Riverside, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

CORONA COLLEGE HEIGHTS ORANGE AND LEMON ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 76-CE-47-R 77-CE-2-X 5 ALRB No. 15

DECISION AND ORDER

On September 27, 1977, Administrative Law Officer (ALO) Gordon H. Rubin issued the attached Decision. Thereafter, United Farm Workers of America, AFL-CIO (UFW) and Respondent each filed timely exceptions and a supporting brief, and the UFW filed a brief in reply to Respondent's exceptions.

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

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, as modified herein, and to dismiss the complaint in its entirety.

We agree with the ALO that the business of Respondent, taken as a whole, is that of an agricultural employer. Cf. Gourmet Harvesting and Packing, 4 ALRB No. 14 (1979). Respondent's members entrusted to it the responsibility inter alia, for

supervising the harvesting operation, making the day-to-day business decisions and virtually all significant decisions in regard to the harvesting, representing their interests concerning wage-rate adjustments, providing all the major equipment used for the harvest, transporting the fruit to the packing shed through a subcontract or by its own vehicles, packing and marketing the fruit,[1/] and financing all the foregoing. In contrast, the role of San Gabriel Valley Labor Association is largely limited to bookkeeping and the maintenance of a labor camp used by some of Respondent's employees. Respondent's more substantial and permanent interest in the ongoing agricultural operation and its greater control over the employees' terms and conditions of employment lead us to conclude that it is the primary agricultural employer.

The UFW excepts to the ALO's failure to find that Respondent violated Section 1153(c) and (a) by laying off employees in the Rafael Gonzalez crew for two weeks in July 1976. As this matter was neither alleged in the complaint nor fully litigated,[2/] at the hearing, we make no finding in regard to it.

We find no merit in the UFW's exception to the ALO's

[1/] All fruit harvested and packed by Respondent, and only such fruit, is marketed by OK San Antonio Fruit Exchange, a district exchange of the type necessary to market fruit through Sunkist; every member of the Board of Directors of this exchange is also on Respondent's Board of Directors, and Respondent's general manager is also employed by the exchange.

[2/] No Party argued at the hearing that this layoff constituted a violation of the Act; Respondent neither cross-examined witnesses nor offered testimony with respect to this layoff and only the Charging Party addressed this layoff issue subsequent to the hearing in its briefs.

finding concerning the August 19, 1976 termination of the Gonzalez crew. Respondent elicited uncontradicted evidence that no more work was available for the Gonzalez crew when it ceased work. Although two foremen with less seniority than Gonzalez, Florentine Navarro and Jorge Guzman, continued to work until early November, the General Counsel did not establish that Respondent maintained a seniority system with respect to either foremen or crew members. Moreover, the record indicates that two crews were laid off before the Gonzalez crew. As the Gonzalez crew was not replaced during the remainder of the harvest season, it would appear that Respondent found that the remaining crews satisfied its harvest requirements. It is also noted that Gonzalez had stopped his harvest work in August the previous year.[3/]

We reject the ALO's finding that the General Counsel established a prima facie case that Respondent discriminatorily refused to rehire Gonzalez and his crew in January 1976. There is no evidence in the record that there was any work available for a foreman or crew when Gonzalez applied for work with Respondent in January 1976. We note that in the preceding year, Gonzalez began working for Respondent at the end of February, substituting for another foreman, and did not begin working with his own crew until early March 1975.

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3/We find merit in the UFW's exceptions to the ALO's findings as to the duration of the harvest season, the timing of the crew layoffs and the location of Florentine Navarro's harvest activity. However, we find that the ultimate findings and conclusions of the ALO in regard to the discharge allegation are supported by the record as a whole.

ORDER

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

Dated: February 28, 1979

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Corona College Heights Orange and Lemon Association	5 ALRB No. 15 Case Nos. 76-CE-47-R 77-CE-2-X

ALO DECISION

Applying the analysis set forth in Napa Valley vineyards, Co., 3 ALRB No. 22 (1977), the ALO rejected Respondent's defense that the San Gabriel Valley Labor Association (Association), and not Respondent, is the agricultural employer of the employees here involved, concluding that Association essentially functioned as a labor contractor for Respondent. Respondent is an association of citrus growers, while Association is an entity which provides services to both citrus and grape growers. In reaching his conclusion, the ALO noted that Association's activity was limited to providing a centralized accounting and bookkeeping function, operating a labor camp for some of Respondent's harvest workers, and writing paychecks for harvest workers and foremen used by Respondent, and that Association in no way supervised the foremen during the harvest. In contrast, the ALO noted that the grower members of Respondent had given it complete authority to direct the harvest of their groves, and that Respondent supervised the harvest, supplied or paid for all the necessary harvest equipment, had responsibility for getting the fruit to the packing house, made all necessary decisions regarding the harvest, and selected and supervised the crew foremen and sometimes even the pickers.

The ALO dismissed four allegations of alleged violations of Section 1153(a) on the ground that they were barred by the six-month limitation period set forth in Labor Code Section 1160.2. The ALO also dismissed the allegation that Respondent violated Section 1153(c) and (a) by laying off foreman Rafael Gonzalez and his crew. Although the ALO found that the General Counsel established a prima facie case that the layoff was motivated by Respondent's desire to rid itself of the Gonzalez crew, which had engaged in concerted activity and included several visible and active UFW supporters, he also found that Respondent adequately rebutted the General Counsel's case by demonstrating that the layoff was occasioned by a reduction in the work force necessitated by the decline of the harvest season. However, the ALO found that Respondent did not sufficiently justify its refusal to rehire Gonzalez when the next harvest season began and, based on the General Counsel's prima facie case, concluded that Respondent had violated Section 1153(c) and (a) by failing or refusing to rehire Gonzalez.

BOARD DECISION

The Board affirmed the ALO's decision that Respondent's business, taken as a whole, was that of an agricultural employer, citing Gourmet Harvesting and Packing, 4 ALRB No. 14 (1979). The Board reasoned that Respondent's more substantial and permanent interest in the ongoing agricultural operation and its greater control over the employees' terms and conditions of employment establish that it is the primary agricultural employer of the employees here involved. The Board affirmed the ALO's conclusions regarding the alleged unfair labor practices with the exception of the refusal-to-rehire allegation. As to that allegation, the

Board reversed the ALO, noting that there is no evidence in the record that there was work available when Gonzalez applied for rehire in January of 1976, and that at the beginning of the previous harvest season he had not started working as a substitute foreman until late February and did not begin working with his own crew until early March. Accordingly, the Board dismissed the complaint in its entirety.

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

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STATE OF CALIFORNIA

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

CORONA COLLEGE HEIGHTS ORANGE AND LEMON ASSOCIATION, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	CASE NOS. 76-CE-47-R 77-CE-2-X

A. Paul Griebel, for the General Counsel

Leon L. Gordon,
Gordon and Glade of
Los Angeles, California, for the Respondent

Douglass Adair of
Coachella, California, for the Charging Party

DECISION

STATEMENT OF THE CASE

GORDON H. RUBIN, Administrative Law Officer: This case was heard before me at Riverside, California, on July 27, 28, part of the 29th, part of August 2, and August 3, 4, 5 and 6, 1977 (on part of July 29, August 1,

and part of the 2nd, 1977, the hearing was in recess for the purpose of examination by the parties of documents produced by the Respondent and the San Gabriel Valley Labor Association pursuant to Subpoenas Duces Tecum). All parties were represented. The Complaint alleges that the Respondent, CORONA COLLEGE HEIGHTS ORANGE AND LEMON ASSOCIATION (CCH), violated §§ 1153 (a) and (c) of the Agricultural Labor Relations Act (the Act). The Complaint is based on-two charges filed by the United Farm Workers of America, AFL-CIO (the Union), consolidated herein for hearing. Copies of the charges were served on the Respondent as admitted in its Answer. Briefs in support of their respective positions were filed after the hearing by all parties.

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

FINDINGS OF FACT

I. Jurisdiction.

In its Answer, Respondent has admitted that the Union is a labor organization representing agricultural employees within the meaning of § 1140.4(f) of the Act, and I so find.

Respondent CCH is a non-profit association organized under the laws of the State of California, composed of more than 150 individual owners of citrus orchards in and around the area of Riverside County, California. CCH operates a citrus packing house and, in conjunction with other marketing associations, markets members fruit. For the reasons set forth below, I find that the Respondent, CCH, is an agricultural employer within the meaning of § 1140.4 (c) of the Act.

A. Discussion of the Facts.

Respondent has denied in its Answer and throughout the proceeding that it was an employer subject to the Act. Its position is based on the uncontradicted facts that the actual picking of fruit was done by pickers and crew foremen who were paid by checks drawn on the account of the San Gabriel Valley Labor Association (SGV), a nonprofit cooperative association. Nearly all members of CCH

are also members of SGV, although they need not be and in apparently a few instances, are not. SGV has a total membership in excess of 450 growers and handles payments to pickers and crew foremen who pick for members of two other cooperative citrus packing houses and various individual grape growers. In order to use the services of SGV, a grower must be a member of SGV. In addition to making the actual payments to pickers and crew foremen, SGV provides various other benefits including medical insurance, vacation and pension benefit plans and maintains a labor camp which consists of facilities for lodging, food, recreation, education and the like. However, pickers and crew foremen need not utilize these latter services of SGV and it was apparent from the testimony that a great many do not do so. (They live in the area and contact or are contacted for work by crew foremen or simply apply on a day to day basis at the labor camp.) SGV is governed by a Board of Directors of nine persons, two of whom are associated with CCH; one is a grower member and the other is Art Peterson, the Assistant Packing House Manager and Supervisor of the Field Department of CCH. All labor charges, including operating overhead are billed directly to CCH on a weekly basis for those pickers and crew foremen working for CCH member growers. CCH also maintains a revolving fund covering monies obtained from joint CCH-SGV member growers for SGV operations, which fund is under the control of CCH exclusively. In addition, although SGV provides sacks, gloves and clippers to the pickers, it requires a refundable deposit from each picker for these items and bills the actual cost of them to CCH as part of its overhead charge.

In contrast to the foregoing, CCH controls all phases of the actual harvest, including supervision of the actual picking for quality control purposes. Thus, CCH provides all ladders, bins, boxes, trucks (those used in the orchards are owned by CCH, and those carrying the fruit from the orchards to the packing house are by contract hauler, pursuant to contract with CCH) and forklifts used in the harvest. CCH personnel in the Field Department determine not only the schedule of orchards for picking and the amount and size of fruit to be picked, but most importantly, they select and assign the crew foremen to do the job, sometimes form new crews and recruit pickers. A large number of the crew foremen picking CCH member orchards have picked for CCH for many years. (See R. Ex. 19.) It

is crucial to the packing house that the picking be done correctly and pursuant to a specified standard of quality control. It is obvious that this task is greatly facilitated for the packing house and the Field Department which is responsible for the harvest, to have knowledgeable, experienced crew foremen that know the standards insisted on by the Field Department and have shown by past performance that they are capable of meeting those standards. The assistant Field Supervisors for CCH, such as R. S. "Short" Reeves, Leo Guevara and others carefully monitor the quality of the picking and make sure that the hours worked by the pickers are accurate. (Although the pickers are paid on a piece rate basis, they are also covered by the minimum wage law.)

Much testimony at the hearing concerned the determination of the wage rate received by the pickers and who sets it. Respondent contended that SGV set the rate while the General Counsel and the Union maintained it was set by CCH. On the basis of the testimony at the hearing, it appears that a "prevailing rate" is adopted in the area as a base for the various kinds and varieties of fruit. There is apparently participation in setting this rate by the various packing house representatives based on information from governmental sources as to comparable wage rates throughout the state. The base rates are generally changed only at the beginning of the season but the amount actually paid may be adjusted upward during the season depending on the difficulty in picking encountered in a particular orchard. (The rate for lemons is set by means of a rate table - R Ex. 6 - which is based on an average of the volume of fruit picked. The rate varies depending on a sample average of boxes picked. The various rates for various volumes contained on the table are themselves revised every season or every few seasons.) It is not clear from the testimony specifically which organization or entity actually determines the prevailing rates. However, it is clear that CCH has the final authority with respect to the amount to be paid to pickers working in its members orchards While normally the prevailing rate is used, in the case of lemons especially, it is sometimes not economically feasible to pick a grove without incurring a loss based on the price then being paid for the fruit in the market. In such case, CCH personnel (generally Art Peterson) direct that a grove not be picked or check with the member grower to determine whether the grower wants the grove picked anyway even though a loss is likely to result. For rates to be paid in excess of the prevailing rate (with the exception of

lemons which are only picked pursuant to the rate table), CCH must give its approval. Generally, the crew foreman will indicate to one of the CCH Field Supervisors that the rate should be higher because of the difficulty in picking a particular orchard. The CCH supervisor will either agree, disagree or consult with Art Peterson, the head of the Field Department. A rate will ultimately be set and often that rate will not be known until the picking is well under way. (This is always true for lemons because until a sufficient volume is picked, the information necessary to apply the rate schedule is not known.) The bottom line, then/ is that CCH, as the purchaser of the pickers' services, ultimately decides the wage rate it will pay and the pickers, often after having worked a substantial part of the day, will then be told what the rate is. (Of course, if the orchard presents no particular difficulty, the pickers may be told at the beginning of the day that the prevailing rate will apply.)

Testimony was presented by Respondent through Xavier Piedra, Manager of SGV and Florentine Navarro, a crew foreman, that Mr. Piedra has the sole authority to set the rates. This testimony is simply not credible in light of the overwhelming economic interest of CCH (on behalf of its grower members) that a rate not be set too high so that a negative economic return would result. In determining that SGV is not the employer under the Act, it is necessary to understand the important role of the crew foreman. Testimony was presented by witnesses for both the Respondent and the General Counsel, that the crew foreman was often expected to recruit his own crew. Art Peterson, for example, urged crew foreman Rafael Gonzales in early 1976 or 1977 to recruit a good crew and be available when needed. Xavier Piedra communicated with Gonzales in September 1976 and later to urge him to get a crew together. Pickers frequently sign on with a crew foreman for a few days or weeks without ever going to the labor camp. Their names are simply added to the time sheets filled out by the crew foremen and they are paid accordingly for the work performed by SGV check. Thus, it is clear that SGV provides primarily a centralized accounting and bookkeeping operation for the benefit of grower members and that it performs no function in regard to the actual harvest operations. In this regard, it is significant that during the peak employment period of 1976, 655 pickers were working while in excess of 3,000 pickers were "on the books" of SGV for the year. In view of this disparity, the crucial role of

the crew foreman becomes apparent. The crew foreman is generally responsible for having a crew which is sufficient to do the job. Although he apparently can and does get pickers through the labor camp directly, this is not in any way an exclusive source of workers. On occasion, CCK personnel also direct pickers to certain crews. (Testimony of Julio Torres that "Short" Reeves assigned him to a crew and later reassigned him.)

There was testimony in the hearing regarding changes in the By-Laws of CCH, authorized by the Board of Directors in 1976. The substance of the changes authorized was to delete references to "picking" or "harvesting" by CCH. These changes have not yet been accomplished. Respondent contends that these changes were merely for the purpose of eliminating obsolete provisions dating to 1964 when the original By-Laws were adopted. At that time, CCH did directly hire the pickers and crew foremen and pay them with CCH checks. Payment by CCH checks ceased in 1968 and payment by SGV checks began. Other than this change, operations of CCH in regard to the harvest have been substantially unchanged. In any event, the provisions of the By-Laws are not determinative of the issue of whether CCH or SGV is the employer for purposes of the Act.

§ 1140.4(c) of the Act provides as follows:

> "The term "agricultural employer" shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agricultural employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperatives engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes, but shall exclude any person supplying agricultural workers to an employer, any farm labor contractor as defined by Section 1682, and any 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."

The General Counsel contends that SGV cannot be an "agricultural employer" under the Act because it is specifically excluded under the terms of the above definition. {". . . any person functioning in the capacity of a labor contractor." SGV has a federal labor contractor license [C. P. Ex. 3] but is exempt from California licensing provisions because it is a nonprofit association -Labor Code § 1682.5.) However, as pointed out by Respondent, the Board has held in Kotchevar Brothers, 2 ALRB No. 45, (1976), page 6, that the mere fact that one is a labor contractor under § 1682 of the Labor Code, does not preclude it from being an "agricultural employer" as well if it performs other functions.

> "It is Walker's ability to supply costly equipment used in the harvesting operations, and to assume responsibility for getting the grapes to the winery, which primarily accounts for his relationship to this employer. ... In the understanding of the industry, Walker is a custom harvester.
>
> In our judgment, a custom harvester falls within the statutory definition of 'agricultural employer' even though some of the functions which he performs are those typically associated with a labor contractor."

Thus, while Kotchevar Brothers would permit a finding that SGV was an agricultural employer under the Act, even though it were also a labor contractor, such a finding must be based on the functions which it performs. Here, contrary to the situation in Kotchevar Brothers, SGV does nothing but provide centralized accounting and bookkeeping functions and maintain labor camp facilities for some of the workers. It also writes paychecks for crew foremen but in no way supervises them in the harvesting operation. (Testimony to the contrary by Respondent's witnesses is not credited because of the complete control over the harvest operations maintained by CCH Field Department personnel.) In addition to supervising the harvest, CCH also supplies or pays for all the necessary equipment used in the harvest and is responsible for getting the fruit to the packing house. In Napa Valley Vineyards, Co.

3 ALRB No, 22 (1977), page 11, the Board held that the determination of "agricultural employer" depends on the "whole activity" of the organization or entity'. It is clear in this case that the individual grower members of CCH which direct it to conduct the harvest of their fruit (all but a few of CCH's members), give to CCH complete authority to accomplish that function. With the single exception of the situation involving possible negative returns from the harvest, CCH makes all decisions necessary to the harvest for its members, including the selection and supervision of the crew foremen and sometimes even the pickers. The Board stated in Napa Valley Vineyards , Co., page 12, as follows:

> "... [W]e have focused on all the functions of the company, that is, on what it actually does, to reach our conclusion that it is an agricultural employer within the meaning of Section 1140.4 of the Act. We further find it supports the purposes of our act which includes the right of agricultural employees 'to negotiate the terms and conditions of their employment* (Section 1140.4) to find this company to be the employer. Here it is the company, and not the landowners, which determines the terms and conditions of the workers' employment and thus it best serves the interest of the workers to negotiate directly with the company as their employer."

For these reasons, I find that Respondent CCH meets the description in § 1140.4 (c) of the Act of a "harvesting association" and, therefore, is an "agricultural employer" in relation to the workers who pick its members orchards.

II. The Alleged Unfair Labor Practices

The Complaint, dated March, 27, 1977, alleges that the Respondent violated §§ 1153(a) and (c) of the Act by certain conduct culminating in termination of a crew of pickers and their crew foreman and by refusal to rehire them because of their concerted activities in protesting the terms and conditions of employment and in

order to discourage their self-organization rights. The Complaint was amended by oral motion on August 4, 1977 (with written amendment timely filed) to include the names of those individuals listed in G. C. Ex. 11 as employees affected by the alleged unfair labor practices.

Respondent denies that it engaged in the alleged unfair labor practices or that it wrongfully terminated the affected employees or that it refused to rehire them.

A. Discussion of the Facts.

Initially, Respondent claims that the unfair labor practices alleged in §§ 6(a) through (d) of the Complaint are barred by the provisions of § 1160.2 of the Act because they show on their face that they occurred more than six months prior to the filing with the Board of the charges on which they are based. Respondent moved to dismiss these allegations and the motion was taken under advisement. General Counsel, at page 8 of its Brief, concedes that the charges were filed beyond the statute of limitations. The Union does not dispute the late filing but argues that the statute of limitations should be tolled for the period in 1976 that the Board was without sufficient funds to fully operate. However, inasmuch as filing ..with, the Board could have been accomplished by merely mailing copies of the charges to the Board in Sacramento, I find that the charges were filed beyond the six month statute; the statute was not tolled and, accordingly, the motion of Respondent to dismiss paragraphs 6 (a) through (d) of the Complaint is granted.

Remaining paragraph 6 (e}, as amended, alleges that the termination of the crew of Rafael Gonzales on August 19, 1976 and the subsequent refusal to rehire the crew violated the Act. It is uncontested that on August 19, 1976, Gonzales[1] crew contained three active union members, Julio Torres, Salomon Borja and his brother, Felix Borja. Respondent's representatives, primarily Art Peterson and Leo Guevara, knew that Torres and the Borjas' were union members and active in trying to improve the wages and working conditions of the pickers. This knowledge was derived from the following undisputed incidents, testified to by witnesses for both General Counsel and Respondent:

a) February (or January) 1976 - Leo Guevara meets Julio Torres driving out of an orchard in which he was not working that day and ascertains that he was engaged

in union organizational efforts on the lunch break.

b) March 1976 - The Borja brothers and Humberto Navarro engaged in concerted activities in the orchard to change bins to boxes because of the difficulty of picking that particular orchard with bins. They were terminated the next day but after filing an unfair labor practice charge were reinstated and the charge was withdrawn.

c) June 1976 - Julio Torres and Union representatives meet with Art Peterson concerning higher wages.

d} July 1976 - Julio Torres and Salomon Borja are spokesmen for the crew of Rafael Gonzales in trying to get increased wages. Gonzales, himself, initially contacts Art Peterson to convey feeling of crew that piece rate is too low. The crew stops working and Torres and Borja talk with Leo Guevara and others. No response was forthcoming that day and they leave the fields without having worked that day about 3 or 4 o'clock. About two or three days later, the entire crew is stopped from working for a two week period while crew foreman Gonzales took a previously scheduled vacation. It was the understanding of the crew that they would have a substitute foreman for the two weeks but this, did not result.

On August 19, 1976, the crew of Rafael Gonzales, including Torres and the Borja brothers, is told that there is no more work for them. The General Counsel and the Union urge that in light of the certain knowledge by Respondent of the concerted activities of Torres and the Borja brothers, the termination of these workers and the rest of Rafael Gonzales' crew is a violation of the Act. General Counsel further supports the contention by offering testimony that other crews continued to work on CCH member orchards after August 19th. On the other hand, Respondent presented credible though, not uncontradicted testimony that the 1975-76 citrus season came to an end within a few weeks after August lath,. During the height of the season, CCH used eight crews for picking. Gonzales' crew was the third to be laid off. One week later, another CCH. crew was terminated leaving four crews working. Of these, two were working in the Escondido area of San Diego County and composed of workers living in that local area and recruited by the crew foremen. The crew foremen of the two crews

continuing to work for CCH in the Riverside area, Ruben Salazar and Gerardo Miranda, were both very experienced, having worked as crew foremen in the area since 1956 and 1961, respectively (see R. Ex. 19). Respondent denies that crew foremen or pickers are hired on the basis of seniority but points out that even if this were the standard, Rafael Gonzales, a crew foreman since the latter part of the 1960's had less seniority than either of the two foremen working in the Riverside area after August 19th. Accordingly, the evidence shows, and I so find, that the Respondent did have a legitimate business purpose in terminating the crew of Rafael Gonzales on August 19, 1976. Put simply, the harvest was nearly over for that season and the work was running out. Rafael Gonzales testified that his crew stopped picking in the middle of the day when there was no more fruit to pick in the orchards in which they were working.

The General Counsel and the Union contend that the incidents alleged in paragraphs 6(a) through 6(d) of the Complaint, while not conduct upon which violations of the Act can be directly based because of the bar of the six month statute of limitations, are nonetheless strong indications of Respondent's anti-union animus. On the other hand, Respondent denied any anti-union animus in general, and specifically denied certain anti-union statements attributed to its personnel or SGV personnel who testified at the hearing. Respondent also objected to testimony on hearsay grounds by the General Counsel witnesses of secondhand statements relayed to them by their crew foremen indicating anti-union threats by CCH personnel. Without recounting the testimony on each alleged incident, I find that the alleged statements and/or conversations by themselves, and in the absence of any evidence of specific discriminatory acts closely related in time to them, are not persuasive enough to show anti-union animus to a significant extent. This finding, however, in no way detracts from the fact that Respondent was clearly aware of the union sentiments and proclivities to protect-concerted activities of Torres and the Borja brothers, as described above.

It is clear that the Union perceived the termination of Gonzales' crew on August 19th, to be a violation of the Act and shortly, thereafter filed a charge. On this record, the termination of a crew containing active union members does support an inference that the termination was a violation of the Act. It is incumbent on the employer, therefore, to present any business justification which it

may have, for the action taken. Respondent has done so, as set forth above, and in weighing the justification against the action taken, I am compelled to find, and do so find, that the termination of the crew on August 19th'was justified by economic circumstances and not discriminatory as to the crew or its foreman. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v Fleetwood Trailer Co., 389 U.S. 375 (1967).

The Complaint, however, also alleges as a violation, the failure to rehire the crew of Rafael Gonzales for the 1976-77 season. Testimony at the hearing supports a finding, and I so find, that Gonzales was a competent and experienced crew foreman and that he had previously worked many seasons picking the orchards of CCH members. Likewise, there was no testimony at all to indicate that Torres and the Borja brothers were anything other than competent, qualified pickers. Accordingly, under normal circumstances, it would be expected that Gonzales would be rehired for the CCH 1976-77 season and that the pickers also would work on crews picking CCH members' orchards, as they had done in the past. Since this did not happen, a pertinent question is raised as to why a relatively long-standing seasonal employment relationship did not continue. If it was because the employer, Respondent CCH, wished to avoid having a crew pick for it which contained pickers active in the Union (and who had engaged in protected concerted activities during the last season), it would be a violation of the Act. Just as in the situation, above, regarding the termination of the crew on August 19th, this record supports an inference that the failure to rehire a crew headed by Rafael Gonzales for the 1976-77 season is a violation of the Act. Against this inference must be measured Respondent's business or economic justification, if any, or other nondiscriminatory reasons for not rehiring a crew headed by Rafael Gonzales.

Xavier Piedra, manager of SGV, testified that in early September, 1976, he contacted Gonzales and asked him to get a crew together and be ready to start picking grapes and, later, lemons, for employers other than CCH. Piedra also testified that he sent letters to members of Gonzales crew on August 19, to urge them to report for work in grapes and lemons for other, employers. Two points are significant in regard to this testimony. First, since SGV is not the employer herein, its offer of work is relevant only to the issue of mitigation or back pay. Secondly, Piedra's

actions, coming as they did on the heels of the first unfair labor practice charge (alleging termination for union activities), served on CCH on August 25, 1976 (R. Ex. 1), seem particularly related to the fact that the charge was made (note the prior incident in March, 1976.) With over 3,000 pickers "on the books" the apparently special treatment accorded the members of Gonzales' crew in terms of a special request to come to work is rather obviously an attempt to counter the allegations in the charge.

On the other, hand, in January, 1977, Gonzalea contacted "Short" Reeves of CCH about working in the harvest then getting under way. Reeves referred him to Xavier Piedra (SGV) with the explanation that he (Reeves) could no longer do anything and that things were now "changed." (Gonzales also testified that he had a similar conversation with Art Peterson but there is confusion in the testimony about the year this occurred. The context suggests it was January, 1977, but Gonzales said it was 1976. In any event, it does not contradict Gonzales[1] testimony that he sought re-employment with CCH in January, 1977.) After his conversation(s) with CCH, Gonzales contacted Piedra and asked to go back to work for CCH, pointing out that a new crew foreman had begun to pick for CCH. Piedra did not refer him for work at that time but, shortly thereafter, on or after January 18, 1977, he was referred the the La Verne co-op, for which he worked intermittently until June or so. I believe it is significant that Gonzales was referred for work shortly after the union prepared a new charge against CCH (date of preparation is listed as January 14, 1977 filed with the Board January 19, 1977) alleging an unfair labor practice in failing to rehire him for the 1976-77 season (R. Ex. 2). Since Gonzales[1] abilities as a crew foreman are not challenged by CCH personnel and because he worked on the orchards of CCH members for the nine or so prior years, I cannot find any business or economic justification for the failure to rehire Gonzales as a CCH crew foreman for the remainder of the 1976-77 season. In fact, none was even offered by Respondent. As noted above, it was Gonzales[1].crew in July, 1976, which stopped working to protest the wage rate, and which, contained the most active and well known union members (Torres, and the Borja brothers). I find, therefore, that the testimony strongly supports an inference that-Gonzales was not rehired by CCH as a crew foreman because CCH personnel were dissatisfied with the concerted activities of members of his crew during the prior season and with his failure or inability to prevent

such activities and sought to avoid such problems during the then current season. As indicated, no contradictory evidence was offered by Respondent. (The testimony by Respondent's witnesses that SGV personnel do the hiring and assignment of crew foremen for CCH is simply not credible on this record.)

Respondent takes the position that the crew foremen are supervisors under § 1140.4(j) of the Act and, therefore, are not entitled to protection thereunder. Since the above section defines "supervisor" as one who has "the responsibility to direct" employees, it appears that crew foremen are properly classified as supervisors. The General Counsel's Brief, page 12, does not dispute this. It is argued, however, that a supervisor is entitled to protection where the action taken against him is aimed at penalizing employees for union activities or other protected conduct. Donelson Packing Co., Inc., 220 NLRB 159, 90 LRRM 1549 (1975); Pioneer Drilling Co., Inc., 162 NLRB 918, 923, 64 LRRM 1126 (1967), enfd. in pert, part 391 F.2d 961, 67 LRRM 2956 (10 th Cir. 1968). I find that the refusal to rehire Gonzales as a CCH crew foreman did have the effect of communicating the position of CCH that it did not wish to utilize crew foremen who permitted or pickers who engaged in union or other concerted activity and, therefore, on the basis of the authorities, cited above, I find that the refusal to rehire Rafael Gonzales as a CCH crew foreman was for an improper purpose and that he is entitled to the protection of the Act.

The amended Complaint, paragraph 6(e), also alleges that an unfair labor practice was committed by the refusal to rehire the crew working with. Gonzales on August 19, 1977. However, in view of the large number of pickers who may work on and off for a particular crew foreman during a season, and in the complete absence of any evidence that any members of the crew on August 19, 1976 requested re-employment with CCH for the 1976-77 season, I am compelled to find, and do so find, that no member of the crew is entitled to personal relief under the Act as a consequence of the refusal to rehire Gonzales as a crew foreman.

CONCLUSIONS OF LAW

I. Respondent, CCH, is an agricultural employer within the terms of § 1140.4 (c) of the Act.

II. The charging party, United Farmworkers of America, APL-CIO, the Union, is a labor organization within the terms of § 1140.4(f) of the Act.

III. The failure of CCH to rehire crew forman Rafael Gonzales in January, 1977, for the harvest season then under way was an unfair labor practice and violated §§ 1153(a) and (c) of the Act.

IV. Rafael Gonzales, although found to be a "supervisor" under § 1140.4 (j) of the Act, is entitled to the protection of the Act because the failure to accord him protection in the circumstances of this case would adversely affect employee rights under the Act.

The Remedy

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to. effectuate the policies of the Act. Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to § 1160.3 of the Act and § 20279 of the Board's Regulations, I hereby issue the following recommendation:

0 R D E R

Respondent, Corona College Heights Orange and Lemon Association, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining and coercing employees in the exercise of their right 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 or protection, or to refrain from any and all such activities (except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment as authorized in § 1153(c) of the Act), by way of discharge, refusal to rehire, or other discipline for engaging in such activities.

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

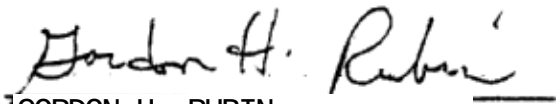
(a) Offer Rafael Gonzales employment as a crew foreman for the 1977-78 season.

(b) Make Rafael Gonzales whole for any loss of earnings suffered by the refusal to rehire him beginning January, 1977, the determination of the actual amount thereof to await further proceedings by the Board.

(c) Give to each crew foreman employed for the 1977-78 season sufficient copies of the following NOTICE TO EMPLOYEES (to be printed in English and Spanish) to distribute personally to each employee as he or she first begins working in that crew during the season and post said NOTICE in a prominent place on all vehicles used by CCH. personnel engaged in harvest supervision for the duration of the 1977-78 season.

IT IS FURTHER ORDERED that the allegations contained in paragraphs 6(a) through (d) and that part of (e) referring to termination of the crew, not specifically found herein as violations of the Act, shall be, and hereby are, dismissed.

DATED: September 27, 1977.



GORDON H. RUBIN
Administrative Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that Corona College Heights, Orange and Lemon Association, and not the San Gabriel Valley Labor Association, is the employer of the workers who pick the fruit of our grower members. The Board has also found that we interfered with the right of our workers to freely decide if they want to join a union when we did not rehire a crew foreman, Rafael Gonzales, in January, 1977, because he had a crew in 1976 that had very active union members in it.

The Board has told us to have our crew foremen pass out this notice to each of our workers this season, and to post it on the vehicles used by our field supervisors. We will do what the Board has ordered and also tell you that:

1) We will offer Rafael Gonzales employment as a crew forman for the 1977-78 season and pay him for any money lost by him because we refused to rehire him in January, 1977.

2) We will not discharge, refuse to rehire or otherwise discipline workers who exercise their rights to self-

organization, to form, join, or assist labor organizations, to bargain collectively through, representatives of their choosing and who engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or who refrain from such activities.

3) We will not discharge, refuse to re-employ or otherwise discipline crew foremen who have workers in their crews who exercise the rights described in 2) above.

DATED:

SIGNED:

CORONA COLLEGE HEIGHTS ORANGE AND LEMON ASSOCIATION

By:_____
(Title)