

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

J. J. CROSETTI COMPANY,)	
)	
Respondent,)	Case No. 79-CE-20-EC
)	
and)	
)	
UNITED FARM WORKERS OF)	6 ALRB No. 10
AMERICA, AFL-CIO,)	
)	
Charging Party.)	
_____)	

DECISION AND ORDER

On October 9, 1979, Administrative Law Officer (ALO) Mark E. Merin issued the attached Decision in this case. Thereafter, J. J. Crosetti Company (Respondent), the United Farm Workers of America, AFL-CIO (UFW) and the General Counsel 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 ALO's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO only to the extent consistent herewith.

The ALO concluded that Respondent violated Labor Code Section 1153 (a) by laying off a group of its employees on January 30, 1979, because they refused to perform a second cutting of lettuce unless Respondent raised their wages. Respondent excepts to this conclusion, arguing that it laid off the employees solely

because, aside from the second cutting, it had no lettuce available for harvesting. We find merit in this exception.

The General Counsel attempted to rebut Respondent's business justification defense through witnesses who testified that they observed a labor contractor's crew harvesting Respondent's fields during the day or days immediately following the January 30 layoff. This testimony, however, was sketchy and unclear at best. Furthermore, with the exception of Ned Dunphy, none of the General Counsel's witnesses testified they observed the labor contractor's crew performing first cuttings of lettuce rather than the second cuttings which Respondent's employees had previously refused to perform. We find Dunphy's uncorroborated testimony is not persuasive, and we note that he first made the assertion during the General Counsel's rebuttal case after remaining in the hearing room as the UFW's legal representative through the entire proceeding. In view of the above, and the record as a whole, we find the General Counsel failed to prove by a preponderance of the evidence that Respondent laid off the employees because of their union activity or other protected concerted activity.

ORDER

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

Dated: February 15, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

J. J. Crosetti Company (UFW).

6 ALRB No. 10

Case No. 79-CE-20-EC

ALO DECISION

The ALO concluded that Respondent violated Labor Code Section 1153 (a) by laying off a group of its employees because they engaged in protected concerted activity, i.e., refusing to work unless they received a wage increase. The ALO recommended that the Board dismiss an allegation that, on a separate occasion, Respondent laid off employees for engaging in protected concerted activity, concluding that the activity involved in the second incident, leaving work to attend a union meeting, was not protected.

BOARD DECISION

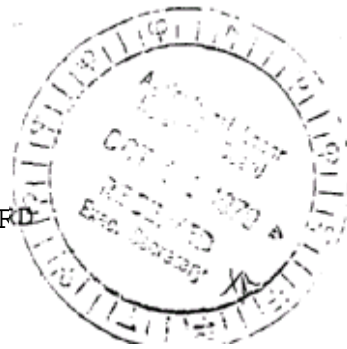
The Board dismissed the complaint in its entirety. The Board found the General Counsel failed to prove that Respondent laid off the employees because they refused to work absent a wage increase rather than because, as Respondent argued, no work was available. The Board tacitly affirmed the ALO's dismissal of the second allegation of discriminatory layoff.

* * *

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
AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of
J. J. CROSETTI CO.,

Case No. 79-CE-20

Respondent,

and

DECISION OF ADMINISTRATIVE
LAW OFFICER

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

_____ /

APPEARANCES

MAURICE JOURDANE, Esq.
for the General Counsel

WAYNE A. HERSH, Esq.
DRESSLER, STOLL, HERSH & QUESENBERRY,
for the Respondent

NED DUNPHY,
for the United Farm Workers of
America, AFL-CIO, Charging Party

STATEMENT OF THE CASE

MARK E. MERIN, Administrative Law Officer:

This case was heard by me on May 29, 30, and 31 and June 4, 1979 in Watsonville, California. The complaint issued, on the 8th day of March, 1979, and alleges violations of 1153 (a), (c), and (e) of the Agricultural Labor Relations Act (ALRA) ¹ herein

¹Statutory references are the the California Labor Code.

after, the "Act." by J. J. Crosetti, Inc.² (hereinafter sometimes referred to as "Crosetti," "the Company," or "Respondent.") The complaint is based on a charge filed February 5, 1979³ by the United Farm Workers of America, AFL-CIO (hereinafter sometimes referred to as the "UFW," or "the Union") and served by mail on respondent on the same date.

All of the parties were given a full opportunity to participate in the hearing. Both the general counsel and the respondent filed post-hearing briefs pursuant to §20278 of the ALRB's regulations.

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

FINDINGS OF FACTS

I. JURISDICTION

Respondent has admitted in its Answer to the Complaint, and I so find, that it is an agricultural employer within the meaning of §114 0.4 (c) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint, as amended at the hearing, alleges that on or about January 31, and continuing to date, respondent "extricated itself from contracts" to harvest lettuce in the Imperial Valley so as to deny employment to its agricultural employees

² Although the respondent, in the complaint, was designated J. J. Crosetti, Inc., the correct designation used by respondent is J. J. Crosetti, Co.

³ All dates, unless otherwise indicated, refer to the year 1979.

because of a lawful work stoppage engaged in by the employees and because of the employees' support for the Union. By those acts, respondent was alleged to have violated §1153(a) by interfering with rights guaranteed to respondent's agricultural employees by Labor Code §1152; and violated §1153(e) by unilaterally changing the working conditions of its agricultural employees without bargaining with their representative for collective bargaining, the UFW.

Respondent denies that it extricated itself from contracts to harvest lettuce in the Imperial Valley or deprived employees of employment in the Imperial Valley and asserts that the employees refused to do the work: available to them and instead engaged in a strike which prevented respondent from fulfilling its contractual obligations to harvest lettuce in the Imperial Valley.

Respondent also denies that it changed the working conditions of its agricultural employees without bargaining with the employees' representative, the Union.

III. THE FACTS

A. Background

Respondent harvests lettuce in the Imperial Valley, pursuant to specific written agreements with growers in the Imperial Valley. Respondent and the Union were parties to a collective bargaining agreement covering respondent's agricultural workers during 1978 but that agreement expired January 15, 1979, immediately prior to the company's start-up of harvesting operations in the Imperial Valley.

In January, the Company had in force two agreement with growers in the El Centro area according to which Crosetti agreed

to pay two-third of the cost of growing a total of 814 acres of lettuce; to harvest and sell the lettuce crops, and to retain two-thirds of the profit, over packing charges, realized from the sale of the lettuce. Five hundred fourteen acres of lettuce were to be grown for Crosetti by Hector De la Vega and 300 acres were to be grown by Mrs. M. Sonra and Mr. B. S. Thind.

Prior to the start of harvest operations, the company, using a form designated for that purpose, requested workers from the Union. While certain companies were being stuck by the UFW, Crosetti's operations were unaffected. Crosetti workers reported for work on January 15 by assembling, as was their custom, at the parking lot adjacent to the Bank of America in Calexico where they were met by a company foreman and transported to the appropriate field. Harvest operations continued, after a two day break, on January 18, and ran through January 30 with breaks on the 21, 25, 27, and 28.

On January 30, after finishing a first cutting in a De la Vega field on DeAnza Road outside of Calexico, the crew was asked to begin to do a second cutting of the same field. After discussing the request among themselves, the crew asked for an increase for the second cutting from the 44.5 cents they were receiving to 75 cents or what they understood a crew working nearby was earning. Checking with his superiors to find out what response to make to the crew, Simon Salas, the field supervisor, was instructed to and did inform the workers that there would be no increase and, as there was no lettuce ready to harvest aside from the second cutting, the crew would be paid off the following Friday afternoon at which time they would be told when the company would resume work. That date,

February 8, was announced on Friday, February 2, and the crews worked on both the 8th and 9th of February.

February 10 was the first of a three day period of masses, marches and demonstrations in Calexico to mourn the death of Ruffino Contreras, a Union member killed in an incident related to the on-going Imperial Valley strike. Crosetti workers participated in a valley-wide work-stoppage from February 10 through February 12. The company fielded a crew on February 13 and continued harvesting operations through February 17. On February 19, the day on which Washington's birthday was celebrated, Crosetti workers assembled at the Bank of America parking lot but indicated they would not work on that "holiday" unless the company paid them time and one-half. Company representatives said the overtime pay was impossible.

Crosetti did not field its harvesting crews again until February 26. On that day, work began at the usual time in the morning but ceased about 9:00 A.M. after about two hours when Ned Dunphy, the UFW employee assigned as contract administrator to Crosetti, summoned the workers to a Union meeting in Calexico. The recollection and testimony of employees and company supervisors differed as to the length of time the Calexico meeting was expected to take, the time of the crew's departure, the time the crew returned, and the time the company left the field after deciding it would no longer wait for the crew's return. The company's supervisors testified that at 1:20 P.M. Simon Salas ordered the stitchers to knock off for the day and left the fields with his equipment at the order of Andrew Vucinich, the company's field manager. Crosetti workers testified variously that they

returned after about 30 minutes at 11:00 or at 12:00, but they agreed that when they did return, they found the equipment and other personnel gone from the fields. Thereafter, although the Crosetti workers continued to appear at the Bank of America's parking lot at the usual time in the morning for work assignment, they did not work again until March 6 when the crew put in two hours and again on March 9 when the crew worked about three hours. It was on March 9 that Crosetti employees officially went out on strike. Although some of the Crosetti employees negotiated directly with field owner De la Vega who agreed to pay the difference between the 61 cents per carton paid by Crosetti and the 75 cents per carton the crew demanded, after three hours of work under the differential agreement, the employees announced they would not work unless it was Crosetti who paid the full amount. Thereupon, flags were put up at the field and the company was struck.

As of March 9, Crosetti had harvested only 350 - 400 of the 814 acres it had contracted to harvest.

B. Work Performed by California Lettuce Company

Company field manager Andy Vuchinich testified that California Lettuce Farms, apparently a labor contractor, assisted the Crosetti Company in the 1978-79 harvest. California Lettuce Farms also assisted Crosetti in both the 1976-77 and 1977-78 harvests as the company had a "lack of help" which required obtaining "outside help." The Union was notified in those years and the outside hiring conducted in conformance with the contractual-article entitled "Hiring." That contractual provision specifies that the company may hire workers not provided by the Union from other sources if the company has earlier notified the Union

of its need for additional workers, the type of work to be performed, the date the workers are needed, and the Union fails to provide the requisite number of workers on the date requested. Vucinich testified that the same procedure required by the hiring article was used during the 1978-79 season and there was evidence that on or about February 10, a request for additional workers was delivered to the Union office in Calexico.

Ned Dunphy, a UFW employee responsible for contract administration at the Crosetti Company from January through March, testified that he saw California Lettuce Farms crews on January 31 in a field at Dogwood and Highway 98 belonging to B. Thind, and supposedly to be harvested, as per their written agreement, by Crosetti. The crew was doing a first cutting of lettuce. Dunphy testified he again saw California Lettuce Farms crews working in Thind fields at Dogwood and Highway 98 on February 28 and also at a field at the intersection of George and Lyon's which Mr. Thind testified belonged to him. Dunphy saw California Lettuce Farms crews in the same areas on March 2nd or 3rd.

Jesus Guzman, a Crosetti agricultural employee for four or five years, testified that he saw a crew from California Lettuce) in a field north of Highway 98 and East of Dogwood after the January 30 lay-off and that crew members told him they had been there two days.

Mr. De la Vega testified that he contacted California Lettuce and had them harvest lettuce in a field adjacent to irrigation gate 65 sometime after Washington's birthday, the day he considered to be the start of the strike. He could not say whether it was in February or early March that California Lettuce

worked in his field, but he stated that California Lettuce crews worked only two days as they were "run off" by striking Crosetti employees.

C. Activities at the Pick-up Point

Crosetti employees testified that it was the practice for them to assemble at the parking lot of the Bank of America in Calexico to be transported to the fields they were to work that day. Customarily, they assembled prior to 6:00 A.M. and, if there was no work that day, they would leave after remaining. 45 minutes to one hour. Company witnesses agreed that this procedure was followed after the start of the harvest.

Even though the field workers were told on January 30 that they would learn on February 2 when they would work again, some still assembled at the bank parking lot on January 31 and the day following, but no work was offered to them.

There was disagreement, however, as to what took place at the bank parking lot in the mornings following February 26. Two workers, Jesus Guzman and Rigoberto Perchez, testified that they went to the Bank of America parking lot every morning from February 27 through March 5 ready to work, but that no work was offered. Ned Dunphy, the Union representative, also testified he was present at the Bank of America assembly point every-morning from February 27 through March 5 and that there were at least 20 and up to 35 Crosetti workers there every day ready to work.

Company foremen Simon Salas and Juan Salas testified that they also were at the bank every day from February 27 through March but that the workers refused to work and asked for more money -\$1 a carton for lettuce. Testimony from the workers and Dunphy

was that the workers neither asked for more money nor refused to work; , furthermore, Dunphy testified that neither Juan nor Simon Salas was at the Bank of America during the period from February 27 through March 5. As a resolution of the conflict in testimony on questions relating to the activities at the Bank of America pick-up point during the period from February 27 through March 5 is significant, I find it necessary to resolve this conflict in the evidence. There is no indication that Crosetti paid its workers who worked on March 6 any more than it paid prior to February 27, yet they were picked up and transported to the fields I from the Bank of America parking lot. Likewise, on March 9, Crosetti was paying its employees 61 cents per carton of lettuce when the crew demanded 75 cents and was subsidized to the extent of 14 cents per carton by De la Vega. The foregoing evidence is consistent with the representation by Crosetti workers and the Union representative that the employees were at the bank parking lot from February 27 through March 5 for the purpose of obtaining work from Crosetti at the usual wage. For these reasons, I credit the employees' and Ned Dunphy's testimony that they were prepared to work from February 27 through March 5 on the terms then in effect, but that no work was offered.

The significance of the above credibility determinations is that I have found that crews from California Lettuce harvested Third fields which Crosetti by written agreement was supposed to harvest and that California Lettuce crews worked on at least two days during the period from February 27 through March 5 when Crosetti employees were assembling at the bank parking lot in the 28 morning and were ready, willing and able to commence work.

D. Legal Discussion

At the outset, I will discuss the allegations that the company failed to bargain with the Union before making a unilateral change in the company's employees' working conditions.

There was no evidence of any bargaining which the Union and the company may have engaged in following the termination of the contract on January 15. While there is no question but that the company remained obligated to bargain with the Union even after the expiration of the contract, without evidence relating to contract negotiations, it is impossible to find that the company did not negotiate with the Union about alleged changes in working conditions, i.e. the employment of California Lettuce, and therefore, I will recommend that paragraph seven of the complaint which alleges that the respondent unilaterally changes working conditions of its agricultural employees without bargaining with the Union in violation of 1153 (c) be dismissed.

While not specifically admitting that it sub-contracted with California Lettuce to harvest fields which its own crews would normally harvest, the company, through its field manager Andrew Vucinich, admitted that it did have an agreement with California Lettuce in 1979, that it called upon California Lettuce and that California Lettuce cut approximately 140 acres of lettuce for Crosetti. Since other evidence competently established that California Lettuce conducted first cut harvesting operations at fields which Crosetti had contracted to harvest and accomplished that work in the days following January 30 and from February 28 through the first part of March while Crosetti employees, as I have previously found, were available for work, the sub-contracting to

California Lettuce was effectively a lay-off of its own crews not for lack of work, but for some other reasons.

As the use of the California Lettuce crews followed immediately the events of January 30 when Crosetti crews requested an increase for second cutting, and the events of February 26 when Crosetti crews left the fields to attend a meeting in Calexico and did not return until after the company had left the field, it is apparent that the lay-off of the Crosetti crews was in retaliation for the actions taken by the Crosetti employees on January 30 and February 26. Further substantiation for the causal relationship between the crew's actions and the subsequent lay-offs is found in testimony from Simon Salas who said that the reason the company didn't work from February 26 through March 6 was "problems with the workers." Since I have concluded that there were no problems manifested by the workers at the bank parking lot from the 27th through the 5th of March, the "problems" to which Simon Salas adverts I take as the absence from work for the Union meeting on February 26.

Respondent has argued that even if the crew did subcontract with California Lettuce, it would have been justified as the workers' actions on January 30 in requesting additional payment for second cutting and on February 26 in attending a Union meeting during scheduled work time were not protected concerted activities and Crosetti would have been entitled to replace these workers or to subcontract.

The two incidents are not identical and are not governed by the same rule. First, as to the second cutting incident, one of the two worker witnesses could not recall second cutting in the previous season and both agreed they had not been asked to second

cut before January 30 in the 1978-79 season. As the purpose of second cutting is to harvest lettuce which was not ready to be picked when the field was first harvested, a short interval between first and second cutting may not produce sufficient yield to justify the crew's working at its usual piece rate. That was the issue which the crew sought to raise with the company.

Even though question about the rate of pay for the second cutting was raised by the workers directly and not through their collective bargaining representative, I find that by requesting additional pay on January 30 for second cutting, the crew was engaging in protected concerted activity and neither striking nor engaging in a quickie strike or other unprotected activity as respondent argues. As the union was striking for higher wages at various companies in the Imperial Valley simultaneously with the instant activity at Crosetti, I find that by seeking to increase pay for the piece rate work they were requested to do, the Crosetti workers were acting in support of their representative's objectives. NLRB v. R. C. Can Co., 55 LRRM 2642 (CA 5, 1964).

The company did not obtain other workers to do the second cutting on or after January 30 (an action which would have been justified had the workers actually refused to do its second cutting ⁴) but merely laid off its workers to a date certain and used California Lettuce labor in the meantime.

As the workers were well aware that California Lettuce crews were working in "their" fields and the use of California

⁴The evidence is inconclusive as to whether the workers refused to do the second cutting at the first cut wage or were ordered to cease work after requesting additional pay.

Lettuce was easily and directly attributable to the workers having engaged in the protected concerted activity of requesting a higher rate, the actions of the employer in substituting California Lettuce crews for its own restrained and interfered with respondent's employees' rights guaranteed by section 1152.

The February 26 incident is governed by a different rule, Union meetings on company time may be protected concerted activity if the purpose of the meeting relates to significant problems at the work site. Robertson Industries, 216 NLRB No. 62, 88 LRRM 1280 (1975). Nothing in the record in this case, however, reveals the purpose of the meeting so I will not fine that workers attending the February 26 Union meeting in Calexico were engaged in protected concerted activity. Activity which is not normally protected, however, may be approved or condoned by the employer in which case subsequent discipline for participation in the subject activity will be a violation of section 1153 Ca). Morrison Knudson Co., 69 LRRM 1232, 173 NLRB No. 12 (1968); Cone Brothers Contracting Co. 158 NLRB 186, 62 LRRM 1059 (1966). Here, however, the only evidence in the record which could be construed as condonation of the workers participation in the meeting is the evidence that the foreman waited until after 1:00 P.M. for the crew to return. Therefore, even if the use of California Lettuce crews after February 26 was intended to discipline Crosetti workers for attending the February 26 Union meeting, that discipline on this record would not constitute a violation of section 1153 (a).

THE REMEDY

Having found that respondent violated section 1153 (a) of the Act by laying off its crews on January 30 and obtaining other

workers to do work up to and including February 7 which would otherwise have been accomplished by the crews laid off, I shall order that respondent make the employees working on January 30 whole for any loss of earnings they may have suffered as a result of the unlawful actions against them by paying to them a sum of money equal to what they would have earned had they done the work performed by California Lettuce during the lay-off period from January 31 through and including February 7, together with interest at 7% per annum from said dates to and including the date of payment.

I am aware that California Lettuce Farms may have been paid not by Crosetti directly but rather by B. Thind or another party operating on their behalf. Who paid the California Lettuce crews harvesting in fields which Crosetti crews should have harvested would not affect the remedy ordered here, however, since under the agreement Crosetti had with Thind, Crosetti received a proportional benefit from the harvest and sale of the lettuce and since Crosetti had the power to control the harvest of Thind fields.

ORDER

Respondent, its officers, agents, successors, and assigns shall

1. Cease and desist from interfering with, restraining, or coercing employees by laying-off or in any other like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 1152 of the Act.

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

a. Make whole the members of the crews working for respondent on January 30, 1979 for any loss of earnings each of them may have suffered by reason of the unlawful action against each of them in the manner set forth in

the section of this decision entitled "The Remedy."

b. Preserve and, upon request, make available to the Board of 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 pay which will be necessary to make whole those employees working for Respondent on January 30, 1979, including all records of payments made to California Lettuce Farms or any other entity which may have performed work for Respondent during the period from and including January 31 through February 7, 1979; on lands covered by harvesting agreements with Hector De la Vega, B. S. Thind, and M. Samra.

c. Post copies of the attached Notice to Workers at the commencement of the 1979 - 80 lettuce harvest in the Imperial Valley for a period of not less than 60 days at places to be determined by the Regional Director of the Salinas region.

d. Mail copies of the attached Notice to Workers in English and Spanish, within 20 days from receipt of this Order, to all present employees, to all employees employed during the 1978 - 79 lettuce harvest in the Imperial Valley, and to all employees hired during the period prescribed for the posting of this Notice. The Notices are to be mailed to each employee's last known address.

e. Have the attached Notice to Workers read in English and Spanish on company time to the assembled employees of Respondent by a company representative or by a Board agent, at times and places specified by the Regional Director, and accord said Board agent the opportunity, outside the presence of

supervisors and management, to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

f. Notifiy the Regional Director of the Board's Salinas office within 20 days from a receipt of the copy of this Decision and Order of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that the allegations contained in the complaint not specifically found herein to be violations of the Act shall be, and hereby are, dismissed.

Dated: *October 9, 1979*

AGRICULTURE LABOR RELATIONS BOARD

By: 

MARK E. MERIN
Administrative Law Officer

NOTICE TO WORKERS

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agriculture Labor Relations Board has found that we have violated the Agriculture Labor Relations Act, and has ordered us to post this notice:

1. The Agriculture Labor Relations Act is a law which gives all farm workers these rights:

- a. To organize themselves;
- b. To form, join, or help unions;
- c. To bargain as a group and to choose whom they want to speak for them;
- d. To act together with other workers to try and get a contract or to help and protect one another; and
- e. To decide not to do any of these things.

2. Because this is true we promise you that:

We will not do anything in the future that interferes with your rights under the Act or that forces you to do, or stop doing, any of the things listed above.

We will not lay-off any employee because such employee exercised any of the rights listed above.

The Agriculture Labor Relations Board has found that we interfered with the rights of our employees working on January 30, 1979 who requested more money for doing a second cutting than we paid for a first cutting by laying them off until February 8 and getting other workers to do their work in the meantime. We will pay those workers the amount they would have earned had they not been laid off plus seven percent interest on the money they

lost as a result of the lay-off,

Dated:

J. J. CROSETTI COMPANY

By _____
Representative, Title

This is an official document of the Agriculture Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.