Union City, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KITAYAMA BROTHERS, Respondent, and LABORERS INTERNATIONAL UNION, LOCAL 304, AFL-CIO, Charging Party.	)	Case Nos. 79-CE-40-S 79-CE-40-1-S 10 ALRB No. 47 (9 ALRB No. 23)

SUPPLEMENTAL DECISION AND ORDER

On December 31, 1983, Administrative Law Judge (ALJ) James Wolpman issued the attached Supplemental Decision and Recommended Order in this proceeding. Thereafter, Respondent filed exceptions to the proposed Supplemental Decision and Order along with a supporting brief and General Counsel filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[1/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions

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[1/] All section references are to the California Labor Code unless otherwise specified.

of the ALJ[2/] and to adopt his recommended Order.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that Respondent Kitayama Brothers, its officers, agents, successors and assigns, shall pay to Clemente Gomez the backpay amount of $13,794.64, plus interest on such amount computed in accordance with the formula for calculating interest set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Dated: November 30, 1984

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

[2/] We uphold the ALJ's exclusion of the stipulation entered into by General Counsel and Respondent at the beginning of the hearing on the underlying unfair labor practice charge. Attorney Morgan's statement on the record in the liability phase as to the limited purpose of the stipulation, together with attorney Aguilar's testimony herein and her contemporaneous notes of conversations with representatives of Respondent, provide substantial evidence that Respondent did not in fact make an unconditional offer of reinstatement as recited in the stipulation. On that basis, the stipulation was properly disregarded by the ALJ. (Back v. Farnsworth (1938) 25 Cal.App.2d 212, 220.)

CASE SUMMARY

KITAYAMA BROTHERS

10 ALRB No. 47
(9 ALRB No. 23)
Case Nos. 79-CE-40-S
79-CE-40-1-S

ALJ Decision

In Kitayama Brothers (1983) 9 ALRB No. 23, the Board determined that Respondent violated sections 1153(c) and (a) of the ALRA by refusing to reinstate Clemente Gomez, and it ordered Respondent to reimburse him for lost wages and benefits. A backpay hearing was held on June 28 and 29, 1983. The ALJ concluded that the backpay period ended on June 30, 1981, when Respondent made an unconditional offer of reinstatement to the discriminatee. The ALJ also determined that Gomez was justifiably terminated from his interim employment for failure to seek permission to leave work when ill, and thus the ALJ concluded that backpay should be tolled for the period Gomez would have continued working but for his unjustified conduct. The ALJ concluded that Gomez should be reimbursed for his reasonable travel expenses based on estimates, and for union dues and initiation fees paid for use of a union hiring hall in seeking interim employment. The ALJ modified Gomez' claim for vacation pay to take into account the amount he would have earned if he had not unjustifiably left his interim employment. The ALJ disallowed payment for treatment of a medical condition, because General Counsel failed to prove that treatment would have been covered under Respondent's medical plan.

Board Decision

The Board affirmed the rulings, findings and conclusions of the ALJ, and adopted his recommendations. The Board upheld the ALJ's exclusion of a stipulation entered into by General Counsel and Respondent during the hearing on the underlying unfair labor practice charge, because the evidence showed the stipulation was made for a limited purpose, and there was substantial proof that Respondent did not make an unconditional offer of reinstatement on the date recited in the stipulation. The Board ordered Respondent to pay the discriminatee the net backpay due him plus interest.

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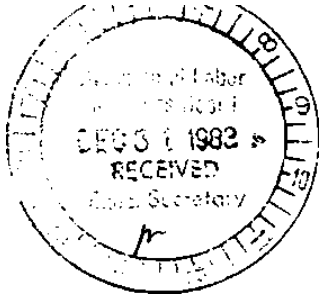
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



In the Matter of:	Case Nos. 79-CE-40-S 79-CE-40-1-S
KITAYAMA BROTHERS	(9 ALRB No.23)
Respondent,	
and	
LABORERS INTERNATIONAL UNION LOCAL 304, AFL-CIO,	
Charging Party.	

Appearances:

Devon Ann McFarland
of Salinas, California
for the General Counsel

Frederick A. Morgan
Stan G. Roman
of San Francisco, California
for the Respondent

Before: James Wolpman
Administrative Law Judge

SUPPLEMENTAL DECISION OF ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

The Board, in 9 ALRB No. 23, found that Kitayama Brothers violated sections 1153(c) and (a) of the Act by refusing to reinstate or rehire Clemente Gomez, and it ordered that he be made whole for the resulting loss of pay and benefits.

When the parties were unable to agree on the amounts due, the Salinas Regional Director issued a back pay specification on June 3, 1983. (Bd. Ex 1-C.) Respondent filed its answer on June 20. 1983. (G.C. Ex 1-E.) An amended specification was filed June 21. 1983. (Bd. Ex. 1-F.)

The case was heard before me on June 28 and 29, 1983, in Fremont, California, at which time a number of matters were stipulated to and testimony was received on the issues remaining. Both the General Counsel and the Respondent filed post hearing briefs.

The findings of fact and conclusions of law which follow are based upon the entire record, including my observation of the witnesses, and upon careful consideration of the arguments and briefs of counsel.

STIPULATIONS

A number of factual issues were disposed of by stipulation:

1. Gomez' backpay period begins July 11, 1979.

2. Gomez worked in the roses, primarily in the position of "flower boy", or "rose pickup", for which he received premium pay in the amount of $.30 per hour more than his hourly wage. Gomez is therefore entitled to the wage increases Respondent granted in the "Nursery A" classification as follows:

November 5, 1979 .....$3.65/hr.

May 26, 1980.....$3.80/hr.

October 1, 1980.....$4.05/hr.

April 1, 1981.....$4.20/hr.

Premium pay for "rose pickup" has remained at $.30 per hour more than the hourly wage.

3. The appropriate measure of the earnings Gomez would have earned is the actual wages earned by:

a. The employee who replaced Gomez, Rafael Gonzalez, during the period July 11, 1979 through August 14, 1980, and Marzo, from August 15, 1980 (the date upon which he replaced Gonzalez).

4. Gomez' weekly gross backpay is set forth in Appendix A to the first Amended Backpay Specification, and is the actual weekly earnings of replacement employee, Gonzalez, through August 14, 1980, and of replacement employee, Marzo, from August 15, 1980 through June 30, 1981.[1/]

5. During that period which is specified in stipulation four Gomez would have earned vacation pay in the amount specified in Appendix A to the first Amended Backpay Specification.

6. Gomez' interim earnings set forth in Appendix A to the Backpay Specification are admitted subject to the right of

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1. The General Counsel explained the use of weekly, rather than daily earnings:

> The wages were chosen on a weekly basis because the records available to the field examiner who was drawing up the spec.'s were on a weekly basis as well as the interims from Silva's Pipeline. (I:27.)

The respondent agreed that weekly earnings were more appropriate in this instance. (I:27-28.)

Respondent to establish additional interim earnings. (I:3-4.)

These stipulations and the information they incorporate by reference have been used, where appropriate, in the Back Pay Calculation which is Appendix I to this Recommended Supplemental Decision.

ISSUES

After taking into account the matters stipulated to, the following issues remain:

1. The date on which the backpay period ended. General Counsel concedes that an unconditional offer of reinstatement was made June 30, 1981. Respondent claims that valid offers were made earlier.

2. The circumstances of Gomez' leaving his interim employment. Respondent claims that its backpay liability to Gomez ended September 29, 1980, when he was terminated by Silva's Pipeline for leaving work without notifying his supervisor. General Counsel contends that he was laid off on that date for lack of work.

3. The expenses he claims. General Counsel asserts that Gomez is entitled to reimbursement (a) for the dues and initiation fees he paid to the Laborers Union, (b) for medical expenses, (c) for gasoline expenses in seeking employment and commuting to work, and (d) for the vacation pay he would have earned at Kitayama. Respondent contests his right to reimbursement for any of these items.

THE OFFERS OF REINSTATEMENT

I. BACKGROUND FINDINGS

Kitayama Brothers grows and wholesales cut flowers. (9

ALRB No. 23, ALJD p. 2.) It is located in Union City and is run by Tom Kitayama and his brother-. (II:14-15.)

Following an election held June 13, 1978, Local 304 of the Laborers' International Union, AFL-CIO, was certified on December 5, 1979, as the collective bargaining representative of the Kitayama employees. See Kitayama Brothers Nursery (1979) 5 ALRB No. 70. Negotiations began in the spring of 1980; the employees struck July 28, 1983; and the strike lasted until October 27, 1980, when agreement was reached on a contract. (I:46; II:15; G.C. Ex 5.)

Clemente Gomez was active in the organizing campaign; and, at the end of June 1979 -- a little more than two weeks after the election -- he asked for and was give a leave of absence. (9 ALRB No. 23, ALJD pp. 13-14.) A week later, on July 3, 1979, he paid the amount required for union membership and continued his membership throughout the period relevant to this proceeding.[2/] (G.C. Ex 12; II:55-56.) On July 11, 1979, he returned to Work, but was denied reinstatement. (9 ALRB No. 23, ALJD p. 14.) As a result, on December 13, 1979, the Union filed the underlying unfair labor practice charge on his behalf. (Id. at p. 1; 1:6.)

Gomez was not an employee of Kitayama at the time of the certification or during the negotiations and strike. By then he had found other work through the union's hiring hall and, for most of that period, was employed at Silva's Pipeline — a company whose employees were represented by the Laborers. (Resp. Ex 6; I:15,29-30, 102.)

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2. There is a discrepancy between the Union's records and Gomez' testimony as to when he joined. (Compare G.C. Ex. 12 with I:23.) I find the records to be more accurate than his recollection; in any event, the difference has little significance.

II. THE FIRST OFFER

Findings. The first of the offers which Respondent claims to have terminated its backpay liability occurred on May 29, 1980, during a discussion between Robert Morgan, the attorney who was representing Kitayama, and Wayne Smith, the then Regional Director for the Sacramento Region. (I:45, 57.) Morgan told Smith that if he at any time thought the charge had merit to let him know and he would see to it that Gomez was put back to work. Morgan said that he was a good worker and Kitayama had nothing against him as far as his work was concerned. (I:58.)

There is nothing in the record to indicate that Smith and Morgan pursued the matter further or that Smith discussed it with Gomez.[3/]

Conclusions. To terminate a backpay obligation, an employer must make a specific, unequivocal and unconditional offer of reinstatement to the affected worker or workers or to their authorized agent. The burden of proving that such an offer was made is with the employer. (Maggio-Tostado (1978) 4 ALRB No. 36; L.A. Water Treatment, Division of Chromalloy American Corp. (1982) 263 NLRB No. 22, p. 10.)

Morgan's comment was not made to Gomez or to his authorized agent. It was made to the representative of the ALRB who was responsible to see to it that the charge was investigated. The relationship of an investigator for a governmental agency charged with protecting a public interest to a member of the public whose

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3. Gomez testified that he did not know who Smith was (I:19.)

rights may have been violated is not one of agent to principal. (Teamsters Local 559 and John Catania, Jr. (1981) 257 NLRB 24, 27-28.)

And even if it were, the offer would still be defective because it was not to take effect unless and until Smith pursued his investigation, decided the charge had merit, got a hold of Morgan and told him so. It was, in short, conditional.[4/]

III. THE OFFER TO THE UNION

A. Findings of Fact

Part of the settlement which ended the strike and resulted in a collective bargaining agreement was a side agreement negotiated by company attorney Morgan and union attorney Dan Boone. (I:46-49; II:15-17.) It required the union to "make its best efforts to solicit withdrawal of pending unfair labor practice charges." (Resp. Ex. 1; G.C. Ex. 5.)[5/] For its part, the company was to advise the Adameda County District Attorney of its desire that criminal charges resulting from strike activity be dismissed. (Resp. Ex. 1; G.C. Ex. 5.) Although placed in a separate document, these understandings were tied to the dismissal of other legal proceedings and the reinstatement of strikers. All were, in turn, tied to agreement on the terms of a new collective bargaining

4. In view of the NLRB's insistence on clarity and specificity, it is doubtful that it would uphold a conditional offer on the basis that the conditions eventually occurred. That issue is not reached here because there is no evidence that Smith ever contacted Morgan to tell him that the charges had merit.

5. The charges involved others besides Gomez.

contract. (I:82-84.)

Although Gomez had left Kitayarna more than a year before the strike began, Morgan and Boone specifically discussed the unfair labor practice charges filed on his behalf and agreed that the union would use its best efforts to solicit their withdrawal. (I:50-51.) At the same time, according to Morgan, Boone asked he and Tom Kitayama:

> [I]f we would be willing to take them back and we said that we had already agreed and we were willing to take back Clemente, but we would not, under any circumstances take back the other two [workers who had charges pending]. (I:51.)6/

The side agreement which was thereupon prepared and executed covered the union's commitment to use its best efforts to withdraw the charges, but said nothing about reinstating Gomez. (Resp. Ex. 1; G.C. Ex. 5; I:51-52.)

The company made no attempt to contact Gomez directly (I:76).7/ Morgan believed he had no right to do so because Gomez was represented by the union. (I:76.) Eventually, Pete Moreno -- the

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6. The phrase, "we had already agreed" is ambiguous. There is no testimony about any earlier agreement between the union and the company over the reinstatement of Gomez, presumably, therefore, it refers to what "we" had agreed between ourselves; i.e., the agreement between Morgan and Tom Kitayama as to what they would tell the union they were willing to do.

7. During the hearing, respondent sought to present evidence of a letter from Tom Kitayama to Gomez offering him reinstatement and of conversation between Kitayama and Smith in which reimbursement was discussed. (II:20-27.) Because this evidence had not been provided to General Counsel in a timely fashion in accordance with the disclosure order I had made at the prehearing and because respondent did not establish good cause for its failure to disclose, I excluded the evidence. (Ukegawa Brothers (1982) 8 ALRB No. 90; Regulations, section 20249(c)(1); Sequoia Orange Company, Case Mo. 83-RC-4-D, et al., Board Order Denying Interim Appeal, dated November 25, 1983.)

Business Manager of Local 304 -- spoke to Gomez about the charge:

> I guess I discussed it with him, and at one time I had an offer to discuss with -- with the laborers that had filed unfair labor practice to talk to them and to desist — or to withdraw the charges. (II:37.)

He asked Gomez (in Spanish): "Do you wish to drop the charges against Kitayama?" (II:41.) Gomez said he did not. (II:52.) At no time did union attorney Boone discuss the matter with Gomez (I:18). Nor did anyone from the union mention reinstatement to him. (I:18-19; II:36.)

On February 12, 1981, Boone wrote to the ALRB. He stated that the union had used its best efforts, but went on to urge that a complaint issue on Gomez' behalf. (Resp. Ex. 4.) A complaint was filed on February 24, 1981. (II:100.)

Thereafter, the company grieved the union's breach of its agreement to use its best efforts to have the charges dismissed. (See I:89-90.) An arbitrator — after hearing detailed testimony from all of the participants -- sustained the company's grievance and awarded Kitayama its legal fees and costs in defending these unfair labor practice proceedings, but declined to hold the union responsible for backpay. (Resp. Ex. 9.) The award was subsequently confirmed as a Judgment of the Alameda County Superior Court. (11:94.)

B. Analysis, Concluding Findings, and Conclusions of Law

Kitayama's claim that it offered Gomez reinstatement through the union raises a number of questions: Was the union a proper party to receive the offer? If so, was it made and was it unconditional?

Kitayama did not contact Gomez directly; nor did anyone

from the union relay the company's offer to him. Consequently, even if it was unconditional, it would only be valid if the union was his agent.

The existence of any agency relationship turns on the particular facts of each case. (See Bagel Bakers Council of New York (1976) 226 NLRB 622.) Here the worker was a member of the union and had been active in its original organizing drive. He no longer worked for the company, but he had utlized the union's hiring hall in seeking work and eventually obtained a job with an employer whose employees were representated by the union. The union had filed the charges on his behalf and, in settling the strike, negotiated to resolve them. When the union business representative asked if he was willing to have them withdrawn, he said no but raised no objection to the union's right to speak for him. And the union did so by urging the ALRB to issue a complaint.

On these facts I conclude that the union was his agent. (See Lipman Brothers, Inc. (1967) 164 NLRB 850.) A communication to it was tantamount to a communication to him.

But was an offer made, and, if so, was it unconditional?

Although union representative Moreno said that he was never asked to convey an offer to Gomez, he could not recall whether reinstatement had been discussed in negotiations. (II:35.) This is not enough to overcome Morgan's testimony that an offer was made; especially since Boone, not Moreno, was the one with whom Morgan spoke. (I:51, 66, 68, 70.) I find, therefore, that an offer of reinstatement was made.

The best way to get at the issue of whether it was

unconditional is to examine carefully the context in which reinstatement was discussed. It came at the end of negotiations to settle a three month strike. The terms of the new contract had been resolved, but a number of issues remained: reinstatement for strikers, a law suit, an injunction, contempt proceedings, criminal charges, and the instant unfair labor practice charges.

Morgan wanted a full settlement, and that meant resolving all the issues. (I:70.) When it came to the unfair labor practice charges, his primary concern was to secure their dismissal. (I:51.) The union, however, said that it could not do so without the approval of the Regional Director and the consent of the workers involved. (I:51.) Morgan therefore told Boone that he would be satisfied if the union would use its best efforts to solicit withdrawal. (I:50.) This was agreeable to Boone, and so he and Morgan went on to discuss how to proceed. They agreed that Morgan would provide Boone with the information in his files and Boone would review it and then talk with the three workers about withdrawing the charges. (I:51, 68, 82-83.) At that point Boone — obviously anticipating the approach he would be making to the workers — raised the reinstatement issue. (I:51.) Morgan said that he and Tom Kitayama had discussed it and agreed that they were willing to take back Gomez, but not the other two. (I:51, 68.) Boone did not question this approach. (I:51.) A short while later, he left the room and drafted the Side Agreement which is Respondent's Exhibit No. 1. (I:50, 52.) When he returned, Morgan immediately signed it. (I:50,52.) As drafted and executed, the document deals only with the dismissal of the criminal charges and

the solicitation of the dismissal of the unfair labor practice charges; it says nothing about reinstatement. (Res. Ex.1.)[8/]

If one takes the offer in context and then asks how Morgan and Boone contemplated the matter would be broached with Gomez, it becomes clear that the solicitation of the withdrawal of the charges was meant to go hand in hand with the offer of reinstatement. Reinstatement would be an inducement to withdrawal, and would thus go to achieve Morgan's primary purpose-disposing of the charges.

Matters would perhaps have been otherwise if Morgan's overriding purpose had been concern over Kitayama's back pay exposure. In that case he would have had every reason to make an unconditional offer, independent of withdrawal. But the potential for liability was not his motivating concern. He believed—and continued to believe — that the company would prevail at hearing. (See G.C. Exs. 4 & 11; Resp. Ex. 2.) His aim was to avoid taking the matter that far. To do so he needed the charges withdrawn, and that was to be accomplished by having the union solicit their withdrawal; reinstatement was thrown in to "sweeten" the solicitation.

Matters might likewise have been different if Morgan had initiated the discussion of reinstatement independent of withdrawal of the charges. But he did not. It was Boone who raised the issue in response to Morgan's proposal for withdrawal, thus tying the one to the other.

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8. In contrast, the collective bargaining agreement contains a detailed procedure to be followed in reinstating strikers. (G.C. Ex. 5, p. 8.)

In testimony, Morgan characterized his offer to Boone as independent of withdrawal. (I:51, 70, 82.) It may be that subjectively he believed that there was no connection between the two, but the words used and the context in which they were spoken make it more reasonable to interpret them as interdependent. And I find them to be. (See Tri-State Truck Service, Inc. (1977) 241 NLRB 225.)

I therefore conclude that Kitayama has not sustained its burden of proving a specific, unequivocal and unconditional offer of reinstatement. (Maggio-Tostado, supra; L.A. Water Treatment, Division of Chromalloy American Corp., supra.) Reinstatement was tied to, and therefore conditioned upon, the Laborers' use of its best efforts to persuade Gomez to drop the charges.

The only thing out of the ordinary about the condition is that it did not depend on an act to be performed by the discriminatee (e.g., taking a physical examination,[9/] showing up at a designated time,[10/] or accepting a different or lower paid position).[11/] Rather, it depended on the happening of a separate event: the union's exercise of its best efforts. But the NLRB, when confronted with such autonomous conditions, has nevertheless found them to vitiate an offer. For instance, an offer of reinstatement "if work is available" had been held conditional even though it turns on an objective circumstance, separate and

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9. Standard Materials, Inc. (1978) 237 NLRB 1136.

10. Otsego Ski Club-Hidden Valley, Inc. (1975) 217 NLRB 408.

11. Albion Corp. (1977) 228 NLRB 1365.

apart from the conduct of the offeree and the offeror. (John J. Canova v. NLRB (9th Cir. 1983) 708 F.2d 1498.) Even more to the point is an offer to reinstate "if the union concedes the company was acting within its rights." It, too, has been held conditional. (Ross Gear and Tool Company (1945) 63 NLRB 1012, 1C 6.)

The respondent contends that, by grieving the failure of the union to use its best efforts, it affirmed its offer as independent of the union's breach. This contention does not take into account my finding that reinstatement was conditioned on the promise of best efforts. That being so, best efforts became a condition precedent to reinstatement and its breach permitted the filing of a grievance without the need to affirm, plead or prove a willingness to reinstate. (See 1 Witkin, Summary of Cal. Law (8th Ed. 1973) Contracts, Sec. 558, p. 477, and authorities there cited.)[12/] The arbitration award (Resp. Ex. 9) contains no mention of reinstatement. Apparently, neither the company, nor the union, nor the arbitrator considered its affirmation required for an award in Kitayama's favor.

IV SUBSEQUENT OFFERS TO ALRB REPRESENTATIVES

Findings. With the strike and negotiations concluded, Morgan was anxious to dispose of the pending charges. (I:54, 58.) To this end he wrote a number of letters and spoke directly and by telephone on a number of occasions with ALRB personnel in Salinas.

Letters were written November 10, 1980, to Norman Sato, the Salinas Regional Attorney (Resp. Ex. 2) and on Nov. 20, Lupe Martinez, the Salinas Regional Director (Resp. Ex. 3); on December

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12. It would have been otherwise if the Company had sought specific performance, but it did not.

31, 1980, another was written to Arcoles Aguilar, the ALRB attorney assigned to the investigation. (G.C. Ex. 3.) A telegram was sent to Sato on February 20, 1981 (G.C. Ex. 10); it was followed by a letter to Martinez of the same date (G.C. Ex. 9); finally there was a long letter to Martinez dated February 25, 1981. (G.C. Ex. 11.)

Both letters of November 10 and the letter of December 31 mention reinstatement having been offered to various workers, but in two of them -- Respondent's Exhibits 3 and 4 — the reference is confined to strikers. The letter of November 10 to Sato does, however, refer to Gomez without naming him. (Resp. Ex. 2; see I:55.) It reads, "[W]e have offered reinstatement to one of the others [Gomez]" and requests that the charges be dismissed because they have "no validity." Morgan enclosed a copy of his "Best efforts" agreement with Local 304. The letter does not contain an offer to be relayed to Gomez; it simply describes the offer which the union had agreed to make (but which was never made). The remaining letters and the telegram (G.C. Exs. 9, 10 and 11) are concerned with the union's repudiation of its obligation to seek dismissal of the charges and contain no mention of Gomez' reinstatement.

In addition to the letters, there were telephone calls on October 28, 1980, to Sato and Smith, and conversations with Martinez and Aguilar toward the end of the year. (I:54, 58.)

Morgan did not remember what he said to Smith (I:54), but did recall telling Sato that a reinstatement offer had been made to Gomez (I:54, 70); and he remembered discussing the terms of the strike settlement with Martinez and Aguilar. (I:58.) In none of

these conversations did he actually make an offer to be relayed to Gomez.

Aguilar testified that sometime in early January 1981, Morgan offered to reinstate Gomez if he would relinquish his claim to backpay. (II:69-70.) And her notes reflect such a proposal. (G.C. Ex. 14; II:70.) Morgan, on the other hand, testified his offer to reinstate was independent of his denial of backpay. (II:91.)

Morgan also testified that on February 19, 1981, when he first learned of the union's repudiation of its agreement, he telephoned Sato "and told him we would like to have Clemente back, and if he could get him to bring him back .... I told him we'd take him back, no conditions at all." (I:59.) Morgan was less certain whether his unconditional offer of February 19 was reiterated or discussed in his subsequent telephone conversation with Sato on March 11, 1981. (I:59, 75-76.) And he did not explain what occurred during his meeting with Martinez. Sato testified that the telephone call of February 19, 1983, was confined to arranging a meeting for February 26, 1983, and that there was no mention of reinstatement. (II:59-60, 64-66.) The memorandum he prepared at the time reflects this. (G.C. Ex. 13.) He does not rule out the prossibility that reinstatement was discussed in subsequent meetings or telephone calls with Morgan, but says that it was always conditioned on the withdrawal of the charges (and the consequent elimination of back pay). (II:60-61, 65-66.) Aguilar testified that there were further settlement discussions with Morgan, but that he continued to adhere to the position that reinstatement was tied

to the dismissal of the charges without backpay. (II:68-69, 71.)

Morgan testified that, in all of his discussions with Sato and Aguilar, he kept the offer of reinstatement separate from the dismissal of charges and the denial of backpay. (II:91.)

Sato described his policy in handling unconditional offers to reinstate:

> Generally the practice is one, I would inform the company or the respondent, or the charged party in a charge to contact the discriminatee directly themselves. And if there is any way the Board could cooperate in attempting to get the last known address, I would also state that and recommend that. . . . And, If there was an attorney assigned to the case at that time, I would inform that attorney of the possible offer of reinstatement to a discriminatee. (11:61.)

The only offer of reinstatement Gomez received from a Board representative was communicated to him by Aguilar and it was conditioned on his abandonment of the unfair labor practice charge which he understood would foreclose his recovery of back pay. (I:19-21; II:70-71.)

Conclusions. The communications from Morgan to Sato in October (I:54,70) and November (Resp. Ex. 2) were not offers at all; they were descriptions of the understanding Morgan believed he had with the union. There is thus no need to rely on the lack of a principal/agent relationship between Gomez and Sato in rejecting them.

The agency problem does, however, surface in the offers to Aguilar in January (II:69-70) and to Sato, Martinez and Aguilar in February and March. (I:59, 75-76; II:59-61, 64-66, 68-69, 71.) Unlike the situation which obtains during the investigatory stage (see page 5, infra), it may be possible, as a case approaches

complaint, for a board representative to accept responsiblity as an agent for the communication of a reinstatement offer. However, to do so, he or she must have the consent or ratification of the discriminatee. Sato explained that his policy was to avoid such a roll (II:61), and there is nothing in the record upon which to base a finding of Gomez' consent or ratificatiion of agency status for Aguilar, Martinez or Sato. That being so, the only way for an unconditional offer to reach Gomez through Aguilar, Sato or Martinez was for it to have actually been communicated to him by one of them. But that did not happen. The only offer he actually received was through Aguilar and she told him that it was conditioned on abandonment of his claim for back pay. (I:19-21; II:70-71.)

I therefore conclude that, regardless of what Morgan may have said to Board representatives,[13/] he has failed to sustain the burden of proving that an unconditional offer was communicated to Gomez.

V. THE STIPULATION AT THE PREVIOUS HEARING

Findings. At the beginning of the hearing on the underlying charge, Aguilar and Morgan entered into a stipulation that on or about February 24, 1981, the respondent made an unconditional offer of reinstatement to the general counsel which was not relayed to Gomez until sometime in May, 1981. (Resp. Ex. 5.)

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13. Given Aguilar's contemporaneous notes of the offer she received from Morgan (G.C. Ex. 14), Sato's recollection of what Morgan said to him (II:60-61, 65-66), and Morgan's failure to explain what he said to Martinez, I doubt that he made unconditional offers to any of them. I do not, however, here reach that issue.

Respondent's purpose in seeking and obtaining the stipulation was disclosed later on in the original hearing when Morgan sought a related stipulation and contended that it would go to disprove anti-union animus. (G.C. Ex. 15.)

Aguilar testified that she agreed to the stipulation only after being assured by the Hearing Officer (in an off-the-record discussion) that, "[I]t was her understanding that an unconditional offer was made when [the] offer to be reinstated was made, period. . . . Regardless of whether the condition was no back pay." (II:83.)

Analysis, concluding findings, and conclusions of law. There are two difficulties in accepting the stipulation as binding. The first concerns the confusion which lead Aguilar to agree to it even though it is at odds with her log entries (G.C. Ex. 14), her testimony (11:68-70, 71), and Gomez' testimony as to what he was told. (I:19-21.) The best explanation for the confusion is that either she or the hearing officer failed to grasp the distinction between offering reinstatement based on a reservation of the back pay issue, and offering reinstatement based on the elimination of back pay as an issue. If reinstatement is offered and nothing is said about back pay, the offer is nonetheless unconditional even though the respondent plans to contest it at hearing -- the issue has been reserved. (Consolidated Freightways (1981) 253 NLRB 988; Moro Motors Ltd. (1975) 216 NLRB 192, 193.) If, however, the discriminatee must renounce back pay to obtain reinstatement, the offer is conditional. (Tri-State Truck Service, Inc., supra; Midwest Hangar Co. (1975) 221 NLRB 911; Amsterdam Wrecking & Salvage

Co. (1972) 196 NLRB 113, 116.)

The Hearing officer's comments – at least as understood and testified to by Aguilar -- blurred the distinction and led her to either misconstrue or misunderstand the term "unconditional" as it was being used. (II:82-83.) The fact that the stipulation was offered, not to eliminate back pay, but to disprove anti-union animus, may have further contributed to her confusion. In any event, I am satisfied that Aguilar was laboring under a misapprehension of the meaning of "unconditional" when she entered into the stipulation; and, therefore, I conclude that it is not binding on general counsel in the present proceeding. (Back v. Farnsworth (1938) 25 Cal.App.2d 212, 219; Brown v. Superior Court (1935) 10 Cal.App.2d 365, 368; 1 Witkin, Cal. Procedure (2d Ed.), Attorneys §139, pp. 148-150.)

The second problem with the stipulation is the rule of law which provides that: "A stipulation between parties may not bind a court on questions of law and this includes legal conclusions drawn from admitted or stipulated facts." (Leonard v. City of Los Angeles (1973) 31 Cal.App.3d 473, 476, and cases cited therein.) Here, the offers of reinstatement and the dates they were conveyed are facts, but their "unconditional" character is not just a question of law, it is the ultimate legal issue in this proceeding.

While the rule that a stipulation of a legal conclusion is not binding has been criticized in some contexts (1 Witkin, op. cit., Attorneys §123, pp. 134-137), its applicability to cases where a public interest is at stake is established. (Oakland Raiders v. Berkeley (1977) 65 Cal.App.3d 623, 629; County of Los Angeles v.

Bean (1959) 176 Cal.App.2d 521, 526; City of Los Angeles v. Harper (1935) 8 Cal.App.2d 552, 555.) This proceeding involves more than Gomez' private interest in obtaining recompense; the public interest in deterring and preventing the commission of unfair labor practices is at stake as well.

Because of this, because of the confusion surrounding the stipulation and because of the likelihood that the actual facts do not support the legal conclusion embodied in it, I conclude that general counsel's objection to its admission is well taken and that the motion to strike, upon which ruling was reserved, should be granted. (I:60-65.) (Brown v. Superior Court, supra.)

INTERIM EMPLOYMENT

Findings. Gomez worked at Silva Pipeline from October 6, 1979, through March 22, 1980, when he was laid off for lack of work. (Resp. Ex. 6; Stipulation #6.) he was rehired at Silva on June 14, 1980, and worked until September 29, 1980. (Resp. Ex. 6; Stipulation #6.)

The circumstances of his leaving on September 29 are in dispute. According to two co-workers, Gomez told them, on the morning of his last day, that he had been out late the previous night singing at a club and now felt ill and wanted to leave work. (II:5-6, 87.) One of them suggested that he tell the foreman (Gus Andrade) that he was sick and ask permission to go home early. (II:6.) Instead, Gomez continued working until noon, but failed to return after lunch. (II:6, 88.) According to one of the workers, the foreman came over to ask where Gomez had gone. (II:88.) The following day a replacement arrived. (II:11.)

Gomez denied leaving work without permission. (II:99.) He claimed that the owner, Mr. Silva, spoke to him personally one morning before work began and told him he was no longer needed because work was slow. (II:96.)

The bookkeeper at Silva testified that Gomez' payroll records were consistent with either a lay off or a termination (but not a voluntary quit). (I:101-102.) She also testified, over general counsel's objection, that the foreman had called to tell her that Gomez left for lunch and never returned and that, when she relayed this information to Silva, he told her that he could not understand it because Gomez had been a dependable worker and instructed her to issue a final pay check. (I:97.)

The company laid off one man on October 17, 1980, but its regular employees worked through the week before Christmas. (I:104.) The two co-workers — one with 3 or 4 years seniority, and the other with 8 or 9 years — continued working until July, 1981. (II:2, 6-7, 85.)

Silva is now deceased and the foreman, Gus Andrade, was not called to testify. (I:103.)

Analysis, concluding findings and conclusions of law. I do not credit Gomez' version of what happened on his last day of work. His memory is sketchy; he had difficulty in keeping his periods of employment with Silva separate; and, at the earlier hearing, he falsely testified that he had had no interim employment. His demeanor was not convincing: he testified in a flat, hollow, conclusionary fashion without the affect and detail which give testimony the ring of truth. The Silva Bookkeeper was honest and

straightforward in her testimony, and so was Juan Pacheco, one of the co-workers. The other, Basilio Rosales, was under the influence of alcohol when he testified (II:90), but I credit him nonetheless: his testimony was corroborated by Pacheco in most respects, and where it went beyond Pacheco's, it comported with the bookkeeper's and with the logic of the situation. None of the three Silva employees had any interest in the outcome or any score to settle.

But there remains the question of whether, given the hearsay objections by general counsel to portions of the testimony, there is enough in the record to sustain respondent's burden of proving that Gomez was justifiably terminated for leaving work without permission.

I find that, under the business records doctrine, the Silva payroll records are insufficient to establish a discharge for cause. The permissible inferences from those entries are as consistent with lay off as with discharge. The statement by the foreman to the bookkeeper that Gomez had gone to lunch and never returned is inadmissible hearsay, but the statement by Silva that, "he couldn't understand why this happened" (I:97), is a statement of his then present state of mind, admissible to prove that he was unaware of Gomez leaving and had therefore not personally laid him off (as Gomez claimed), or given him permission to leave. (Evidence Code, section 1250.) The question which Rosales testified the foreman asked -- "Where is this boy?" (II:88) -- likewise disclosed that Andrade was ignorant of Gomez' leaving and therefore had not given his permission. It was not objected to, but had it been, it, too, would be admissible as the foreman's then present state of mind

(ignorance) to prove a critical fact (failure to give permission).

The admissibility of Andrade's and Silva's statements fill the evidentary gaps needed to sustain Respondent's position. Gomez' failure to seek permission to leave work when ill is sufficient to deny him back pay for the period he would have continued working but for his unjustified conduct in walking off the job. (Maggio-Tostado, supra, ALOD p. 14; East Texas Castings Company, Inc. (1956) 116 NLRB 1336; Knickerbocker Plastics Co., Inc. (1961 132 NLRB 1209.)

The length of time he would have continued working for Silva is open to doubt. One employee was laid off October 17, 1980. The two who testified continued working until July, 1981; both, however, had substantially more seniority than Gomez. The best estimate is the week before Christmas, 1980 (payroll of December 28); according to the bookkeeper, most regular employees worked until then. (I:104.) I therefore conclude that Gomez would have continued working there until that date.

Thereafter, Gomez would have been unemployed. And, while I have expressed reservations about his credibility, they are, standing alone, insufficient for me to conclude that he did not continue looking for work as he had done prior to his employment at Silva. He was able to provide specific, uncontroverted testimony as to his search for work, testimony which I find believable. (S & F Growers (1979) 5 ALRB No. 50.)

EXPENSES

I. UNION DUES

Union dues and initiation fees are recoverable as an employee expense when they are required as a condition of interim employment or when they are paid for the use of a union hiring hall. (Miami Coca-Cola Bottling Company (1965) 151 NLRB 1701, 1710; Carter Lumber Company (1977) 227 NLRB 730, 736.)

Although Silva Pipeline had a union contract, general counsel failed to prove that it contained a union shop provision.[14/] Therefore, if Gomez is to receive credit for dues and initiation fees, it must be based on his use of the hiring hall. The evidence establishes that he did use it to obtain employment and re-employment with Silva and that he continued to use it after he left Silva. (I:12, 14, 15.) I therefore conclude that dues and initiation fees have been established as a reasonable and necessary expense.[15/] (See G.C. Ex. 12.)

II. MEDICAL EXPENSES

Had Gomez not been refused rehire at Kitayama, he would have been covered by the company's Blue Cross Medical

14. He was therefore not entitled to a credit for dues paid while he was employed (or would have been employed). This is reflected in the modifications contained in Appendix I

15. Because there is no evidence before me that the use of the hiring hall was available at a lesser fee, I accept the amount of dues and initiation fees as the best available measure of its cost.

Plan. (I:16; G.C. Ex. 5, p.22.) During the back pay period he had a skin condition which required medical treatment at a cost to him specified in General Counsel's Exhibit No. 2. (I:16-16.)

Respondent does not contest the right of a discriminatee to recover for medical expenses which would have been paid by his employer's medical plan, but claims that general counsel failed to prove that the company's plan covered this particular illness.

The general counsel proved that the company had a medical plan (I:16) and that Gomez had used it for another medical problem (I:17), but failed to prove that treatment for his skin condition would have been covered, in whole or part, by the plan. Knowing what I know about Blue Cross plans, it is likely that his condition would have been covered; however, in the absense of proof on the record, I have no choice but to disallow the claim.

III. GASOLINE

Respondent does not contest the right of a discriminatee to recover reasonable travel expenses in seeking and maintaining interim employment, but argues that the amounts here claimed are not justified.

Having accepted Gomez' testimony concerning his search for work and considering the travel entailed at his job with Silva, I conclude that the amounts sought are justified.

IV. VACATION PAY

In her brief, the general counsel modified Gomez' claim for vacation pay to take into account the vacation pay he earned as Silva. In Appendix I, I have further modified the amount of vacation pay to take into account what he would have earned had he not left his interim employment without justification.

RECOMMENDED ORDER

I hereby recommend that the Board, pursuant to Labor Code section 1160.3, order Respondent Kitayama Brothers, its officers, agents, successors and assigns to pay to Clemente Gomez the back pay amount of $13,794.64, plus interest on such amount computed in accordance with the formula for calculating interest set forth in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

DATED: December 31, 1983

JAMES WOLPMAN
Administrative Law Judge

APPENDIX I
BACK PAY CALCULATION

1979 W/E Date	Gross Backpay	Interim Earnings	Total	Expenses: U-union dues G-Gasoline		Net Backpay
7/15	152.64		152.64			152.64
7/22	228.95		228.95	G U	5.00 160.00	393.95
7/29	228.95		228.95	G	5.00	233.95
8/05	193.80		193.80	G	5.00	198.80
8/12	161.50		161 .50	G	5.00	166.50
8/19	207.20		207.10	U G	100.00 5.00	312.10
8/26	178.50 155.75*		178.50	G	5.00	183.50 155.75
9/02	207.10		207.10	G	5.00	212.10
9/09	224.20		224.20	G	5.00	229.20
9 '16	166.25		166.25	G	5.00	171.25
9/23	228.95		228.95	G U	5.00 30.00	263.95
9/30	182.40		182.40	G	5.00	187.40
10/07	197.60	236.41		G	20.00	0
10/14	197.60	402.40		G	20.00	0
10/21	228.00	241.44		G	20.00	0
10/28	197.60	241.44		G	20.00	0
11/04	195.70	414.75		G	20.00	0
11/11	205.40	422.17		G	20.00	0
11/18	205.40	331.52		G	20.00	0
11/25	243.92	248.64		G	20.00	0
12/02	205.40	414.40		G	20.00	0
12/09	205.40	414.40		G	20.00	0
12/16	211.33	437.71		G	20.00	0
12/23	191.58	217.56		G	20.00	0
12/30	223.25	82.88	140.37	G	10.00	150.37

*Annual Vacation Pay computed as follows: 44.50 hours @ $3.50 per hour.

1980 W/E DATE	GROSS BACKPAY	INTERIM EARNINGS	TOTAL	Expenses: U-union dues G-Gasoline		NET Backpay
1/06	266.63	165.76	100.87	G	20.00	120.87
1/13	205.40	82.88	122.52	G	10.00	132.52
1/20	202.44		202.44			202.44
1/27	211.33	331.52		G	20.00	0
2/03	205.40	248.64		G	20.00	0
2/10	191.58	414.40		G	20.00	0
2/17	193.90	248.64		G	20.00	0
2/14	205.40	0	205.40			205.40
3/02	204.41	331.52		G	20.00	0
3/09	205.40	165.76	39.64	G	20.00	59.64
3/16	205.40	414.40		G	20.00	0
3/23	205.40	331.52		G	20.00	0
3/30	205.40	0	205.40			205.40
4/06	205.40	0	205.40	G	5.00	210.40
4/13	205.40	0	205.40	G	5.00	210.40
4/20	205.40	0	205.40	G	5.00	210.40
4/27	225.15	0	225.15	G	5.00	230.15
5/04	189.80	0	189.80	G	5.00	194.80
5/1 1	304.09	0	304.09	G	5.00	309.09
5/18	252.00	0	252.00	G	5.00	257.00
5/25	211.33	0	211.33	G	5.00	216.33
6/01	260.71	0	260.71	U G	30.00 5.00	295.71
6/08	215.28	0	215.28	G	5.00	220.28
6/15	222.70	331.52		G	20.00	0
6/22	207.38	414.40		G	20.00	0
6/29	201.45	414.40		G	20.00	0

1980 W/E Date	Gross Backpay	Interim Earnings	Total	Expenses: U-union dues G-Gasoline		Net Backpay
7/06	139.24	145.04		G	20.00	14.20
7/13	262.61	586.39		G	20.00	0
7/20	212.18	465.		G	20.00	0
7/27	212.18	93.12	119.06	G	20.00	139.06
8/03	168.10	465.60		G	20.00	0
8/10	168.10	436.50		G	20.00	0
8/17	139.40	465.60		G	20.00	0
8/24	264.60	465.60		G	20.00	0
8/31	264.60 324.85*	232.80 1289.13	31.80 0	G	20.00	51.80 0**
9/07	312.90	72.48		G	20.00	0
9/14	252.00	372.48		G	20.00	0
9/21	252.00	372.48		G	20.00	0
9/28	168.00	372.48		G	20.00	0

10/05 - 12/28: Bac pay tolled ;but for unjustified loss of Employment interim earnings would have exceeded gross back pay plus expenses.

* Annual Vacation Pay computed as follows: 89 hours @ $3.65 per hour.

**Annual Vacation Pay accrued at Interim Employer exceeds amount at Gross Employer.

1981 W/E Date	Gross Backpay	Interim Earnings	Total	Expenses: U-union dues G-Gasoline		NET BACKPAY
1/04	297.98		297.98	U	45.00	342.98
1/11	245.47		245.78	G	10.00	255.78
1/18	245.78		245.78	G	10.00	255.78
1/25	245.78		245.78	G	10.00	255.78
2/01	210.98		210.98	G	10.00	220.98
2/08	245.78		245.78	G	10.00	255.78
2/15	247.95		247.95	G	10.00	257.95
2/22	245.78		245.78	G	10.00	255.78
3/01	226.20		226.20	G	10.00	236.20
3/08	272.48		272.48	G	10.00	282.48
3/15	221.85		221.85	G	10.00	231.85
3/22	245.78		245.78	G	10.00	255.78
3/29	87.00		87.00	G	10.00	97.00
4/05	251.86		251.86	G	10.00	261.86
4/12	254.25		254.25	G	10.00	264.25
4/19	270.00		270.00	G	10.00	280.00
4/26	254. 25		254.25	G	10.00	264.25
5/03	384.08		384.08	G U	10.00 30.00	424.08
5/10	285.83		285.83	G	10.00	295.83
5/17	293.63		293.63	G	10.00	303.63
5/24	303.75		303.75	G	10.00	313.75
5/31	363.00		363.00	G	10.00	373.00
6/07	313.13		313.13	G	10.00	323.13
6/14	298.43		298.43	G	10.00	308.43
6/21	293.63		293.63	G	10.00	303.63
6/28	253.65		253.65	G	10.00	263.65
6/30	103.68*		103.68	G	10.00	113.68

*No vacation pay; annual vacation pay at interim employer would have exceeded amount of vacation pay at gross employer.