STATE OF CALIFORNIA AGRICULTURAL

LABOR RELATIONS BOARD

KAWANO, INC.,	)	
Respondent,	)	No. 75-CE-13-R 75-CE-25-R
and	)	
	)	3 ALRB No. 54
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

This decision has been delegated to a three member panel. Labor Code Section 1146.

On March 12, 1977, administrative law officer (ALO) Leo Kanowitz issued his decision in this case. The respondent and charging party filed timely exceptions. Having reviewed the record, we adopt the ALO's findings, conclusions, and recommendations to the extent consistent with this opinion.

In finding that Felix Hernandez had been discriminatorily discharged, the ALO relies in part on anti-union animus inferred from a previous wage increase. We find that the facts surrounding the discharge, as found by the ALO and supported by the record, are themselves sufficient evidence of an anti-union motive to show a violation of the Act. It is therefore not necessary to determine whether or not the wage increase demonstrated anti-union animus.

The Remedy

We modify the ALO's recommended remedy in conformity with our past practices.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board orders that the respondent, Kawano, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of employees in the UFW or any other labor organization by unlawfully discharging or laying off employees/ or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code Section 1153(c).

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Labor Code Section 1152.

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

(a) Immediately offer Felix Hernandez reinstatement to his former job without prejudice to his seniority or other rights and privileges and make him whole for any losses he may have suffered as a result of his termination.

(b) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this Order.

(c) Immediately offer Javier Acosta reinstatement to his former position of sprayer without prejudice to his seniority or other rights and privileges.

(d) Post copies of the attached notice at times and places to be determined by the regional director. Copies of the notice shall be furnished by the regional director in appropriate languages. The respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(e) Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this order, to all employees employed during the payroll periods which include the following dates: September 1, 1975 and September 22, 1975.

(f) A representative of the respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the respondent on company time. The reading or readings shall be at such times and places as are specified 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 employees may have concerning the notice or their rights under the Act. The regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

(g) Hand out the attached notice to all present employees and to all employees hired in the next peak season.

(h) Notify the regional director in writing, within 20 days from the date of the receipt of this Order, what steps have been taken to comply with it. Upon request of the regional director, the respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: July 15, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Robert B. Hutchinson, Member

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely decide if they want a union. The Board has told us to send out and post this Notice.

We will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

(1) to organize themselves;

(2) to form, join, or help unions;

(3) to bargain as a group and choose whom they want to speak for them;

(4) to act together with other workers to try to get a contract or to help or protect one another;

(5) to decide not to do any of these things.

Because this is true we promise that:

WE WILL NOT do anything in the future that forces you to do, or stops you from doing any of the things listed above. Especially:

WE WILL NOT threaten you with being fired, laid off, or getting less work because of your feelings about, actions for, or membership in any union.

WE WILL NOT fire or do anything against you because of the union;

WE WILL OFFER Felix Hernandez his old job back beginning in this harvest and we will pay him any money he lost because we laid him off.

WE WILL OFFER to assign Javier Acosta to his former position as sprayer.

Dated:

Kawano, Inc.

By: _____
(Representative) (Title)

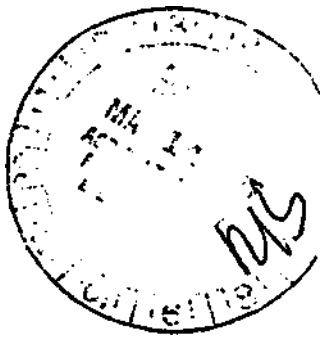
This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. DO NOT REMOVE OR MUTILATE.

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD OF

THE STATE OF CALIFORNIA

In the Matter of: KAWANO, INC., Employer and Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party and Intervenor	Case Nos.75-CS-13-R 75-CE-25-R



Michael Kalkstein, Wendy E. Sloan, Hugo Morales and A. Paul Griebel for the General Counsel

David B. Geerdes, James K. Smith, Gray, Gary, Ames and Freye, Norman L. Vetter, Feist, Vetter, Knauf & Loy, for Respondent

E. Michael Heuman, for the Charging Party and Intervenor

ADMINISTRATIVE LAW OFFICER'S DECISION

STATEMENT OF THE CASE

LEO KANOWITZ, Administrative Law Officer: These cases, initiated by charges filed on October 6, 1975 and October 20, 1975* and a consolidated complaint issued on November 7, 1975 were tried before me during ten days of hearing at San Diego, California on December 1-5, 1975 and December 15-19, 1975. In issue are:

1) Whether Respondent violated Section 1153(a) of the ALRA (hereafter "the Act") by instituting, approximately two v;3eks before the Act's effective date, a wage increase and a health insurance program, during the United Farm Workers' (hereafter "the

Union") organizing campaign, and maintaining these benefits through the representation election at Respondent's ranches.

2) Whether Respondent violated Section 1153(a) of the Act by engaging in surveillance of employees during organizing activities.

3) Whether Respondent violated Section 1153(a) and (c) of the Act by discharging Felix Hernandez for engaging in union activities.

4) Whether Respondent violated Section 1153(a) and (c) of the Act by discharging Josefa Hernandez and Ramon Trevino because of their membership in the Union.

5) Whether Respondent violated Section 1153(a) and (c) of the Act by assigning Javier Acosta and Antonio Flores to more arduous and less agreeable work because of their union membership and activities.

6) Whether Respondent violated Section 1153(a) and (c) of the Act by providing a crew of 55 workers (the Vandergrif West ranch crew) with less employment than they would normally have received, as retaliation for their activities in and support- of the Union and to discourage membership in that union.

Subsequent to the hearing counsel for the General Counsel and for Respondent filed helpful briefs which have been carefully considered.

Upon the entire record in this case and my observation of the demeanor of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is a corporation engaged in agriculture in San

Diego County. It is an agricultural employer within the meaning of Section 1140.4(c} of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The United Farm Workers of America, AFL-CIO ("Union") is a labor organization within the meaning of Section 1140.4(f) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Wage Increase and Health Insurance Program

It is undisputed that the wages of Respondent's employees were raised 65 cents from $2.25 to $2.90 per hour during the second week of August, 1975» and that a health insurance program for its employees was Instituted by Respondent at the same time. The wage increase was the first received by Respondent's' employees in two years. The record is also clear that Respondent's president, John Kawano, at the time the wage increase and new benefits were instituted, was aware, through his own knowledge and that of his supervisors, of the Union's organizing activities among Respondent's employees which had started as early as July, 1975 and continued through August, and up to the time of the election on September 12. Respondent's president also knew that the act would be going into effect that summer.

General Counsel contends that the granting of the wage increase and new insurance benefits under such circumstances violated Section 1153(a) of the Act in that it interfered with, restrained, or coerced Respondent's employees in the exercise of the rights guaranteed

in Section 1152.

Respondent, on the other hand, asserts that this conduct did not violate Section 1153 (a) for several reasons: 1) the wage increase was instituted to maintain an historical 15•/hr. wage differential between Respondent's employees and the employees of competing employers in the region; 2) the health insurance benefits were also instituted to keep up with neighboring employers who competed for the services of many of the same employees; 3) in any event, . these improvements in wages and benefits occurred prior to August 28, 1975> the effective date of the Act.

The granting of a wage increase or improvement of benefits during an organizational campaign has been held to be an interference with employees' protected rights since "interference is no less interference because it is accomplished through allurement rather than coercion." NLRB v. Crown Can Co., 138 P.2d 263, 267, 13 LRRM 568 (8th Cir. 1943). The United States Supreme Court has observed that the timing of a benefit grant is a significant factor in determining its effect upon employees since:

> /T/he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. NLRB v. Exchange Parts Co., 375 U.S. 405, 409, 55 LRRM 2098 (1964)

At the same time, it is established that wage increases or

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1. Section 1153 provides: "It shall be an unfair labor practice for an agricultural employer to do any of the following:
"(a) To interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152. . . .
Section 1152 provides, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . "

2. Section 1148 of the ALRA requires the Board to "follow applicable precedents of the National Labor Relations Act, as amended.

benefit improvements instituted by an employer will not constitute interference with protected employee rights under the National Labor Relations Act if they are instituted in accordance with the employer's historical pattern of matching or improving benefits granted by competing employers. J.P. Stevens & Co. v. NLRB, 406 F.2d 1017 (4th Cir. 196XX

Respondent's position, as indicated, is that the evidence establishes that the increase and benefits at issue were of the latter type, whereas General counsel asserts that the evidence shows that Respondent's principal motivation in granting these benefits was to thwart its employees' organizational efforts, and that the increase and benefits did not conform to an historical pattern.

Resolution of this conflict will be undertaken below, but first, I find, as a matter of law, that the Respondent's grant of wage increases and a health insurance program prior to the effective date of the Act did not by itself violate Section 1l53(a) or any other section of the Act.

The United States Supreme Court, in rejecting an NLRB ruling that a complaint based upon an unlawful union security agreement was not barred by the NLRA's six-months limitation period because the agreement was "continually enforced" within the period of limitations, stated:

> In any real sense ... the complaints in this case are 'based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. . . . /I/f the /limitations period/ is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement. Local 1424, Machinists Union v. NLRB, 362 U.S. 411, 423 (1960).

In other words, the Court rejected the notion that the violation was a "continuing wrong" extending into the six-months limitation period.

For the same reasons, I find that the grant of wage increases and insurance benefits before the Act went into effect cannot violate the Act. However one might regard this phase of Respondent's conduct, there is no doubt that it was lawful at the time it occurred. It cannot be rendered unlawful at a later -date by a "continuing violation" theory which, as noted above, has been rejected by the United States Supreme Court.

This conclusion does not, however, obviate the need to resolve the conflict in the evidence concerning the true reasons for these wage and benefit improvements, i.e., whether they conformed to Respondent's historical practice or were designed to thwart-the employees' organizational efforts.

For, in the Local 1424, Machinists Union case, discussed above, the Supreme Court distinguished efforts to characterize a violation as a continuing wrong extending into the six-month limitation period, which it rejected, from another situation:

> Where occurrence within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be used to shed light on the true character of matters occurring within the limitations period: and for that purpose /the limitations period/ ordinarily does not bar such evidentiary use of anterior events. Machinists Local 1424 v. NLRB, 362 U.S. at 416. (Emphases supplied).

Because Respondent is also, charged with various alleged violations of Section 1153(c) of the Act, which declares it an unfair labor practice for an employer "By 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;" because proof of an anti-union animus on the part of an employer, if not always required to establish a violation of the counterpart prov-

ision in the NLRA, Section 8(a)(3), will at least be sufficient to establish such a violation, NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); because the institution of the wage increase and benefit improvements, while not unfair labor practices in and of themselves for the reasons explained above, nevertheless occurred only two weeks before the Act's effective date, when Respondent's president already had knowledge of the Union's organizing campaign in progress, and between two and nine weeks before the-alleged Section 1153(°) violations occurred—because of all these considerations, and in view of the Supreme Court' s pronouncement in Local 1424, Machinists Union v. NLRB, supra, that "earlier events may be used to shed light on the true character of matters occurring within the limitations period," a determination of the "true character" of the wage increase and benefit improvement instituted by the Respondent in mid-August, 1975 is in order.

The wage increase and benefit improvements at issue here were instituted by the Respondent only three-and-a-half weeks before a Board-conducted election. Under similar circumstances, it has been held that the employer has the burden of justifying the timing of benefits conferred while an election is in the offing. See e.g., J.C. Penney Co., 160 NLRB No. 26, 62 LRRM 1597 (1966), enf 'd, 384 F.2d 479, 484-85: NLRB v. Panhandel Bradford, Inc., 520 F.2d 275, 89 LREM 3195 (1st Cir. 1975). To be sure, those and similar cases involved charges of interference with protected employee activities which, in the circumstances of this case, I have found not to have occurred. Nevertheless, the principle of imposing the burden of explanation upon the employer seems equally valid here, where the purpose of the inquiry is to establish the "true character" of the benefit and wage improvements for whatever light it may shed on

alleged violations of the Act that occurred shortly thereafter when the Act had already gone into effect.

Respondent's president, John Kawano, testified that the wages of the employees were raised from $2.25/hr. to $2.75 In mid-August, 1975, the first raise that had been granted in two years. He also testified that the raise was instituted to keep up with wages in the Chula Vista area which had recently raised its wages to $2.75 an hour. Significantly, he offered no testimony as to what the level of wages had been at Chula Vista just before the alleged wage increase there. He also testified that because some of his employees refused to come to work if they were not receiving a traditional 15•/hr. differential over what was received by Chula Vista workers, he Immediately raised the wages to $2.90. But no employees were offered as witnesses by Respondent to corroborate this explanation for the wage increase. Nor did Respondent offer the testimony of any foremen to corroborate this explanation, despite the fact that Respondent's president testified that it was his foremen who notified him of his employees' displeasure with the fact that they were not getting more than Chula Vista area workers. Under similar circumstances, the NLRB has declared it accords "little weight to /the/ uncorroborated explanation of the business reasons which led Respondent to grant the raise." Wintex Knitting Mills, 216 NLRB Ho. 172, 88 LRRM 1566, 1568 (1975). When to-this principle are added the facts, which I find to have been established, that the 65• raise represented a wage Increase of over 25£ and that it was instituted approximately two weeks after the Union's president, Cesar Chavez, passed through the area in an organizational effort, an event clearly recalled by Respondent's president,

I find that the real motivation behind the wage increase from $2.25 to $2.90 in mid-August, 1975 was to discourage unionism among Respondent's employees and not to keep up with other competing employers.

I find also, for the same reasons, that Respondent was similarly motivated in instituting a health insurance program in mid-August, 1975* close in time to the election and after the Union had been discussed among the employees. Cf. Indiana Metal Products Corp. (1952) 100 NLRB No. 161, 30 LRRM 1393, enf'd on this point, 202 F.2d 613, 31 LHRM 249 (7th Cir. 1953), (a grant of insurance benefits close to an election without satisfactory employer explanation is an unfair labor practice).

Respondent's president claimed that the insurance plan at issue was instituted to remain competitive in the labor market after his neighbor had instituted a similar plan. But he also testified that he knew of the plan's availability during the previous year, and that his neighbor had instituted the plan in the early part of 1975. Since Respondent instituted its program in August, 1975 and so close to the election, I find that the timing of the insurance grant was not a coincidence, but was motivated by Respondent's desire to discourage unionism among its employees.

B. The Surveillance

During the Union's organizing campaign, Javier Acosta, one of the employee union members was active in organizational efforts at the Kawano ranches. Specifically, the Union had assigned him the task of obtaining authorization cards from the "illegal" workers. General Counsel asserts that Felipe Castellon, one of Respondent's supervisors, engaged in surveillance of these organizational activities, and that Respondent thereby violated Section 1153(a) of

the Act.

The sole testimony in support of this charge came from Javier Acosta himself who stated that Felipe Castellon stood by each time he, Acosta, attempted "to talk to the illegals," and that the "illegals" were afraid to talk to Acosta because of the Supervisor's presence. Respondent has denied any motivation, in this conduct, to interfere with the employees' protected rights or any interference in fact.

Significantly, the record contains no indication that supervisor Felix Castellon, at the time he "stood by" while Javier Acosta was trying to "talk to the illegals," was anywhere he was not required to be by his employment duties. Castellon was, after all, on his employer's premises, and was one of his supervisors. If Felix Castellon, at the time he was "standing by," was in a place where he was not required to be by his supervisorial duties, that is a fact that could have been readily adduced by the General Counsel at the hearing. But no explanation was offered for the failure to present this obviously available testimony.

Though it has been held that an employer who gives its employees "the impression" that it was engaging in surveillance activities may thereby interfere with protected employee activities, Hotel Conquistador, Inc., d.b.a. Hotel Tropioana, 159 NLRB 1220, enf'd per curiam (CA 9, 1968) 58 LC Par. 12,817, it has also been determined that an employer who stands near the doorway of his plant during the employees * lunch hour and observes the distribution of union leaflets on the sidewalk and in

the plant does not thereby engage in unlawful surveillance, in view of the open nature of the distribution and its situs. Accacio Guerra (Columbia Casuals, Inc.) (1969) 180 NLRB Ho. 111, CCH NLRB Par. 21,555. Even more directly in point is the decision of the NLRB in Mt. Vernon-Woodberry Mills, Inc , (1945) 64 NLRB 294 in which the fact that a supervisor closely watched three employees who were active in a union campaign during working hours was held not to prove unlawful surveillance where the supervisor's conduct was a proper incident of his duties.

In the light of the above considerations, I do not "believe that the evidence has established that supervisor Felix Castellon's observation of Javier Acosta's organizational activities, under the circumstances described, constituted unlawful surveillance. I therefore will recommend dismissal of this allegation of the" complaint.

C. The Discharge of Felix Hernandez

Felix Hernandez worked for Respondent from November, 1973 until September 22, 1975 when he was fired personally by Respondent's president, John Kawano, under circumstances to be described hereafter. General Counsel asserts that the firing of Felix Hernandez violated Section 1153(a) and (c) of the Act. Respondent's position is that Felix Hernandez was fired for "refusing to work and no other reason."

Felix Hernandez was an organizer for the Union at Respondent's San Luis Rey ranch, and after the election was named to the negotiating committee. The record discloses that Respondent was aware of these activities since Felix Hernandez had talked to

his supervisor, Pascual Lopez, about joining the Union and had asked permission to organize employees. Hernandez' duties on the negotiating committee required the compilation of a current employee list of the San Luis Key workers. On September 22, he asked permission for an hour off to compile that list. This permission was requested from "Antonio" & "crew pusher," who had charge of the crew when the supervisor, Pascual, was absent. There is some conflict in the testimony as to whether positive permission was given, but the record is clear that in any case Antonio did not refuse the request.

Hernandez went to his car to get a tablet and when he was returning to the fields was seen by John Kawano, Respondent's president. Hernandez testified that the following conversation took place.

> /Kawano/ said, "Hey man, where are you going?" *I* said, "Excuse me, sir. I ᶠm going to make a list." He said, "What do you want the list for?" I said, "I'm going to make a list of the, workers here." He says, "There is no union here and no union is going to exist. What's going to happen right now is that I'm going to give you your time and your check and no more work here." That's what he told me.

However, John Kawano testified that the reason for the discharge was Hernandez' refusal to work. The interchange between Hernandez and Kawano was, according to Kawano, as follows:

> He was working with a clip board under his arm. So I called for him and I asked him what he was doing. He says that he is one of the delegates of the union. He said that he needed to get names of the workers as working at the ranch. I asked him who gave him permission to take off this early. He says Antonio Gonzales did.

Q: Who is Antonio Gonzales?

A: Well, he was a crew pusher but Antonio doesn't have the right to give him permission. So I called for Antonio. ' He comes up and *I* said did you give Felix permission to leave early and he says, no.

So I told Felix that he didn't give you permission. So you go back to work and he says he is not.

Q: Felix said he was not going back

to work?

A: Yes.

Q: Did he say why?

A: No. He said that he wants to get this work done for the union. I said that he go back to work and he said no. I told him that he better go back to the van because I'm going to terminate him.

John Kawano specifically denied, moreover, that in terminating Felix Hernandez, he had in any way referred to a Union.

How should this conflict in testimony be resolved?

In the first place, the record reveals that, contrary to the manner in which he acted in Felix Hernandez[1] case, John Kawano routinely gave permission to other employees to leave work for personal reasons. Moreover, Kawano testified that: 1) employees who take such time off work are n.-»t fired even if they do not ask permission; and 2) he would have given the time off in this case if Hernandez had wanted to go to the doctor or dentist. Under cross-examination, he could give no explanation for his refusal to give permission.

In addition, John Kawano's own testimony, quoted above, reveals that, though there may have been some question as to the authority of Antonio, the "crew pusher," to grant Hernandez permission to stop work early, Kawano resolved that question in

favor of finding such authority by asking Antonio whether he had granted the permission. Though the record also reveals that Antonio may not have given the permission in the clearest possible terms, still his response to Hernandez' request was such as reasonably to lead Hernandez to believe that the permission had been granted. Specifically, the conversation between Antonio and Hernandez, according to Hernandez, was as follows:

> Hernandez: Mr. Antonio; I want to stop right now at 2:00 because I have to make a list.
>
> Antonio: Well, if you want to, it's fine.

To be sure, if Kawano's objections to Hernandez' taking time off from work were really that, by compiling his list, Hernandez would be interfering with the work of the employees whose names he sought for his list, some justification for the discharge of Hernandez could be found. For in a variety of contexts, it has been established that "working time is for work." Republic Aviation Corp. v. NLRB (1945) 324. U.S. 793; Peyton Packing Co (1943), enf'd 142 F.2d 1009 (5th Cir.), cert denied, 323 U.S. 730 (1944).

But nothing in the record indicates that any interference with the work performance of anyone else would have occurred had Felix Hernandez been permitted to take the requested time off to compile the Union list. What is more significant is that, by his own testimony, John Kawano makes it clear that his sole reason for firing Felix Hernandez was that he had taken off from his job early, and not because he was concerned that Hernandez' compilation of a list would interfere with the ongoing work of any other employees. When to this is added the

inference of anti-union animus that has been drawn from the wage and benefit improvements discussed earlier in this Decision, the conclusion is inescapable that Felix Hernandez was fired because of his union activity. Finally, in view of the above, and in the light of the fact that Felix Hernandez' testimony that John Kawano told him "he didn't want a union and that no union was going to exist" when he fired him was corroborated by another witness, Ramon Trevino, who was within earshot when this conversation took place, I find that John Kawano made such a statement when he fired Felix Hernandez.

An employee discharge accomplished under circumstances that give the employee the idea that it was for union activities violates Section 1153(a). NLRB v. Vacuum Plating Co. (1965) 155 NLRB No. 73, 60 LRRM l1401. A violation of 1153(a) does not turn on the employer's motive or on whether the interference succeeded. "The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise- of employee rights under the Act." Cooper Thermometer Co. (1965) 154 NLRB 502, 503, note 2; 59 LRRM 1767.

The circumstances of this case show that the employee was engaged in union activities. The anti-union statements accompanying a discharge following discovery of union activities make that discharge an 1153(a) violation.

In addition, a violation of Section 1153(c) of the Act was also committed by this discharge. To prove a violation, specific evidence of intent to discourage membership need not be shown. Nor is it necessary that employees were actually discouraged from joining a labor organization by the employer's conduct, since, when a natural consequence of a discharge is such discouragement,

it "is presumed that (the employer) intended such consequences. . ." Radio Officers Union v. NLRB (1954) 347 U.S. 17, 44-45, 33 LRRM 2417. Circumstantial evidence of motive to discourage membership is sufficient since that is all that is generally available. NLRB v. Putnam Tool Co. (6th Cir. 1961) 290 P.2d 663, 48 LRRM 2263. In addition, the United States Supreme Court has held that "to discourage membership in any labor organization" includes discouraging participation in concerted activities. NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221, 233, 53 LRRM 2121. That the discharge had such an effect on Hernandez' participation in union activities cannot be disputed given the above-cited circumstances of the discharge. The burden in establishing justification for the discharge is on the employer. NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 65 LRRM 2465.

In a case similar to the instant one, a violation was found when an employee was discharged for taking an unauthorized work break to solicit for the union, the discharge coming only after the employer discovered his union activity. Monterey Light Systems Inc. (1973) 203 NLRB No. 151, 83 LRRM 1291. The NLRB has also held that where an employee's union activities have no disruptive effect on operations (no such claim was made at the hearing) the employer may not prevent the activity by witholding permission. Farah Manufacturing Co. (1973) 202 NLRB No. 99, 82 LRRM 1623; Bob Henry Dodge, Inc. (1973) 203 NLRB No. 1, 83 LRRM 1077. Further, Hernandez' good work record is additional evidence that the discharge was based on protected activities. Marian Sprocket & Gear, Inc. v. NLRB (5th Cir. 1964) 329 F.2d 417, 55 LRRM 2739.

I find that: 1) Felix Hernandez was singled out for discharge when he took time off for union purposes even though his conduct would not have resulted in discharge had he not been so engaged; 2) on that basis, Respondent has not met its burden of justification; and 3) the discharge violates Section 1153(a) and (c) of the Act.

D. The Discharge of Josefa Hernandez and Ramon Trevino

When Felix Hernandez was discharged (see C above) he was driving a van of 10 workers to the San Luis Rey ranch each day. Shortly after the election some of his riders quit working and four were transferred to the Carlsbad ranch so that he had only four riders after he was discharged. He continued taking these people to work after his discharge but was not permitted to wait at the ranch. These persons included Josefa Hernandez and Ramon Trevino. They were laid off on October 13 with the other workers riding with Felix Hernandez.

General Counsel contends that Ramon Trevino and Josefa Hernandez were not transferred to any other ranch despite the availability of work and despite the fact that others were transferred to the Carlsbad ranch. The refusal to transfer these workers, asserts General Counsel, violated Section 1153(a) and (c) of the Act. Respondent's position is that these workers were not transferred essentially for two reasons: 1) a lack of work; and 2) the impracticability of transferring only a few workers because transfers were made only by the car load. In addition, Respondent's president, John Kawano denied that the fall-off in the number of Felix Hernandez' riders was due to

any statements by him, Kawano, telling employees directly or indirectly not to ride with Felix Hernandez, and specifically denied having made such statements.

However, at the hearing Josefa Hernandez testified that individual workers were transferred from riding with Felix Hernandez to Carlsbad by Pascual Lopez, a foreman. Moreover, Enrique Sanchez, another drive (still in Respondent's employ at the time of the hearing) testified that he was told by John Kawano to take his car to Carlsbad but to leave Mario Guerrero and Ram on Trevino behind at San Luis Key.

I find the facts to be as alleged in the aforesaid testimony of Josefa Hernandez and Enrique Sanchez.

However, for the reasons set out in the discussion in F infra, concerning the alleged discrimination against a 55-member crew, in failing to transfer it from the Vandergrif West ranch to Carlsbad on or about October 13, I find here, as I do there, that, by that date, there was no work at Carlsbad for which additional workers were needed by Respondent.

For the above reasons, and since Josefa Hernandez and Ramon Trevino continued to work at the San Luis Rey Ranch until their lay-off m October 13, I find that the failure to transfer them to Carlsbad did not violate either Section 1153(a) or Section 1153(c). I shall therefore recommend dismissal of this allegation of the complaint.

E. Assignment of Javier Acosta and Antonio Flores to More Arduous and Less Agreeable Work

1) Javier Acosta

This employee had been working for Respondent for four and a

half years, was a member of the ranch organizing committee, and actively sought signatures on authorization cards for the Union. During the 1974 season he drove a tractor at Carlsbad for several days and during the 1975 season, from June to September, he was assigned tasks of tractor and truck driving, irrigating and spraying. Such work was considered easier and better than picking, though the pay was the same. Around September 1, Acosta was assigned to regular picking tasks and a worker named Manual, who was relatively new, was assigned to the tomato spraying that Accsta had been doing. Acosta has not been assigned to any of the easier jobs since then.

General Counsel contends that this reassignment of Acosta from easy to more arduous work by Respondent violates Section 1153(a) and (c) since it tended to chill unionism and was motivated by anti-union animus. Respondent's position is that Acosta was removed from the spraying assignment because he could not be counted on to regularly report for work; that the spraying function had to be performed in a certain period, and the employee to whom that task was assigned was, unlike Acosta, one that the foreman could rely upon to come to work and perform. In short, Respondent claims that its re-assignment of Acosta was based upon sound business reasons, and not because of Acosta's organizational activities.

The only testimony in support of Respondent's position was that of Acosta's supervisor, Felix Castellon, who stated that Acosta is "an absent person frequently from work." The record reveals, however, a string anti-union attitude on Castellan's part, as indicated by his change of a normal friendly relationship with Acosta soon after Acosta began his union activities,

and his threats to discharge "illegal workers" if they voted for the Union. This anti-Union attitude on Castellan's part renders his testimony concerning the reasons for re-assigning Acosta less than credible. Moreover, no payroll records were presented to substantiate the claim that Acosta was prone to absenteeism. This failure to produce evidence within the employer's province is some evidence that it would not be favorable to Respondent's position. Hill-Behan Lumber Co. (1967) 162 NLRB 745, 749, 64 LRRM 1108. In addition, that a relatively new worker replaced Acosta is further evidence that the change was retaliation for union activity. NLRB v. Somerville Buick, Inc., 194 F.2d 56, 29 LRRM 2379 (1st Cir. 1952).

When to the above is added the fact, which I find also to have been established, that Respondent knew of Acosta's union activities and adherence at all relevant times herein (since Acosta tried to organize employees in front of his supervisor, Felix Castellon, was observed distributing Union literature, and was told by Castellon that he, Castellon, knew Acosta was a Union member), I find that the removal of Acosta from his tomato spraying job and his assignment to the task of picking violated Section 1153(a) and (c) of the Act.

2) Antonio Flores

Antonio Flores has been working for Respondent since 1966—as a seasonal worker until 1972, and a year-round employee since then. In 1973 and 1974 he was a "crew pusher" at the Las Lomas East ranch under Joacuin Haro. The "crew pusher" position is an easier one than picking. During the 1975 season, however, he was not assigned as a crew pusher, but was transferred to the Las Lomas West Ranch about a week before the election. The record

also reveals that Respondent knew of Flares' union activities, its president having seen him serving as a Union observer from the Vandergrif West Ranch on the day of the Board-conducted election.

General Counsel contends that Respondent's failure to assign Flores as a crew pusher in 1975 violated Section 1153(a) and (c)of the Act, for the same reasons advanced with respect to Javier Acosta's 1975 work assignment, supra. In response, Respondent asserts that Antonio Flores was not continued as a crew-pusher by his foreman because the available work had dwindled to the point where a crew pusher was not needed. The change in Flores work assignment,. Respondent contends, was caused by work necessity, not Flores' union attitudes.

Flores' work assignment, I find, is markedly different from that of Acosta's, supra, in one crucial respect. Whereas Acosta had been replaced by another, relatively new employee as a tomato sprayer, there is nothing in the record to indicate that Flores had been similarly replaced as a crew pusher. Indeed, had such an event occurred, evidence thereof would surely have been produced by General Counsel. The total discontinuance of the crew pusher function, in Flores' case, lends support to the Respondent's explanation that it was caused by a fall-off in work requirements, and I do so find.

I therefore will recommend dismissal of this allegation of the complaint.

F. The Alleged Provision of Less Than a "Normal" Amount of Employment to a 55-Member Crew (Vandergrif West)

Finally, General Counsel alleges that Respondent violated Section 1153 (a) and (c) of the Act by providing the 55 workers of the Vandergrif West Ranch crew with less employment than they "usually received, " to discourage their union activities and membership. Specifically, General Counsel contends: 1) this crew, which included the most active union supporters at all of Respondent's ranches, was denied a final transfer to work in the tomato harvest at the Carlsbad ranch, a "traditional" practice in the past, and was laid off when the work at Vandergrif West was finished; and 2) this same crew had its number of working hours per day and days per week reduced from what was normal —- both events occurring after the Union had won a Board-conducted election.

Respondent's position is that the hours of work for this crew were cut back for lack of work and for no other reason.

The evidence discloses, and I find, that the crew in question worked at the Vandergrif West ranch under the supervision of Leopoldo Dagnino and Francisco Araux; that many of the workers on this crew had been transferred to the Vandergrif West ranch from others of the Respondent's ranches shortly before the election; that the crew included 10 of the 14 members of the ranch organizing committee and all five of the Union delegates who had been sent by their fellow Union members to a Union convention in Fresno; that Respondent was aware of this activity and support both before and after the election; that, starting with the first pay period following the election, this ranch crew began experiencing reduced work time; and that these workers

remained at the Vandergrif West ranch and were not transferred to other ranches, though transfers had been made prior to the election.

In addition, I find that there had been no routine practice of the Respondent in past years of transferring workers from Vandergrif West to Carlsbad, because 1975 was the first year in which Vandergrif West was worked; that, in any event, Respondent did transfer five carloads, totalling between 60 and 65 employees to Carlsbad: one car from Vandergrif East, two cars from Vandergrif West, and two cars from San Luis Rey; that, by the time picking at Vandergrif West began to slow down on or about October 13, picking had been virtually completed at Carlsbad, since Carlsbad had been staffed with a full crew of pickers for a whole month by the time workers from Vandergrif West became available; and that Respondent's failure to transfer the 55-member crew to Carlsbad when its work at Vandergrif West was completed was not designed to interfere with protected employee activities, but was rather prompted by business necessity.

Moreover, I find that up through the payroll period ended October 9, 1975, the 55-member crew in question worked essentially a full, normal five or six-day work week at Vandergrif West; that a slight decline in hours worked by this crew for the week ended September 18, 1975 is explained by the fact that many workers took off for Mexican Independence Day on September 16th and 17th, an 3 that the slight decline in hours worked from September 25, 1975 to October 9, 1975 reflects a decision of the workers themselves to work only eight hours per day in September.

In sum, I find that Respondent did not provide the 55 workers of the Vandergrif West Ranch crew with less employment than they

usually received to discourage their union activities and membership, and that Respondent, in this regard, did not violate either Section 1153(a) or Section 1153(c). I shall therefore recommend dismissal of this allegation. of the complaint.

CONCLUSIONS OF LAW

1. Respondent did not violate the Act in granting wage increases and improving benefits before the Act's effective date, though those increases and improvements "continued" past the effective date of the Act.

2. Respondent did not violate the Act when its supervisor, Felipe Castellon, stood by each time Javier Acosta attempted "to talk to the illegals."

3. By discharging Felix Hernandez because if his union activity, Respondent has discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union in violation of Section 1153(a) and (c) of the Act.

4. Respondent did not violate the Act in failing to transfer Josef a Hernandez and Ramon Trevino from the San Luis Rey ranch to the Carlsbad ranch.

5. By removing Javier Acosta from his tomato spraying job and assigning him to picking, Respondent discriminated in regard to his hire and tenure of employment, thereby discouraging membership in the Union in violation of Section 1153 (a) and (c) of the Act.

6. Respondent did not violate the Act in failing to assign Antonio Flores to the crew pusher position during the 1975 season.

7. Respondent did not violate the Act by the amount of work assigned to the 55-member Vandergrif West crew during the 1975 season.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 1153(a) and (c) of the Act, my recommended Order will require that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

To remedy Respondent's unlawful discharge of employee Felix Hernandez, Respondent will be required to offer him full reinstatement to his former job, beginning with the date in the 1977 season when the crop activity in which he is qualified commences, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him. Such backpay shall be computed on a quarterly basis in the manner established by the NLRB in F.W. Woolworth Company, 90 NLRB 289 (1950) and shall include interest at the rate of seven per cent per annum as has been granted by the NLRB under the rule established in Isis Plumbing & Heating Co., 138 NLRB 716.

To remedy Respondent's unlawful treatment of Javier Acosta, Respondent will be required to offer to assign Javier Acosta the job of sprayer beginning with the date in the 1977 season when the crop activity in which he is qualified commences.

General Counsel has asked for Respondent to be ordered to reimburse Felix Hernandez for a van he purchased in reliance on "the employer's promise that he could carry more workers," i.e., transport them to and from work and home, and to be paid by the workers so transported. Such a remedy, I have concluded, is unwarranted for several reasons: 1) No showing was made that the decrease in the number of workers transported by Felix Hernandez was a consequence of his having been unlawfully discharged by

Respondent; 2) TO the contrary, the evidence indicated that other reasons, having nothing to do with labor-management tension, caused the fall-off in Felix Hernandez'. passengers; 3) To the extent, if at all, that the fall-off in passengers constituted a breach of promise on Respondent's part, redress is more appropriately to be accorded by the courts in regular civil proceedings rather than by the Board.

General Counsel has asked for Respondent to be ordered to reimburse the Board and the Union for litigation costs, including attorney fees. Since the 1153(a) and (c) violations found here were isolated, Ido not believe that the awarding of litigation costs and attorney fees in this case will effectuate the purposes of the Act. I believe that the remedies in the recommended Order, infra, are sufficient to correct the harms done, and an award of costs would serve no purpose, Cf. Resetar Farms, 3 ALRB No. 18 (1977).

In addition, I shall recommend that the Order require that the attached Notice to Workers be read in English and in Spanish to assembled employees on company time and property at the commencement of the 1977 peak harvest season, by an agricultural Labor Relations Board agent, and that the Board agent be accorded the opportunity to answer questions which employees might have regarding the notice and their rights under the Act. Moreover, the Order will require that the notice be mailed to all present employees, as well as to new employees rehired, and that the notice be posted, at the commencement of the 1977 harvest season, for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily pasted.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 1160.3 of the Act and Section 20234.1 of the Board's Regulations, I make the following recommended:

ORDER

Respondent, Kawano, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against their employees because of their union activities;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteeed in Sections 1152, 1153(a) and 1l53(c) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Felix Hernandez his former position, beginning with the date in the 1977 season when the crop activity in which he is qualified commences.

(b) Make Felix Hernandez whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the section of the Administrative Law Officer's Decision entitled "The Remedy," the determination of the actual amount thereof to await further proceedings by the Board.

(c) Offer to assign Javier Acosta the position of sprayer beginning with the date in the 1977 season when the crop activity in which he is qualified commences.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order.

(e) Mail the following Notice to Workers (to be printed in English and Spanish) in writing to all present employees, wherever geographically located, and to all new employees and employees rehired, and mail a copy of said notice to all of the employees listed on its master payroll for the payroll period or periods applicable to October 12, 1975, and post such notice at the commencement of the 1977 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted.

(f) Have the attached Notice to Workers read in English and Spanish to assembled employees on company time and property at the commencement of the 1977 harvest season, to all those then employed, by a Board agent accompanied by a company representative. Said Board agent is to be accorded the opportunity to answer questions which employees may have regarding the notice and their rights under Section 1152 of the Act.

(g) Notify the regional director in the San Diego Regional office within 20 days from receipt of the copy of this decision of the steps which Respondent has taken and will take to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that the allegations contained in the Consolidated Complaint, as amended during the hearing, not specifically found herein as violations shall be, and hereby are, dismissed.

Dated: March 12,1977.

AGRICULTURAL LABOR RELATIONS BOARD

Leo Kanowitz

Administrative Law Officer

APPENDIX

NOTICE TO WORKERS

After a trial in which each side had a chance to present their side of the story, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers to act together to try to get a contract or to help one another as a group. The Board has told us to send out and post this notice.

We will do what the Board has ordered, and also tell you that the Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To bargain as a group and to choose whom they want to speak for them.

4. To act together with other workers to try to get a contract or to help and protect one another, and

5. To decide not to do any of these things.

Because this is true, we promise that:

We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

WE WILL NOT fire you or lay you off because you act together to help and protect one another as a group.

WE WILL offer Felix Hernandez his old job back if he wants it, beginning in this harvest and we will pay him any money he lost because we discharged him.

WE WILL offer Javier Acosta the position of sprayer if he wants it, beginning in this harvest.

We recognize that the Agricultural Labor Relations Act is the

law in California. If you have any questions about your rights under the Act, you can ask an agent of the Board. The nearest Board office is at _____, San
(address of San Diego Regional office)
Diego, and its phone number is _____

Dated: _____

KAWANO, INC.

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.

(PROOF OF SERVICE BY MAIL - 1013a , 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within above titled action; my business address is 1949 Yosemite Road, Berkeley, CA 94707.

On March 12, 1977 I served the within Administrative Law Officer's decision on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box, Berkeley, California, addressed as follows:

CERTIFIED MAIL

David B. Geerdes, Esq. James K. Smith, Esc. 2100 Union Bank Bldg. San Diego, CA 92101
Norman L. Vetter, Esq. P.O. Box 240
Oceanside, CA 92054
Agricultural Labor Relations 3d.
San Diego Regional Office
6153 Fairmount Ave.
Suite 101
San Diego, CA

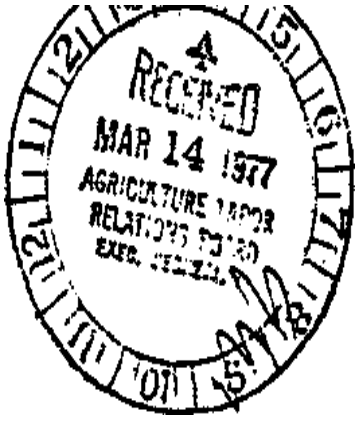
CERTIFIED MAIL

United Farm Workers of America P.O. BOX 11049
Salinas, CA 93901
Attn: E. Michael Heuman

Mr. Harry Delizonna
General Counsel
ALRB
915 Capital Kall
3d Floor
Sacramento, CA 95814.

Ron Greenberg, Esq.
Office of the Executive Sec'y
ALRB
915 Capitol Mall
3rd Floor
Sacramento, CA 95814

Executed on March 12, 1977 at Berkeley, California. I certify (or declare), under period of perjury that the foregoing is true and correct.



Leo Kanowitz