Bakersfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS,	)	
Respondent,	)	Case No. 79-CE-14-D[1/]
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	6 ALRB No. 44
Charging Party.	)	

DECISION AND ORDER

On November 27, 1979, Administrative Law Officer (ALO) Stuart A. Wein issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each filed exceptions and a supporting brief. Respondent and the General Counsel each filed a reply brief.[2/]

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.

[1/]This case was formerly consolidated for hearing with Case Nos. 79-CE-13-D and 79-CE-18-D. See footnote 6, infra.

[2/]In its brief, Respondent requests that the exceptions of the General Counsel be disregarded because they were not submitted by registered mail, pursuant to 8 Cal. Admin. Code section 20480(b). As Respondent has failed to show that it was prejudiced by the manner of the mailing, we hereby deny Respondent's request. In his brief, the General Counsel requests that the exceptions filed by Respondent be disregarded because they contain no citations to the record as required by 8 Cal. Admin. Code section 20282 (a). Although Respondent did not fulfill the requirements of the regulations as to page citations, no prejudice has been shown by the General Counsel. Accordingly, we hereby deny this request also.

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[3/] of the ALO as modified herein, and to adopt his recommended Order as modified herein.

Respondent excepts to the ALO's conclusion that it discriminatorily failed to rehire Francisco Larios because of his activities on behalf of the United Farm Workers of America, AFL-CIO (UFW). We find no merit in this exception.

Larios was an active union supporter. Respondent's knowledge of his union activities was conceded at the hearing. During the 1977 UFW organization campaign, Larios recorded a pro-UFW campaign message in which he identified himself as an employee of Respondent. This tape was played over a local radio station hourly during the 24 hours prior to the election. In addition, Larios obtained employees' signatures on UFW authorization cards and served as an unpaid union observer in the representation election which was held in July 1977. In a previous unfair labor practice proceeding, Sam Andrews' Sons (November 30, 1978) 5 ALRB No. 68, this Board concluded that Respondent violated the Act by suspending Larios for two weeks following his attendance at a UFW convention in August 1977. In that case, the Board found that Larios was "the most well known union member among Respondent's workers."

[3/]As no exceptions were filed to the ALO's conclusion that Respondent did not violate the Act by failing to rehire Francisco Larios as an irrigator since March 30, 1979, we affirm his conclusion without adopting his rationale therefor.

The ALO in the instant case found evidence of Respondent's anti-union animus in an admission made by supervisor Guerra after Larios was laid off. According to Guerra, the fact that Larios was a Chavista, i.e., a UFW supporter, must have been the reason that he was not rehired. This admission, along with a 1976 incident in which supervisor Castro removed a pro-union sticker from Larios' car and attempted to replace it with an anti-union sticker, indicates sufficient anti-union animus to establish discriminatory motivation in the failure of Respondent to rehire Larios.

On March 20, 1979,[4/] thinning-crew foreman Diego Mireles promised Larios that he would hire him "as soon as there is a job available." On that same day, Larios asked ranch superintendent Dolores Alvarez for work in another thinning crew and in the irrigation crew. Alvarez had overall responsibility for Respondent's farming operations, including the work of the thinning crews. He encouraged Larios to fill out a work application and also promised to call him when work became available.

Respondent's crew records indicate that Mireles' crew was in fact reduced after Larios was laid off on March 20 from a high of 55 to a low of 39 workers. However, after April 4, the crew was increased to 51 workers and reached 67 on April 10. Not only was Mireles' crew increased, but an additional thinning crew of about 40 workers was employed by Respondent on April 12

[4/]Unless otherwise noted, all dates mentioned hereinafter refer to 1979.

and 13.

We find that Respondent's anti-union animus, and the fact that a number of other workers were hired while Larios was not rehired, despite the promises by Alvarez and Mireles to rehire Larios, along with Respondent's admitted knowledge of Larios' past union activities all establish discriminatory motivation in the failure of Respondent to recall Larios. We therefore conclude that Respondent's failure to rehire or recall Larios constituted unlawful discrimination in employment, and a violation of section 1153 (c) and (a) of the Act.

The General Counsel excepts to the ALO's recommended dismissal of the charges filed in Case Nos. 79-CE-13-D and 79-CE-18-D, which were originally consolidated with Case No. 79-CE-14-D in this proceeding. General Counsel has filed a motion to partially vacate the ALO's decision, and Respondent has filed a motion in opposition. These motions are based on the ALO's recommended dismissal of the above-mentioned charges.

Cases 79-CE-13-D and 79-CE-18-D were informally settled, and the Regional Director approved the settlement agreement, prior to the hearing herein. Accordingly, at the hearing, the ALO indicated that "the charges in those two cases have been withdrawn as exhibits" (emphasis added). In his decision, the ALO recommended dismissal of those charges.

We reject that recommendation. Charges are not pleadings or allegations in a complaint, NLRB v. Fant Milling Company (1959) 360 U.S. 301, 307 [44 LRRM 2236], and therefore

are not subject to a recommended dismissal of the ALO.[5] In view of the ore-hearing settlement agreement in Case Nos. 79-CE-13-D and 79-CE-18-D, it was entirely proper that the allegations based on the charges in those cases were not litigated at the hearing, and that no findings or conclusions based on such allegations were made by the ALO, or will be made by the Board in this proceeding.[6]

We agree with the General Counsel's contention that Respondent is estopped from arguing that Diego Mireles was not a supervisor or agent.[7] In its answer to the complaint, Respondent admitted that Mireles was an agent. Respondent's proposed amended answer, denying that Mireles had such status, was filed subsequent to the close of the hearing.

In Bogart Sportswear Manufacturing Company (1972) 196 NLRB 189 [80 LRRM 1262], affirmed in relevant part (5th Cir. 1973; 485 F.2d 1203 [84 LRRM 2313], the employer admitted in its answer

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[5] An ALO may, of course, recommend dismissal of specific allegations of a complaint with respect to which no evidence was taken at hearing, or may recommend dismissal of an entire complaint where he concludes that General Counsel has not proved the allegations therein by a preponderance of the evidence.

[6] In view of the pre-hearing settlement herein, it would have been appropriate for the ALO, on motion of the General Counsel, or sua sponte, to sever the two settled cases and to proceed with the hearing as to the allegations of the complaint based on the charges on the remaining matter, Case No. 79-CE-14-D. As the severance was not effected at the hearing, we hereby sever Case Nos. 79-CE-13-D and 79-CE-18-D from this proceeding.

[7] On the basis of the record alone, we would conclude that Mireles was a supervisor and/or agent of Respondent. The evidence clearly shows that he had authority to hire and discharge employees on Respondent's behalf. In fact, he hired several workers while at the same time failing or refusing to rehire Francisco Larios.

that an individual was its agent and supervisor at all times material, and did not seek to withdraw that admission during the hearing or in its post-hearing brief to the Trial Examiner. The National Board held that the General Counsel was entitled to rely on Respondent's admission and ruled that the Trial Examiner had properly found Respondent responsible for the agent's conduct. As the General Counsel in the instant case was warranted in his reliance on Respondent's admission and presented his case on that theory, Respondent is estopped from arguing that Mireles was not its supervisor or agent. United Furniture Workers (1962) 139 NLRB 1279 151 LRRM 1477].

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Sam Andrews' Sons, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Failing or refusing to rehire any employee because of his or her union membership or union activity, or otherwise discriminating against any employee in regard to his or her hire or tenure of employment, or any term or condition of employment except as authorized by section 1153 (c) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, 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 or all of such activities.

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

(a) Immediately offer Francisco Larios full and immediate reinstatement to his former job or equivalent employment, without prejudice to his seniority or other employment rights and privileges, and make him whole for any loss of pay and other economic losses he has incurred as a result of Respondent's failure to rehire him, together with interest thereon computed at the rate of seven percent per annum.

(b) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel 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.

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

(d) Post copies of the attached Notice, in all appropriate languages, for 60 consecutive days in conspicuous places on its property, the period 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.

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time between April 6, 1979, and the time such Notice is mailed.

(f) 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 non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

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

Dated: August 15, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SAM ANDREWS' SONS, Respondent, UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 79-CE-13-D 79-CE-14-D 79-CE-18-D

Ricardo Ornelas, Esq., for the
General Counsel

Clark Brown, Esq.
Cohen, Freeman & Broker
of Los Angeles, CA
for the Respondent

Javier Cadena
of Salinas, CA for
the Charging Party

DECISION

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer: This case was heard by me on October 22, and 23, 1979, in Bakersfield, California.

The Complaint, dated August 30, 1979, as amended on November 1, 1979 is based on three charges filed by the United Farm Workers of America, AFL-CIO (hereafter the "UFW or union"). The charges were duly served on the Respondent SAM ANDREWS' SONS, on April 3, 1979 and April 10, 1979.[1]

[1]Unless otherwise specified, all dates herein mentioned refer co 1979.

The Complaint and Amendment thereto allege that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "Act").

All parties were represented at the hearing and were given a full opportunity to participate in the proceedings. The General Counsel and Respondent filed briefs after the close of the hearing.

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

FINDINGS

I. Jurisdiction

Respondent, SAM ANDREWS' SONS, is a partnership engaged in agricultural operations - specifically the growing and harvesting of lettuce, onions, melons, garlic and tomatoes in Kern County, California, as was admitted by Respondent. Accordingly, I find that Respondent is an agricultural employer within the meaning of Section 1140.4(.c) of the Act.

I also find that the UFW is a labor organization within the meaning of Section 1140. 4 (f). of the Act, as was admitted by Respondent.

II. The Alleged Unfair Labor Practices

The General Counsel's Complaint and subsequent Amendment charge that Respondent violated Sections 1153(a) and (c) of the Act by (1). discriminatorily changing the working conditions of Primitivo Garcia because of his activities in support of the UFW

(2) discriminatorily laying off irrigators Herculano Garcia, Jr., Felipe Farfan and Jesus Perez because of their activity in support of the UFW; (3) discriminatorily laying off Francisco Larios and Maria Elia Leyva Nevarez who were from the lettuce weeding and thinning crew because of their activities in support of the UFW;

(4) discriminatorily refusing to rehire Francisco Larios and Maria Elia Leyva Nevarez for a lettuce weeding and thinning crew because of their activities in support of the UFW;

(5) discriminatorily refusing to rehire Francisco Larios as an irrigator from March 30, 1979, and continuing thereafter because of his activities in support of the UFW. Additionally the Complaint and Amendment charge that the Respondent violated Sections 1153(a) and (d) of the Act by discriminatorily laying off Francisco Larios in retaliation for his testifying in 1978 on behalf of General Counsel in an unfair labor practice matter involving Respondent.

Allegations (1) and (2)[2] were resolved prior to commencement of the hearing by informal settlement between the parties, which was subsequently memorialized. The respective charges were withdrawn, and I consequently dismiss paragraphs 5 (a) and 5 (c) of the Complaint and Amendment.

With respect to the allegations concerning Francisco Larios and Maria Elia Leyva Nevarez, the Respondent denies that it violated the Act in any respect. Particularly, Respondent contends that there was really no work for Francisco Larios and Maria Elia [2]Charges 79-CE-13-D, 79-CE-18-D

Leyva Nevarez on March 20, 1979 and that they were allowed to work the one day as a "favor", because the two had already made the lengthy drive out to the ranch. The thinning and weeding crews had been ordered to be reduced, so the two alleged discriminatees were not subsequently rehired. Mr. Larios was not hired as an irrigator because the Respondent never knew about his application or his interest in returning to his old position since he had voluntarily quit in July, 1978.

III. Background

Respondent grows cotton, vegetables and melons on its two [3] Kern County ranches which are the sites of the alleged unfair labor practices. They encompass approximately 14,000 acres in the Bakersfield area, with a work force which varies in size from 1800 during a harvest to a steady work force of around 100.

The various processes are best defined by the usual work force available on Respondent's ranches: The thinning crew of "Danny" Garcia and Cirilo Alvarado normally thin and hoe lettuce commencing in January and continuing intermittently through the end of March. From the end of March, or beginning of April, to the end of June, the Garcia-Alvarado workers would thin and hoe watermelons, canteloupes, honeydew melons, casabas, crenshaws, garlic, onions, and tomatoes. They harvest melons through the end of July, with a layoff until the very end of August or first of September when they return to thinning lettuce until the second week of October, finishing up by the end of December or [3] Lakeview and Santiaga

first of January.[4]

The crew hired by labor contractor Anastasio Carreon and supervised by foreman Diego Mireles work more sporadically. They usually start around the middle of April and work "almost" continuously until the middle of June, thinning and weeding the same crops. By the end of June, or early July, they form their own smaller crews and harvest, and for the last few years, worked a few weeks in September, thinning lettuce. This year a similar pattern prevailed at Respondent's ranches with the exception that spring thinning started earlier in March rather, than the normal mid-April period due to weather conditions.

Francisco Castro and Juan Perez oversee the ranches' irrigators[5] which fluctuate from over 100[6] during the peak in August to 30-40 during the lull season commencing in September.

Respondent had been under contract with the Teamsters during the period 1975-1978 and to some extent adhered to the seniority provisions of said contract for the thinning and irrigation crews during the relevant period herein.[7] Employees gained seniority retroactive to the original date of hire by working for Respondent for at least 30

[4]Other "harvest" crews not relevant to this action harvest the lettuce in the spring and fall.

[5]Dolores Alvarez is the Ranch Superintendent who oversees the various thinning and irrigation foremen.

[6]40 in Mr. Castro's vegetable crew and 70 in Mr. Perez' cotton crew.

[7]See Respondent's Exhibit No. 6 at page 7.

days within a 90-day period. Seniority was lost by discharge for cause or the voluntary quitting of the employee. The lists were updated periodicially -- every two months for the thinners, and twice a year for the irrigators. One seniority list (General Counsel's Exhibit No. 7) contained the names of the irrigators with both the Castro crew and the Perez crew. There are separate seniority lists for each of the Carreon - Mireles thinning group (General Counsel's Exhibit No. 2) and the Garcia - Alvarado people.

The alleged unfair labor practices occurred on March 20, and for some time thereafter involving the employment status of former worker Francisco Larios and his companion Maria Elia Leyva Nevarez. Mr. Larios had been employed by Respondent from June 1975 through July 1978, primarily as an irrigator, but initially for a period of some six months as a thinner. Mr. Larios' previous relationship with Respondent had been uneventful until his two-week suspension in 1977 which was the subject of a previous unfair labor practice hearing,[8] and Mr. Larios' ultimate decision to voluntarily quit work in July, 1978. Findings of Fact and Conclusions of Law and Analysis will be discussed for each allegation in seriatim.

IV. Layoff of Francisco Larios and Maria Elia Leyva Nevarez of March 20.

A.) Facts:

Francisco Larios thinned and weeded lettuce in the Carreon-

[8]Case Nos. 77-CE-63-D, et al., currently on appeal to the Board.

Mireles crew on March 20, 1979. He obtained the job through his brother-in-law Santiago Cortez, who along with Mr. Larios' sister, Maria de la Luz Cortez, and his companion, Maria Elia Leyva Nevarez, rode up to the ranch together on the morning of the 20th. According to Mr. Larios, he had been working approximately one hour when he saw ranch superintendent Dolores Alvarez who stopped to ask Larios what he was doing at the ranch. With Ms. Leyva at his side, Larios responded that he was working and then Mr. Alvarez and foreman Mireles walked together in the opposite direction, conversing out of hearing of worker Larios. After lunch, Larios was informed by Mireles that he was to be laid off the next day, because about "half" of the workers were to be laid off. The layoff was subsequently confirmed by Alvarez who first said he didn't know anything about the layoff and then told Larios that indeed he had told Mireles "to lay off and only leave about 38." (See Reporter's Transcript I, p. 167, 11. 13-23).

General Counsel alleges that Francisco Larios and Maria Elia Leyva Nevarez were discriminatorily laid off because of Mr. Larios' prior support for and activities on behalf of the UFW. Mr. Larios was a "known" UFW activist wearing union buttons, carrying pro-union bumper stickers on his vehicle, and making radio announcements in favor of the UFW during the 1977 election campaign. He considered himself to be the "most active Chavista" at Respondent's Kern County ranches, who helped with the initial organizing and served as spokesperson for other workers.

Respondent denies that either Mr. Larios or Ms. Leyva were discriminatorily laid off, but rather that Dolores Alvarez had ordered Diego Mireles to lay off some crew members three days prior to the arrival of Larios and Leyva, and that as newcomers, they were the first to be laid off. Thus, Diego Mireles testified that worker Santiago Cortez had spoken to him two weeks previously *(.i.e.,* around the first week of March) about work for two or three additional unnamed persons, in order to help defray gas expenses for Cortez and his wife. By the time the new workers -- Larios and Leyva -- arrived on March 20, Mireles had already been given the order to lay off some of the crew. There were no specific instructions from any ranch supervisor to lay off these two particular individuals, but there was a certain "pressure" on Mireles to reduce the size of his lettuce thinning and weeding group. Indeed, Dolores Alvarez had repeated his instructions on March 20 that Mireles should commence laying off workers. While company crew records for March 21 indicate that there were 54 workers, as opposed to 51 for the day before. (See General Counsel Exhibit Nos. 5 and 6), Mireles explained that the increase came from members of his wife's crew who had been off work for a few days and needed the extra money. They also were warned that a layoff was imminent, and that they might be able to continue for only a day or two. Records of Mireles' crew for subsequent days confirmed this pattern, showing a work force of 55, 53, 43, 42, 39, 39, 45, 46, 51, 47, 66, 64, 65, 67, 65, 41, 56,58 and 57. (See General Counsel's Exhibit No. 10). According to Mireles,

Mr. Larios had never worked for him personally before, and he had never seen Ms. Leyva. The other workers from his crew were longtime friends and associates from Mexico and Texas. In his own mind, he never considered his actions with respect to the newcomers a layoff; rather, they showed up on a day when there was really no work, and during a time when Mireles was to be laying off long-time workers.[9] Instead of having them remain idle on the ranch, however, and in light of the rather lengthy car ride that all four had just endured, he permitted Larios and Leyva to work for one day only. Mireles informed brother-in-law Santiago Cortez of the one-day duration of this "employment" who apparently communicated same to Larios without comment. Mireles reiterated the need for the layoff to both Cortez and Larios sometime after lunch on the 20th.

B. Analysis and Conclusions:

Section 1153(c) of the Act makes it an unfair labor practice for an employee "(b)y discrimination 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." The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the layoffs or discharges. Maggio-Tostado, 3 ALRB No. 33 (.1977), citing NLRB v. Winter Garden Citrus Products Co-Operative, 260 F.2d 193 (5th

[9]Upon seeing the two "newcomers", Mireles told Cortez that it was just as well that he (Cortez) hadn't brought three new workers, since he would be laying off people anyhow. Larios overheard part of this conversation, recalling that Mireles was pleased that two rather than three new people showed up on the 20th.

Cir. 1958). The test is whether the evidence, which in many instances is largely circumstantial, establishes by its preponderance that employees were laid off for their views, activities, or support for the union. Sunnyside Nurseries, Inc., 3 ALRB No. 42 *(1977}.* Among the factors to weigh in determining General Counsel's prima facie case are the extent of the employer's knowledge of union activities, the employer's anti-union animus, and the timing of the alleged unlawful conduct.

Respondent's knowledge of Francisco Larios' union sympathy was apparent and conceded at hearing. Foreman Diego Mireles recalled seeing Mr. Larios speaking with union organizers during the 1977 election campaign. Irrigation Supervisor Francisco Castro recalled Mr. Larios' request for a few days off to attend a union convention in 1977. Ranch Superintendent Dolores Alvarez and payroll chief Cathy Carlson remembered the prior testimony of Larios at an earlier unfair labor practice hearing. Mr. Larios further testified that he was a union observer during the election, obtained signatures from workers during breaks and after work and had occasion in 1977 to broadcast a pro-union campaign message over a local radio station during which he identified himself as a Sam Andrews' Sons employee. And both foreman Mireles and Superintendent Alvarez readily recognized Larios as he commenced thinning on the morning of March 20. I thus find that the Respondent was fully aware of the union sentiments of Mr. Larios upon his return on March 20, 1979. (See S. Kuramura, Inc., ALRB No. 49 (1977)).

Apart from Diego Mireles' alleged opinion that he didn't like the union because it would "mess everything up"[10] which I consider protected free speech under Section 1155 of the Act (and therefore not supportive of General Counsel's case) , there is ample indicia of anti-union animus in the record. Larios detailed an incident in October 1976 wherein his Supervisor Francisco Castro attempted to remove a "Yes on 14" bumper sticker from Larios' car and replace it with a "No on 14" sticker. While Castro's opinions regarding Proposition 14 are protected free speech (See Superior Farming Company, Inc. 5 ALRB No. 6 (1979)), a foreman's attempt to remove the sticker from a worker's car without the worker's consent constitutes conduct not protected by Labor Code §1155. Additionally, prior allegations of unfair labor practices -- the refusal to pay Larios while the latter served as union observer during the 1977 election, and the two-week suspension following Larios' request for a three-day leave to attend the union convention -- may constitute indicia of anti-union animus. See Southwest Janitorial and Maintenance Corp., 209 NLRB 402, 85 LRRM 1590 (1974). See also, Kellwood Co., 206 NLRB 206, NLRB 665, 669 (1973). While I decline to take judicial notice of Sam Andrews' Sons, 75-CE-49-E(R), and Sam Andrews' Sons, 3 ALRB No. 45 (1977), and Sam Andrews' Sons, 77-CE-63-D, as

10 Although Mireles could not recall the comments, his concession of earlier "talks" with Larios, and his knowledge of Larios' discussions with other workers regarding the union lead me to credit Larios' recollection of the statements.

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requested by General Counsel [11] , I do find that Larios was an unpaid union observer during the 1977 election, and that he was suspended! for a two-week period in 1977 following his attendance at a 3-day union convention. I also find a sufficient instance of employee opposition and hostility to the union to establish anti-union animus in the admission by Supervisor Guerra that Larios' being a Chavista must have been the cause of the latter's employment woes. (See discussion on p. 20)

The timing of the layoff -- on the very first day of Larios' return to work -- further raises the suggestion that Larios' union sympathies were an unwanted intrusion of Respondent's operations. The fact that six others were added to the Mireles' crew on March 21 on the identical day that Larios and Maria Elia Leyva Nevarez would again become unemployed buttresses the suspicion that there was sufficient work for Larios and his companion and that Respondent would not tolerate "agitators"

Respondent's contention that the real reason for the layoff was the previous order given to Mireles by Superintendent Alvarez to reduce the lettuce thinning and weeding work force is persuasive, however, and supported by documentation. The crew records (See General Counsel Exhibit No. 10) indicate declines

[11]I decline to take judicial notice of the Administration Law Officer decisions in case nos. 75-CE-49-E and 77-CE-63-D because the former was settled prior to adjudication, and the latter is presently on appeal before the Board. 3 ALRB No. 45 is also presently on appeal and I consequently decline to take notice of that decision as well. See Cal Admin. Code $20286. Since both parties have agreed in their briers, and since 4 ALRB No. 59 is a final decision, I will take judicial notice of that case for the purpose of finding that the UFW prevailed in a certification election held at Respondent's ranches in July 1977, and was certified by the Board to be the exclusive collective bargaining representative of Respondent s agricultural employees on August 21, 1978.

in the work force from the March 20 level of 51 to 43 on March 24, 42 on March 26, 39 on March 30, 40 on March 31, 42 on April 2, and 46 on April 3. That Alvarez gave the "cutback" order to Mireles, and that Mireles communicated same to Larios' brother-in-law Santiago Cortez stands uncontroverted. And Mireles' loyalty to his longtime friends and cohorts from Texas and Mexico is understandable and not suggestive of *a.* discriminatory motive in his conduct vis a vis Larios and Leyva. In his own mind, Mireles was not "laying off" the latter workers, but rather, merely affording them one day of work since they had already made the lengthy drive to the ranch with Santiago Cortez. While there was no reason to keep the two "newcomers" idle for the day, nor was there sufficient work in the next few days to keep them on the payroll. Allowing them to work one day was consistent with his work decision to allow "friends" from his wife's crew two extra days before instigating the layoff.

Placing the burden on the Respondent (see Maggio-Tostado, 3 ALRB No. 33 (.1977), relying on NLRB v. Great Dane Trailers, Inc. 388 U.S. 26, 65 LRRM 2465 (1967)), once the General Counsel has proven its prima facie case by showing that the employer has engaged in discriminatory conduct which could have adversely affected employee rights, I find that the preponderance of the evidence establishes that the "layoff" of Larios and Leyva was motivated by legitimate business objectives. Had Mireles not been ordered to cut back his thinning and weeding crew, Larios and Leyva would have had additional work regardless of their

union sympathies and/or activities. While it was not often that Mireles would offer work to people in the face of his Superintendent's cutback order, the informality of the hiring process, Mireles' attitude of taking care of things "in time", and his general unfamiliarity with Larios and the latter's work, belie discriminatory motivation.

I further reject the contention that any anti-union motive constituted "the last straw which broke the camel's back". See NLRB v Whitfield Pickle Co., 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967). The Respondent's limitation of Larios and Leyva to the one-day of work was consistent with the seasonal lull in thinning activity. There was no indication on the record that an partner of Respondent, or any other management personnel directed the specific termination of the two new arrivals. While Mireles may have differed with Larios about his views of the merits of unionization, there is no history of animosity between the two which would be a motivating reason for limiting the March 20 employment to one day. Having determined that Respondent's explanation refutes any inference of discrimination which may be drawn from the circumstances, *I* therefore find that Respondent did not violate Section 1153(a) or (c) of the Act by "laying off" Francisco Larios and Maria Elia Leyva Nevarez on March 20, 1979.

I further find that Respondent did not violate Section 1153(d)[12] of the Act by the March 20 layoff. There was no evidence provided at the hearing that Diego Mireles was even

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aware of the previous unfair labor practice hearings. The chief protagonist at the earlier sessions was irrigator foreman Francisco Castro, who was not allegedly involved in the decision of Alvarez and Mireles to cut back the lettuce thinning crew. [13] Larios had worked for Respondent long after the previous charges had been filed, and by his own admission, voluntarily "quit" because he was tired of the arduous work schedule required of Respondent's irrigators, particularly during the July-August peak season. No charge of retaliation was raised at that time, and a subsequent retaliatory motivation cannot credibly be inferred in the March 20 layoff. Therefore, I find that General Counsel" failed to prove by a preponderance of. the evidence that Respondent discriminatorily laid off Francisco Larios in retaliation for his testimony in 1978 on behalf of General Counsel as alleged in Paragraph. 5(d) of the Complaint herein.

V. Refusal to Rehire Francisco Larios and Maria Elia Leyva Nevarez Following the March 20 Layoff.

A.)_ Facts:

Francisco Larios testified that foreman Mireles told him not

[12]Cal. Lab. Code Section 1153(d) provides that it is an unfair labor practice for an agricultural employer "[t]o discharge or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part."

[13]General Counsel's theory alleges that Mireles either through, his own anti-union feelings, or at the discretion of Ranch Superintendent Dolores Alvarez, who was familiar with Larios' prior union activities, discriminatorily determined to lay off Larios upon his unsuspected arrival on March 20.

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to worry on the day of the layoff, that he would contact the latter (through his sister Maria de la Luz Cortez) "as soon as there is a job available". (R.T. II, p. 168, 11 18-22). Mireles confirmed to Larios' brother-in-law Santiago Cortez that he would hire Larios if he had more work later on. (R.T. 28, 11 20-22). Larios further made clear his desire to continue working with Respondent in conversation with Superintendent Alvarez the afternoon of March 20. Larios told Alvarez that he was broke and that he needed a job. Larios queried whether or not there was work in the other lettuce thinning crew (Danny Garcia/Cirilo Alvarado). Alvarez indicated that there was no work, because there would be lay-offs there too. At that time, Larios was encouraged to fill out an application, [14] and was assured that he would be called when there was work. Neither Larios or Leyva was rehired up through the date of the hearing.

B.) Analysis and Conclusions:

I reach a different conclusion with respect to the failure to rehire Francisco Larios as a thinner as alleged in amended Paragraph 5(b) of the Complaint. Applying the identical standard to the General Counsel's prima facie case, I find the following:

Larios was a known union sympathizer who the Respondent preferred to have work elsewhere. Previous incidents -- the admission of Supervisor Garcia and the conduct of Supervisor

[14] The record is unclear as to whether Larios was encouraged to fill out an application for irrigator or thinner, since Alvarez supervised all ranch activities.

Castro -- all indicate sufficient anti-union animus to suggest discriminatory motivation in the failure of Respondent to recall Larios.

The critical distinction between the failure to rehire and the layoff lies with Respondent's crew records. (See General Counsel's Exhibit 10). While the Mireles crew did indeed decrease from its "peak" of 50-55 workers during the March 20-23 period, by April 4 the crew level was back to 51. On April 6, 66 workers were listed; 64 on April 7; 65 on April 9; 67 on April 10; 65 on April 11; 56 on April 12; 58 on April 13; 57 on April 14. Additional thinning crew of 41 and 39 workers respectively were recorded for April 12 and April 13.

Mireles' preference for his friends and acquaintances from Mexico and Texas is a much less compelling rationale for failing to recall Larios in light of his conceded promise to do so once the work force increased. Although the thinning operation started earlier this year -- in March, rather than April -- testimony of Respondent employee Cathy Carlson indicated that some two months of high level thinning activity during the spring could be expected every year.

Although Respondent would contend that it was unaware of Larios' application for irrigation and of his desire to return to his former job (see discussion, pp. 22-23), it cannot credibly be argued that Mireles was unaware of Larios' desire to continue thinning. Larios' explanation to Ranch Superintendent Alvarez that he was broke and needed work was uncontroverted. And Mireles

promised Larios that he would be recalled as soon as there was work. Nor can Respondent persuasively postulate that it was unable to communicate with Larios, since both Larios' sister and brother-in-law continued working on the ranch under foreman Mireles as they had done for the past few years.

While the Act does not give the Board a license to dictate the methods by which an employer chooses to rehire workers, it may review the method selected where the action is taken for prohibited purposes. Maggio-Tostado, 3 ALRB No. 38 (1977), citing NLRB v Midwest Hanger Co., 82 LRRM 2693 (8th Cir. 1973). In the instant case, I find that on April 6, Respondent through its foreman Diego Mireles and ranch Superintendent Dolores Alvarez discriminatorily refused to rehire Francisco Larios, because of the latter's activities on behalf of the union. I find that Mr. Larios was a "ready, willing, and able" thinner who communicated his availability to Respondent, and which communication was known to Respondent as of March 20. By April 6, there was ample thinning work at Respondent's ranches. I find that the evidence by its preponderance establishes the discriminatory refusal to rehire Mr. Larios as alleged in Amended Paragraph 5(b) of the Complaint, and recommend the appropriate remedy.

By motion pursuant to Section 20240 of the Regulations of the Agricultural Relations Board, Respondent moved to file a First Amended Answer concommitant with its post-hearing brief to deny the allegation that Diego Mireles was a thinning crew foreman and

an agent of Respondent acting on Respondent's behalf. As the motion raises a jurisdictional issue, I have fully considered the evidence surrounding Mr. Mireles' relationship to the Respondent' s operations and find that he is indeed an agent as alleged in Paragraph 4 of the Complaint as amended. While Mireles is personally paid by Carreon rather than by Respondent, and often works other ranches in the area as well, he has worked on Respondent's properties for over five years. His crew members are paid directly by Respondent. Determination of how many workers are to be hired, where, and the type of work they are to do are all made by Respondent through ranch Superintendent Dolores Alvarez. Where, as here, Respondent is basing its defense on the layoff directive by admitted agent, Dolores Alvarez, I am reluctant to render the Respondent immune from the conduct of foreman Mireles. Unlike the recent district court of appeals decision in Vista Verde Farms v. Agricultural Labor Relations Board, 96 Cal. App. 3d 658 (1979) (appeal pending), I find that Respondent conceded authority for the original decision to lay off workers on March 20, and encouraged Francisco Larios to seek work with Respondent following his layoff. While Dolores Alvarez may not have "singled" out Larios for the March 20 layoff, his directive certainly caused Larios severance from employment. And it was another Alvarez directive which permitted the subsequent increase in the thinning work force in early April.

I specifically find that Larios' discussion with Mireles and

Mireles' promise to recall him constituted a "sufficient" application for rehire under the rules of George Lucas and Sons, 5 ALRB No. 62 (1979), citing NLRB v. Shedd-Brown Mfg. Co., 213 F.2d 163 (7th. Cir. 1959),34 LRRM 2278, Capital City Candy Co., 71 NLRB 447, 19 LRRM 1006 (1946), and H & H Mfg. Co., Inc., 87 NLRB 1373, 25 LRRM 1264 (1949). As Mireles could have communicated with either Larios' sister or brother-in-law at the beginning of April, I find that no further effort on the part of Larios was prerequisite to finding a discriminatory refusal to rehire.

With respect to Maria Elia Leyva Nevarez, about whom no evidence of any nature was produced, with the exception that she was the companion of Francisco Larios on March 20, I recommend that she be dismissed from the amended Paragraph 5(b) of the Complaint herein. Conceding that a worker need not necessarily be "very active" in union affairs before an employer's knowledge may be inferred, (see As-H-Ne Farms, 3 ALRB No. 53 (1977)), and that: the termination of a worker for the union activities of his/her relation or companion may be proscribed conduct, (see McAnally Enterprises, Inc., 3 ALRB No. 82 (1977)), there is nothing in the record from which it might be inferred that Respondent's failure to rehire Maria Elia Leyva Nevarez stemmed from discriminatory motivation.

There is no indication that Ms. Nevarez was particularly interested in continuing to work at Respondent's ranches, as was Mr. Larios who was broke and badly in need of work. Foreman Mireles had never seen her before, and there was no evidence that

she had ever thinned before or that her work was satisfactory or unsatisfactory. He made no promise to rehire her when there was more work. While it might be contended that it was her misfortune to be associated with a known union adherent, and that she was not: recalled because of this connection, this theory is not necessarily consistent with Respondent's conduct toward employees Maria de la Luz Cortez, and Santiago Cortez. Both of the latter workers had labored with Mireles for some 8 years. Both remained on the payroll during the March 21-23 "lull", and apparently thereafter. And both were, of course, related to Francisco Larios, the chief discriminatee in the case herein. While , Respondent's anti-union animus may have been causally related to its unwillingness to fulfill the promises of Mireles and Alvarez to rehire Mr. Larios, that motivation did not interfere with the Cortez' employment relationship. There is nothing in the record which would suggest that the Respondent would act any differently toward Maria Elia Leyva Nevarez. She may have been more or less a union partisan than Larios' relations, but there is no evidence that the Respondent was aware of her union sentiments, or had compared same to those of Larios or the latter’s sister and brother-in-law.

While it is not the purpose of this ruling to "penalize" Nevarez for what General Counsel termed her "fear" of testifying ; at the hearing[15], it would nevertheless be improper to hold Respondent liable for conduct which General Counsel has been

[15]This explanation was also suggested in explanation of the omission of Ms. Nevarez from the original Complaint.

unable to prove by a preponderance of the evidence. In the instant case, I am reluctant to infer any anti-union motivation for the failure to rehire Ms. Nevarez as alleged in Amended Paragraph 5(b) of the Complaint, and therefore recommend dismissal of that portion of the pleading. Unlike the situaton in George Lucas and Sons, 5 ALRB No. 62 (1979)', where there was sufficient evidence from other sources to prove violations of Labor Code Section 1153(c) and (a), there is no such record here. While Maria Elia Leyva Nevarez may have born the "onus" of being Mr. Larios' companion, Maria de la Luz Cortez and Santiago Cortez have born a similar "onus" of being related to Mr. Larios. That they continued in the employ of Respondent suggests that General Counsel has not met its burden of showing discriminatory motivation in the failure to rehire Ms. Nevarez, and I so find.

VI. Refusal to Rehire Francisco Larios as an Irrigator on or About March 30 and For Some Time Thereafter.

A) Facts:

Francisco Larios testified that co-worker Primitive Garcia took him three blank application forms for irrigation positions at Respondent's ranches on the day following the March 20 layoff. On March 30, Mr. Larios filled out the original application '(General Counsel Exhibit No. 9) and made a copy at the office of Angel Garcia, an employment counselor for a local public agency. Attached to the application, Mr. Larios stapled *a.* letter of recommendation (General Counsel Exhibit No. 8) from former Respondent personnel manager, Stephen Highfill, and asked

irrigation Supervisor Miguel Guerra to take the application to Respondent's main offices on Copus Road. Supervisor Guerra walked into the office and handed the original application to one of the female office workers, and asked her to give the application to personnel manager, Bob Garcia. Guerra commented at the time that Larios formerly worked for Sam Andrews' Sons. Guerra allegedly told Larios, following the submission of the application, in the yard next to the foremen's office during lunch, that "he couldn't figure out why he (Larios) had any problems because he was a good worker, and the only reason he could imagine was that the rest saw that he (Larios) was a Chavista." Larios responded to Guerra that he "wasn't a Chavista, I am a Chavista." (R. T. 2, pp 178-179, 11 23-27)

Respondent denies all knowledge of the application until the date of the hearing. The filing system was an "informal" one, which categorized applicants by job type, but was not maintained ; in any chronological or alphabetical order. Bob Garcia specifically denied seeing the application until the date of the hearing, as did Respondent's payroll worker Cathy Carlson. Ranch Superintendent Alvarez denied even reviewing the file over the previous year.

Respondent crew records for irrigators (Respondent's Exhibit No. 3) reveal a work force of 57 on March 30, 59 on March 31, 42 on April 1, 45 on April 2, 62 on April 3, 43 on April 4, 41 on April 5, 43 on April 6, 43 on April 7, 40 on April 8, 41 on April 9, 41 on April 10, 39 on April 11, 41 on April 12, and 41 on

April 13. Although some "new" irrigators were hired between April 18 and April 30, the entire force never reached 60 irrigators, all of whom were included on Respondent's irrigation seniority list (General Counsel Exhibit No. 7) which contained the names of 93 workers as of March 30. Mr. Larios was not on the seniority list as he had voluntarily terminated his employment! with Respondent in July, 1978. Although no longer contractually bound to the seniority provisions of the expired teamster contract (Respondent's Exhibit No. 6), informal company policy dictated hiring from this list and the removal of Mr. Larios' name from same following his departure in 1978.

B.) Analysis and Conclusions:

Although the issue is rendered somewhat moot by the previous ruling regarding the failure to rehire Mr. Larios as a thinner by April 6 [17], full consideration of General Counsel's contentions on the March 30 application is warranted in light of the potential difference in the availability of thinning and irrigation work on a yearly basis at Respondent's ranches. (See testimony of ranch Superintendent Dolores Alvarez, R.T. I., p. 142, 11 21-26).

While it is uncontroverted that Francisco Larios submitted his application for irrigation on March 30, I find that the 16

[16] One irrigator - Roberto Corona -- with an alleged date of hire of 11-78 , was not on the seniority list. He apparently worked for the one-week period 3-28 through 4-4.

[17]There is no apparent discrepancy in the pay for irrigators and thinners, or particular reason why one job is more preferable.

Company's failure to rehire him was due to its ignorance of his intention rather than to any anti-union animus. Larios conceded that he neither attempted to speak with or relay a message to any of the hiring personnel - Alvarez, Castro, Garcia or Guerra --following the submission of the application. While Larios testified that he told other workers he was available for his old irrigation job, there is no evidence that they relayed this information to any of the supervisors. Insofar as they did not do. so for reasons relating to any anti-union sentiment on their part, such conduct cannot be attributable to the employer. (See Rod McLellan Co., 4 LRB No. 22 (1978)). To the extent that the workers did convey the information to the supervisors, there still is no evidence of why no effort was made to rehire Mr. Larios.

With respect to the time immediately proximate to the application, it is clear that there was a "lull" in irrigation and that the work force was drawn from the Respondent's -- albeit admittedly informal -- seniority list. Mr. Larios was deleted from the list following his July 1978 resignation from the Company -- another policy consistent with Respondent's practice under the expired Teamsters' Contract. It would not be until July or August when the work force would exceed the number of "available" hands on the seniority list. Since Larios' application for employment preceded the "peak" irrigation season by some 3-4 months, and since Respondent did not systematically review the applications on file, it is probable that Mr. Larios

was simply not considered as an available irrigator, rather than rejected because of his union activities. The inference is buttressed by the omission of any formal charge regarding the March 30 application [18], as well as the very late amendment to the Complaint encompassing this allegation. Had Mr. Larios included this matter in his original charge, Respondent would have had an opportunity to remedy its "filing" system and consider Mr. Larios' application during the "peak" July-August irrigation time.

Lest Respondent be encouraged to "disorganize" its hiring practices, it should be added that the dismissal of Mr. Larios' allegation of failure to rehire is limited to the instant context Where the employee makes no further efforts to communicate his desire to be reemployed, where there is no showing of the futility of these efforts, where the application corresponded to a seasonal lull, where an informal seniority hiring practice was in effect, and where the peak labor force season would not be reached for 3-4 months, the General Counsel has not sustained its burden of proving discriminatory motivation. I consequently recommend dismissal of amended Paragraph 5(e) of the Complaint herein.

SUMMARY

I find that Respondent violated Sections 1153(a) and (c)

[18] Counsel for Respondent contended that he was unaware of the March 30 application for irrigation until the first day of I the hearing, and Respondent's employees confirmed this lack of knowledge.

of the Act by the failure to rehire Francisco Larios as a thinner on April 6. I recommend dismissal of all other fully litigated allegations raised during the hearing and incorporated in the Complaint as amended on November 1, 1979. Because of the importance of preserving stability in California agriculture and the significance of employee rights, I find the misconduct to be serious, and recommend the following: [19]

REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 1153 (a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully failed to rehire Francisco Larios, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to the job of thinner or substantially equivalent job if it has not already done so

[19]I specifically reject Respondent's contention that the violation is not cognizable under the Act since there was no evidence that the "Larios-Leyva layoffs " destroyed or in any way remotely affected the UFW's capacity and ability for effective and responsible representation", (See Respondent's Brief to the Administrative Law Officer, p. 10). I have determined the "real" motive of Respondent in failing to rehire Mr. Larios to be discriminatory, because of his activities in support of the union; consequently, it is unnecessary for General Counsel to further demonstrate the actual effect of such discriminatory conduct. See NLRB v Great Dane Trailers, Inc., (1967) 87 S. Ct. (1972). Nor does the fact that the UFW has been certified as the exclusive collective bargaining representative of Respondent's agricultural employees in August 1978 render the employer immune from unlawful conduct. This unfair labor practice could have a "chilling" effect on employees who may be involved in future election campaigns.

without prejudice to his seniority or other rights and privileges. I shall further recommend that Respondent make Francisco Larios,
whole for any losses he may have suffered as a result of its unlawful discriminatory action by payment to him of a sum of money equal to the wage he would have earned from April 6, 1979 to the date on which he is reinstated, or offered reinstatement, less his respective earnings, together with interest at the rate of seven percent per annum, such back pay to be computed in accordance with the formula adopted by the Board in Sunnyside Nurseries, Inc.. 3 ALRB No. 42 (1977).

In order to further effectuate the purposes of the Act and to ensure to the employees the enjoyment of the rights guaranteed to them in Section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act and that it has been ordered not to engage in future violations of the Act. Accordingly, I shall recommend that respondent furnish the Regional Director of the Fresno region, for] his or her acceptance, copies of the notice attached to this decision, accurately and appropriately translated into Spanish and that the notice and translation then be made known to its employees in the following methods:

1. Post a copy of the Notice, including a copy of the translation for the duration of the 1980 harvest season (through August 31, 1980) at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

2. Mail a copy of the Notice and the translation to each employee employed by Respondent for any period from March 20, 1979, to the date of mailing (excluding employees who are current employees). The Notice shall be mailed to the employee's last known home address.

3. Give a copy of the Notice and the translation to each employee employed by Respondent at the time of distribution.

4. Have the Notice and the translation read to assembled employees on Company time by a Company representative or by a Board agent and accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act. Such question and answer period should not be conducted in the presence of the Respondent and/or any of its agents.

To further ensure to the employees the enjoyment of the rights granted in Section 1152, I will recommend that Respondent notify the Regional Director on *a* periodic basis under penalty of perjury of the steps it has taken to comply with this decision.

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

ORDER

Respondent, its officers, agents and representatives shall:

1. Cease and desist from discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully failing to or refusing to rehire, or in any other manner

discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by Section 1153(c) of the Act.

2. Take the following affirmative action:

(a) Offer to Francisco Larios immediate and full reinstatement to his former thinning or equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any losses he has suffered as a result of the Respondent's failure to rehire him in the manner described above in the section entitled "The Remedy".

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due to Francisco Larios.

(c) Furnish the Regional Director of the Fresno region, for his or her acceptance, copies of the Notice attached hereto, accurately and appropriately translated into Spanish.

(d) Post a copy of the Notice attached hereto including the Spanish translation for the duration of the 1980 harvest season (through August 31, 1980) at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(e) Mail a copy of the Notice attached hereto and the translation to each employee employed by Respondent for any period from March 20, 1979, to the date of mailing (excluding employees

who are currently employees). The Notice shall be mailed to the employees' last known home address.

(f) Give a copy of the Notice attached hereto and the translation to each employee employed by Respondent at the time of distribution.

(g) Have the Notice attached hereto read in English and Spanish to assembled employees on Company time by a Company representative or by a Board agent and accord the Board agent the opportunity to answer questions which employees might have regarding the Notice and their rights under Section 1152 of the Act, without the presence of Respondent or any of its agents.

(h) Notify the Regional Director in the Fresno Regional Office within twenty (20) days from receipt of a copy of this decision of the steps Respondent has taken to comply therewith, and to continue to report periodically thereafter, in intervals of twenty (20) days until full compliance is achieved.

It is further recommended that the remaining allegations in the Complaint as amended be dismissed.

DATED: November 27, 1979.

STUART A. WEIN
Administrative Law Officer

APPENDIX A

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found we interfered with the right of our workers to freely decide if they want a union. The Board has told us to hand out or 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;
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 offer Francisco Larios his old job back if he wants it, and we will pay him any money he lost because we failed to

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/////

rehire him

DATED:

Signed:

SAM ANDREWS' 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.

MEMBER McCARTHY, Dissenting in Part:

The majority premises its conclusion that Respondent violated Sections 1153(c) and (a) of the Act on the assumption that Respondent was obligated to hire or rehire Francisco Larios and would have done so but for his prior union activity. While Respondent's failure to hire Larios may arguably have been a breach of its alleged promise to do so, I cannot find that it was tantamount to a refusal to reinstate him or that it was related in any way to his past activities in behalf of the UFW. West Coast Growers and Packers (1942) 42 NLRB 814 [11 LRRM 10].

Larios had been employed in Francisco Castro's irrigation crew from June 1975, until July 1978, when he quit voluntarily, relinquishing his position as well as his established seniority status. He did not thereafter work for Respondent, except for one day in the spring of 1979 under circumstances described below.

Larios' sister and brother-in-law, Maria and Santiago Cortez, had been employed in the lettuce thinning and weeding

operations of labor contractor Anastasio Carreon for approximately eight years and were working in Respondent's fields in a crew supervised by Carreon foreman Diego Mireles during all times relevant herein. The 1979 season began in early March, almost one month earlier than in previous years. At that time, Mireles agreed to fill two or three job openings with friends of the Cortezes, at the latter's urging, in order to help them share and thus reduce their transportation costs. It was not until two weeks later, on March 20, that the additional workers, Larios and another person, arrived at the work site with the Cortezes. In the interim, on March 17, Mireles had been instructed by his supervisor to begin effectuating cutbacks in the crew. He therefore informed Santiago Cortez on March 20 that although it was too late to take on new workers, he would give Larios and the other applicant a day's work since they were dependent upon the Cortezes for the lengthy return trip home. Mireles also told Santiago Cortez he would hire Larios if he should happen to have any more work later on. Mireles made a similar statement to Larios.

The ALO found that Larios was laid off on March 20 for valid business reasons but with a promise of recall when a job opening occurred. The size of the crew decreased after its March 20-23 high of 50 to 55 employees, thereafter increasing and reaching an average seasonal peak of 60 workers between April 4 and 14. Larios was not recalled nor did he actively seek work with Carreon as a thinner after March 20, although on March 30 he filed an application with Respondent for irrigation work. The ALO concluded that Respondent's failure to rehire him was

discriminatory.[1/]

While it may be true, as the ALO indicated, that Mireles has a demonstrated preference for hiring regular returnees from out of state,[2/] this does not constitute unlawful discrimination, absent union considerations. Moreover, even assuming that Larios was assured of future employment, it has not been established that there was an availability of work after the contractor had reinstated returning workers or that the failure to keep such promise evidenced a discriminatory motive.

Respondent's knowledge of Larios' participation in

[1/]The ALO's reliance on ranch superintendent Alvarez' role to establish a promise of future employment in the Mireles crew is misplaced. Larios hailed Alvarez as the latter was driving by on the afternoon of March 20 to inquire about work with one of Respondent's own thinning crews. He was informed that layoffs were imminent there as well, and received substantially the same response when he inquired about irrigation work. According to Larios, he then asked, "If I put in my application, would I be called when there is a job available?" Alvarez responded, "Yes, go ahead and put in your application and I'll call you." Larios filed an application for irrigation work in Respondent's office on March 30. The irrigation file contained a number of recent applications filed prior to March 30. Francisco Castro, foreman of the vegetable irrigation crew in which Larios had been previously employed, testified that he alone was responsible for filling vacancies in his crew and that he did so only according to seniority. He did not at any time during the relevant season need to hire more workers than the seniority list provided. Moreover, he laid off irrigators at least once, perhaps twice, during March, 1979. Larios testified that although he alerted some workers to notify him if an opening arose, he never contacted Castro.

[2/]Mireles explained that most of his crew members begin arriving from Texas or Mexico in April of each year, reporting to him at his home to learn where and when work will be available. As noted previously, the relevant season in 1979 began almost one month earlier than in previous years. While Respondent adheres strictly to seniority in the hiring and laying off of its own thinning crews, Mireles does not rely on seniority in hiring workers for Carreon because, he testified, "not everybody knows how to thin, I have to find those that know how to do the work".

protected activities is not in dispute. But employer knowledge of an employee's union activities standing alone will not support finding a violation of Section 1153(c) , especially where, as here, those activities occurred more than a year prior to the alleged discriminatory act. The Van Heusen Co. (1975) 221 NLRB 732 [90 LRRM 1687]; Freeport Transport, Inc. (1975) 220 NLRB 833 [90 LRRM 1444]. The General Counsel has not, in my opinion, met his burden of proving, by a preponderance of the evidence, that there was a causal connection between Larios' past union activities and Respondent's failure to recall him after March 20.[3/]

The majority has adopted the ALO's reference to two incidents as evidence of Respondent's anti-union animus. Neither has probative value. The first is based on Larios' testimony that one Miguel Guerra, expressed to him the opinion that Larios was not rehired because of his UFW affiliations.[4/] The testimony of Larios clearly shows that Guerra's statement was based on what he "imagined", indicating that Guerra had no personal knowledge of Respondent's reason, if any, for its failure to recall Larios. The second concerns Larios' description of supervisor Castro's

[3/]It is noted that Larios' past union activities did not prevent him from being hired on March 20, and that he did not apply for work during the preceding two weeks, before the cutbacks in the crew were directed by management, or contact Mireles at any time after March 20.

[4/]According to Larios, Guerra told him that "he couldn't figure out why I had any problems because I was a good worker and that the only reason that he could imagine was that the rest saw that I was a Chavista." Guerra was not called to testify, nor was it even established that he was a supervisor or agent of Respondent within the meaning of the Act. In these circumstances, his testimony cannot be held to be an "admission" binding on Respondent, as the majority seems to imply.

unsuccessful attempt to remove from Larios' car a bumper strip indicating support for the UFW sponsored Proposition 14 initiative in the 1976 statewide primary election, almost three years before the events herein. Castro then applied a "No on 14" sticker to the bumper of Larios' car, which Larios immediately removed, in Castro's presence, without further incident. In Superior Farming Company, Inc. (Jan. 26, 1979) 5 ALRB No. 6, based on a similar act, we held that an employer's opposition to Proposition 14, in and of itself, cannot be considered as evidence of anti-union animus.

As further evidence of Respondent's anti-union animus, the majority relies on Sam Andrews' Sons (Nov. 30, 1978) 5 ALRB No. 68. The acts and conduct found to be violations therein[5/] occurred one and a half years prior to the conduct which is at issue in the present proceeding and therefore are too remote in time to warrant serious consideration as the basis for the majority's conclusion in this matter. Even if Respondent had engaged in independent violations of the Act contemporaneously with its failure to recall Larios, such conduct would not necessarily be probative as an element of unlawful treatment of Larios.

> The mere fact that the employer has been guilty of unfair labor practices during the same general time period that the discharge occurred does not supply the requisite evidence of unlawful motive. Standing alone it constitutes nothing more than a 'suspicion,' and a finding of unlawful motive cannot be based on mere suspicion. [Chemvet Laboratories, Inc. v. NLRB (8th Cir. 1974) 497 F.2d 445 [86 LRRM 2262].]

[5/]The Board found therein that between July and October, 1977, Respondent discriminatorily changed the terms and conditions of employment of two workers, refused to recall two other workers, and, in addition, suspended Larios for two weeks for an unauthorized leave of absence from work.

I would find that the General Counsel has failed to establish by a preponderance of the evidence that either Respondent or Carreon failed or refused to hire or recall Larios because of his union membership or union activities, and would therefore dismiss the allegation to that effect.

Dated: August 15, 1980

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side presented evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against and interfering with employees in the exercise of the rights guaranteed them by section 1152 of the Agricultural Labor Relations Act. We have been ordered to notify you that we will respect your rights in the future. We are advising each of you that 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.

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.

WE WILL NOT fail or refuse to rehire any employee, or otherwise discriminate against any employee because of his or her membership in, or activity on behalf of, the United Farm Workers of America, AFL-CIO, or any other labor organization, or because he or she engaged in any concerted activity for mutual aid or protection of employees.

Because the Board found that we failed to rehire Francisco Larios in April 1979 because of his union activity, WE WILL OFFER to reinstate Francisco Larios to his former job, and we will reimburse him for any money he lost because we failed to rehire him, plus interest computed at the rate of seven percent per year.

Dated: SAM ANDREWS' 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

Sam Andrews' Sons

6 ALRB No. 44
Case No. 79-CE-14-D

ALO DECISION

The ALO concluded that Respondent had not discriminatorily laid off employees Francisco Larios and Maria Elia Leyva Nevarez, finding that the layoffs were motivated by legitimate business objectives. However, the ALO concluded that Respondent violated section 1153 (a) and (c) of the Act by subsequently failing to rehire Larios as a thinner.

BOARD DECISION

The Board affirmed the ALO's conclusion that Respondent violated section 1153 (c) and (a) by failing to rehire Francisco Larios, noting that supervisors Mireles and Alvarez both promised to rehire him as soon as work became available, and that the record shows that although Respondent's crews were thereafter increased, Larios was not rehired. These facts, along with evidence that Larios was a strong union supporter and that Respondent demonstrated anti-union animus, were held as establishing that Respondent's failure to rehire Larios was discriminatory.

DISSENTING OPINION

Member McCarthy would find that the General Counsel failed to establish a causal connection between Larios' union activity and Respondent's failure to rehire him, and would therefore dismiss the complaint in its entirety.

REMEDY

The Board ordered Respondent to rehire Larios, to reimburse him for loss of pay and other economic losses suffered as a result of Respondent's discrimination, and to post, mail, distribute, and read a remedial Notice to its employees.

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