation. After the land is ready, then disk one or two times, then land plane and it is again ready to disk. Cortex testified he knows how to do all of this. He testifies further that in cultivating the plant, once it is born and the land is dry enough, we use a cultivator to get rid of the weeds and to free the plant. After this process medicine is sprayed, and again it is prepared for irrigation. I proceed to the same until the plant is ready to be picked. That process is what one calls cultivation; then fertilizing and spiking. The work of the spiker is to dig further into the ground. Since the shovel makes rows. I know it and I have done it. Cortez testifies he has also operated harvest machinery.

Rutledge testified he does not follow seniority in layoffs. Explaining his reasons for retaining workers with less seniority than Cortez, he testified that he kept Arturo Bermudez even though hired several months after Cortez was hired because "he was qualified, he could do anything, didn't have to be with him."

Rutledge, who hired C. R. Sneed on February 23, 1976, three days after Cortez was laid off, (See R. Exhibit No. 3) testified that Sneed had been on a leave of absence and he wanted him to run toppers in beets. He had not laid off Sneed; he took off and was always welcome back; he had stopped work February 5, and came back February 25; he had not quit, just a leave of absence.

With respect to Felix Verdusco, whose last period of employment is shown on Respondent Exhibit No. 3, as from September 4 to December 1975, and currently working, Rutledge testified he worked in lettuce in 1975. Rutledge testified further "he takes his leave of absence when work is slack. He is an all around guy. He and his family go north, to work. He always takes his leave of absence then. We don't go for seniority. He is an all around man, been with us a long time, knows what there is to do; have to get the best qualified men to do this kind of work."

With respect to Grant Williams (shown by Respondent's Exhibit No. 3 to have been last hired December 1, 1975) Rutledge testified, "he was a good all around man. He always worked this way. On May 29, 1976 he quit to work for himself."

Rutledge testified that Cortez was not as experienced as Bermudez, Sneed, Verdusco or Williams.

Although he has been a general foreman for 13 years who supervises approximately 14 tractor drivers, Rutledge continued with his incredible testimony that he did not see his workers looking at leaflets, no one said anything to him about the election, he was not curious, and he did not notice organizers come and go. He testified incredibly that prior to the November 1975 election, that although he had heard about organizing and had read about it, no one talked to him about it, he never discussed it. He testified, "I do not discuss daily things; I do not talk to my fellow workers about news items." Viewing the open and notorious leadership roll exhibited by Cortez in Union organizational activity among the tractor drivers outlined above, I am satisfied, and I find that the Respondent, and that includes Rutledge, was aware of Cortez's Union activity and support.

Rutledge testifies, that when he laid off Cortez, he told him there was a lack of work and that he said "I am not firing you, and when work comes up, I will let you know." Yet at the hearing in this matter Rutledge sought to justify his selection of Cortez for layoff because of his inexperience in bedding and digging beets while at the same time he acknowledged in his testimony that out of the 14 tractor drivers under his supervision only two or three can bed and dig beets. If lack of experience was the criterion for layoff, then one wonders why 10 or 11 other tractor drivers were not laid off along with Cortez. Respondent's motive for laying off Cortez becomes suspect by the inconsistency of telling Cortez there is a lack of work and then asserting at the hearing that lack of experience dictated Cortez's selection for layoff notwithstanding Rutledge's acknowledgement that Cortez's work was entirely satisfactory.

I credit Cortez's testimony that when Rutledge terminated him on February 20, 1976, Rutledge told him that there wasn't much work and they were going to reduce the number of workers; this year John (Elmore) is going to give some of the field to his son Howard, so there is less work. Additionally, it is observed that Respondent's business manager, Victor Anderson acknowledged by his testimony that he notified Cortez in writing of his layoff

so he could draw his unemployment insurance.

It is clear, contrary to Rutledge's testimony, that Rutledge's choice of words in terminating Cortez impressed on him that the layoff was permanent and not only for a few days. Surely Rutledge was fully aware of his need requirements for tractor drivers, and if he intended to layoff Cortez for only a few days, he would have told him so on February 20. Instead, Rutledge told Cortez that they were going to reduce the number of workers because of a partial change in ownership. Cortez's recital of the exit interview is also credited because he immediately went out and procured another job.

I am satisfied that Cortez properly understood that his layoff was permanent, and that he was not told that he would be called back as Rutledge testified.

Query: Why did Rutledge seek out Cortez on March 1, 1976 to return to work? There were two reasons that come to mind, (1) that the Respondent needs Cortez's tractor-driver services and (2) the Union's unfair labor practice charge in connection with Cortez's termination served on February 27, 1976, has prompted the Respondent to reconsider their action in terminating Cortez on February 20, 1976.

I am of the opinion that the Respondent terminated Jesus Castellanos Cortez on February 20, 1976 because of his Union membership and activity and theregy engaged in unfair labor practices within the meaning of Section 1153(a) and (c) of the Act.

K. Discontinuance of the Morning and Afternoon Breaks Sometime in October 1975, Public Relations man William Grima, apparently to win over the employees to the Respondent's side in its campaign to defeat the Union in the approaching November 21, 1975 Board election, persuaded the Respondent to grant the weeding and thinning crew 10 minute work "breaks" in the morning and again in the afternoon of each work day. These 10 minute morning and afternoon breaks were continued until about December 22, 1975 when they were discontinued without any explanation.

As it is clear that the work breaks 'were instituted to gain the employees favor in the approaching election as a means of defeating the Union at the polls, it amounted to an unfair labor practice within the meaning of the United States Supreme Court's decision in MLRB v Exchange Parts, 375 U.S. 409, 55 LRRM 2100 where Mr. Justice Harlan, speaking for the Court stated: "The danger in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference

that the source of the benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."

The General Counsel alleges at Paragraph 11 (g) of the Second amended Complaint that by discontinuing the breaks in December 1975, the Respondent violated Section 1153-(a) and (c) of the Act.

I agree. I find that abolition of the breaks was in reprisal for the employees' voting for Union representation in the November 21, 1975 Board election. Sunbeam Corporation 211 NLRB No. 75, 87 LRRM 1112; Maple City Stamping Co., 200 NLRB 743, 82 LRRM 1059; Carbide Tools Inc. 205 NLRB 318, 84 LRRM 1149.

Just as the institution of the break periods shortly before the Board election suggested "the fist inside the glove" the denial of the breaks about one month after the Board election suggested the naked fist without the glove and the "source" - which may dry up if it is not obliged." NLRB v. exchange Parts (Supreme Court) supra.

I find that discontinuance of the 10 minute work breaks discriminated against agricultural employees because

of their Union membership and activity and interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 1152 of the Act, thereby violating Section 1153(a) and (c) of the Act.[1]

L. Liability of Respondent for the Conduct of Pedro Cuevas When Crew Was Off Respondent's Payroll

In its post-hearing brief, the Respondent argues that the Respondent should not be held responsible for the conduct of Pedro Cuevas during the time the weeding and thinning crew was not on its payroll but on the payroll of the labor contractor, El Don, after January 6, 1976, (See G. C. Exhibit No. 5 where Respondent notifies employees on January 6, 1976 that it is "going back to using contract crews"). The Respondent contends that to hold the Respondent liable for the activities of the labor contractor before he gets to Respondent's property is clearly inequitable.

I agree with the General Counsel's position expressed in its post-hearing brief that Section 1140.4(c) of the Act makes the Respondent responsible as the employer even though its foreman and crew were no longer on Elmore's payroll after January 6, 1976.

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[1] The work-breaks were reinstituted in March 1977.

Section 1140.4(c) of the Act states:

> "The term 'agricultural employer[1] shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee. . .but shall exclude any person supplying agricultural workers to an employer, and arty person functioning in the capacity of a labor contractor. The_ employer engaging such labor contractor or person shall be deemed the employer for all purposes under this part." (Emphasis Added)

See Also Cardinal Distributing Co., 3 ALRB No. 23 (1977) Tmy Farms 2 ALRB No. 58 (1976).

M. The Six-Month Statute of Limitations .

Pointing to Section 1160.2 of the Act which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon whom the person against whom such charge is made," the Respondent contends that the allegations of violations recited in paragraphs 11 (a), (c) and (d) of the Second Amended Complaint should be dismissed because the Amendments were made in March 1977, whereas the conduct complained of occurred in October to December 1975.

The originalcharges which were later amended were filed and served in February and March 1976, less than six months after any or all incidents in 1975 alleged as unfair

labor practices in subsequent charges or in the complaint.

Section 20210 of the Board's Rules and Regulations provides as follows:

> "Amendment of Charge - An amendment to a charge must be in writing and contain the same information as a charge. An amended charge must refer, by docket number, to the charge to which it is related, and must be filed and served on the charged party in the same manner as the original charge. The Board may disregard any error or defect in the charge which does not substantially affect the rights of the parties."

The Board and the Courts have held that the six month limitation should be liberally construed to insure that the rights of employees be protected. None of the acts complained of in the subsequent charges occurred more than six months before the initial charges filed in February and March 1976. Therefore the subsequent charges filed in 1977 referring to 1975 violations are not barred by the six month limitations. Fant Milling Co. 360 U.S. 301 (1959); NLRB v. Southern Materials 447 F 2d 15 (1971).

Upon the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondent, John Elmore, Inc., a corporation engaged in agriculture in the vicinity of Brawley, California, is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

2. The Union, United Farm Workers of America, AFL-CIO, the charging party herein, is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

3. By speeches of its agents, William Grima, conditioning the payment of wage and other benefits to agricultural employees in October and December 1975, on said employees rejecting the Union as their collective bargaining representative, the Respondent interfered with, coerced, and restrained agricultural employees in the exercise of their rights defined in Section 1152 of the Act, and the Respondent thereby engaged in unfair labor practices within the meaning of Section 1153(a) of the Act.

4. The Respondent's layoff of employees from December 10, 1975 to December 16, 1975 was economically justified and did not violate the Act.

5. The Respondent's conduct in requiring employees at times to use the asparagus knife in the fields instead of the long handle hoe was based on prudent agricultural practices and was not intended as a reprisal against employees for their Union activity, and there was no violation of the Act.

6. By reason of Pedro Cuevas's refusal to rehire Jesus Sandoval and his discharge of Jesus Sandoval on or about December 17, 1975 on-the order of the Respondent because of his Union membership and activity, the Respondent engaged in unfair labor practices within the meaning of Section 1153(a) and (c) of the Act.

7. Pedro Cuevas's refusal to hire Gumencindo Villalobos on a day in February 1977 did not violate the Act.

8. Pedro Cuevas's refusal to hire Jose Munoz on one day in January or February 1977 did not violate the Act.

9. By Pedro Cuevas's refusal to hire Isidro Huerta on one day in early March 19-77, because of his Union membership and activity, the Respondent violated Section 1153 (a) and (c) of the Act; whereas Cuevas's refusal to hire Huerta

on a second occasion in late March or early April 1977 did not violate the Act.

10. Pedro Guevas's refusal to hire Hector Sotello on or about March 22, 1977 did not violate the Act.

11. By general foreman Lee Rutledge's termination of Jesus Castellano Cortez's employment from February 20, 1976 to March 4, 1976, and thereafter harassing him, Respondent discriminated against Cortez for his Union membership and activity and thereby engaged in unfair labor practices within the meaning of Section 1153(a) and (c) of the Act.

12. By discontinuing the 10 minute morning and afternoon breaks to the employees in the weeding and thinning crew on or about December 22, 1975 until resumed again on or about March 1977, the Respondent engaged in unfair labor practices within the meaning of Section 1153 (a) and (c) of the Act.

THE REMEDY

Having found that the Respondent violated Section 1153(a) and (c) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policy of the Act.

As I have found that the Respondent on or about December 17, 1975 discriminatorily refused to rehire and did discharge Jesus Sandoval in violation of Section 1153(a) and (c) of the Act. I shall recommend that the Respondent be ordered to reinstate him immediately to his former position with all rights and privileges and to make him whole for any loss of earnings in accordance with the requirements of F. W. Woolworth Company, 90 NLRB 289, with interest at seven percent per annum as required by Valley Farms & Rose J. Farms *2* ALRB Ho. 41 (1976). See also Isis Plumbing and Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962) and Tex-Cal Land Management Inc., 3 ALRB No. 14.

As I have found that the Respondent terminated the employment of Jesus Castellanos Cortez from February 20, 1976 to March 4, 1976, and refused to hire Isidro Huerta on one day in early March 1977, I shall recommend that the

Respondent be ordered to make them whole for the period of their unemployment described by the payment to them of any wage loss they incurred with interest at seven percent per annum in accordance with the requirement of F. W. Woolworth Company, Supra and Valley Farms & Rose J. Farms, Supra.

As I have found that the Respondent discriminatorily discontinued the 10 minute morning and afternoon breaks from December 22, 1975 to March 1977, I shall recommend that Respondent be ordered to make all agricultural employees denied such breaks, whole by payment to each of them one-half their regular hourly rate of pay for all the work-breaks that were denied them from December 22, 1975 to March 1977. Although the employees in question suffered no wage loss by abolishment of the breaks, they were denied the rest and recreation periods offered by the breaks, and this has a monetary value much as a requirement to work on a non-work day such as a Sunday or holiday for which it is customary to compensate at one-half the regular rate of pay. Such payment shall be made with interest at seven percent per annum.

The unfair labor practices committed by the Respondent strike at the heart of the rights guaranteed to employees by Section 1152 of the Act. It will therefore be

recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 1152 of the Act.

Upon the basis of the entire record, my findings of fact and conclusions of law, and pursuant to Section 1160.3 of the Act, I hereby issue the following recommendation:

ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the UFW-AFL-CIO or any other labor organization by threats of withdrawing wage and other benefits, by threats of discharge, or by discharging, laying off, refusing to hire, or in any other manner discriminatory against employees in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized in Section 1153 (c) of the Act.

(b) In any other manner interfering with, restraining, coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any and all such activities except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of

continued employment as authorized in Section 1153(c) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Offer Jesus Sandoval full and immediate reinstatement to his former position and make him whole in the manner above described in the Remedy.

(b) Make Jesus Castellanos Cortez and Isidro Huerta whole in the manner above described in the Remedy.

(c) Make whole all agricultural employees who were deprived of their 10 minute morning and afternoon breaks between December 22, 1975 and March 1977 in the manner above described in the Remedy.

(d) Preserve and, upon request, make available to the Board or its Agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this order.

(e) Issue the attached NOTICE TO WORKERS (to be printed in English and Spanish) in writing to all present employees, wherever geographically located, and to all new employees and employees rehired, and mail a copy of said NOTICE to all the employees listed on its master payroll for the payroll period immediately preceding the November 21, 1975 Board election, and to post such notice immediately for a period of not less than sixty (60) days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted, such locations to be determined by the Board's Regional Director.

(f) Have the attached NOTICE read in English and Spanish at the peak season in 1977 on company time, to all those then employed, by a company representative or by a Board agent and to accord said Board agent the opportunity to answer questions which employees may have regarding the NOTICE and their rights under Section 1152 of the Act.

(g) Notify the Regional Director of the El Centro Office within twenty (20) days after receipt of this order as to what steps have been taken to comply with this order.

(h) It is further ordered that allegations contained in the Second Amended Complaint not specifically found herein as violations of the Act shall be dismissed.

Dated May 17 1977.

Herman Corenman
Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

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

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

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

(1) To organize themselves;

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

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

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

(5) To decide not to do any of those things, because this is true, we promise that:

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

We WILL NOT threaten you with being fired, laid off or refuse to hire you or give you less work because of your feelings about, actions for, or membership in any Union.

We WILL NOT fire or do anything against you because of the Union.

WE WILL OFFER Jesus Sandoval his old job back if he wants it and will pay him any money he lost because we refused to rehire him and fired him on or about December 17, 1975.

WE WILL pay Jesus Castellanos Cortez any money he lost because we laid him off February 20, 1976 and we will not harass him while he is at work, because of his Union membership or activity; and we will pay Isidro Huerta any money he lost for the one day he was refused work.

WE WILL pay all our employees who were deprived of the 10 minute morning and afternoon breaks from or about

December 22, 1975 to March 1977 an amount of money equal to one-half their hourly rate of pay for. the total number of hours their 10-minute breaks add up to during the period they were deprived of the breaks between December 22, 1975 to March 1977.

Dated: May 1977

JOHN ELMORE, INC.,

By: _____
Representative Title