Delano, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LOUIS CARIC & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-31-D 77-CE-31-1-D 77-CE-31-4-D 6 ALRB No. 2

DECISION AND ORDER

On March 30, 1979, Administrative Law Officer (ALO) Michael E. Weiss issued the attached Decision in this proceeding. Thereafter, the General Counsel timely filed exceptions[1/] and a supporting brief.

The Board has considered the record[2/] and the attached Decision in light of the exceptions and supporting brief, and has

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[1/] In the absence of exceptions to the ALO's recommendations that the Board dismiss the allegations concerning Maria Llamas and the allegations of Section 1153(d) violations, those allegations are hereby dismissed. In recommending dismissal of the Section 1153 (d) allegations, the ALO stated that there has been no Board determination under Section 1153 (d) of the Act, overlooking Bacchus Farms, 4 ALRB No. 26 (1978), in which we found three violations of that section.

[2/] During the hearing, one portion of the complaint, the charge concerning Brigetta Rivera, No. 77-CE-31-3-D, was settled. A written stipulation prepared to that effect pursuant to Cal. Admin. Code Section 20298(a) was not available at the time the ALO issued his Decision. The stipulation was subsequently executed by the parties and filed with the Board on April 11, 1979.

decided to affirm the ALO's rulings, findings,[3/] and conclusions, only to the extent consistent herewith.

We find merit in the General Counsel's exception to the ALO's conclusion that Respondent's failure and refusal to rehire Maria and Juan Gonzales in August 1977 was not a violation of Section 1153 (c) or (a) of the Act.

In July of 1977, Maria and Juan Gonzales worked in Arvin, California, for another employer, under a crew leader, Simon Matias, who later hired and supervised a crew for Respondent during Respondent's August harvest. While in Arvin, Juan Gonzales asked Simon Matias about work in the Caric grape harvest. Matias assured them that they would be hired. At the conclusion of the harvest in Arvin, Matias and the Gonzales family moved to Delano. On the Sunday immediately following their arrival in Delano and on the two successive Sundays, the Gonzales family visited Matias and asked for work. All three Gonzaleses--Juan, Maria and their daughter Socorro—testified that, on one of these Sundays, Simon said he could not give them work because the boss did not like union people. Maria Gonzales further testified that on August 16, 1977, they went to the work site and that Simon would not give them work because the boss did not want people with the union and that Simon said they could file whatever suit they wanted against him. While they were at the site, Simon hired six additional workers.

[3/]ALO found that Matias hired other known and active union supporters at the same time he refused to hire the Gonzaleses. Our review of the record discloses no evidence on which the ALO could base this finding, and we therefore reject it.

Mrs.. Gonzales' testimony is basically uncontroverted.[4/] In fact, in her anger at being given the "run around" by Simon she made corroborating notes of that day's events which were introduced into evidence. The ALO found Simon Matias' blanket denials and failure of recollection of these events not credible. To the extent that an ALO's credibility resolutions are based upon demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios, 4 ALRB No. 24 (1978); Standard Dry Wall Products, 91 NLRB 544, 26 LRRM 1531 (1950). We have reviewed the record and find the ALO's credibility resolutions to be supported by the record as a whole.

Failure or refusal to rehire employees on account of their union activity or union sympathy violates Labor Code Section 1153 (c) and (a) because such conduct constitutes discrimination in regard to hire or tenure of employment which tends to discourage union support or membership, and because it tends to restrain employees from exercising their right to join or assist labor organizations. Pleasant Valley Vegetable Co-op,

[4/]The Respondent seeks to discredit the Gonzaleses' testimony on the basis of inconsistencies. While it is true that Juan Gonzales did not testify as to the events of August 16, a careful examination of the record reveals that he was never questioned about that day by either counsel. Furthermore, while Socorro Gonzales testified at one point that Maria Gonzales did not accompany her and her father to the field on August 16, the record clearly shows that this witness had difficulty recalling events more than a year past and that on direct examination she included her mother as one of the individuals who went to the field. The ALO recognized the problem when, at the conclusion of the hearing he found Mr. and Mrs. Gonzales to be credible witnesses and found Socorro "basically to be credible. I'm not sure I'm going to rely very much on her testimony."

4 ALRB No. 11 (1978); Jesus Martinez, 5 ALRB No. 51 (1979).

In order to establish that Respondent violated Section 1153 (c) and (a) by failing or refusing to rehire Maria and Juan Gonzales because one or both of them supported the union, the General Counsel has the burden of showing that such failure or refusal was based on Respondent's knowledge, or belief, that one or both of the employees supported the union or had engaged in union activity.

Matias' statement that he was not hiring the Gonzaleses because the boss did not want union people is as direct and convincing evidence of anti-union motivation as this Board is likely to see.[5/] It clearly and simply establishes Respondent's knowledge or belief[6/] that the Gonzaleses were involved in union activity, and that that was the reason for not hiring them.

Evidence was introduced of union activity on the part of Maria Gonzales but none on the part of Juan Gonzales. Having found that Matias' statement was the basis for an unfair labor practice having been committed as to each, we do not find it necessary to resolve the issue of whether there was discrimination

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[5/] We also note that Simon Matias had previously been found by this Board to have committed an illegal act of surveillance in prior litigation involving the Respondent. Louis Caric S Sons, 4 ALRB No. 108 (1978). More importantly, in this case there was unrefuted testimony that on or about the time in question Matias had fired a worker for tearing down an anti-union poster only to reinstate her after she threatened to go to the union.

[6/] An employer's mistaken belief that an employee was involved in union activity is no defense to a Section 1153 (c) allegation. Griffin Mfg. Co., 103 NLRB 732, 31 LRRM 1574 (1953); Ridge Tool Co., 102 NLRB 512, 31 LRRM 1348 (1953), enf'd 211 F.2d 88, 33 LRRM 2626 (6th Cir. 1954).

against Juan Gonzales, because of the union activity of his wife Maria. We reject the ALO's legal analysis concerning discrimination against a close relative. We have not held that each of the elements listed by the ALO must be present before we will find that discrimination against a close relative of a union supporter violates the Act.[7/]

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Louis Caric & Sons, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to hire or rehire any employee because of his or her union activities or union sympathies.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer Maria Gonzales and Juan Gonzales full

[7/] General Counsel argues that Respondent had knowledge of Maria Gonzales' union support due to her filing of a discriminatory layoff charge against the Respondent in May 1977. We do not rely here on any knowledge Respondent may have had regarding that charge, nor do we decide what probative value such knowledge carries.

reinstatement to their former positions, or comparable positions, without prejudice to their seniority or other rights and privileges, beginning with the earliest date following issuance of this Order when there are positions available in which they are qualified.

(b) Make whole Maria Gonzales and Juan Gonzales for any loss of earnings and other economic losses they have incurred by reason of Respondent's discrimination against them, together with interest thereon at the rate of seven percent per annum, beginning with the first day in Respondent's 1977 harvest when there was available work for which Maria and Juan Gonzales were qualified.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back pay period and the amount of back pay due under the terms of this Order.

(d) Sign the Notice to Employees attached hereto. Upon its translation by a Board agent into appropriage languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the time(s) and place(s) of posting 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.

(f) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after issuance of this Order, to all employees employed at any time during the payroll period which included August 15, 1977, and thereafter distribute copies to all present employees and all employees hired by Respondent during the 12-month period following the date of issuance of this Decision.

(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees assembled on company time and 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 nonhourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director, in writing, within 30 days after issuance of this Order, of the steps it has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: January 18, 1980

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

JOHN P. McCARTHY, Member

MEMBER PERRY, concurring in part and dissenting in part:

I concur in the majority's finding that Respondent violated Section 1153(a) of the Act through the remark of its supervisor, Matias, that the boss did not want people who were union supporters. This remark would clearly tend to interfere with the exercise of rights guaranteed in Section 1152.

I respectfully dissent, however, from the finding of a violation of Section 1153 (c). In order to establish that Respondent violated Section 1153 (c) by failing or refusing to rehire Maria and Juan Gonzales because one or both of them supported the Union, the General Counsel had the burden of showing that there was union activity or support, that Respondent had knowledge of it, and that there was a causal connection between the union activity or support and the refusal to rehire. The only evidence the General Counsel produced of a causal connection between Respondent's knowledge of the Gonzales' union support and its failure or refusal to hire them was supervisor

Matias' remark. In my judgment this evidence standing alone is insufficient to make the General Counsel's case. Matias' remark might well have been but a convenient device to drive away job applicants whom he preferred not to hire for personal, ethnic, or other reasons not related to union support.

Finding that the General Counsel did not meet his burden of establishing a violation of Section 1153(c) by a preponderance of the evidence, I would dismiss the complaint as to this alleged violation.

Dated: January 18, 1980

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a hearing at which each side had a chance to present its 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 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 fail or refuse to rehire or otherwise discriminate against any employee because he or she exercised any of these rights.

WE WILL OFFER Maria and Juan Gonzales their old jobs back and will reimburse each of them for any pay or other money they lost because we failed or refused to rehire them.

Dated: LOUIS CARIC & SONS

By: _____
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

Louis Caric & Sons (UFW) 6 ALRB No. 2

Case Nos. 77-CE-31/31-1/
31-4-D

ALO DECISION

The ALO recommended dismissal of allegations in the complaint that two workers were discharged for their union support, in violation of Section 1153(c) and (a), finding that the discharges resulted from a lack of available work. The ALO also recommended dismissal of an allegation that Respondent discriminatorily refused to rehire a married couple because of their union support and because they filed unfair labor practice charges against Respondent, in violation of Section 1153 (c), (d) and (a).

BOARD DECISION

The Board found that Respondent violated Section 1153 (c) and (a) by discriminatorily refusing to rehire a married couple because of their union support, basing this conclusion on the testimony of the discriminatees, explicitly credited by the ALO, that the crew foreman told them on two occasions that he would not hire them because the boss did not want or like Union people. The Board dismissed the allegation that these refusals to rehire violated Section 1153(d).

CONCURRING/DISSENTING OPINION

Member Perry concurred with the finding that Respondent violated Section 1153(a) but dissented from the finding of a violation of Section 1153(c), stating that the evidence was insufficient to support that finding.

REMEDY

The Board ordered Respondent to cease and desist from failing or refusing to hire or rehire any employee because of his or her union activities or union sympathies, and from interfering with, restraining or coercing employees in any like or related manner in the exercise of their statutory rights. The Board further ordered Respondent to offer the discriminatees full reinstatement to their former or equivalent positions and to make them whole for any losses they incurred by reason of Respondent's discrimination, and to post, mail, distribute and read a remedial Notice to Employees.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: LOUIS CARIC & SONS, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 77-CE-31-D 77-CE-31-1-D 77-CE-31-4-D

Appearances:

Kenwood C. Youmans
Seyfarth, Shaw, Fairweather & Geraldson
Los Angeles, California
For Respondent Louis Caric & Sons

Robert D. Chase
Delano, California

For General Counsel No

appearance for charging party.

DECISION

MICHAEL H. WEISS, Administrative Law Officer: This case was heard before me on October 30, 31, and November 1, 1978 in Delano, California. The order consolidating the cases was issued on September 28, 1978. The Complaint alleges violations of Sections 1153 (a), (c) and (d) of the Agricultural Labor Relations Act (hereinafter the Act) by Louis Caric & Sons (hereinafter Caric or respondent). The Complaint[1/] is based on charges filed and served on or

[1/]The Complaint was amended once by the General Counsel on October 31, 1978 to include two additional persons alleged to be supervisors. In addition, at the conclusion of the hearing, one portion of the Complaint, the charge of Brigette Rivera, No. 77-CE-31-3-D, was settled. A written stipulation was to be

about May 9, 1977, August 18, 1977 and November 23, 1977 by United Farm Workers of America, AFL-CIO (hereinafter UFW). Copies of the charges were admitted by respondent to have been duly served on it on or about those dates.

All parties were given full opportunity to participate in the hearing[2/] and after the close of the hearing the General Counsel and respondent each filed a brief in support of its respective position.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is an agricultural employer within the meaning of Section 1140. 4(c) of the Act and that the UFW is a labor organization within the meaning of Section 1140.4(f) of the Act and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Complaint, dated September 28, 1978, alleges that respondent

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[1/] (con't.)

prepared to that effect pursuant to 8 California Admin. Code § 20298 (a), but to date has not been forthcoming. However not having heard to the contrary, I have assumed that the Rivera charge has been settled and accordingly it will not be considered or discussed in this decision.

[2/] A Notice of Intervention was filed by Deborah Miller of the UFW on October 18, 1978. However at the inception of the hearing Ms. Miller called and informed the General Counsel's office that the UFW was not going to be present or participate in the hearing. Nevertheless Ms. Miller did particiapate on behalf of the UFW at the negotiations and discussions that led to the settlement of the Rivera charge and entered an appearance on the record on November 1, 1978 to that effect.

violated Sections 1153(a), (c) and (d) of the Act for the following incidents:

1. The discharge of Maria Llamas[3/] and Maria Gonzales on or about April 20, 1977 by Eliseo Casabar for their known union support;

2. The refusal to rehire Maria Llamas, Maria Gonzales and Juan Gonzales by Eliseo Casabar, Simon Matias and Louis Caric, Sr. on or about May, 1977 and continuing thereafter because of their activities in support of the UFW;

3. The refusal to rehire Maria Llamas, Maria Gonzales and Juan Gonzales on or about May, 1977 and continuing thereafter because of the prior filing of unfair labor practice charges against respondent on May 9, 1977.

Respondent denies that it either discharged or refused to rehire any of the named employees for their union support or for the filing of the ULP charge on May 9, 1977 or otherwise violated the Act. Essentially, respondent contends that the employment decisions regarding these employees were made in the usual course of Caric's grape growing operations.

III. THE FACTS

A. THE OPERATION OF CARIC & SONS

Respondent is a partnership[4/] that grows, harvests, stores,

[3/] At the hearing it was agreed by the parties that the references in the Complaint to Maria Llamas were, in fact, to Maria Llamas. See Vol. II, p. 94-95

[4/] The partnership consists of brothers, Steve and Louis Caric, Sr. and Steve Caric's son, Louis Caric, Jr. The latter is the one who testified at the hearing. See Vol. III, pp. 31- et seq.

ships and sells various varieties of table grapes. It operates from four parcels of land located within a few miles of each other near Delano in Kern and Tulare Counties. [5/] The operations consist of pruning and tieing, which start around the 1st of December and last until the end of January or early February, followed by crown and ground suckering (which normally does not start until the beginning of April), thinning and then pulling leaves (which normally occur in June and July) and finally harvesting which normally starts the first week of August and continues through October and sometimes into November.

Except during the harvest, Caric employs 75 - 100 persons in three crews, varying in size from 30-35 persons each, for its operations. During harvest, the number of employees exceeds 300 persons divided into 5 crews of 54 persons each in addition to the supervisors, loaders, drivers, etc.

Respondent maintains two labor camps, one near Richgrove and one near Delano where most crew members live, essentially free when not working and for ten cents an hour when working for respondent. The crew bosses are in charge of the labor camps and obtain their crews, prior to the operations starting, primarily from those who stay in the labor camps.

Respondent admitted in its Answer that Eliseo Casabar, Cecil de Castro, Louis Caric Sr. and Jr. were supervisors within the

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[5/] ALO Exhibits 1A -1D found in the Exhibit file herein contain schematic layouts of the four parcels of land and reflect the variety and locations of grapes grown by Caric.

meaning of Section 1140.4(j). Moreover, at the hearing it stipulated that Simon Matias, who works for Caric running a crew only during the harvest season, and Mariano Obando, were also supervisors within the meaning of Section 1140.4(j). Respondent denied that Don Luna or Steve lira were supervisors within the meaning of the Act. Both men, Caric testified, were second foremen without hiring authority who apparently worked for Caric during the 1977 harvest season only. [6/] However, Eliseo Casabar, one of Caric's primary crew bosses, testified at the hearing that Steve Tira, in fact, had been delegated hiring authority during the time he was a second foreman. [7/] Accordingly, I find that Steve Tira was a supervisor within the meaning of Section 1140.4(j). No comparable testimony or evidence was presented on this issue regarding Don Luna and I accordingly find that he was not a supervisor within the meaning of the Act. [8/]

Both in its answer and at the inception of the hearing, respondent raised the defense of laches to the entire Complaint on the basis of the time lapse of 10_i to 16 months between the filing of the 3 charges (May - November 1977) and the Complaint herein (September 28, 1978). However, each of the charges were timely

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[6/] See Vol. III p. 37-38

[7/] See Vol. III p. 17

[8/] Respondent's grape operation and supervisors have not materially changed from the 1975 season. See, e.g., ALO Decision, p. 4-6, Louis Caric & Sons, 4 ALRB 108(December, 1978). A detailed description or the seasonal operations was testified to, at the hearing,' by Louis Caric, Jr. Vol. Ill, p. 31-51.

filed pursuant to Labor Code §1160.2. Moreover, respondent has shown no prejudice, with the possible claimed exception of being unable to locate, interview and produce Steve Tira for the hearing. However, in view of the tangential relevance of Tira's role and testimony in the case, and in view of my ultimate recommendation that the three charges in the Complaint at issue herein be dismissed in its entirety, there does not appear to be any prejudice.

B. The Employees at Issue

1. Juan & Maria Gonzales' work history at Caric's

Juan and Maria Gonzales are husband and wife who have worked in agriculture for a number of years. Unlike most of the other workers who lived at one of the two Caric labor camps, they lived in Delano. Both Juan and Maria had initially worked for the Caric's during the previous harvest in the fall of 1976 under Simon Matias. Thereafter, Juan worked several weeks during a portion of the pruning and tieing phase in late December, 1976 to mid-January, 1977. [9/]
However, prior to the pruning phase being completed, he voluntarily, and with permission, left the Caric employ.

Both Juan and Maria were next re-employed by Eliseo Casabar in mid-April, 1977 during the tipping and suckering phase of Caric's grape growing operations. On or about April 20 all of the women in Casabar's crew, including Maria and Maria Llamas, were laid-off for several days while the men completed the ground suckering. [10/] On

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[9/] All dates hereinafter are to 1977 unless otherwise noted.

[10/] Ground suckering requires considerable physical exertion, including the use of large shears. It is common and usual for men only to perform this task.

Saturday, April 23 some of the women were rehired. Two additional women were re-hired on that Monday, April 25 and one additional woman was re-hired on that Tuesday. However, when Maria Gonzales, Maria Llamas, and two other women sought re-employment on Monday morning, April 25, they were informed by Casabar that they did not need any more women at that point.

The record and testimony is unclear as to how soon after April 25 Maria sought work again with Caric. However, Maria testified credibly that on three successive mornings she reported to work with her husband and attempted to start work in Steve Tira's crew. Each time, however, she was stopped by Tira within a few minutes and told that there was already enough workers available. Throughout the period of April 25 - May 3, Juan continued to be employed by Caric in Casabar's crew. On the basis of the entire record, especially Maria's testimony that her husband had to come from his crew to take her out, it is my conclusion that this three day period Maria testified to occurred during the time that Juan was still working in Casabar's crew. [11/]

In any event, the record is quite clear that on May 9 Caric received a copy of an unfair labor practice charge accusing it, through its foreman Casabar, of discriminatorily firing Maria

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[11/] On at least one of the occasions Mariano Obando wrote out a note in Ilacano for Maria to give to Steve Tira. See General Counsel's Exhibit 2. Although the note indicates a date of June 1, 1977 Juan was not back working at Caries at that time, having been laid off when Casabar's crew stopped working on May 3. Thus, it is unclear whether anyone with hiring authority actually hired Maria on these occasions. According to respondent's records she was not. The General Counsel did not obtain a translation of G.C. Exhibit 2, so it was not determined what the note said.

Gonzales and Maria Llamas because of their "knowledge and support of the union", [12/] in addition to receiving a letter from a Board agent advising that the Board would be investigating the charge. Thereafter, respondent and its counsel were contacted again by the Board agent on May 23 and 25 which culminated in a meeting with the Board Agent on or about June 14.

Sometime after the charge had been filed the Gonzales sought employment again from Casabar on a number of occasions after thinning started. Thinning and girdling operations apparently began again on May 30. [13/] After unsuccessfully being able to obtain work from Casabar, Juan and Maria were stopped one day by Casabar on the road to Richgrove. He told them that if they wanted to work for him to go see Mariano Obando who was starting a thinning crew. When they indicated they didn't know where Mariano lived, Casabar showed them where Obando lived. Casabar conversed in Filipino with Mariano and then told the Gonzales they would start work the following day with Mariano. Respondents' records indicate that June 9 was the first day that Obando supervised a crew doing thinning work and the Gonzales (and their daughter) started work on June 10 and worked through June 20 when the operation was completed and most of the crew laid off. [14/]

[12/] See General Counsel's Exhibit 1A

[13/] See General Counsel's Exhibits 7A, 7D. Girdling is also one of the operations that women do not perform.

[14/] See General Counsel's Exhibit 7B.

During July, Juan, Maria and their daughter Socorro worked for Simon Matias as part of a crew of approximately 150 persons harvesting grapes for 7-10 days in Arvin. Juan and Maria testified credibly that they asked Matias, both in Arvin and subsequently at the Delano labor camp when the crews were being selected, for work in the Caric grape harvest to start on August 15. But apparently so were many others as well. According to the Gonzales, many of Simon Matias' crew members in Arvin came to Delano to seek work with Matias at Caric's. Moreover, as reflected in respondent's records, approximatley 80% (91 of 115 employees) of Matias' and Domingo's harvesting crews were made up of persons employed at Caric immediately prior to the 1977 harvest in Mariano Obando's deleafing crew.

When Juan talked to Matias at the Delano labor camp about jobs for his family prior to the harvest starting he was told by Matias to wait and to see him at his home. On three successive Sundays in August, Juan, Maria and/or their daughter Socorro visited Simon at his home to seek work in the harvest. In addition, they also visited the Caric ranch on or about August 15 and 16 and asked for work from Louis Caric, Sr. On each of the occasions they were told that there was no work available. On one of the visits to Simon, Juan and Socorro credibly testified that when Juan asked Simon why he wouldn't hire them, Simon answered there was no work available and because the boss told him he did not want people who are union supporters. [15/]

[15/] At the hearing and in its brief (p. 16-18) respondent challenged the probity of this testimony based on claimed inconsistencies in the testimony. However, I found the basic thrust of the testimony to be essentially consistent and credible, in sharp contrast to the testimony of Simon Matias, a harvest crew boss for Caric for 40 years.

Juan told Simon that he would file a charge and Simon responded that "you could do what you want". On August 19 a charge was filed on behalf of Juan and Maria by the UFW.

Respondent's records show that once the crews were filled and the harvest started on August 15 nine persons were hired by Caric, seven on August 16: two in Eliseo Casabar's crew and seven in Simon Matias' crew (five were hired on the 16th, including one woman who worked only 6 1/2 hours, one was hired on the 18th and one on the 19th). One of the persons hired on the 16th was Teresea Rivera, Bridgette Rivera's mother, both of whom were known union supporters. Respondent's records also indicate that nine harvesters in Simon's crew were laid off on August 15 or 16. [16/]

2. The Work History of Maria Llamas at Caric

The evidence presented regarding Maria Llamas was limited. She did not testify at the hearing although the General Counsel's staff had contact with her as recently as the week prior to the hearing. Respondent's records indicate that Maria Llamas worked there during the first quarter of 1977 for several weeks and for three days in April, during suckering, before being laid off with Maria Gonzales and the other women from Casabar's crew on April 20.

Llamas as well as Maria Gonzales and two other women sought

[16/]See General Counsel's Exhibits # 73, 7D and 7E; Transcript, Vol. 2, p. 16, 49.

[17/]See General Counsel's Exhibit # 7F. Unfortunately, the Xerox copy of the record in evidence cut off the date column so the exact dates employed are not set forth.

reemployment but were not rehired on April 25. It is unknown what efforts, if any, she made to obtain work either prior or subsequent to the May 9 charge filed on her behalf by the UFW. However, Maria and Socorro Gonzalaes did testify that they saw Llamas at the Caric ranch on August 15 or 16 apparently looking for harvesting work there at the time as well.

3. The Union Activities of the Employees

Maria Gonzales testified that her union activities in 1977 were as follows: she attended periodic union meetings in Delano and she passed out leaflets on two or three occasions there as well. She also testified to putting stickers on cars during the November, 1976 general election. In 1975 she was a delegate to the UFW convention. However there was no testimony that respondent or any of its supervisors were directly or indirectly aware of Maria's activities, sympathy or support for the UFW until and except for the May 9 ULP charge served on respondent. [18/]

To state the matter succintly, there was no testimony or evidence presented that indicated either Juan Gonzales or Maria Llamas were active in, participated in or were supporters of the UFW. As candidly stated by the General Counsel at the hearing, [19/] the union

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[18/]Maria Gonzales did testify that a confrontation occurred between her and a teamster organizer while harvesting in Arvin in July in which she was called a "chauvista". However, neither Simon nor any other supervisor apparently were present or nearby when the incident occurred.

[19/]See Vol. II, p. 63-64.

activity of the Gonzales' (as well as Llamas) was minimal at best, essentially inferred from the charge that was filed by the UFW on behalf of Maria Gonzales and Llamas on May 9 and the fact that Juan was Maria's husband.

Since the September 11, 1975 election won by the teamsters by a large majority, there has been no union organizing or campaign at respondent's by either the UFW of Teamsters. [20/] According to Louis Caric, Jr., no employee or outside organizer was known or observed organizing at respondent's in 1976 or 1977, although he did receive a form letter dated April 7, 1977 from Richard Chavez, Director of the UFW' s Delano Field Office indicating their continued interest in representing their employees.

Despite the absence of union organizing in the Delano area generally, including their ranch, respondent did post and maintain during the harvest in 1977 ant-union posters [21/] because, as Louis Caric, Jr. indicated, "We wanted to keep our people informed that we didn't think that there was any need for a union, and we expected that if the UFW won Giumarra that they would be out in force."[22/]

[20/]The election was challenged by the UFW but became moot when the Teamsters requested to withdraw its Petition for Certification and to declare the election null and void. See ALO decision, p. 2, footnote 1, Louis Caric and Sons, 4 ALRB 108 (1978)

[21/]See General Counsel's Exhibit # 5.

[22/]See Vol. II, p. 59.

C. General Counsel's Post-Hearing Motion for Judicial Notice of the Boards' Decision in Louis Caric & Sons, 4 ALRB No. 108

Subsequent to the close of hearing on November 1, 1978 and the filing of post-hearing briefs on or about December 8, 1978, the Board issued its decision in Louis Caric & Sons, 4 ALRB 108, Dec. 28,'78 That decision includes findings that respondent, through various of its supervisors and agents, expressed antagonism towards the UFW including discharges of workers supporting the UFW. The General Counsel seeks, in a Motion filed on January 29, 1979, which the respondent opposes in an Opposition filed on or about February 8, 1979., to have the ALO take judicial or administrative notice of the findings of facts and conclusions of law as it bears on respondent's current anti-union sentiment or animus. Contrary to respondent's contention I find that the General Counsel's Motion to have merit and I therefore grant it.

Preliminarily, it should be noted that I would have found anti-union sentiment or animus in any event on the basis of Louis Caric, Jr.'s testimony and General Counsel's Exhibit 5. However, the finding of union animus in the previous proceeding is corroborative and supportive in an area or issue that is material and relevant to this proceeding. Both ALRB and NLRB precedents as well as the California Evidence Code uniformily provide applicable precedents to taking judicial or administrative notice here. See e.g., Sunnyside Nurseries, 4 ALRB No. 88, p. 3, footnote 4; NLRB v. Mueller Brass Co., 509 F.2d 704, 705, 88 LLRM 3236, 3239 (5th Cir. 1975)(Proper to take judicial notice of findings of prior proceeding in order to supply corroboration of background of anti-union animus); Teamsters, Local 327

(Hartmann Luggage Co.), 419 F2d 1282, 73 LRRM 2199 (6th Cir. 1970) (Proper to take judicial notice of prior board proceedings in which union's proclivity for violence at issue); Semble, NLRB v. American Art Industries, Inc. 415 F2d 1223, 72 LRRM 2199 (5th Cir. 1969); California Evidence Code Section 452(c); Marino v. City of Los Angeles, 34 CA3d 461, 110 C.R. 45(1973); indeed, the case cited by respondent, Longshoremen (ILWU) Local 13, 88 LRRM 1117,1119 (1974) supports taking judicial notice here.

Pursuant to the Board's decision in Sunnyside Nurseries, Inc. 4 ALRB No. 88, footnote 3, (.1978), I am setting forth the facts judicially noted:

1. Supervisor Eliseo Casabar instructed employees not to sign union authorization cards.
2. Respondent, through supervisor Simon Matias, engaged in surveillance of employees and instructed them not to talk to union representatives.
3. Respondent, through supervisor Madrid, discharged three employees because of their union activity.
4. Respondent, through the activities of its supervisors and agents provided unlawful assistance to the Teamsters and interferred with the UFW's communication with employees at respondent's labor camp.

IV. Analyses and Conclusions

I. Introduction

Section 1152 of the Act guarantees employees ".....the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing,

and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities ...". Section 1153 (a), makes it an unfair labor practice for an agricultural employer "to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." Section 1153 (c) makes it an unfair labor practice for an agricultural employer to discriminate "...in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Section 1153(d) makes it any unfair labor practice for an agricultural employer "to discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part."

Employer conduct which is not unlawful under section 1153(c) may nonetheless violate the section 1153(a) prohibition against interfering with, restraining or coercing employees in the exercise of their rights to form, join or assist labor organizations, or to refrain from such activities. The test is whether the conduct tended to interfere with the free exercise of employee rights. D'Arrigo Brothers Co., 3 ALRB No. 31, (1977).

Generally, under Section 1153(a), concerted activity by employees is protected regardless of the employer's motivation, [23/] while

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[23/] As noted by the Supreme Court regarding the identical portion of the N.L.R.A., "Section 8(a)(l) is violated if an employee is discharged for misconduct arising out of a protected activity despite the employer's good faith, when it is shown that the misconduct never occurred. **** A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21, 57 LRRM 2335, 2386 (1964).

conduct under Section 1153(c) requires evidence of anti-union animus as well as evidence of improper motivation as the basis for the employers' conduct.[24/]

Of course, as with other allegations of unfair labor practices, the General Counsel must support the charges by a preponderance of the evidence. See Section 1160.3. As discussed herein below, the General Counsel has not met this burden, either because no evidence [25/] supporting the charge was introduced or because in Maria Gonzales' case reliable evidence contradicted the charge.

2. There Is No Direct, Circumstantial or Inferential Evidence That Respondent Violated Sections 1153(a) and (c)Regarding Maria Llamas

As noted above, a necessary factor in a finding that an employer has discharged or laid off an employee for union activity is the determination that the employer had knowledge of such activity. Lassen Canyon Nursery 4 ALRB No. 21 (1977); citing, NLRB v. Whitin Machine Works, 204 F.2d 883, 32 LRRM 2201, 2202-3 (1st. Cir. 1953).

No evidence was presented by General Counsel that Maria Llamas either participated in, supported or was an active member of the UFW, and further that respondent had any such knowledge of these activities. [26/] The General Counsel apparently suggests that such a

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[24/]See Resetar Farms, 3 ALRB No. 18 (1977)

[25/]as in Maria Llamas' and Juan Gonzales' cases

[26/]I qualify this to note the UFW did. file a charge on her and Maria Gonzales' behalf on May 9 for the April 20 "discharge". However, respondent's records indicate that the "discharge" in both cases was, in fact, layoffs to all women in the crew dictated by business necessity. All the women rehired between Saturday, April 23 and Tuesday, April 26 for the remaining two weeks of the suckering operation had also previously worked the sane craw. There is no evidence, direct or

finding is appropriate solely from the May 9 charge filed by the UFW to establish the necessary elements of union activity or support by Llamas, as well as respondent's knowledge of such activity and improper motivation in refusing to rehire her on or about August 15. On the basis of the record in this case I cannot agree.

I accordingly find that General Counsel has failed to establish by a preponderance of the evidence that

a. The "discharge" of Maria Llamas on or about April 20 by Eliseo Casabar was for her known union support;

b. The refusal by respondent to rehire Maria Llamas on or about August 15 was because of her activities in support of the UFW.[27/]

3. No Evidence Was Presented by General Counsel That Respondent Violated Sections 1153(a) and (c) Regarding Juan Gonzales

The General Counsel appropriately conceded at the hearing that the record reflects a serious gap in at least two elements of the Section 1153(.c) and (a) charge with respect to Juan Gonzales; namely, his union support, activity or sympathy and knowledge of such support, direct or inferential, by the employer. In order to bridge and fill that gap, the General Counsel seeks to utilize the "well established [doctrine] that discrimination against any employee because of the union activity or participation in the Board's process of a close

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26/ (con't.)
circumstantial, that indicates absence of union support was a factor for these recalls or rehires, or that respondent had knowledge of Gonzales' and Llamas' union support or activities, if any.

27/ The section 1153(d) charges in the Complaint with respect to the alleged discriminatees is treated separately, infra.

relative violates the Act."[28/] While the application of this doctrine may well be proper in the appropriate factual setting, I am unpersuaded that any such circumstance has been presented or indicated in this case.

Each of the cases cited by the General Counsel upheld the application of the doctrine because of the following factors:

1. An active organizing effort or campaign by the union was on-going;

2. An active anti-union campaign by the company was also on-going, coupled with strong anti-union animus;

3. Widespread and serious unfair labor practices were being committed by the employer; and

4. Active and known union support by the relative, discriminatee or both, was present.

By contrast, most, if not all of the factors to compel invoking the doctrine in the cited cases are absent here. For nearly two years since the September, 1975 election neither an active organizing nor active anti-union campaign was conducted by the UFW

[28/]See General Counsel's Post-Hearing Brief, Page 9, footnote 7; The General Counsel cites in support of the proposition to J.P. Stevens & Co. v. NLRB, 76 LRRM 2817(5th Cir. 1971); Dewey Brothers, Inc, 76 LRRM (1971)., Enforced, 80 LRRM 2112 (4th Cir. 1972); George J. Roberts & Sons, Inc., dba Roberts' Press, 76 LRRM 1337 (1971); B.G. Management & Co., 82 LRRM 1444(1973); Colonial Press Inc., 83 LRRM 1648 (1973); and American Buslines, Inc., a div of Continental Trailways, Inc., 87 LRRM 1444 (1974).

[29/]With the exception of the Continental Trailways, Inc. case, where a union had been certified to represent the employees; nevertheless, "too active or vociferous" union support by the husband of an employee resulted in her discharge, a factor not established in the present case.

or respondent respectively. I recognize that I have determined that respondent had anti-union sentiment or animus based upon their conduct during the 1975 campaign and election and the posters posted during the 1977 harvest.[30/] However, such animus did not manifest itself in any conduct approaching that found in the cited cases. Moreover, except for the charges at issue herein and the one settled at the hearing, there was no evidence of other unfair practices and certainly not of widespread or egregious unfair labor practices being committed by respondent such as were found in the cited cases. Finally, and perhaps the most important sine qua non, no evidence of either active or known union support was presented with respect to either Juan or Maria, that in conjunction with the other elements, would call for invoking the doctrine. [31/]

I accordingly find that General Counsel has failed to establish by a preponderance of the evidence that the failure to rehire Juan Gonzales by respondent on or about August 15 was because of his activities in support of the UFW.

4. The General Counsel Has Not Sustained its Burden of Proof That Respondent Violated Sections 1153 (a) and (c) With Respect to Maria Gonzales

While the record was notably absent of any union support, activity or sympathy on behalf of either Maria Llamas or Juan Gonzales, there was some evidence, albeit limited, of union activity, support and

[30/] See pages 13 and 14 supra.

[31/] The absence of any such evidence of testimony is underscored by the colloquy between Counsel and the ALO regarding the matter. See Vol. 1, p. 159-162.

sympathy on behalf of Maria Gonzales. Nevertheless, the record is devoid of any evidence that respondent was aware, either directly or inferentailly, of these limited union activities. In addition, the record does not show that union activities were a factor or played a role in the determination of which women were rehired after the April 20 lay-off to complete the remaining two weeks of the suckering operations. I accordingly find that General Conusel has failed to establish that the lay-off by respondent of Maria Gonzales on April 20 was because of her activities in support of the UFW.

However, once the May 9 charge of the April 20 lay-off was filed by the UFW on behalf of Maria Gonzales and received by respondent, General Counsel argues, this provides sufficient basis for establishing the necessary knowledge of union activity and support and anti-union motivation to support finding the necessary elements for the August 15 violation.

I have reviewed the entire record, including taking into consideration the Gonzales' credited version of a conversation they had in August with Simon Matias during which he stated, in addition that no work is available, that "the boss doesn't want union supporters." I have nevertheless concluded that the record does not contain substantial evidence of unlawful motive with respect to the August 15 refusal to rehire for the following reasons. First, subsequent to the serving of the May 9 charge regarding Maria Gonzales and Llamas, Louis Caric, Jr. was notified that the General Counsel's office would be investigating that charge. Caric testified that in conjunction with the investigation he discussed the charge with Casabar. Yet during this same period of time that the General

Counsel urges that respondent now knows that Maria Gonzales is an "active" union supporter and such knowledge provides the motivation and basis for the August 19 charge, respondent, thru the same supervisor, rehires Juan and Maria (and their daughter) on June 10 as part of Obando's thinning crew. Moreover, as the Gonzales so testified, Casabar went out of his way in assisting them in obtaining the employment during June. In July, the Gonzales are with Simon Matias' harvesting crew in Arvin. They then seek to join Matias' crew when he starts harvesting at Caric's in August. [32/] There apparently are many more available and qualified workers then vacancies for the harvesting crews. Although Simon apparently indicated he would hire or try to hire Juan and his family, and clearly that was the Gonzales' expectation, they were not hired. However, other known and actually active union supporters, Bridgette Rivera and her mother Teresa Rivera, were hired at the same time. While the hiring of other known union supporters does not necessarily prevent a finding of improper motivation, it is a factor, along with the other surrounding circumstances [33/] that ultimatley leads me to the conclusion that respondent did not violate Section 1153(a) and (c) of the Act by refusing

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[32/] Juan seeks work for himself, Maria, their daughter Socorro and apparently his sons as well. See Vol. I, p. 136.

[33/]Other factors considered are Caric's somewhat disorgainized hiring procedure and the primary hiring source being present Caric employees and labor camp residents. The fact that there were 9 layoffs and 9 hires between August 15 and 19 by respondent is potentially subject to equally competing inferences. I ultimately considered it a "neutral" factor, other than confiming that if all other elements had been found, I would have considered there to have been "available" jobs for at least one or more of the Gonzales to fill.

to rehire Maria (and Juan) Gonzales.

In examining whether the refusal to rehire the Gonzales violated Section 1153 (a) the same conclusion ultimately is reached. I found this analysis to be a considerably closer one, in part, because the employer's motivation and proof thereof is not a necessary element of the charge. Nevertheless, applying the objective standard of whether the employer's conduct would tend to interfere with, restrain or coerce reasonable employers in the exercise of their right to engage in protected, concerted activity, NLRB v. Corning Glass Works, 293 F.2d 784, 45 LRRM 2759 Cist Cir. 1961), I am unpersuaded that a Section 1153(a) violation has been made out either. If anyone or more of the factors set forth above [34/] had not been present, I would have found sufficient countervailing factors along with Matias' remark to make out a Section 1153(a) violation.

5. No Evidence was Presented that Respondent Violated Section 1153(d) regarding any of the alleged discriminatees.

Section 1153(d) is patterned after Section 8(a)(4) of the National Labor Relations Act. Like its counterpart, the number of complaints filed under Section 1153(d) is minuscule,[35/] in part because the scope of the unfair labor practice under this section is

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[34/] E.G., Juan and Maria's rehire by Caric after knowledge of Maria's ULP charge filed by the UFW; no other known union activity or support by Gonzales; no union organizing campaign; more available workers than available vacancies; preference given to Caric labor camp residents and current employees, and hiring of other known union supporters.

[35/] A Section 1153(d) charge is briefly referred to without discussion or determination in M. B. Zaninovich, Inc., 4 ALRB No. 70, p. 4-5 (1978). No other decision by the ALRB regarding the provision has apparently been made.

narrow. [36/] In view of the findings and analysis herein regarding the § 1153Ca) and (c) charges, I do not find that the §1153(d) charge adds anything or provides any different conclusion. There has been no evidence presented that respondent "otherwise discriminated against an agricultural employee because he filed charges" in violation of § 1153 (d). The filing of the two charges, on May 9 and the other on August 19, are at issue. As to the first charge, no unfair labor practice was found to have occurred that resulted in the filing in the first place. More importantly, subsequent to the filing of the initial charge, the Gonzales were rehired by the same supervisor that was the subject of the charge, negating the inference, if there was any, that the filing of the charge was the basis for alleged discrimination. As to the second charge filed on August 19, the record is unclear whether the filing occurred before or after the Gonzales were denied re-employment during the harvest. Obviously, if made after the denial, the filing is simply unrelated to any alleged discrimination. However, even assuming the filing occurred before the Gonzales were denied re-employment, the record lacks any evidence that there was a casual connection between the

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[36/]See Generally, Morris, The Developing Labor Law, p. 134 and Supp., p. 67-69.

[37/]On the basis of the conflicting testimony, the *Gonzales* could have sought employment from Simon Matias at his home on any three consecutive Sundays between the dates July 31, August 7, August 14, August 21, and August 28.

[38/]No evidence was presented with respect to Maria Llamas on her than she apparently sought work on or about August 15 or 16 prior to the charge being filed.

two events. Indeed, the only reference by Matias to the filing of a charge in August as testified to by Juan, indicates that the decision not to rehire the Gonzales had already been made. I accordingly find that the General Counsel has failed to establish by a preponderance of the evidence that respondent violated Section 1153 (d) of the Act with respect to any of the alleged discriminatees

V. CONCLUSIONS & RECOMMENDATIONS

Based upon the foregoing findings of fact, analysis and conclusion of law I recommend that the Complaint be dismissed in its entirety.

Dated: March 30, 1979.

Respectfully submitted,

Michael H. Weiss

MICHAEL H. WEISS
Administrative Law Officer