Brawley, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN J. ELMORE,

Respondent,

and

JESUS CASTELLANOS CORTEZ [1/]

Charging Party.

Case No. 78-CE-40-E

6 ALRB No. 7

DECISION AND ORDER

On July 10, 1979, Administrative Law Officer (ALO) Paul D. Cununings issued the attached Decision in this proceeding. Thereafter, the General Counsel and the United Farm Workers of America, AFL-CIO (UFW) each filed exceptions and a supporting brief. Respondent 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 caption correctly identifies the Charging Party as Jesus Castellanos Cortez. Earlier documents, including the complaint and the Administrative Law Officer's Decision, incorrectly name the United Farm Workers of America, AFL-CIO (UFW) as the Charging Party.

[2/] Respondent's motion to dismiss the exceptions filed by the UFW is hereby denied. The UFW indicated its intention to intervene under Section 20268 of the Board's regulations by filing exceptions to the ALO's decision. Although Mr. Castellanos, and not the UFW, was actually the Charging Party, General Counsel incorrectly captioned the complaint designating the UFW as the Charging Party, which led the UFW reasonably to expect that it would be treated as the Charging Party for purposes of intervention in this proceeding. We note that there has been no showing that the UFW's intervention will result in prejudice to any other party.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALO as modified herein.

The original charge was filed on July 6, 1978, by Castellanos as an individual, alleging that Respondent violated Section 1153(c) and (a) of the Agricultural Labor Relations Act (Act) by discriminatorily laying off Castellanos because of his activities on behalf of the UFW. The complaint, which issued on January 23, 1979, and incorrectly named the UFW as Charging Party, similarly alleged that Respondent violated Section 1153(c) and (a) by laying off Castellanos because of his union activities, and alleged in addition that Respondent violated Section 1153(d) by laying off Castellanos in retaliation for filing an earlier unfair labor practice charge and testifying at the hearing on that charge. The complaint also alleged that Respondent violated Section 1153(e) by refusing to bargain with the UFW over the subcontracting of tractor work. For the reasons stated below we dismiss each of these allegations.

We agree with the ALO's conclusion that the General Counsel failed to show that Respondent violated Section 1153(c) of the Act by laying off five tractor drivers on April 14, 1979. However, we do not adopt the ALO's broad treatment of seniority rights. Although an employer is free to create seniority rights, and seniority rights may be defined in a collective bargaining agreement, an employer cannot apply such rights in a manner which discriminates against an employee because of union activity.

Pleasant Valley Vegetable Co-op, 4 ALRB No. 11 (1978); Kitayama Bros. Nursery, 4 ALRB No. 85 (1978). In the present case, however there is no evidence that the seniority list was used in a discriminatory manner, and there is insufficient evidence of any causal connection between the layoff of the tractor drivers and the union activity of Castellanos. Castelianos complained that two employees who had more seniority than he were not laid off in April of 1978, even though each had broken seniority by not working during the summer. There was, however, no evidence that Respondent had a seniority policy whereby employees would lose seniority rights due to a break in service, or that Respondent discriminated on the basis of union activity when it allowed the two tractor drivers to retain their positions on the seniority list.

We adopt the ALO's recommendation that the allegation of a Section 1153(d) violation be dismissed. There was insufficient evidence to show that Castellanos was laid off in retaliation for filing an unfair labor practice charge and/or testifying at the hearing of that charge.

We agree with the ALO's recommendation to dismiss the allegation of the complaint that Respondent violated Section 1153(e) of the Act by failing to notify or bargain with the UFW concerning the subcontracting of bargaining-unit work. The ALO based his conclusion on evidence of Respondent's subcontracting practices and an analysis of case law in the area of subcontracting. We dismiss this allegation on different grounds. As we do not reach the merits of the subcontracting issue, we neither accept nor reject the ALO's treatment thereof.

During the course of the Regional Director's investigation of the charge filed by Mr. Castellanos, the UFW and Respondent were engaged in negotiations sessions (almost all of which were attended by Mr. Castellanos). The UFW and Respondent concluded their negotiations in December 1978, when they signed a collective bargaining agreement. The complaint issued about two months later. The UFW, the chosen and certified bargaining representative of Respondent's employees, never filed a charge alleging that Respondent failed to discharge its statutory duty to bargain with the Union. The UFW did- not participate in the hearing, not even to the extent of offering evidence about the bargaining history between Respondent and the Union. The UFW did not, in fact, enter this case until after the issuance of the ALO's Decision when as intervenor it filed exceptions thereto,

One of the central purposes of the Act is to promote stability in agricultural labor relations through collective bargaining. Labor Code Section 1140.2. In view of the circumstances mentioned in the preceding paragraph, particularly the fact that Respondent bargained to contract with the UFW, we do not believe it would further the purposes of the Act for us to consider the allegation that Respondent violated Section 1153(e) by failing to bargain in good faith with the UFW.

ORDER

Pursuant to Section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby

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orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: January 25, 1980

GERALD A. BROWN, Chairman

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

John J. Elmore, Inc. 6 ALRB No. 7
(Jesus Castellanos Cortez) Case No. 78-CE-40-E

ALO DECISION

The ALO recommended dismissing the complaint in its entirety. He found that five tractor drivers who had allegedly been laid off in violation of Section 1153(c), (d), and (a) were laid off for valid business reasons, as Respondent did not have enough work to keep them busy, and did not have enough equipment for them to use when the amount of work to be done increased. The ALO also found that when Respondent subcontracted work previously performed by the five tractor drivers it did not violate the duty imposed by Section 1153(e) to negotiate with its employees' certified collective bargaining representative about changes in working conditions, because the practice of subcontracting was of long standing and was understood and accepted by the Union.

BOARD DECISION

The Board dismissed the allegation that the layoff violated Section 1153(c) and (a) because there was no evidence that Respondent, in selecting the five employees for layoff, utilized its seniority list in a discriminatory manner, and insufficient evidence of any connection between layoff and the employees' union activity. The Board also dismissed the alleged violation of Section 1153(d) because of insufficient evidence that the layoff was in retaliation for the Charging Party's filing of an unfair labor practice charge and his testifying at the subsequent ALRB hearing. The Board dismissed the alleged violation of Section 1153(e) of the Act because the purposes of the Act would not be furthered by considering a failure-to-bargain charge against Respondent, which had concluded a collective bargaining agreement with the UFW after the filing of the charge and about two months before the complaint was issued. The complaint was dismissed in its entirety.

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

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

JOHN ELMORE, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case No. 78-CE-40-E

Octavio Aguilar, Esq.
for the General Counsel

Dressier, Stoll and Jacobs, Esq.
by Ron Barsamian, Esq.
of El Centro, California
for Respondent

DECISION

STATEMENT OF THE CASE

PAUL D. CUMMINGS, Administrative Law Officer: This case was heard before me in El Centro, California on April 3, 4, 5, 6, 7, and 9, 1979.

The complaint alleges that John Elmore, herein Respondent, violated Sections 1153(a),(c), (d), and (e) of the Agricultural Labor Relations Act, herein the Act, by reason of the following discriminatory acts:

1. On April 14, 1978, Respondent laid off Jesus Castellanos Cortez, herein Mr. Castellanos,. Miguel Moreno, Sergio Fidel Cordova, Jose C. Esquibel, and Maximo Mendoza in order to discourage their activity on behalf of the United Farm Workers, herein the UFW. All five employees were tractor drivers for Respondent.

2. In laying off Mr. Castellanos, Respondent also discriminated against him because he filed charges and gave testimony in a Board hearing.

3. Respondent hired Pablo Rosas and Sons to perform work which otherwise would have been done by the laid off tractor drivers without notifying or negotiating with the UFW regarding its decision to subcontract such work.

Respondent denies that it has committed any of the unfair labor practices alleged.

As affirmative defenses Respondent in its answer alleges:

1. Respondent's use of Pablo Rosas and Sons to perform work was in full accord with its business practices for the past 25 years and Respondent's use of said custom equipment operation to perform necessary work was not a unilateral change in operations.

2. The UFW was fully appraised' of the layoff and assisted in the layoff by helping Respondent determine who should be laid off according to seniority. In so doing, the UFW has waived any objections it may have.

3. The UFW was informed of Respondent's business practice of using custom equipment subcontractors on two separate occasions during contract negotiations previous to the incident complained of.

At the close of the General Counsel's case Respondent made a motion to dismiss the allegations of the complaint as it pertained to the four tractor drivers other than Mr. Castellanos on the grounds that no evidence had been submitted that would establish that Respondent had discriminated against any of them because of their union activity and that thereby the General Counsel had not established a prima facie case with respect to

them. The Administrative Law Officer withheld his ruling on such motion until the record could be studied in depth. I now make a ruling on said motion. Evidence was submitted in the General Counsel's case which would tend to show, and a finding could be so made, that all five tractor drivers were union supporters and their work was subsequently performed by an outside contractor with the effect and purpose of diminishing the unit and these were the employees affected. Such an event would at least tend to discourage their union activity and it certainly effected their continuation in employment, both violations of the Act. Also evidence was submitted that would tend to show that Respondent laid off four employees to get at Mr. Castellanos, a strong union supporter and leader among his fellow employees. This would also be a violation of the Act. Said motion is denied.

All parties were given full opportunity to participate in the hearing and after the close thereof the General Counsel and Respondent each filed a brief in support of its position.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of John Elmore, Inc. and United Farm Workers of America, AFL-CIO, 4 ALRB No. 98 and of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. Jurisdiction

I find that Respondent is an employer engaged in „ agriculture in California and is an agricultural employer. The land farmed by Respondent is located in Imperial County, north of the city Westmoreland. On this land, some of which is owned and some of which is leased, Respondent grows various crops, including cotton, wheat, sugar beets, alfalfa, lettuce, tomatoes,

and cantaloupes.

I further find that the UFW is a labor organization representing Respondent's agricultural employees in the matters of wages, hours, and working conditions.

I further find that Mr. Castellanos, Miguel Moreno, Sergio Fidel Cordova, Jose C. Esquibel, and Maximo Mendoza were all agricultural employees employed by Respondent as tractor drivers in the farming of Respondent's land.

II. Background

The General Counsel submitted as evidence the Board's "Decision and Order" in John Elmore, Inc. and United Farm Workers of America, AFL-CIO, 4 ALRB No. 98, in which case the parties were the same as presently before this hearing officer. In that case the Board adopted the findings of the Administrative Law Officer, who had found that Respondent had committed certain unfair labor practices, including, among other things, laying off Mr. Castellanos on February 20, 1976, for his union membership and activity in violation of Sections 1153 (a) and (c) of the Act. The findings of fact and conclusions of law as found in that case relate to the case presently before us, but I find that they are not determinative of the issues, in this instant case.

III. The Alleged Unfair Labor Practices

A. The Layoff of The Five Tractor Drivers

In 1974 or 1975 Respondent divided its farming operations into two units for closer supervision, each unit being supervised by a grower who was responsible for the growing of crops in his own unit. Each grower had a wheel tractor foreman and an irrigation foreman working under him. A general tractor foreman supervised the crawler or heavy tractor work in both units. The wheel tractor

work involved the planting of the crops and performing cultivating operations after the crops were planted. The crawler tractor work involved the preparation of the land for the planting of a new crop after each crop was harvested. Each unit also had a shop where tractors and equipment were repaired.

Extensive evidence was taken with respect to the identity of the fields farmed by Respondent in the years 1974 through 1978 and the various crops grown on those fields during those years. Also extensive evidence was taken with respect to the time of year various crops would normally be planted by Respondent. Lee Rutledge, employed by Respondent about 25 years and supervisor over heavy tractor operations for about 20 years, testified concerning tractor operations, including both wheel and heavy tractor work. He went through each step called for in the preparation of the land for the planting of the various crop's. Variations in methods and timing occurred depending principally on the crop to be planted, the crop previously harvested, the condition of the soil, and the weather. After the land was prepared for planting, the wheel tractor foremen would take over the operations for planting and cultivating. Respondent did not do its own harvesting.

The tractor drivers worked in a pool. All tractor drivers were capable of doing both heavy tractor and wheel tractor work, depending upon the need in the different areas as it arose. If there was tractor work in the field the tractor drivers, would be assigned there, provided there was equipment to do the work. If there was no work in the field, and there was work that could be done in the repair shop assisting the mechanic, the tractor driver would be sent there to do whatever had to be done, such

as assisting in an overhaul of the equipment, painting the equipment, washing the tractors, and helping the mechanic.

Mr. Castellanos was first employed by Respondent in July, 1975. He was employed as a tractor driver. During the period between March, 1977 and April, 1978 he spent 90 percent of his time doing heavy tractor work under Mr. Rutledge. The remaining time, other than at most two days spent in the repair shop when a season had ended and there was no other work, was spent doing wheel tractor work. There was one occasion Mr. Castellanos was sent to the shop for a longer period of time for a reason that was not made clear other than it was not because of a lack of work. Mr. Castellanos was admittedly a well-qualified tractor driver and no fault was found with his work.

On or about April 11, 1978, Respondent's labor relations man, Mr. Manuel Mireles, accompanied by one of Respondent's growers, Mr. Masaru Nakadaira, notified Respondent's tractor drivers of an impending lay off. Mr. Mireles gave Mr. Castellanos and Mr. Jose C. Esquibel a copy of a tractor driver seniority list prepared by Respondent and informed them that the last five tractor drivers on that list would be laid off in about four days due to lack of work. Mr. Nakadaira had made the decision to lay off the employees. Mr. Castellanos told Mr. Mireles that he believed that the seniority list was incorrect as to the seniority dates for Felix S. Verdusco in that Mr. Verdusco did not work during the summer of each- year and had therefore broken seniority. Mr. Castellanos also objected to the seniority date for Mr. Ignacio C. Diaz in that Mr. Diaz had not worked during the summer of 1975, when Mr. Castellanos began working there and had also therefore broken seniority as of that date. Mr. Mireles took the matter under advisement but at

no time did he get back to Mr. Castellanos with respect to the matter. Mr. Castellanos and the other four tractor drivers were laid off on or about April 15, 1978. Mr. Castellanos was told at the time of the lay off that it was because there was very little work, but the wheatfields would be worked soon and as soon as there was a wheatfield ready to be worked they would be recalledt-Mr. Castellanos was recalled to work for temporary work on June 15, 1978. He had the highest seniority of those laid off. He was again laid off for lack of work. During this period of employment he worked nights. Mr. Castellanos and the other laid off tractor drivers were recalled in order of seniority. He reported back to work on February 26, 1979. Besides Mr. Castellanos, Mr. Mendoza was the only other laid off tractor driver to return to work.

Mr. Nakadaira, one of Respondent's growers, made his decision for the lay off because most of the heavy tractor work was finished and there was not enough other work available to keep all fourteen of the tractor workers busy. The work could be accomplished with the nine remaining tractor workers used interchangeably, doing heavy and wheel tractor work as needed.

It is the contention of the General Counsel that the layoffs were instituted, not because of a lack of work, but because of the union activities of the employees affected. Further the General Counsel contends that subcontracting of their work was unilaterally carried out by Respondent in derogation of its duty to bargain with the UFW. Let us examine the facts with respect to such contentions.

B. The Union Activity of the Five Tractor Drivers

The Board has found and I so find that Respondent had knowledge of Mr. Castellanos's union activity. When the UFW began

its organizational efforts of Respondent's employees, in the fall of 1975, Mr. Castellanos was an active participant in the campaign with Respondent knowledge. When the UFW filed a petition for certification Mr. Castellanos attended a pre-election conference with Respondent knowledge. He served as a union observer at that election with Respondent knowledge. The UFW was certified as the exclusive bargaining representative of Respondent's employees on August 5, 1977. Soon after that election, on February 14, 1976, Respondent laid off Mr. Castellanos. The Board found that Mr. Castellanos was terminated because of his union activity and ordered him reinstated. Mr. Castellanos testified at that hearing in his own behalf, again with Respondent knowledge. In the interim, Mr. Castellanos was recalled and the Board also found that he had been harrassed in carrying out his work assignments because of his union activity. Respondent and the UFW engaged in contract negotiations commencing the latter part of 1977 and continuing until a collective bargaining agreement was executed by the parties on December 6, 1978. Mr. Castellanos was a member of the UFW negotiating committee and attended all the negotiating meetings but one. Respondent had knowledge of Mr. Castellanos's activity in this connection. The record leaves no doubt but that Respondent had knowledge that Mr. Castellanos was a leader in the union activities of his fellow employees. All of Respondent's tractor drivers were union adherents. We know nothing more about the union activity of the five tractor drivers other than Mr. Castellanos.

C. Subcontracting

The General Counsel contends that there was work for the laid off tractor drivers and that work that could have and should

have been done by them was let out to outside independent contractors.

Extensive evidence was taken with respect to Respondent having subcontracted tractor work, both wheel and heavy, to outside contractors, principally Paul Rosas and Sons in 1977 and 1978. That tractor work was work that the laid off tractor drivers could have performed and such subcontracting greatly increased in 1978 over 1977. Nothing was put in evidence with respect to the extent of subcontracting in years prior to 1977.

Mr. Vie Anderson, long-time employee and officer manager of Respondent, called as a witness for the General Counsel testified that Respondent had always contracted outside equipment contractors, that they had done so for 25 years. In answer to the question of who makes the determination when Respondent subcontracts tractor work, Mr. Anderson answered:

> The determination is made by the grower and in anticipating that—to explain a little further, everything is keyed off from when you want to harvest a crop. If you want to harvest lettuce in December, it keys off that you have to start the ground back in July and flooding it for summer, leave it lay idle and let it dry up then and let it get ready to start planting then in a certain date in September. So each field has to be put on schedule.
>
> "You start that planting to that day so you can start water and so your ground has to be put on a schedule to be worked up, certain period, and if you've fallen behind and then the grower says I need this job done today, do we have the equipment, that's up to the tractor foreman to say yes or no. And then we get somebody to help out if we do not have the equipment to do it on time. So it is a grower. He says to the tractor foreman I need this field to plant and irrigate at this certain date. It has to be done."

Mr. Nakadaira testified that there is only so much growing season for each crop and if the crop is late getting in the ground they do not get the needed yield from that crop. If Respondent is behind in preparing the ground and all the tractors are in use, they resort to outside contractors with the equipment to do the work.

Mr. Nakadaira also testified that he coordinated the tractor work in preparing the land for the planting of lettuce in 1978 with the grower of the other unit, Mr. Ralph Yocum so that they would avoid having to subcontract tractor work.

Lee Rutledge, long-time employee and tractor foreman of Respondent called by the General Counsel, when asked as to who makes the decision to get outside help, testified:

> "We talk it together. We get together- -the supervisor or superintendents, the growers, Moss and Ralph Yocum, and we talk it over. If we see that this work is—that we can't do it with the equipment we have got, they suggest to get some help to get caught up with it, to get this particular crop in.... get the ground ready to plant the crop."

Mr. Rutledge also testified that they never subcontracted unless they have more than they can do with their own tractors. They do not just let their equipment sit. Respondent had all of its heavy equipment going with the men they had. Rosas and Sons did the work Respondent could not get to get the fields ready to plant.

No evidence was put in the record either specifically or generally that Respondent not only had work in his fields but had the equipment available to do that work in a timely manner.

I find that Respondent only subcontracted its tractor work to outside contractors when it did not have its own- equipment

available to do the job in a timely manner.

In support of its position, Respondent, over the strenuous objection of the General Counsel that it was inadmissible evidence, had introduced through Mr. Anderson an exhibit compiled under the direction of Mr. Anderson in his position as office manager from other office records, all of which were available to the General Counsel, which showed the use put to every one of Respondent's heavy tractors during the applicable time period and established that no such tractors were available for use by Respondent's laid off drivers. Even without the introduction of this useful exhibit, I would make such a finding.

D. Collective Bargaining

Mr. Anderson testified that Respondent had never notified the UFW of any of the tractor jobs before they were subcontracted. He testified that after the UFW was certified on August 5, 1977 he participated in contract negotiations, attending all except one meeting, until a contract was entered into and that during those negotiations, it was brought out and agreed that Respondent continue operations as it always had in the past twenty-five years. Respondent saw no need to notify the union.

Over the strenuous objections of the General Counsel, Respondent had introduced into evidence its Exhibits 8 through 12. These exhibits were photostatic portions of subject matter relating to subcontracting taken from voluminous minutes prepared for Respondent by a secretarial service. The objections were based essentially on best evidence and hearsay. The General Counsel also objected strenuously to the introduction of a photostatic copy of the collective bargaining agreement between Respondent and the UFW which culminated from their collective bargaining

efforts, admitted as Respondent Exhibit 13. Section 1160.2 of the Act provides in pertinent part "Any such proceeding shall, so far as practicable, be conducted in accordance with the Evidence Code." In the interest of such practicality, common sense, and in conformance with the Evidence Code, these exhibits were admitted.

Respondent Exhibits 8 through 13 do indeed establish what I would determine even without them, that subcontracting of tractor work had been one of the subjects negotiated on between the parties, and this specifically included the tractor work. Respondent's Exhibit 8, minutes of negotiating meeting held on November 16, 1977 reads in part:

> "Miss Smith: So in order to catch up at times when you don't have enough equipment you hire outside people?
>
> Mr. Anderson: Yes, with big crops it hits all at one time and we need to hire outside help to catch up. They supply the men as well as the equipment."

Respondent Exhibit 9, minutes of a negotiating meeting held February 9, 1978, reads in part:

> "Miss Smith: What we are worried about is if you need a man to do the job you should hire someone who has seniority, but if you need a man and a machine then that comes under the sub-contracting part of the contract proposal."

Miss Ann Smith was the negotiator for the UFW.

The other minutes and the collective bargaining agreement itself establish clearly that the issue of subcontracting was negotiated and agreed to.

IV. Conclusions of Law and Discussion

I find Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

I find the UFW is a labor organization' within the

meaning of Section 1140.4(f) of the Act.

I find Jesus Castellanos Cortez, Miguel Moreno, Sergio Fidel Cordova, Jose C. Esquibel, and Maximo Mendoza are agricultural employees within the meaning of Section 1140.4(b) of the Act.

It is alleged that the above named employees were laid off because of their activity on behalf of the UFW and Mr. Castellanos because he had filed charges and given testimony at a hearing. While it is true that Mr. Castellanos had testified at a Board hearing against Respondent and while it is true that Respondent was found in the past to have committed unfair labor practices, and specifically against Mr. Castellanos, it does not automatically follow that every lay off affecting that employee is motivated by anit-union animus and is discriminatory per se under the Act. Respondent had valid business reasons for laying off the five employees. There was not enough work to keep all of its tractor drivers busy. Respondent decided in its management prerogative to lay off five employees and it laid them off according to seniority. Much is made in the General Counsel's case that in the eyes of Mr. Castellanos that seniority list was not proper because two employees were granted what he considered to be special privileges and should have been dropped below him. The Act does not govern seniority lists. It is axiomatic that seniority rights are matters of contract rights flowing from a contract between an employer and a union. Absent that agreement an employee’ seniority rights are dependent on , what if anything an employer will recognize. Of course, if an employer discriminates for reasons proscribed by the Act that is another matter, but it has nothing to do with seniority rights. Complain as he would, Respondent had no duty to get back to Mr.

Castellanos. He is not the certified representative of Respondent's employees. The UFW is Respondent presented the seniority list in conformance with the request of the UFW. if anyone had the right to complain it was the UFW. It did not. Respondent was only trying to be fair. When the collective bargaining agreement was actually entered into temporary, leaves of absence without loss of seniority were indeed provided for One will find this in "Supplemental Agreement No. 2 Seniority" attached to that agreement.

All of the tractor drivers, including those remaining on the payroll were UFW adherents. Some wore buttons; some did not. It is true that Mr. Castellanos was a leader among his fellow employees but so was Oligario Perez, another tractor driver. It is contended that to reach Mr. Perez on the seniority list, Respondent would have to lay off all of the tractor drivers. But, as pointed out above, if one wanted to reach Perez and Castellanos, why use the seniority list at all. At that stage of the game, Respondent had no such obligation. But it did use the seniority list and Mr. Castellanos and four others were affected. But simply because they were does not warrant a finding that it was for reasons proscribed by the Act. The fact of the matter is that there was no work in the fields or in the shop for these employees to do.

Respondent, before and subsequent to the lay-off, subcontracted work that the laid off employees could have done, could have done if the proper equipment were available, which it was not. Plan as it will, Respondent cannot control all the factors that go into land preparation. One thing is certain, before one can harvest a crop, it has to be planted and planted

on time. And the work has to be done. Even if Respondent recalled the five employees what would they sit on to do that work? It is clear that that equipment was not available. Additional machines were needed and contractors who provided those machines brought their own men. Respondent had no obligation to lease machines or to work its own machines nights.

These layoffs were not conduct carrying with it unavoidable consequences which the employer not only foresaw but which he must have intended and they do not bear their own indicia of intent to discriminate. Avondale Shipyards, Inc. v. NLRB (CA 5) (.1968) 391 F.2d 203, 67 LRRM 2652, NLRB v. Great Dane Trailors, Inc. (1967) 388 U.S. 26, 65 LRRM 2465, NLRB v. Brie Resister Corp. (1963) 373 U.S. 221.

Respondent has come forward with evidence of legitimate and substantial business justification for its conduct. There was no disparate treatment in the lay off. Xaloy, Incorporated (1969) 175 NLRB 693, 71 LRRM 1132. Knowledge without more does not make a lay-off discriminatory. Watkins Center (1965) 156 NLRB 442, 61 LRRM 1063. John F. Cuneo Co. (1966) 160 NLRB 670, 63 LRRM 1030.

Nor does knowledge alone establish a violation for the giving of testimony. There was no evidence introduced to show that this Respondent's conduct, since the resolution of the previous unfair labor practice in May, 1977, has been anything but exemplary. Proof of the pudding is in the contract negotiated between the parties. J.P. Stevens and Co., Inc. (1967) 167 NLRB 258, 66 LRRM 1030.

It is contended by the General Counsel that the subcontracting was subject to prior collective bargaining. Sub-

contracting of work done by bargaining unit employees is a subject for mandatory bargaining. Fibreboard Paper Products Corp., (1964) 379 U.S. 203, 57 LRRM 2609. But whether an employer can act unilaterally in a matter of subcontracting is dependent on all the circumstances.

In Central Rufina, (1966) 161 NLRB 696, 63 LRRM 1318, the NLRB stated:

> "...(The Respondent was faced not only with the inability to operate efficiently because of matters beyond its control, but, also, in view of the curtailment of its bank credit on which the Respondent's operation was completely dependent, with the inability to operate at all. It would appear, therefore, that in the circumstances of this case, the factors which led to the Respondent's decisions to subcontract and to terminate its grinding are not peculiarly suitable for resolution within the collective bargaining framework; on the contrary, it seems certain that no amount of give-and-take in negotiations could have forestalled the Respondent's inevitable decision to cease operations for the season. Moreover, it is a well-established principle in the Puerto Rican sugar industry that a "force majeur " may be sufficient cause for curtailment of the grinding season, and Respondent's response to the "force majeur" present in this case was consistent with its past practice and the past practice of the Puerto Rican sugar industry generally. Finally, we emphasize our recent statement that "our condemnation in Fibreboard and like cases of unilateral subcontracting of unit work was not intended as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved." The NLRB thereupon cited Westinghouse Electric Corp. 1965 CCH NLRB, 150 NLRB 1574.

This well-established principle is particularly applicable to the case at hand Respondent had been in the practice

of subcontracting tractor work for 25 years and only did so when compelled to do so because it lacked the equipment, when certain circumstances presented themselves, to do required work in a timely manner. Time and nature wait for no man. This procedure in no way constituted a change in operations but rather a continuation of an economic necessity. The advent of a union does not require an employer to change operations until and in fact those changes have been bargained for. What an employer was doing before he can continue to do.

But the fact of the matter is the UFW and Respondent did bargain and the UFW was informed about Respondent having a past practice of subcontracting tractor work. Not only did they bargain but they agreed that that practice could continue.

One might, wonder how the UFW could charge Respondent with refusal to bargain when the facts so. clearly point out that the parties did bargain on the very points at issue herein. An examination of the charge will show that it has been filed by an individual who named only himself as the aggrieved party. That charge was never amended nor did any party, including the UFW, join and yet the complaint is filed in the name of the UFW. Mr. Castellanos, the charging party, while he may be on the negotiating committee, has no apparent official position with the UFW. For an employer to be complained against ostensibly in the name of a union with which it has just successfully concluded contract negotiations that it has refused to bargain in good faith is not conducive to good labor relations, the purpose for which the Act was enacted.

Because the issues were joined and a full hearing had, this Decision is written on the merits of the complaint as- written.

I find, that Respondent has not interfered with, restrained

and coerced agricultural employees in the exercise of their rights guaranteed in Section 1152 of the Act, violating Section 1153(a) of the Act.

I find that Respondent has not discriminated against employees in regards to their terms of employment in order to discourage union activity, and has not violated Section 1153(c) of the Act.

I find that Respondent has not discriminated against an agricultural employee because he filed charges and gave testimony in a Board hearing and has not violated Section 1153(d) of the Act.

I find that Respondent has not refused to bargain collectively in good faith with the UFW and has not in any way violated Section 1153 (e) of the Act.

V. Recommendation

Having found that Respondent has not engaged in any unfair labor practices within the meaning of Sections 1153(a), (c), (d) and (e) of the Act, I shall and do hereby recommend that the complaint issued against Respondent be dismissed in its entirely. I make the following recommendation; based upon the entire record, the findings of fact, conclusions of law, and pursuant to Section 1160.3 of the Act.

ORDER

The complaint against Respondent is hereby dismissed with respect to all allegations contained therein.

DATED:

PAUL D. CUMMINGS
Administrative Law Officer