Azusa, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MONROVIA NURSERY COMPANY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 81-CE-43-SD 9 ALRB No. 15

DECISION AND ORDER

On March 8, 1982, Administrative Law Judge (ALJ)[1/] Stuart A. Wein issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel each timely filed exceptions, a supporting brief, and a reply brief.

Pursuant to the provisions of Labor Code section 1146, the Agricultural Labor Relations Board (Board or ALRB) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the ALJ's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ only to the extent that they are consistent herewith.

The parties agreed that Respondent customarily lays off some employees during the winter months when there is less work to do at the nursery, and that poor economic conditions made it

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

necessary to lay off more employees in 1981 than in prior years. However, General Counsel alleged that discrimination occurred in the selection of employees to be laid off in 1981, and that 13 of the employees were selected for layoff because of their union activity.[2/]

The ALJ found that General Counsel had established a prima facie case of discriminatory layoff with respect to all 13 of the alleged discriminatees. Regarding five of the employees (Efigenia Albarran, Jose Mendoza, Maria Reynoso, Claudia Valerio, and Atala Villarreal), the ALJ concluded that Respondent's business justification successfully rebutted General Counsel's prima facie case, and that General Counsel had thus failed to prove that those employees had been discriminatorily laid off. However, the ALJ concluded that the remaining eight employees (Socorro Cervantes, Maria Fernandez, Amparo Godinez, Maria Jimenez, Francisca Lozano, Maria Medina, Adela Moraza, and Maria Rios) had been discriminatorily laid off by Respondent because of their union activities.

For the reasons discussed herein, we affirm the ALJ's dismissal of the allegations regarding Respondent's layoff of five employees, but we reverse his conclusion that the other eight employees were discriminatorily laid off, as we find that General

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[2/] General Counsel's complaint alleges the discriminatory layoff of 12 named employees. The layoff of a 13th employee, Efigenia Albarran, was also litigated at the hearing although she was not named in the complaint. Respondent did not object, either at the hearing or by way of exception, to the inclusion of Albarran as one of the alleged discriminatees. We find that the matter of Albarran's layoff was related to the subject matter of the complaint, and was fully litigated at the hearing. (George A. Lucas & Sons (1981) 7 ALRB No. 47.)

Counsel failed to establish a prima facie case of discriminatory layoff of any of the 13 employees.

We affirm the ALJ's finding that Respondent's anti-union campaign (which included weekly meetings between employees and supervisors, distribution of pro-company buttons, and posting of union caricatures) did not constitute evidence of anti-union animus. Respondent's campaign was protected free speech and contained no unlawful threats or promises that would tend to prove anti-union animus.

As well as finding no anti-union animus from the evidence of this case, we find that no such animus can be inferred herein on the basis of our Decision in Monrovia Nursery Company (1983) 9 ALRB No. 5. In that Decision, we dismissed most of the charges that Respondent had unlawfully discriminated against a number of workers because of their union activities, but found, in part because of the close timing between two employees' open union activities and their suspension by Respondent, that Respondent had discriminatorily suspended those two employees. In the instant case, although the United Farm Workers of America, AFL-CIO (UFW) filed a Notice of Intent to Take Access and a Notice of Intent to Organize on June 18, 1981, the union campaign was inactive during the summer months of 1981. On September 28, 1981, the UFW filed a second Notice of Intent to Take Access, and UFW organizer Scott Washburn took access at Respondent's premises on September 30. Respondent's assistant general manager William Bruce Usrey testified without contradiction that the decisions about whom to lay off October 1, 1981, were made three to four days prior to the

layoff (that is, approximately September 27 or 28). Thus, there is no clear evidence that Respondent knew of the Union's renewed organizing effort at the time the layoff selections were made.

Francisca Lozano

From 1973 to 1981, Francisca Lozano worked, off and on, for Respondent at various jobs including assembling orders, cutting, and watering plants. At the time of her layoff in October 1981, she had worked as a waterer for five months in Division 3. Sales production manager Gilbert Resendez testified that Lozano was selected for layoff because she was the slowest waterer in his division and had a poor attitude (for example, she would sometimes take off her gloves and stop work before break time). Lozano had been warned a couple of times about her work performance, and was asked to work a little faster and show more interest in her work. Resendez asserted that all ten of the employees retained in Lozano's crew had greater crew seniority and superior skills, and more experience in the type of work performed during the winter months than she had.

The ALJ found that the testimony regarding Lozano's work speed was conflicting. However, we find that although a co-worker testified that Lozano was an "average" worker, two supervisors consistently testified that she was slow and had been warned about her slowness and her generally poor attitude.

In concluding that Lozano's layoff was discriminatory, the ALJ relied in part on the lack of documentary evidence of Lozano's inadequate work performance. Since there is no evidence that Respondent used any system of written warnings or reprimands,

we find the ALJ's reliance unjustified.

The ALJ held that if Lozano had not been a union activist, her company seniority would have ensured that she be retained. Respondent's layoff policy, as described in testimony of supervisors, was to consider first an employee's productivity, dependability, skills and experience in the type of work remaining to be done; only where those factors were equal would Respondent take seniority into account. Contrary to the ALJ, we find that there was no "announced company policy of retaining long-term employees who had performed satisfactorily during their tenure." (ALJ Decision, p. 50.)

It is true that Resendez' consideration of Lozano's crew seniority appears inconsistent with his and other supervisors' statements that seniority was considered in layoffs only where other factors were equal. However, this apparent inconsistency is not sufficient to prove that Respondent discriminatorily laid off Lozano, especially since uncontradicted testimony established that the employees retained in Division 3 had greater skills and experience than Lozano in the type of work that remained.

Therefore, we reverse the ALJ's conclusion that Respondent discriminatorily laid off Lozano because of her union activities, and hereby dismiss the allegation that her layoff was in violation of the Act.

Maria Jimenez

Maria Jimenez, who began working for Respondent in 1973, performed various jobs including potting, assembling orders, pruning, and watering. Although UFW organizer Scott Washburn testified

that Jimenez was one of the 15 "very active" union supporters at Monrovia, there was no evidence that her union activities (holding a union meeting at her house and telling co-workers that she favored the union) were known to Respondent.

Division 6 manager Rudy Armendariz testified that he selected Jimenez for layoff because she was the slowest worker and wasted a lot of time, and that some workers with less seniority than Jimenez were retained because they were better and faster workers than she. Armendariz and Respondent's production manager Jim Poorbaugh both testified that Jimenez had also been selected for layoff a year earlier, in 1980, for the same reasons. However, the supervisors found out that the rumor of her impending 1980 layoff had gotten back to Jimenez. Because they did not like the idea of workers learning about layoffs from rumors, the supervisors decided to transfer Jimenez in 1980 instead of laying her off.

We find insufficient evidence from which to conclude that Respondent had knowledge of Jimenez' union activities. The ALJ incorrectly stated that Jimenez wore UFW insignia to work (Jimenez specifically denied having done so, although she also stated that when Respondent distributed company buttons she did not take one). The ALJ disbelieved Armendariz' denial of knowledge of Jimenez' union activities, since Jimenez testified at a June 1981 ALRB hearing involving Respondent and showed Armendariz her subpoena. However, Armendariz did not deny knowledge of her testifying at the hearing; he would not necessarily have considered her testimony to be union "support" or union "activities."

The ALJ also considered significant the lack of

"documentation" that Jimenez worked slowly and wasted time. We have already found that Respondent had no system of written reprimands or warnings.

The ALJ found that Jimenez' layoff was inconsistent with Respondent's "avowed policy of rewarding employees for the length of time that they have been with the company." (ALJ Decision, p. 43.) We have already found that Respondent had no such policy; rather, it rewarded length of service only where other factors were equal.

Another indication that Jimenez was not discriminatorily laid off in 1981, is the evidence that she was recommended for layoff the previous year, before she testified at the June 1981 ALRB hearing (that is, before she engaged in any protected activity that was proved to be known to Respondent).

We conclude that General Counsel has not shown that Respondent had knowledge of Jimenez' union activities, nor proven any causal connection between her protected concerted activities and her layoff, and we hereby dismiss the allegation that her layoff was a violation of the Act.

Maria Medina and Maria Rios

Maria Medina and Maria Rios were both working in foreman Narciso Branca's tying and weeding crew when they were laid off in October 1981. Branca testified that his supervisors told him to lay off four people from his eight member crew, and that he selected Medina for layoff because she was very slow, usually came to work late, and did not pay enough attention to her work. He added that he selected Rios because she allowed herself to get

distracted and distracted other employees by talking too much on the job. Branca stated that he had spoken to Medina about specific problems he had regarding her work, and that he had warned Rios about talking too much during work time. Branca testified without contradiction that the four workers he retained were better workers than the four he laid off.

Medina claimed in her testimony that the four employees laid off from Branca's crew were the only open union supporters in the crew, and the ALJ relied on that statement in his analysis. However, Francisca Lozano testified that her sister-in-law Claudia Sierra, who worked in Branca's crew but was not laid off, was a member of the union organizing committee who signed the May 29, 1981, letter to Respondent requesting a list of Respondent's employees. (General Counsel's Exhibit No. 10.) On the basis of that testimony and evidence, we find that the four employees laid off by Branca were not the only open union supporters in his crew.

In his analysis, the ALJ also relied on Respondent's lack of documentation of its criticism of Medina's and Rios' work, and Respondent's failure to follow seniority in laying off these two employees. For the reasons stated above, we find the ALJ's reliance on those factors to be unjustified.

We conclude that General Counsel failed to prove a causal connection between Medina's and Rios' union activities and their layoffs, and that Respondent laid them off for legitimate business reasons. Therefore, we hereby dismiss the allegations that their layoffs were in violation of the Act.

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Division 7 Layoffs: Efigenia Albarran, Socorro Cervantes, Maria Fernandez, Amparo Godinez, Adela Moraza, and Claudia Valerio

Division 7 manager Dennis Connor testified that he laid off 24 employees in October 1981, because of a general slowdown in business, and that the standards he used in selecting persons for layoff were work performance and versatility on the job (i.e., ability to work in various departments). Connor stated that he examined production reports to determine each worker's potting and cutting scores, and laid off those with poor scores, as well as those who were not good liner workers or could not assemble orders. He testified that he evaluated all the employees on the roster before selecting the 24 for layoff, and that he never had to consider seniority at all.

The ALJ found that Efigenia Albarran's and Claudia Valerio's union activities (associating with UFW supporters during breaks and meetings) were extremely limited, and concluded that General Counsel failed to prove that those two workers would not have been selected for layoff but for their union activities. We affirm the ALJ's conclusion but find, contrary to the ALJ, that General Counsel did not prove a prima facie case of discriminatory layoff of Albarran or Valerio.

In concluding that Respondent had discriminatorily laid off the four other above-named employees from Division 7, the ALJ unjustifiably relied on Respondent's failure to follow seniority and its lack of documentation of certain employees' unsatisfactory work, as evidence of discrimination.

The ALJ also relied on a faulty statistical analysis to

support his determination that the four Division 7 employees were discriminatorily laid off. Thus, the ALJ found that seven of the 24 employees laid off from Division 7 were union supporters (i.e., 29 percent) while only 10 to 15 percent of the total number of employees in Division 7 were laid off. However, two of the laid-off employees (Albarran and Valerio) had very minimal union activities and should not be counted in the number of persons known by Respondent to be union activists. Further, comparing the percentage of union supporters among laid off employees to the percentage of the overall work force laid off is illogical and meaningless; the only proper comparison would be the percentage of union supporters among the employees laid off compared to the percentage of union supporters in the work force. As the record does not contain figures indicating the percentage of union supporters in the work force at the time of the layoff, no meaningful statistical analysis can be made.

We find that there is insufficient evidence to establish that Respondent used other than objective criteria, objectively applied, in deciding which Division 7 employees to lay off, and that General Counsel therefore has failed to prove a prima facie case of discriminatory layoff of any of the Division 7 employees. Accordingly, the allegations in the complaint to that effect are hereby dismissed.

Jose Mendoza, Maria Reynoso, and Atala Villarreal

When Jose Mendoza was laid off, he was working as a carpenter's assistant. There was undisputed testimony that Mendoza did not have the carpentry skills of the two carpenters with whom

he worked, and that his productivity and seniority were low in comparison to workers who were retained. The ALJ concluded that Mendoza would have been laid off, despite his protected concerted activities, for legitimate economic reasons. We affirm that conclusion, but, contrary to the ALJ, we find that General Counsel did not make a prima facie showing that Mendoza was discriminatorily laid off.

Gilbert Resendez testified that Maria Reynoso was one of three waterers laid off from Division 1. He stated that the employees who were retained in Division 1, unlike Reynoso, were experienced in jeep driving, assembling orders, pruning, and spacing as well as watering. Reynoso did not testify at the hearing, and no evidence was offered to contradict Resendez' testimony that she was selected for layoff because of her limited skills. Therefore, we affirm the ALJ's conclusion that her layoff did not constitute a violation of the Act, but reverse his finding that General Counsel proved a prima facie case of discrimination as to Reynoso.

Atala Villarreal worked in a tying crew and later in an espalier crew, and was sometimes assigned to do watering in other divisions. Gilbert Resendez testified that she was selected for layoff because both supervisors and co-workers found her difficult to get along with. He stated that he had talked to her several times about the problem, and had told her in June 1980, that any further incidents would require his taking more serious measures than just talking to her. We reverse the ALJ's finding that General Counsel established a prima facie case of discrimination

as to Villarreal, but we affirm his conclusion that Respondent did not violate the Act by its layoff of this employee.

In view of the above findings, we hereby dismiss the allegations in the complaint that Respondent violated the Act by its layoff of Mendoza, Reynosa, and Villarreal.

ORDER

Pursuant to section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated: April 4, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

CASE SUMMARY

Monrovia Nursery Company
(UFW)

9 ALRB No. 15
Case No. 81-CE-43-SD

ALJ DECISION

The ALJ concluded that Respondent had discriminatorily laid off eight of 13 alleged discriminatees because of their protected concerted activities. Regarding the remaining five employees, the ALJ found that General Counsel had proven a prima facie case of discriminatory layoff, but that Respondent's business justifications for the layoffs had successfully rebutted the prima facie case.

BOARD DECISION

The Board affirmed the ALJ's dismissal of the allegations regarding Respondent's layoff of five employees, but overruled his conclusion that eight employees were discriminatorily laid off. The Board concluded that General Counsel had failed to establish a prima facie case of discriminatory layoff of any of the 13 alleged discriminatees.

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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.

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STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Agricultural Labor Relations Board
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In the Matter of: MONROVIA NURSERY, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 81-CE-43-SD

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DECISION OF THE ADMINISTRATIVE LAW OFFICER

STATEMENT OF THE CASE

STUART A. WEIN, Administrative Law Officer: This case was heard by me on November 13, 16, 17, 18 23, 30, December 11 and 12, 1981, in Irwindale, California.

The complaint, dated 20 October 1981, as amended on 12 November 1981 and 15 December 1981 (pursuant to oral motion made during the hearing), was based on one charge filed by the United Farm Workers of America, AFL-CIO (hereafter the "Union" or "UFW") on or about 7 October 1981. The charge was duly served on the Respondent, Monrovia Nursery Company (hereinafter referred to as the "Respondent", the "Company", or the "Employer") on or about 7 October 1981.

The complaint as amended alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the "Act") relating to the layoff of thirteen (13)[1/] named employees on October 1, 1981.

The General Counsel and Respondent were represented at the hearing and were given a full opportunity to participate in the proceedings. The Charging Party made no appearance. The General Counsel and Respondent filed briefs after the close of the hearing.

Based on the entire record, including my observations of the demeanor of the witnesses, and after consideration of the agruments and briefs submitted by the General Counsel and by the Respondent, I make the following:

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1. Maria Reynoso, Maria Jimenez, Francisca Lozano, Maria Medina, Socorro Cervantes, Atala Villarreal, Adela Moraza, Amparo Godinez, Jose Mendoza, Senorina Duque (aka Maria Fernandez), Maria Rios, Claudia Valerio, and Efigenia Albarran.

FINDINGS

I. Jurisdiction:

Respondent Monrovia Nursery Company is an employer engaged in agricultural operations -- specifically the growing for wholesale of general ornamental plants in the County of Los Angeles, California, as was admitted by Respondent. Accordingly, I find that the Respondent is an agricultural employer within the meaning of Section 1140.4(c) of the Act.

As was also admitted by Respondent, I find that United Farm Workers of America, AFL-CIO is a labor organization within the meaning of Section 1140.4(f) of the Act, and that the thirteen alleged discriminatees were at all relevant times agricultural employees within the meaning of Section 1140.4(b) of the Act.

II. The Alleged Unfair Labor Practices:

The General Counsel's complaint as amended charges that Respondent violated Sections 1153(a), (c), and (d) of the Act by laying off thirteen employees in retaliation for their participation at an ALRB hearing in June, 1981,[2/] and/or because said persons were open and candid about their union sentiments.

The Respondent denies that it violated the Act in any respect. Rather, it contends that the layoffs were seasonal in nature, motivated in part by poor economic conditions that made it

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2. Witnesses at the June, 1981, hearing (Case No. 80-CE-90-SD, et al.) included Maria Reynoso, Maria Jimenez, Francisca Lozano, Maria Medina, and Socorro Cervantes. Those who attended the hearing were Atala Villarreal, Adela Moraza and Amparo Godinez.

necessary to lay off more employees than in prior years. Thus, eighty-three (83) employees were laid off on October 1, 1981, from all parts of Respondent's operations -- the selections being made by individual supervisors in collaboration with division managers and other supervisory personnel based on work performance, skills, and length of service with Respondent. Each of the thirteen alleged discriminatees were chosen for layoff, the Company suggests, because their work performance was inferior in some manner to that of the remaining employees.

III. Background:

Respondent is a wholesale grower of general ornamental plants located in the foothills near Azusa, California. It covers approximately 500 acres and employs some 700 full-time employees, with approximatley 100 additional employees during the peak (summer) season. Approximately 250 employees work in Division 7 where the propagation of the plants begins. Employees trim cuttings in the division's cutting department, and place them in flats holding some 200 cuttings each. The flats are then transported by jeep and trailer into greenhouses or mist beds, which constitute separate departments in the division. Some plants require specialized treatments -- e.g., ferns or tender plants -- and are rooted, grown and transplanted into liners in a single greenhouse which is another distinct department within the division.

After three to nine months, roots will form on the cuttings which are taken to the potting department. There, the cuttings are removed from the flats and transplanted into individual 2" X 3" pots

generally transferred to or from other departments when work requirements are not as pressing. (See Joint Exhibit No. 1).

Each division is managed by a manager and an assistant manager, with the exception of Division 7 which is managed by one individual who has two assistants. Each department within the latter division has one supervisor.

Key supervisory personnel in the instant case are Bruce Usrey, assistant general manager who oversees Divisions 6, 7, 8, 11, and 15; Gilbert Resendez, sales production manager in charge of Divisions 1, 3, 4, 9, 12, and 14, and supervisor of three tying crews; production manager Jim Poorbaugh; Dennis Connor, Division 7 manager; Rudy Armendariz, Division 6 manager; Augustin Ramirez, Division 3 manager; David Fierro, Division 1 manager; Ed Ash, production specialities manager; Narciso Branca, tying crew supervisor; and Elisa Espinoza, espalier crew supervisor.

In September, 1980, the UFW commenced an organizing drive at the company. Various incidents which arose during the ensuing seven months of that campaign were litigated in a June, 1981, hearing (Case Nos. 80-CE-90-SD, et al., presently before the Board). The Company responded to the organizing effort by its own campaign which consisted of distributing literature to employees, holding meetings in the various divisions, and posting caricatures of the Union effort throughout the company plant.

On 29 May, 1981, UFW organizer Scott Washburn directed a letter to General Manager Bruce Usrey requesting a list of all Respondent's workers. The letter was also signed by fourteen (14) employees, including Amparo Godinez, Francisca Lozano, Adela Moraza,

called "liners". Liners are then transported by jeep and trailer into 8' x 50' growing beds located in the division's liner department where they will remain for an additional three to nine months before sale or canning into one-gallon containers. Care of these liners requires watering, pruning, assembly for sale orders, removal for canning, and consolidation in the beds as the liners are removed.

After the liners are transplanted into one-gallon containers they are transported to one of the 16 other divisions of the nursery. The principal tasks performed in these divisions include watering, pruning, staking and tying, spacing, assembly for orders, hauling to shipping docks and consolidation in the beds.

An average of 30 employees work in the cutting department, although during the winter months (November through February) as many as 100-200 people may be used to process the large influx of conifer cuttings.[3/] Approximately 12-15 employees are assigned to the greenhouse; 25-40 employees work in the potting department; 50-80 employees care for the liners; and an average of 12-15 employees work in each of the other divisions. There are also certain specialized crews (approximately 10 people employed in each crew) which are not assigned to any one division whose tasks include canning, pruning, weeding, staking, tying, pest control, and maintenance. As happens throughout the nursery, the number of employees per department and/or division fluctuates as needed for such work to be performed. Thus, employees within Division 7 are

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3. The average length of employment of the present work force is between 4 and 5 years.

and Maria Fernandez (aka Senorina F. Duque) as "members of the organizing committee of the United Farm Workers at the Monrovia Nursery." (General Counsel Exhibit No. 10). On June 18, 1981, the UFW filed a Notice of Intent to Take Access and a Notice of Intent to Organize, but the union campaign remained essentially dormant during the summer months. On 28 September 1981, the UFW filed a second Notice of Intent to Take Access. UFW organizer Scott Washburn took access on 30 September 1981 with other organizers and spoke to workers Socorro Cervantes, Maria Fernandez and Amparo Godinez, among others. The following day, the organizer returned on two occasions -- noon and 4:00 p.m., speaking to workers outside Division 7 and distributing leaflets as employees were leaving from work. Organizer Washburn was informed at that time that many employees had been laid off. The charge that gave rise to the instant proceeding was filed thereafter.

The parties are in agreement that Respondent historically laid off employees during the winter months when there was less work to be done at the nursery. Furthermore, "poor economic conditions" made it necessary to lay off more employees in 1981 than in prior years. The General Counsel contends, however, (and the Respondent denies) that the layoff was directed at thwarting the UFW organizational effort. Thus, approximately ten[4/] of the fifteen "very active" union supporters were notified that they were included in the October 1 layoff. Some of these active supporters had many years of seniority with Respondent, and/or had not previously been

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4. Jose Mendoza, Amparo Godinez, Atala Villarreal, Adela Moraza, Maria Rios, Maria Jimenez, Socorro Cervantes, Maria Fernandez, Francisco Lozano, and Maria Medina.

laid off on a seasonal basis. Respondent contends that the layoffs were occasioned by economic necessity, that roughly 10-15 percent of the work force would be affected, and that the various supervisors were requested to submit names of the least productive employees in their respective work areas. Respondent further contends that neither UFW activity nor participation in the earlier ALRB hearing was considered in determining which of the 83 employees would be laid off.

I shall set forth the factual findings with respect to each of the thirteen alleged discriminatees including employment history, union activities, and Respondent's proffered reason for layoff, seriatim, categorizing the workers by site of last employment, and grouping them according to supervisorial responsibility for the particular layoff decision.[5/] The Analysis and Conclusions section will follow, again with reference to each individual employee.

IV. Facts:

A. Jose Mendoza -- Maintenance Crew

Jose Mendoza loaded semi-trucks and weeded under production manager Jim Poorbaugh commencing in March 1978. He then worked with

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5. Production specialties manager Ed Ash determined that Jose Mendoza would be laid off; Gilbert Resendez authored the termination reports of Maria Reynoso, Francisca Lozano, Maria Jimenez, Maria Medina, Maria Rios, and Atala Villarreal; Dennis Connor (Division 7) decided the layoff of Claudia Valerio, Adela Moraza, Amparo Godinez, Maria Fernandez, Socorro Cervantes and Efigenia Albarran.

a spacing[6/] crew under Salvador Oceguera, for approximately two years, during which time he also loaded trucks and drove a jeep. For approximately six months, Mr. Mendoza pruned under supervisor Pablo Miranda, and finally did "carpentry" work in the maintenance department under production specialties manager Ed Ash, and the latter's assistant "Reiner", during the 2-3 months immediately preceding the October 1, 1981, layoff. Mr. Mendoza denied any adverse commentary regarding his work, testifying that he was given merit increases and was praised by his immediate supervisors. He was transferred from Mr. Oceguera's crew to that of Pablo Miranda because of a back injury, and went from pruning to maintenance because of problems with allergies and sinuses which made it difficult for him to work among the plants.

Mendoza was identified by UFW organizer Scott Washburn as one of the "very active" union supporters at the nursery. Mendoza had a meeting at his house in support of the Union, passed out flyers at his school, made telephone calls, and wore Union buttons at work. Mendoza described himself as the only open UFW supporter in the last three crews in which he worked (Oceguera, Miranda, Reiner). Mendoza further related a conversation he had with supervisor Oceguera in which the latter allegedly told Mendoza that he (Oceguera) thought that Mendoza was the only worker who knew something about the Union, and that the "big people" had told Oceguera to speak to Mendoza about the latter's pro-Union views.

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6. Spacing is a task involving separation and movement of the plants to allow the product to grow better.

Oceguera also suggested to Mendoza that the Union had earlier attempted to organize the nursery, and that the person involved in the organizing activity had ultimately been fired. Finally, Mendoza suggested that at least one other employee ("Roberto") had suffered similar allergy problems but was not laid off in October 1981, and Mendoza volunteered to clean bathrooms, work in the trash, or drive trucks to retain his employment at the nursery.

For the Respondent, production specialities manager Ed Ash testified that Mr. Mendoza was one of five under his direction selected for layoff on October 1, 1981, because of Mendoza's low productivity and seniority. He described Mendoza's work as "carpentry preparation" -- mostly involving shovel work, in contrast to his companions Alejandro Baltazar and Simon Perez who were skilled carpenters. Ash described Mendoza as a very slow worker who had the least seniority (approximately two months) in his crew. The others laid off by Mr. Ash were similarly unskilled or had poor work histories. Production manager Jim Poorbaugh concurred in the result because of Mendoza's continuing medical problems.

Ash denied knowledge of Mendoza's UFW sympathies, characterizing the worker as a "very low profile-type person." Former supervisor Oceguera also denied knowledge of Mendoza's pro-UFW sympathies, as well as having suggested to Mendoza that his bosses knew Mendoza was for the Union. Oceguera, however, did concede that he had spoken to Mendoza and told the worker that he was "free to decide" whether he wanted the union or not.

B. <u>Maria Reynoso (Arroyo) -- Division 1</u>

Maria Reynoso was hired in July, 1979, and worked in

Division 7, in Narciso Branca's weeding crew (where she had been criticized, along with Francisca Lozano for taking off her gloves too early -- an incident which was the subject of the prior hearing), and in Division 1, watering for David Fierro. Although she did not testify in the instant case, Respondent admitted that she was a witness on behalf of General Counsel at the earlier hearing, and admitted that supervisory personnel saw her wear a Union button from time to time. (General Counsel Exhibit No. 1; R.T., Vol. VII, p. 84, ll. 9-12). She was also identified as one of a group of UFW sympathizers at the potting table in January-February 1981, who, along with Efigenia Albarran, Maria Huizar, Amparo Godinez, Carmen Catalan, Claudia Valerio, Francisco Lozano and Yolanda Menez, would gather during breaks on Respondent's premises and discuss the Union.

Sales production manager Gilbert Resendez testified that Maria Reynoso was one of three water persons laid off from Division 1. Because of the slowdown in business, the remaining eleven people in the crew -- all capable of driving a jeep, assembling plants for sale,[7/] pruning or spacing -- would be able to do the watering and the rest of the work. Maria Reynoso had no experience in any of the above tasks, and although she had previously worked in Division 7, she was not recommended for transfer as there would be layoffs in

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7. Assembly involves the selection of plants of optimal size and quality, affixation of labels and transferral of plants to flats which are then transported to the shipping docks.

the latter division as well.[8] The termination report completed by Mr. Resendez indicated that Ms. Reynoso was subject to seasonal layoff, and that she was an acceptable watering person who was eligible for rehire. (Respondent Exhibit No. 11).

C. Francisca Lozano -- Division 3

Francisca Lozano testified that she started working for Respondent in the cutting shed (Division 7) in 1973, was laid off for a short period, and returned to work in Division 7 assembling orders for approximately four months. She returned again in January 1976 and worked in various departments within Division 7 for the next four years without incident. She then worked in a tying crew for Narciso ("Tito") Branca for approximately two months (February-March 1981), and the supervisor's criticisms of Ms. Lozano's "lack of enthusiasm" and "slow work" were the subject of charges at the earlier hearing. Ms. Lozano was then transferred to Division 3 under supervisor Augustin Ramirez, where she worked as a waterer for approximately five months prior to the October 1, 1981, layoff. She was on vacation when the decision was made to include her in the reduction in work force.

Ms. Lozano denied that she received any criticism in Division 3, testifying rather that Ramirez told her she was doing very well, that he was very happy with her work, and that there would be watering for her through the middle of November. Further, Lozano testified that Branca had recommended her for the transfer

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8. Indeed, in 1981, unlike previous years, because of the economic situation no workers were transferred to Division 7 through the last date of the hearing (December 12, 1981).

because she was such a competent water person. Ms. Lozano suggested she was capable of pruning and assembling orders in Division 3 because of her previous experience with those tasks in other divisions.

Ms. Lozano was referred to as one of the "very active" union supporters by organizer Washburn, wore a UFW button, cap and jacket to work for many months, signed the May 29, 1981 letter to Bruce Usrey as a member of the UFW organizing committee at Monrovia Nursery, and testified on behalf of General Counsel at the earlier hearing. She was also identified as one of the UFW supporters with whom Efigenia Albarran would congregate during breaks at Division 7.

For the Respondent, Gilberto Resendez testified that on Monday, September 28, he informed division manager Augustin Ramirez that "because of the slowdown in work and the drastic downturn in sales, we were going to have to lay off again, as we normally do in the fall, and I asked him to give me the names of the people that he felt he could do without in his division." (Reporter's Transcript, Vol. V, p. 96, lines 26-28; p. 97, lines 1-2). At that time, Ramirez gave Resendez five names (from a crew total of 17) -- two (or four)[9/] students who worked on Saturdays, Jose Frias, a jeep driver with attendance problems, and waterers Maria Ruiz and Francisca Lozano. According to Resendez, Ms. Lozano was selected for layoff because she was the slowest water person who was often the last to arrive and the first to leave, and because she was

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9. I find no particular significance in the factual conflict between Mr. Ramirez' statement that four schoolboys were laid off, as opposed to Mr. Resendez' recollection that only two had been laid off. Both agreed that the full-time employees laid off were Mr. Frias, Ms. Lozano, and Ms. Ruiz.

unable to do the other tasks available at the division -- e.g., jeep driving, consolidating, and assembling orders. (R.T. Vol. V, p. 99, ll. 15-18).

Mr. Resendez testified that there were over 200 varieties of plant material in Division 3 which required that employees knew the characteristics of these plants. The assembly work that Ms. Lozano had done under supervisor Branca was principally related to berberis, euonymus, and ligustrum varieties which are basically the same size, and shipped in the spring. Thus, Ms. Lozano had no previous experience in the only jobs available in the division at the time of the layoff. She was allegedly not transferred back to Division 7, according to Resendez, because of the slowdown in that division. On the termination report, Resendez indicated that Ms. Lozano had a "very poor attitude" and would not be recommended for rehire, although she received a "good" score in attendance and punctuality and a "fair" score in work habits. He stated that, "It didn't seem like she had a whole lot of interest in her work." (Reporter's Transcript, Vol. 7, p. 96, ll. 27 and 28.)

Mr. Ramirez testified that he had spoken to Ms. Lozano about her work problems, and denied telling her that her work was fine and/or that there would be watering through the end of November. The division manager described Lozano as an inferior worker compared to those retained on the work force. However, Ramirez acknowledged that he was aware of Ms. Lozano's prior testimony at the earlier hearing as well as the UFW insignia she would wear to work. None of the remaining members of Ramirez' crew -- all males -- wore UFW buttons or other identifiable Union

insignia.

Narciso Branca testified that he thought Ms. Lozano's way of working was not very good because "she would always be in front of the others," and "would take off her gloves before the others." (Reporter's Transcript, Vol. 8, p. 21, lines 1-8.) He also opined that she was a slow worker, and that she (as well as Maria Reynoso) was the first waterer he volunteered for other divisions, because he "didn't have to be calling their attention." (Reporter's Transcript, Vol. 8, p. 35, lines 4-7.)

In rebuttal, Onorio Catalan, brother of an alleged discriminatee in the earlier hearing (Carmen Catalan) testified that he never noticed Ms. Lozano arriving late or leaving early while working in Division 3, suggesting that worker Manuel Gomez -- a substitute jeep driver and assembler with the least seniority in the division -- was the earliest to leave.

D. Maria Jimenez -- Division 6

Maria Jimenez commenced working for Respondent assembling orders, pruning, and cleaning up in Division 8 in July 1973. After approximately three years she was transferred to the potting table in Division 7 where she worked another three years before being transferred to Division 6 under Rudy Armendariz. There, she assembled orders, pruned, canned, weeded, and watered until the layoff, with the exception of a brief (September 1980 - February 1981) return to Division 7. Ms. Jimenez denied ever having been criticized for her work by any supervisor, but did admit that she had certain problems with co-workers which prompted her request for a transfer within Department 7 (prior to her work at Division 6). A

recommendation for her layoff in the winter of 1980 was apparently rescinded when Ms. Jimenez had learned about the Company's intended action from co-workers, with Mr. Resendez and Mr. Poorbaugh instead deciding to transfer her back to the potting because she "had always done a good job." (Reporter's Transcript, Vol. 2, p. 103, ll. 24-28; p. 104, ll. 1-2.) Ms. Jimenez denied any other incidents at work, and suggested that her performance was comparable to other workers within her division. Finally, she testified that she was assigned to advise other workers because of her experience and skills.

Ms. Jimenez was referred to as one of the "very active" union supporters by organizer Washburn, testified as a witness on behalf of General Counsel at the earlier hearing, and referred to herself as the only open-UFW supporter in her crew at the time of the layoff. She referred to five or six people not laid off who were more recent arrivals to the division.

Gilberto Resendez testified that three persons were laid off from Division 6 (from a crew of 19) because of the slowdown in sales which affected the rest of the nursery. Maria Jimenez was selected for layoff by Division Manager Armendariz because she was slow in her work and wasted time -- "the only person out of the division that goes most to the restroom" (Reporter's Transcript, Vol. 8, p. 42, ll. 17-18.)

Mr. Armendariz testified that he had selected her for layoff in 1980 for the same reasons. He suggested that some persons with less seniority were retained because they "were better and faster" workers (Reporter's Transcript, Vol. 8, p. 53, ll. 11-12),

and denied that Maria Jimenez ever advised or assisted other workers with less seniority. No persons had been transferred to Division 6 since the October 1st layoff through the date of the hearing.

Ms. Jimenez' termination report rated her "good" in attendance and punctuality, and "fair" in work habits. It was recommended that she not be rehired with the remark that she "tended to waste a lot of time". (Respondent's Exhibit, No. 4.)

E. Maria Medina -- Tying Crew of Narciso Branca

Maria Medina initially worked in the cutting department (Division 7) for approximately six weeks in 1975 when she was transferred to Division 10 to water until she was laid off. She returned to the potting shed in 1977, and worked there and in other departments within Division 7 until February 1981 when she was transferred to Narcisco Branca's tying crew. She denied that Mr. Branca ever criticized her job performance, stating that the latter always told her she did very good work. Medina admitted to having been late on two occasions to take her children to school, and further described a conversation with her supervisor in which she advised him that she did not like to arrive early at the time clock because she didn't want to be surrounded by other people.

Ms. Medina was described as one of the "very active" union supporters by organizer Washburn, attended UFW meetings, wore union insignia at work (for approximately three weeks in January 1981), and testified on behalf of the General Counsel at the earlier hearing. She stated that the only four open union supporters in her crew -- Maria Rios, Maria Huizar, Carmen Gomez, and she -- were the four to be laid off on October 1.

Supervisor Branca viewed Medina as a very slow worker who usually arrived late and did not pay attention to her work. He testified that he spoke to her regarding her promptness on one occasion, as well as discussed her slow pace on one other occasion. On cross-examination, he admitted telling Maria Medina she was a very good worker and even sent her to assemble orders because of her experience and skill.

Sales production manager Resendez confirmed that the basic reason for Ms. Medina's layoff was that she was a slow worker and tended to be late from time to time. Her termination report -- signed by Mr. Resendez -- rated Ms. Medina as "good" in attendance and punctuality; "fair" in work habits. The form further indicated that she was not acceptable for rehire because she "tended to arrive at [the last] minute" and "didn't show much interest in her work." (Respondent's Exhibit No. 13).

F. Maria Rios -- Tying Crew of Narciso Branca

Also included in Supervisor Branca's layoff decision was Maria Rios. Ms. Rios first worked some four years in Division 7 starting in 1973, voluntarily left, and returned to the division in 1978. She worked in several departments within that division until transferred to Division 4 under Charles Edwards. There, she watered and assembled for approximately three months and then moved to Narciso Branca's tying crew in July 1981. She denied receiving any criticism from her supervisors until the very day of the layoff,[10/]

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10. Ms. Rios testified that supervisor Branca criticized her for spending too much time at the lunch wagon on the day she was laid off (October 1, 1981).

testifying that Mr. Edwards gave her additional responsibilities because of her good work, and was also put "in charge" of a weeding crew in Division 7 because of her abilities.

Maria Rios was identified by organizer Washburn as one of the "very active" union supporters, passed out leaflets, attended meetings, and wore a UFW button to work in Division 7 as well as in Narcisco Branca's crew. She testified that Supervisor Catalina Fierro asked her if she knew all the problems she was getting into by going into the union. She described the supervisors' attitude toward her as friendly and talkative until her UFW's sympathies became known, at which time they started to ignore her.

Supervisor Branca testified that Maria Rios became distracted or distracted others with her talking. He denied knowledge of her union activities, and considered the four employees not laid off to be "better employees" than Ms. Rios.

Mr. Resendez completed a termination report for Maria Rios giving her a "good" rating in attendance and punctuality, and a "fair" in work habits, indicating that she was not suitable for rehire because the quality of her work was poor, she talked incessantly, and didn't pay attention to instructions (Respondent Exhibit No. 12).

Charles Edwards described Ms. Rios as a "fairly good worker" whose work habits could be improved because she talked too much and went to the bathroom too much. He conceded that Ms. Rios at times substituted in the office for his assistant, but attributed this position to her bilingual capabilities rather than to her work performance. A similar rationale was give by production manager Jim Poorbaugh for the weeding assignment given Ms. Rios.

G. Atala Villarreal -- Espalier Crew

Atala Villarreal worked in a tying crew for Tomasa Lopez from 1972 to 1978. She then tied in Elisa Espinoza's espalier[11] crew for three years until the October 1 layoff, and was periodically loaned out to other divisions for watering. She described an incident with foreman David Fierro which occurred during the summer of 1981. Ms. Villarreal asked Mr. Fierro how to water a particular group of plants. The foreman apparently became somewhat upset when Ms. Villarreal suggested there was a potential dangerous condition in that the plants were too close together. Ms. Villarreal related the incident to Mr. Resendez and Mr. Fierro informed Mr. Resendez that he did not want her to return to water in his division.

Ms. Villarreal was described by organizer Washburn as a member of the core group of "very active" Union supporters. She wore Union insignia to work, attended meetings, distributed leaflets and attended the Fresno convention in 1981 with Maria Fernandez. She stated that out of the 11 people in her crew, only she and Paula Arzate (who was not laid off) were open UFW supporters. She attended some sessions, but did not participate in the earlier hearing, arriving after work between 4:00 p.m. and 5:00 p.m.

For the Respondent, Gilberto Resendez testified that he decided to lay off Ms. Villarreal because of the general cutback in production at the nursery. She allegedly had a history of being

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11. Ornamental plants which grow on trellises.

very argumentative and hard to get along with. He described various disagreements Ms. Villarreal had with supervisors and/or coworkers, and had warned her in June 1980 that if they recurred, he would have to take more drastic measures. On the day of the layoff, Mr. Resendez told Ms. Villarreal that she alone was selected from the espalier crew because she was unable to get along with coworkers and supervisors. The "incident" with Mr. Fierro was the last of a series of incidents which determined Ms. Villarreal's fate with the company. (R.T., Vol. VII, p. 50, lines 20-24.) The termination report completed by Mr. Resendez characterized Ms. Villarreal as having "good" attendance and punctuality, and "fair" work habits, with the recommendation that she not be rehired, because she was very disruptive, did not get along with the crew and forelady, and the supervisor from Division 1 did not want her back to water. (Respondent's Exhibit #10.)

H. Division 7 Employees

(1) Claudia Valerio -- Potting Shed

Claudia Valerio commenced assembling orders for Maggie Garcia in 1979. After one year she was transferred to the potting department under Catalina Fierro for two months and then went to the cutting shed under Maria Elena Ibarra. After three months she assembled orders, watered, and pulled weeds in Division 4, and returned to potting some four months later where she remained until the October 1 layoff. Ms. Valerio denied having any problems at work -- either with coworkers or supervisors. Her performance was described as satisfactory by coworker (alleged discriminatee) Amaparo Godinez who at times counted labels in the potting shed.

Ms. Valerio talked to her coworkers about the Union and associated with UFW supporters Adela Moraza, Amparo Godinez, Maria Fernandez and Carmen Catalan. A few months prior to the layoff, she signed a UFW authorization card at work while her supervisor Catalina Fierro was looking in her direction at a distance of some 25-30 feet.[12]

(2) Adela Moraza -- Potting Shed

Ms. Moraza commenced working in the cutting shed in May, 1976, and transferred to Maggie Garcia's department where she assembled orders for three to four months. She then returned to the cutting shed for approximatley eight months. She voluntarily left the nursery for three months in 1978, returned to the cutting shed in February 1979, for another seven to eight months, and was later transferred to the potting department. Between February 28, 1979 and October 1, 1981, she worked in the cutting and potting departments, spending the four months immediately preceding the layoff planting and potting under supervisor Catalina Fierro. She denied any criticism from her supervisors or problems with coworkers, and was described by coworker Amparo Godinez as a good worker who was performing two jobs.

Ms. Moraza was described by UFW organizer Scott Washburn as one of the "very active" union organizers, wore UFW insignia to work, gathered signatures, attended meetings, spoke to coworkers during breaks, and signed the May 29, 1981 letter as a member of the UFW organizing committee at Monrovia Nursery. She attended, but did

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12. Supervisor Fierro denied observing Ms. Valerio sign the authorization card. Because the supervisor's denial was specific and Ms. Valerio's recollection of whether Ms. Fierro observed her imprecise, I do not infer Respondent knowledge by this event.

not participate in, one session of the previous hearing.

(3) Amparo Godinez -- Potting Table

Ms. Godinez was hired to work in Division 7 in July 1969. She canned and assembled plants under supervisor Maggie Garcia for approximately three months and was then transferred to the potting table. Until the layoff in October 1981, she worked at least nine months a year at potting, and also sporadically worked "outside" with Maggie Garcia for one-two weeks. In 1979 and 1980, she also worked three months in the cutting department. Additionally, Ms. Godinez worked in Division 4 (watering and assembling orders) for approximately three months commencing in February 1981 and for one month in Division 16, but returned to the potting table because of physical problems she was having while working in the sunlight. Ms. Godinez denied any problems with her supervisors, but detailed one incident where she exchanged angry remarks with coworker Maria Valdez[13] for which both were reprimanded by Division Manager Dennis Connor.

Ms. Godinez was described by UFW organizer Scott Washburn as one of the "very active" Union supporters, attended Union meetings, wore a UFW button to work (along with one other worker in her department -- Celina Galvan -- who was not laid off), and distributed leaflets outside the entrance to the nursery. She signed (as member of the UFW organizing committee for the company) the May 29 letter directed to Bruce Usery, and attended the earlier

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13. Ms. Godinez testified that her coworker called her "a pitiful spit" and she (Godinez) retorted, "You pitiful elephant without a tail". (R.T., Vol. 3, p. 110, lines 21-26.)

hearing on a few occasions.

(4) Efigenia Albarran -- Potting Shed

Efigenia Albarran first started working in Division 7 in 1974, spending a little over one year with Maggie Garcia assembling orders before being transferred to the potting shed. After maternity leave, she returned to the potting shed for approximately five months, assembled orders "outside" with Maggie for eight months, and returned to potting. She stayed at the potting shed (with the exception of a four-month assignment taking yellow leaves off plants with another forelady and a two-month leave of absence for an accident) until September 11, 1981, when she took her fifth maternity leave. She denied having been criticized by her supervisors or having any problems with coworkers that were called to the attention of her foreladies.

While at work, Ms. Albarran associated with known union adherents Carmen Catalan, Maria Medina, Amparo Godinez, Francisca Lozano, Claudia Valerio, Yolanda Menez and Maria Reynoso. Ms. Albarran's husband Lorenzo also wore a UFW button to work (Division 7) for approximately three weeks in February 1981.

(5) Socorro Cervantes -- Cutting Shed

Socorro Cervantes started working for Respondent in May 1968, pulling weeds and watering, in Tomasa Lopez' crew. She then assembled orders in Divison 16 and was thereafter transferred to cutting where she had worked some 11 years prior to the October 1 layoff, except for various sporadic assignments in other divisions. She denied ever having problems with coworkers, or receiving criticisms from her supervisors. However, she admitted to "missing"

a few times because of sickness or family problems.

As was conceded by Respondent, Ms. Cervantes testified on behalf of General Counsel at the earlier hearing, and wore a UFW button to work in the presence of company supervisors.

(6) Maria Fernandez -- Cutting Shed

Maria Fernandez worked full time with Respondent for twelve years -- generally in the cutting department, and at times was tranferred to potting or "liner" work with Maggie Garcia. She received compliments for her work performance from her supervisors, and denied any problems with coworkers. On one occasion, in March, 1981, cutting forelady Maria Elena Ibarra assured Ms. Fernandez that she need not fear a layoff because she was a good worker.

Ms. Fernandez was described by UFW organizer Scott Washburn as one of the "very active" Union supporters at Monrovia Nursery. She wore a UFW button to work on a daily basis for approximately four months (commencing January 1981), attended the convention in Fresno in September 1981, spoke to UFW organizer Washburn during the noon break in late September 1981, and signed the May 29, 1981, letter to Mr. Usrey as a member of the UFW organizing committee from the nursery.

For the Respondent, Division 7 manager Dennis Connor testified that twenty-four (24) people from his area were laid off due to the general slowdown in business. Bruce Usrey contacted him approximately one week prior to October 1 and informed him that some twenty-thirty percent of the division had to be laid off. Mr. Connor's criteria for selecting individuals for the layoff was their work performance and "versatility" on the job -- i.e., being able to

work in the various departments of the division.

Some eight people in total were laid off from the potting shed, and Connor testified that he relied upon the identical standards in determining who would be selected for layoff:

Claudia Valerio was chosen because she had poor cutting scores, was not a good liner worker and was not an exceptionally good potter. Ms. Valerio's termination report indicated a potting shed score of 2,600 per day, and a cutting shed score of 1,400 per day.[14/] Ms. Valerio was given a "good" mark in attendance and punctuality, a "fair" in work habits, and was not found acceptable for rehire. (Respondent Exhibit No. 19.) Even though Ms. Valerio was working in the potting shed at the time of the layoff, Mr. Connor considered her cutting scores because of anticipated future cutbacks in the potting and greater need in the cutting during the winter months.

Adela Moraza had low potting and cutting scores, was not considered a good liner worker, and was not acceptable for rehire (Respondent's Exhibit No. 20.)

Amparo Godinez was an excellent potter, but had poor cutting scores, and was a poor liner worker (because of her problems working in the sun). As she was "quarrelsome with other workers" and "foul mouthed", she was not acceptable for rehire. (Respondent's Exhibit No. 21.)

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14. These figures represent an average score gleaned by Mr. Connor from records in the cutting shed during December through January, 1981, and potting shed scores in the spring and summer of 1981. A more detailed discussion of these scores follows, infra.

Efigenia Albarran was on pregnancy leave at the time of the layoff, and was selected because of her "fair" potting scores (2,300 per day). She was described, however, as having a "good attitude", was a good liner worker, and was deemed suitable for rehire (Respondent Exhibit No. 24.)

Of the six people laid off from the cutting shed, Socorro Cervantes was selected because her cutting scores were consistently low, and because Connor had problems with her "as being an unsteady worker, coming and going from the job a lot." (R.T., Vol. VIII, p. 11, lls. 25-28; Respondent Exhibit No. 23.) She was also a poor liner worker and was not recommended for rehire.

Maria Fernandez was a good potter and cutter, but was chosen because she was not going to be able to work in the liners in the spring. She was considered suitable for rehire. (Respondent Exhibit No. 22.)

Mr. Connor denied that seniority was a consideration in his decision to make the layoffs in Division 7, or that any new hirees had been selected for his division since October 1. Further, he denied that there were any workers transferred into his division at the time of the layoff or thereafter (with the exception of a group that went from Division 7 to weeding and then returned) as was the practice in previous years. Further, Connor testified that he made his decisions without consultation with any of the immediate supervisors within the division.

V. Analysis and Conclusions:

Section 1153(c) of the Act makes it an unlawful labor practice for an employer "[b]y discrimination in regard to the hiring or tenure of employment, or any term or conditions of employment, to encourage or discourage membership in any labor organization". This state's highest court, as well as the ALRB and the NLRB, have recommended that the standard to be applied is whether the employer's conduct (layoff of 13 employees in this instance) would not have occurred "but for" the union activity. (Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal. 3d 721, citing Wright Line, a division of Wright Lines, Inc. (1980) 251 NLRB No. 150, 105 LRRM 1169; Royal Packing Company v. Agricultural Labor Relations Bd. (1980) 101 Cal.App. 3d 826.) The General Counsel has the burden of establishing the elements which go to prove the discriminatory nature of the employer's actions. Among the factors to weigh in determining General Counsel's prima facie case are the extent of the employer's knowledge of the employee's union activities, the timing of the alleged unlawful conduct, and the employer's anti-union animus.

In the instant case, Respondent admitted that Maria Reynoso, Maria Jimenez, Maria Medina, Socorro Cervantes and Francisca Lozano testified at the June, 1981 hearing. Uncontroverted testimony also placed employees Atala Villarreal, Adela Moraza, and Amparo Godinez at the hearing as observers for one or more sessions. Fourteen employees were designated members of the UFW organizing committee at the nursery -- including Francisca Lozano, Amparo Godinez, Adela Moraza, and Maria Fernandez -- which

designation was made known to Respondent's supervisory personnel in late May, 1981. The credible testimony of UFW organizer Scott Washburn indicated that of some 15 very active union supporters at Respondent's operations, approximately 10 were subject to the layoff -- Jose Mendoza, Amparo Godinez, Atala Villarreal, Adela Moraza, Maria Rios, Maria Jimenez, Socorro Cervantes, Maria Fernandez, Francisca Lozano, and Maria Medina.

Finally, in varying degrees which will be considered infra, each of the alleged discriminatees either attended meetings, wore UFW insignia, distributed leaflets, associated with other openly supportive UFW sympathizers and/or discussed their views with various supervisory personnel. While the extent of the activity may have varied from individual to individual, I find that Respondent's knowledge of its employees' union activities and/or sympathies to be established by a preponderance of the evidence.

I thus reject Respondent's contention (Respondent's Brief, p. 15) that it had no knowledge of the Union activity engaged in by workers Valerio, Rios, Medina, Jimenez, Albarran and Mendoza. Both Medina and Jimenez testified on behalf of the General Counsel at the earlier hearing as was conceded by Respondent. Valerio and Albarran associated with union activists; Rios and Mendoza wore UFW insignia while at work. Where, as here, the Respondent has engaged in an active anti-union campaign which included the dissemination of its own propaganda, as well as group and individual meetings among supervisors and employees regarding the pros and cons of unionization, the knowledge of the employees' union activities may be inferred. (S. Kuramura, Inc. (1979) 3 ALRB No. 49, rev. den.,

Ct.App., 1st Dist., October 26, 1977; hg. den. December 15, 1977.) Although such activity was extremely limited in certain cases (e.g., Efigenia Albarran and Claudia Valerio, the import of which will be discussed infra), I find it more likely than not that Respondent's supervisory personnel were aware of the UFW activists working on its premises.

The timing of the layoff is somewhat more problematical. The testimony of Jim Poorbaugh, Bruce Usrey, and Gilberto Resendez all placed the decision to seasonally layoff 10-15 percent of the work force prior to the renascent union activity which commenced 28 September 1981 (Monday). Indeed, union activity had been somewhat dormant pending the outcome of the June hearing. The Notices of Intent to Organize and to Take Access were not delivered by UFW Organizer Washburn until the Monday following the Saturday on which General Manager Usrey had been notified of the decision regarding layoffs. However, the methodology of the layoff, and the identity of those employees who would be selected for layoff was apparently not determined until the period between Monday, September 28, and Wednesday, September 30 -- to wit, following notice to the Respondent of the UFW's renewed organizing efforts. And since it is the manner of selection of the employees who were laid off rather than the fact of the layoff itself (which all parties concede to be necessitated by [non-discriminatory] economic conditions)[15/] the

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15. As pointed out by the Administrative Law Officer in J & L Farms (1980) 6 ALRB No. 43, rev. den. Ct.App., 1st Dist., Div. 1, May 18, 1981; hg. den. June 17, 1981, the "fact that a layoff may be justified for economic reasons does not preclude the conclusion that a specific person may have been discriminated against by being laid off." (Fn. 11, p. 9, ALOD, citing Akitomo Nursery (1977) 3 ALRB No. 73, rev. den., Ct.App., 5th Dist., December 28, 1979.)

timing is at least consistent with the inference that the procedures were discriminatorily motivated.[16]

The record evidence of anti-union animus is also somewhat less than definitive. While the company did conduct its own campaign involving weekly (or more) meetings, distribution of company insignia, posting of caricatures, and counseling sessions with supervisory personnel, Section 1155 of the Act provides that "[t]he expressing of any views, arguments, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute evidence of an unfair labor practice, if such expression contains no threat of reprisal or force, or promise of benefit." Although highly disparaging of the union effort,[17] the caricatures contained no threat of reprisal or force, or promise of benefit, and are therefore not supportive of General Counsel's case. While certain derogatory statements have been found violative of both the ALRA and the NLRA (see Harry Carian (1980) 6 ALRB 55, citing Globe Construction Company (1967) 162 NLRB 1547 [64 LRRM 1217]; Doral Hotel and Country Club (1979) 240 NLRB 1112 [100 LRRM 1392]; Wolfie's (1966) 159 NLRB 22 [62 LRRM 1332]), the diagrams in the instant case do not impute impurity, suggest moral turpitude, or embody obscene epithets which have been found inimical to employees'

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16. While some four months had elapsed since the June hearing, there was no decision to lay off any employees during the interim summer (busy) months. Hence, I do not find the four-month hiatus to be of great significance.

17. One cartoon featured a boot kicking a posterior carrying a UFW insignia; another exhibited a two-faced (angel-devil) union spokesman; a third suggested the folly of union promises (General Counsel Exhibits 9A-9C).

protected rights. It is true that the suggestion that the Union did not fulfill its promises might have been more tastefully drafted. However, I am reluctant to conclude that they constitute evidence of violations of the Act in light of the section 1155 proviso.

I reach a similar conclusion with respect to the leaflet distributed by Respondent to the employees laid off on October 1, 1981, (Respondent Exhibit No. 1). Paragraph 4 of the layoff announcement provides. "Although we have had to issue layoffs at this time we are optimistic that conditions will improve so that we can provide more jobs. Don't be fooled into thinking that by giving your support to a union you will create a job for yourself. At the Monrovia Nursery employment has always been based on your performance, the skills you have acquired and the length of time you have been with us. During the winter months we employ those workers who have shown good work habits and over the years have developed the skills to match the work available." (Emphasis added.)

Included, as it was, in an announcement of a company-wide layoff which would affect many long-term employees, the suggestion that workers should not be "fooled" into thinking that they will create a job for themselves by supporting the union might raise a suspicion of unlawful motivation. The language may carry the implicit message that jobs will be made (kept) available for those who decide not to support the union. Conversely, those who do demonstrate UFW sympathies would find their jobs in jeopardy. Since the language is included in the Respondent's "official" notice of the layoff, the leaflet would arguably tend to establish a causal nexus between the unlawful motivation and the alleged offending

conduct. (See Louis Caric & Sons (1978) 4 ALRB No. 108, remanded by Ct.App., 5th Dist., Augst 13, 1980, modified by 6 ALRB No. 50 (1980).)

However, the instant statement is not charged as an independent violation of the Act, nor does General Counsel suggest that it provides evidence of anti-union animus. There was no evidence as to why the company included the statement in its notice, nor did any employees testify as to how they perceived these remarks. Hostility per se between the company and the Union in a pre-election campaign is not equivalent to an unfair labor practice. As the Ninth Circuit Court of Appeals has stated:

> It is well established law that an employer has the right to express opinions or predictions of unfavorable consequences which he believes may result from unionization. Such predictions or opinions are not violations of the National Labor Relations Act if they have some reasonable basis of fact and provided that they are in fact predictions or opinions rather than veiled threats on the part of the employer to visit retaliatory consequences upon the employees in the event that the union prevails. (N.L.R.B. v. Lenkurt Electric Company, Inc. (9th Cir. 1971) 438 F.2d 1102, 1105, 1106.

This Board has not adopted the view that the mere expression of anti-union views would tend to prove anti-union animus. (See Lassen Canyon Nursery (1978) 4 ALRB No. 21.) While there is a divergence of views among the circuit courts of appeals (compare N.L.R.B. v. Colvert Dairy Products (10th Cir. 1963) 317 F.2d 44 with Darlington Mfg. Co. v. N.L.R.B. (4th Cir. 1968) 397 F.2d 760 [68 LRRM 2363], cert. denied, 393 U.S. 1023 [89 S.Ct. 632, 21 L.Ed. 567]; Indiana Metal Products v. N.L.R.B. (7th Cir. 1953) 202 F.2d 613 [31 LRRM 2490]), I am not inclined to infer anti-union animus from protected free speech. Here, the suggestion that the

Union cannot create jobs -- albeit articulated in a somewhat confusing manner -- is an accurate statement of fact. The supplication that workers not be "fooled" is consistent with the earlier campaign's caricature which hinted at the folly of UFW promises. In contrast to recent NLRB precedent where the employer predicated adverse economic actions upon unionization (Joint Electrical Industry and Pension Committee (1978) 238 NLRB No. 196 [99 LRRM 1455] -- employer statement to employees that the loss of employment was attributable to the union held violative of the NLRA; Shield-Pacific, Ltd. (1979) 245 NLRB No. 51 [102 LRRM 1497] -- employer unlawfully told employees that continued membership in the union would limit their opportunities to return to work; Reeves Rubber, Inc. (1980) 252 NLRB No. 26 [105 LRRM 1586] -- disparaging employees' need for union in context of statements that employees had forfeited pay increases held violative of the NLRB), Respondent herein merely indicated to its employees what the union could not truthfully promise. Such "propaganda" reiterated its earlier pre-election (protected) oratory. While there is no doubt the company utilized the announcement of the layoff to promote its own (anti-union) position, I do not infer unlawful motivation in the determination of the individuals to be laid off from this statement.

Nor do I find evidence of unlawful threats made by supervisory personnel to company employees. Alleged discriminatee Jose Mendoza did testify that his former supervisor Salvador Oceguera warned that somebody had been fired in years past for supporting the union. But I decline to attribute this statement to Mr. Oceguera for the following reasons: (1) The latter specifically

denied the remark; (2) Mr. Mendoza's recollection of the events surrounding the alleged conversation was very imprecise; (3) Since there was no indication that there had ever been a prior union organizing effort (pre-September 1980), it is somewhat unlikely that the threat would have been made in the manner alleged. Similarly, I find that General Counsel failed to sustain its burden of proving that supervisor Catalina Fierro warned worker Maria Rios about getting involved in union problems. Again, the supervisor's denial was specific; the employee's recollection of dates, times, places, and exact conversations was somewhat less than impressive. While I have no reason to doubt the sincerity of either Mr. Mendoza or Ms. Rios -- on the contrary, both attempted to answer questions directly, honestly, and in a seemingly unrehearsed manner -- I find that the preponderant evidence does not establish that either of these (unprotected) threats occurred.

There may or may not be evidence of anti-union animus in the eight unfair labor practice charges litigated in Case No. 80-CE-90-SD, et al. However, as no Board decision had been issued in this matter at the date of this writing, pursuant to Section 20286 of the Regulations, I decline to rely upon the decision of the Administrative Law Officer (issued December 11, 1981) for purposes of this hearing. While General Counsel has requested that I take notice of this decision (see General Counsel's Brief, p. 1, fn. 1), no authority for such action has been cited. NLRB precedent seems to indicate that it is inappropriate for the Administrative Law Judge to rely on credibility findings made in another case. (See Local No. 3, Electrical Workers (Nixdor Computer Corp.) (1980) 250

NLRB No. 82 [105 LRRM 1431].) As the administrative law officer's findings in the previous decision were at least part based on credibility resolutions, and no "final" adjudication by the Board has yet been made, I feel it inappropriate to adopt the same and/or incorporate them into this decision. Suffice it to say that the General Counsel's prima facie case would become much more compelling herein to the extent that any or all of the violations charged in the previous case -- concerning events taking place during the initial UFW organizing campaign commencing in September 1980, and involving some of the same individuals named herein as alleged discriminatees[18/] -- are affirmed by the Board.

The absence of the more common indicia of anti-union animus, however, does not foreclose inquiry into the issue of whether the alleged discriminatees' union activities and/or sympathies were a motivating factor in Respondent's determination to lay them off. Indeed, Respondent has referred to a list of factors relied upon in earlier ALRB (and NLRB) cases to determine the existence of anti-union motivation (See Respondent's Brief, p. 25, citing C. Mondavi & Sons (1979) 5 ALRB No. 53, rev.den. Ct.App., 1st Dist., Div. 2, June 18, 1980; hg. den. November 26, 1980). They include: (1) The extent to which the alleged discriminatee engaged in union activity; (2) The employment record and general efficiency of the alleged discriminatee; (3) The extent of employer knowledge of the individual's union activity; (4) Other unfair labor practices committed by the employer; (5) Statements or conduct by the employer

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18. E.g., Francisca Lozano, Maria Reynoso.

showing state of mind; (6) The timing of the employer's action; (7) The anti-union activity by the employer.

Although the present record reflects no evidence of other unfair labor practices (Factor 4), or (unprotected) anti-union activity by the employer (Factor 7), application of the other criteria to at least two of the alleged discriminatees in the instant case (Maria Fernandez and Amparo Godinez) suggests unlawful motivation. Both Ms. Fernandez and Godinez were long-term employees with impeccable records.[19/]
Both were among the most active UFW supporters -- as members of the UFW employee organizing committee at Monrovia Nursery which status was known by company supervisory personnel. While the layoff was seasonal in nature, neither employee had been previously laid off. The decision as to which employees were to be laid off was made immediately after notice of the UFW's renewed organizing effort. While the company articulated a policy of providing work on the basis of performance, skills, and length of tenure, employees of equal (or inferior) skills and less seniority who apparently did not support the union were not laid off in the cutting and potting departments. While approximately 12 percent of the work force was laid off on October 1, 10 of 15 "very active" Union supporters, or

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19. I reject the Respondent's reliance on Ms. Godinez' "foul-mouthed" propensities as a reason for her layoff. Supervisor Connor could recite only one "incident" during Ms. Godinez' thirteen years with the company. I find it totally incredible that the exchange (which apparently did not result in the layoff of the other participant, Maria Valdez) could render Ms. Godinez a substandard employee.

67 percent of the Union activists were not retained.[20/] Similar to the circumstances in the Wright Line, supra, decision, I find it of further significance that Respondent departed (without explanation) from its articulated policy of affording some priority to long-term employees in the determination of the Division 7 layoffs.

From the foregoing, I conclude that General Counsel has made a prima facie showing that Ms. Fernandez' and Ms. Godinez' union activity was a motivating factor in Respondent's decision to include them in the 1981 layoff. That determination, juxtaposed with my earlier findings with respect to the union activities and company knowledge thereof relating to the 11 other alleged discriminatees, as well as the timing of the announcement, lead me to conclude that the General Counsel has established a causal nexus between the employees' protected activities and the employer's action with respect to all 13 alleged discriminatees. Unlike the situation in Lu-Ette Farms Inc., (1977) 3 ALRB No. 38, a disproportionate number of more visible UFW supporters was laid off in the instant case. Here, Respondent's inexact personnel policies singled out at least two open UFW supporters who were selected for layoff for no other ostensible (lawful) reason. Ten of the thirteen alleged discriminatees were found unsuitable for rehire, despite the fact that many had never been previously criticized in their work or

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20. Even if Mr. Washburn's testimony were not to be credited, 4 of 14 (or approximately 29%) of the UFW employee organizers listed in the May 29, 1981, letter to Bruce Usrey, were laid off. Although Mr. Washburn had an obvious "interest" in the proceedings, I found him to be a generally credible witness as he testified in a responsive and apparently sincere manner.

laid off in earlier years. I therefore find that the General Counsel has established a prima facie case with respect to all 13 alleged discriminatees. The task at hand thus becomes one of weighing the Respondent's proffered business rationale for the layoff of each of the 13 individuals involved. I shall treat them according to their employment positions with Respondent at the date of the layoff, corresponding to the factual findings, since the criteria for the layoff varied somewhat from department to department.

A.) Jose Mendoza -- Maintenance

It is undisputed that Jose Mendoza did not possess the carpentry skills of his companions Alejandro Baltazar and Simon Perez. While he had worked for Respondent for some three years, he was a recent arrival to the maintenance department. His transfers throughout the company were necessitated by various physical ailments which rendered him unable to perform in other areas. Because of this low productivity and seniority, division manager Ed Ash, with the concurrence of production manager Jim Poorbaugh, included Mr. Mendoza in the group of 83 to be laid off.

General Counsel's prima facie case pales in comparison. The primary reference to supervisorial knowledge of Mr. Mendoza's union activities was attributed to former supervisor Jose Oceguera, and no allegation was raised that the previous transfer from Mr. Oceguera's crew was discriminatory. Furthermore, for the reasons aforesaid, I am not inclined to credit Mr. Mendoza's version of the threat allegedly uttered by supervisor Oceguera. At most, the

former supervisor was aware of Mendoza's union sympathies,[21] but no alleged disciminatory action was taken for one full year from the date of the Oceguera-Mendoza conversation.

The only reference to another "similarly situated" employee -- a "Roberto" who suffered from identical physical ailments but apparently was not laid off -- is insufficient to suggest disparate treatment. There is no evidence as to Roberto's job position, skills, or performance in his division. Of the other four employees laid off from Mr. Ash's area, three possessed skills similar to those of Mr. Mendoza. Although the other employee laid off from maintenance possessed greater skills, he was absent excessively. None were alleged to be union supporters.

Weighing all the evidence in this particular instance, I find that the Respondent's legitimate business rationale for the layoff to be the more persuasive. Here, Jose Mendoza just did not possess the experience and skills requisite to be retained in his work area. Even, assuming arguendo, that Mr. Mendoza was the "most vocal" union supporter in his maintenance crew,[22] I find that he would have been laid off regardless of this proctected conduct because of the legitimate economic reasons

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21. The supervisor did recollect a conversation with Mendoza in which the latter stated that he did not need to be advised about his rights because he (Mendoza) already knew about the union. R.T. Vol. VII, p. 140, ll. 4-5.

22. Mr. Mendoza testified that there were no visible supporters in the maintenance crew, but did not indicate whether or not he openly expressed his pro-union views after his transfer into this area.

proffered by the Respondent.[23/] I therefore recommend that that portion of the complaint be dismissed.

B. Maria Arroyo (Reynoso) -- Division No. 1

As Ms. Reynoso did not testify at the hearing, there was no evidence to rebut Mr. Resendez' testimony that Ms. Reynoso was laid off because of her low seniority and limited skills. Three "watering" persons were chosen for layoff from Division 1, leaving a remaining crew of 11 people experienced in jeep driving, assembling orders, pruning, and spacing, as well as watering. While there was significant indicia of Ms. Reynoso's union activities -- prior testimony, association with the pro-UFW adherents, wearing of union insignia, all of which was known to the Respondent -- I find that Respondent has proven that it would have reached the same decision (to lay off Ms. Reynoso) regardless of her union activities. (See Nishi Greenhouse (1981) 7 ALRB No. 18.) She had worked for Respondent only two years prior to the layoff decision. She was deemed acceptable for rehire. There is no suggestion that she alone was singled out for layoff from her division because of union activities and/or sympathies. The reasons articulated by Mr. Resendez for her layoff were consistent with the announced criteria of performance, skills, and length of time at the nursery.

Unlike other years, no workers were transferred into Division 7 at the time of the 1981 seasonal layoff. General Counsel

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23. I make no finding with respect to the duty, if any, of Respondent to rehire Mr. Mendoza at some future time. As of the date of the hearing, no workers were added to the work force -- either new hirees or rehired personnel -- and thus the issue of the respondent's duties in this regard was not litigated.

has failed to rebut Respondent's proffered (legitimate) business justification for this "change" in practice -- to wit, the economic slowdown which caused cutbacks in the propagation division as well. General counsel has not demonstrated that this facially neutral policy was either directed at discouraging union involvement and/or had a disproportionate impact upon union activists. Indeed, there is no showing that a disproportionately large number of union activists were among those who would normally expect to be included in a transfer between the divisions rather than among those to be laid off. Certainly, Ms. Reynoso had not established long tenure with the Respondent, and could not reasonably have expected to be transferred every year during seasonal slowdowns. I therefore conclude that no discriminatory motivation has been proven with respect to the decision to lay off Ms. Reynoso and will recommend that that portion of the complaint be dismissed.

C. Maria Jimenez -- Division No. 6

I reach a different conclusion with respect to the layoff of Ms. Jimenez. Respondent's avowed rationale -- that she was slow, and tended to waste a lot of time (by going to the bathroom frequently) is not supported by documentation other than manager Armendariz' testimony and the termination report[24/] completed by Mr. Resendez. No prior warnings or discipline had ever been imposed on Ms. Jimenez. Moreover, a comparison of Ms. Jimenez' termination

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24. As the termination report was not completed until after the initial charge had been served upon general manager Bruce Usrey, I view it with some caution. (See Thermo Electric Co. (1978) 222 NLRB 358, 368 [91 LRRM 1310], enf'd (3rd Cir. 1977) 547 F.2d 1162.)

report with that of Blanca Macias Cruz suggests identical work performance. The distinction between the two forms is that Ms. Jimenez worked for the nursery for some six-plus years more than Ms. Cruz. While both were laid off, the latter, not the former, was deemed elegible for rehire.

The exclusion of tenure from consideration of Ms. Jimenez' situation further beclouds Respondent's alleged economic justification for her layoff and is inconsistent with its avowed policy of rewarding employees for the length of time that they have been with the company. This is not to suggest that Respondent must or should have followed some form of seniority basis for its employment decisions. Rather, once Respondent has announced that seniority was a factor in its layoff determination, any proffered rationale applied to a particular individual (with long-term seniority) which ignored this factor becomes suspect. And Respondent's belated efforts to deny any seniority policy (see Respondent's brief, page 3) is equally suspicious and suggestive of "shifting" business justifications. While no rigid seniority lists were adhered to by the company, its articulated policy did consider the employee's tenure. And the Respondent's evidence that long-term employees were laid off in prior years (i.e., before the union organizing effort) was limited to the recitation of one worker by name -- Demisio Serrano -- whose failure to be recalled was one of the subjects of litigation at the previous hearing.

Division manager Armendariz' denial of knowledge of Maria Jimenez' union activites casts additional doubt on the bona fides of Respondent's reasons for her layoff. She testified at the previous

hearing, and even showed Mr. Armendariz her subpoena to do so. She wore UFW insignia to work, and considered herself the only active UFW supporter in her division. While others (non-union supporters) were laid off, they enjoyed less tenure with the company. Weighing the evidence in Ms. Jimenez' case, I am not persuaded by Respondent's proffered business justification. I find that Respondent's consideration of Ms. Jimenez' union activities and/or sympathies to be causally related to her layoff. I find it more likely than not that she would not have been laid off but for her protected activity on October 1, and will recommend the appropriate remedy therefor.[25/]

D. Francisca Lozano -- Division No. 3

Respondent's proffered rationale that Francisca Lozano was the slowest of all water people in Division 3, had a very poor attitude, and was always last to start in the morning and first to

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25. The fact that Ms. Jimenez was recommended for layoff the preceding year does not alter the conclusion that unlawful motivation determined her status in October 1981. Ultimately, she was not laid off in 1980 because of "rumors" which had preceded the company's decision. I do not find this evidence to be either supportive of or harmful to General Counsel's case in this regard, as it is uncertain from the record as to whether the 1980 episode preceded the initial UFW campaign. Indeed, no supervisory personnel denied that when Ms. Jimenez was informed that she would not be laid off in 1980, she was told that her work performance was satisfactory. These statements seem more probative of her actual performance than Mr. Armendariz' testimony that she went to the bathroom too much. Because I am unable to draw any inferences with respect to the 1980 transfer, I am not persuaded by Respondent's contention that Ms. Jimenez was merely a victim of the 1981 neutral policy of non-transfer. In Ms. Jimenez' case, unlike that of Ms. Arroyo, the employee had performed satisfactorily over a long period of time. Since Respondent's articulated policy was to reward such long-term employees, it is highly incongruous that work would not have been found for Ms. Jimenez absent some prohibited consideration.

quit in the afternoon does not withstand scrutiny. Conflicting testimony of supervisors Branca and Ramirez, on the one hand, and workers Lozano and Catalan on the other suggest that Lozano was either too slow, too fast, or an average worker. More persuasive, I think, is Mr. Lozano's relatively long tenure with Respondent -- over six years -- and the lack of any documentary evidence[26/] of her inadequate performance.

Compared with Ms. Lozano's open union activities, prior testimony, and membership in the company's employee organizing committee, I find Respondent's alleged business justification not to be persuasive. Although she was on vacation at the time of the layoff decision, her union sympathies were well known to the company. The organizing effort had just been rejuvenated, and she was a focal point of the earlier litigation. While only ten (males) remained in Division 3 following the layoff, none of them were open union supporters. A declaration by production manager Gilberto Resendez attributing Ms. Lozano's layoff in part to her low crew seniority, also buttresses the conclusion that Respondent "shifted" its proffered business justifications to shield its true anti-union motivation. That is, company seniority was articulated as a factor in the October 1 layoff announcement. In Division 7, seniority was not considered. In Division 3, lack of crew seniority was averred by Mr. Resendez to be a primary reason for Ms. Lozano's layoff.

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26. The termination report gave Ms. Lozano a "good" in attendance and punctuality; a "fair" in work habits. Respondent further conceded that it followed a disciplinary procedure which included suspensions for substandard employees. There is no evidence that Ms. Lozano had ever been suspended prior to the date of the October 1 layoff.

(See General Counsel Exhibit No. 19, p. 2, ll. 19-22.)[27/] After reviewing all the evidence, I find that the decision to lay her off on October 1 to be causally related to Respondent's anti-union motivation. Had she not been a union adherent, I find it likely that her long-term tenure with the nursery would have dictated that she would have either remained in Division 3 or returned to Division 16.[28/] In any event, absent her UFW activity, she would have not been among the 83 laid off. In light of Ms. Lozano's previous experience and satisfactory efforts in other divisions, I find Respondent's explanation for the layoff to be insufficient to rebut the General Counsel's case in her regard, and I will recommend the appropriate remedy therefor.

E. Maria Medina, Maria Rios -- Division No. 6

I find Respondent's avowed reasons for laying off these two employees similarly implausible. There was no documentation of Ms. Rios' alleged incessant talking, or Ms. Medina's "slow" work and/or tendency to arrive at the last minute. Both had worked at Respondent's operations for a number of years and Ms. Rios had been assigned tasks given to employees of experience and skill. All four laid off from Mr. Branca's crew were the only open UFW supporters in

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27. I have decided to grant General Counsel's motion to receive this exhibit in evidence on the basis of Evidence Code section 770(b). The declaration was presented to Mr. Resendez while he was testifying, and I believe he had a reasonable opportunity to explain the inconsistency. It is further admissible as an authorized admission exception to the hearsay rule. (Evidence Code §1222.)

28. Again, this is not to suggest a particular methodology of Respondent's layoff decision. Respondent could have opted for any system, so long as it was not discriminatorily motivated.

the group. Non-union-supportive workers with less seniority were retained. Narcisco Branca -- the supervisor responsible for this layoff selection -- was a particularly ineffective witness, denying knowledge of the workers' open union support, and presenting his testimony in an obsequious manner, seemingly geared to pleasing the audience rather than to reciting the factual circumstances of the layoffs.

I find it particularly incongruous that neither Ms. Rios or Ms. Medina would be deemed suitable for rehire in their respective termination reports in light of Branca's admitted statements that "his girls" were good workers. Nor was a contention made that seniority was followed in this decision as avowed in the "official" announcement issued on the day of the layoff.

I conclude that Ms. Rios' and Ms. Medina's very active involvement with the UFW and the UFW organizing effort to be determinative of the layoff decision. Had they been less vocal in their sentiments, they would likely have escaped the October 1 reduction in work force, regardless of any alleged (legitimate) business justification articulated by the Respondent.

In reaching this conclusion, I reject Respondent's suggestion (see Respondent's Brief, p. 17) that Ms. Rios and/or Ms. Medina falsified their testimony regarding their union support and wearing of UFW insignia. Although Ms. Rios had difficulty in remembering dates, she appeared to be a straightforward and sincere witness who made an earnest attempt to accurately recall prior events. Ms. Medina's testimony was similarly credible.

F. Atala Villarreal -- Tying Crew

Ms. Villarreal was allegedly laid off because of her inability to get along with coworkers and her crew forelady (Elisa Espinoza), as well as because of the "problem" she had with supervisor David Fierro in Division No. 1. On the one hand, any "problems" Ms. Atala Villarreal might have had with Ms. Espinoza do not at first blush appear to be related to the layoff decision. The incidents described involving Ms. Espinoza occurred in previous years, and Ms. Espinosa did not testify as to Ms. Villarreal's performance in the espalier crew. This employee had been with Respondent nine years, and her work had never been criticized. I consider the "incident" with David Fierro insignificant, particularly since it was the employee who brought it to Mr. Resendez' attention in July, and since no indication was given to Ms. Villarreal at that time that this was "the straw that broke the camel's back." Other employees who had faced disciplinary suspension from prior misconduct were retained.

I find Ms. Villarreal to have been an open UFW supporter, who attended some sessions of the previous hearing, and along with coworker Paula Arzate, constituted the only UFW activists in her crew. Although the 1981 layoff exceeded in magnitude previous seasonal reductions, I find it highly suspicious that this union activist would be subject to the layoff (for the first time in nine years) coincidental with the renewed union organizing effort. That her termination report would suggest that she not be rehired, I find further supportive of General Counsel's case and inconsistent with Respondent's proffered business justification. While it is true

that Ms. Arzate, the other openly pro-union activist in the crew was not laid off, the fact that some union adherents escaped the discriminatory policy does not excuse violation of the Act. (See Sahara Packing Co. (1980) 4 ALRB No. 40.)

On the other hand, Respondent's reasons for the layoff of Ms. Villarreal were consistently articulated both in her termination report and in Mr. Resendez' conversations with the employee in the days immediately following the layoff. While the David Fierro incident seemed insignificant, it was undisputed that Mr. Fierro uttered his preference to Mr. Resendez not to have Ms. Villarreal return to his division. Ms. Arzate, the only other openly pro-union supporter in the espalier crew -- was "more vocal" than Ms. Villarreal, at least to the extent that she (Ms. Arzate) was a known member of the employee organizing committee. While I do not find Respondent's business justification particularly persuasive in Ms. Villarreal's situation, I do not find that General Counsel's prima facie case was particularly persuasive in her regard. Her "attendance" at some sessions of the previous hearing (arriving after work between 4:00 p.m. and 5:00 p.m.) does not evidence great union activity. While her work performance was satisfactory, Ms. Villarreal did admit to her prior problems. On balance, I am unable to conclude that Respondent would not have laid off Ms. Villarreal in the absence of her protected conduct. Although she survived other seasonal layoffs for nine years, and the "problems" she had been causing were not sufficient to determine her layoff previously, it is true that a much larger number were laid off in 1981. The more "marginal" employees could thus be expected to be included in

that year's reduction in force. It does not seem unreasonable for Respondent to lay off the one employee who was asked not to work for certain supervisory personnel. As I am not convinced that General Counsel has carried its burden in rebutting Respondent's non-discrminatory rationale for its decision with respect to Ms. Villarreal, I shall recommend that that portion of the complaint be dismissed.

G. Division No. 7 -- Claudia Valerio, Adela Moraza, Amparo Godinez, Efigenia Albarran, Socorro Cervantes, Maria Fernandez

The criteria used for selecting the 24 workers to be laid off from the employer's propagation division were work performance and versatility on the job according to the testimony of division manager Dennis Connor. However, these standards were not consistent with the announced company policy of retaining long-term employees who had performed satisfactorily during their tenure. Furthermore, the standards were not consistently applied. For example, an excellent potter and cutter -- Maria Fernandez -- was selected for layoff because she was not a good liner, while recently hired employee Maria Mota had not worked in either cutting or the liner department prior to October 1. I find it highly unlikely that Ms. Mota -- who had been employed for approximately two months -- would be given preference over Ms. Fernandez, in the absence of discriminatory motivation. It further belies credulity that Amparo Godinez would not be acceptable for rehire after twelve years with the company (the longest seniority in the potting department) with a history of excellent potting scores because she was "foul-mouthed." The isolated incident interjected by Respondent suggests more that

its decision to lay off Ms. Godinez was related to her union activities -- she was a member of the employee organizing committee and testified at the earlier hearing -- than to any (non-discriminatory) economic justification. I reach a similar conclusion with respect to Socorro Cervantes who had been with Respondent since 1968. There was no documentation of her being an "unsteady" worker or that she was a problem for any reason other than her open union support. While Adela Moraza had worked fewer years with Respondent (since 1979), her satisfactory performance record, coupled with manager Connor's recommendation that she not be rehired, and her open union activities (she was a member of the UFW organizing committee), suggest discriminatory treatment.

I reach a different conclusion with respect to Ms. Albarran and Ms. Valerio. Their Union support was extremely limited (association with active Union supporters during breaks and at meetings). Ms. Albarran's husband wore a UFW insignia, and was retained. Ms. Albarran was on maternity leave on October 1 and was recommended for rehire. Ms. Valerio had only been with the company for two years and had extremely low cutting scores. I find that General Counsel has failed to prove by a preponderance of the evidence that these two workers would not have been selected for the layoff but for their union activities and will recommend that that portion of the complaint be dismissed.[29/]

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29. For the reasons cited, I decline to grant Respondent's motion to preclude the amendment to the complaint. As the matter was fully litigated, there is no prejudice to any party by this determination. (See Porter Berry Farms (1981) 7 ALRB No. 1.)

In reaching these findings, I have considered the various potting and cutting scores that were introduced at the hearing (General Counsel Exhibits Nos. 14, 15, 16, 17 and 18), but do not find them determinative in the instant case. All the employees were considered satisfactory workers, and none had previously been laid off.[30/] Nor does Respondent's contention (Respondent's Brief, p. 47, fn. 39) that a smaller percentage of union supporters were laid off from this division than the total laid off accurately characterize the record. A more significant statistical analysis might compare the number of UFW supporters laid off in proportion to the total laid off from the division. That figure -- 7 of 24 (28%) -- is greater than the total number from the division laid off (10-15 percent). Since this number also represented 21% (3/14)[31/] of the employee organizing committee, and 26.7% (4/15)[32/] of the "very active" union supporters at the nursery, Respondent's layoff policy had a not insignificant impact on the union organizing efforts. While I do not view this Board's function to determine the methodology of employer's layoff decisions, the Act prohibits discriminatory motivation in their effectuation. Because I do not find Respondent's proffered business justification to be persuasive with respect to eight of the named discriminatees, I find that

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30. Conversely, I find Mr. Connor's apparent underestimation of the potting and cutting scores of the alleged discriminatees to be insignificant. Under any tabulation, Ms. Valerio's scores were low; Ms. Albarran's scores were mediocre.

31. Amparo Godinez, Adela Moraza, and Maria Fernandez.

32. Amparo Godinez, Adela Moraza, Socorro Cervantes, and Maria Fernandez.

General Counsel has sustained its burden of proving the Section 1153(a) and (c) violations.[33/]

SUMMARY

I find that Respondent MONROVIA NURSERY COMPANY violated Sections 1153(a), (c) and (d) of the Act by laying off UFW activists Francisca Lozano, Maria Jimenez, Maria Medina, and Socorro Cervantes on October 1, 1981. Respondent violated sections 1153(a) and (c) of the Act in the layoffs of Maria Rios, Adela Moraza, Amparo Godinez, and Maria Fernandez. I recommend dismissal of all other fully litigated allegations raised during the hearing. Because of the importance of preserving stability in California agricultural, and the significance of protecting employee rights, I recommend the following:

REMEDY

Having found that Respondent MONROVIA NURSERY COMPANY has engaged in certain unfair labor practices within the meaning of Sections 1153(a), (c) and (d) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that Respondent MONROVIA NURSERY COMPANY unlawfully laid off Francisca Lozano, Maria Jimenez, Maria Medina, Maria Rios, Adela Moraza, Amparo Godinez, Socorro Cervantes, and

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33. An integral part of the union activities of Ms. Lozano, Ms. Jimenez, Ms. Medina, and Ms. Cervantes, was their testimony at the prior hearing. I therefore find that Respondent has also violated section 1153(d) in their cases. I am unable to ascertain the extent of Ms. Godinez' participation in the prior hearing, or the causal nexus, if any, between that participation and the lay off decision. I therefore decline to find a further section 1153(d) violation in her regard.

Maria Fernandez, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former jobs without prejudice to their seniority or other rights and privileges.

I shall further recommend that Respondent make Francisca Lozano, Maria Jimenez, Maria Medina, Maria Rios, Adela Moraza, Amparo Godinez, Socorro Cervantes, and Maria Fernandez whole for any losses they may have suffered as a result of its unlawful discriminatory action by payment to them of a sum of money equal to the wages and other benefits they would have earned from October 1, 1981, to the date on which they are reinstated, or offered reinstatement less their respective earnings and benefits, together with interest at the rate of seven percent (7%) per annum. Such backpay and benefits are to be computed in accordance with the formula adopted by the Board in J & L Farms, supra.

In order to further effectuate the purpose of the Act and to insure to the employees the enjoyment of the rights guaranteed to them in Section 1152 of the Act, I shall also recommend that Respondent publish and make known to its employees that it has violated the Act, and that it has been ordered not to engage in future violations of the Act. (See M. Caratan, Inc. (October 26, 1978) 4 ALRB No. 83; 6 ALRB No. 14 (March 12, 1980) review den. by Ct.App., 5th Dist., May 27, 1980).)

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

ORDER

Respondent, MONROVIA NURSERY COMPANY, its officers, agents, and representatives shall:

(1) Cease and desist from:

(a) Discouraging membership of employees in the United Farm Workers of America, AFL-CIO or in any other labor organization by unlawfully laying off any of its agricultural employees or in any other manner discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, because of their union membership, or because they participated in proceedings under the Act.

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

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

(a) Offer to Francisca Lozano, Maria Jimenez, Maria Medina, Maria Rios, Adela Moraza, Amparo Godinez, Socorro Cervantes, and Maria Fernandez immediate and full reinstatement to their former jobs at Respondent's operations without prejudice to their seniority or other rights and privileges.

(b) Make whole each of the agricultural employees discriminatorily laid off for any loss she suffered as a result of her layoff, by payment to each of them of a sum of money equal to the wages they lost, less their respective net earnings, together with interest thereon at the rate of seven percent (7%) per annum. Backpay shall be computed in accordance with the formula established

by the Board in J & L Farms, supra.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all records relevant and necessary to a determination of the amounts due to the aforesaid employees under the terms of this order.

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

(e) Post copies of the attached Notice in conspicuous places at its Azusa property for a 90-day period, the times and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any notice which has been altered, defaced, covered, or removed.

(f) Mail copies of the attached Notice in all appropriate languages within 30 days of issuance of the Order to all employees employed by Respondent from 1 October 1981 to the present.

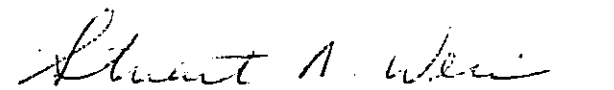
(g) Arrange for a representative of Respondent or a Board agent to distribute and read the attached notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading(s), 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 Respondent to all non-hourly wage

employees to compensate them for time lost at this reading and the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps which have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with this Order.

It is further recommended that the remaining allegations of the Complaint as ammended be dismissed.

DATED: March 8, 1982



STUART A. WEIN
Administrative Law Officer

NOTICE TO EMPLOYEES

After a hearing at which each side had a change to present its facts, the Agricutural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to 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 farmworkers these rights:

1. To organize themselves;
2. To form, join, or help any union;
3. To bargain as a group and to choose anyone they want to speak for them;
4. To act together with other workers to try to get a contract or to help or protect each other; and
5. To decide not to do any of these things.

Because this is true, we promise you that:

WE WILL NOT layoff or otherwise discriminate against any employee because he or she has exercised any of these rights.

WE WILL offer Francisca Lozano, Maria Jimenez, Maria Medina, Maria Rios, Adela Moraza, Amparo Godinez, Socorro Cervantes, and Maria Fernandez their old jobs back if they want them, and will pay them any money they lost because we discharged them unlawfully.

DATED:

Signed:

MONROVIA NURSERY COMPANY

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.