Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MATSUI NURSERY, INC. Respondent, and JESUS M. ORNELAS, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 82-CE-126-SAL 82-CE-127-SAL 82-CE-143-SAL 83-CE-ll-SAL 83-CE-21-SAL 11 ALRB No. 10

DECISION AND ORDER

On October 21, 1983, Administrative Law Judge (ALJ) Joel Gomberg issued the attached Decision. Thereafter, Respondent Matsui Nursery, Inc., and Charging Party, United Farm Workers of America, AFL-CIO (UFW) filed timely exceptions to portions of the ALJ's Decision with supporting briefs. Reply briefs were submitted by General Counsel and Respondent.

Pursuant to the provisions of section 1146[1/] of the Agricultural Labor Relations Act (Act), 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 Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the ALJ and issue

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

his recommended Order, with modifications.[2/]

The Year-end Bonus

Charging Party excepted to the ALJ's failure to find a violation of section 1153(c) by the Employer's decision not to grant a yearly bonus. Charging Party argues in its brief supporting this exception:

> " ... the company's books (GCX 18) demonstrate unexplained extraordinary expenses in the months immediately following the election. Absent such unusual payments, the company would have realized a substantial profit and would have been able to pay the year end bonus as well as grant a greater wage adjustment."

Expenses may well have been extraordinary, but the record does not disclose testimony or documentary evidence which would support Charging Party's implied contention that these expenses were not legitimately incurred.[3/] Thus, on the record before us, we affirm the ALJ's dismissal of this charge.

Refusal to Rehire Pablo Hernandez

Respondent excepts to the ALJ's finding that Pablo Hernandez was not offered a full-time position because of his union activities in violation of section 1153(c) and (a) of the Act.

Hernandez was hired as a temporary worker about a month before the election. Shortly after he was hired, he asked his foreman, Jose Resendez, to inquire about obtaining a permanent job

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[2/] No exceptions were taken regarding the findings of discrimination regarding Rafael Ponce Gonzalez and Jose Roman. We therefore affirm those findings and conclusions.

[3/] The Administrative Law Judge noted on the record that this employer had brought to the hearing, in addition to these records, certain "backup information" supporting these records, which the employer invited General Counsel and Charging Party to examine.

for him.[4/] Resendez corroborated Hernandez' testimony on this point and further testified that he told Chester Sowersby of Hernandez' interest.[5/] According to Resendez, Sowersby's response was simply that there were no permanent jobs open at that time. Sowersby stopped short of denying Resendez' account, testifying only that he could not remember whether Resendez came to him with this inquiry, but doubted that he had.

Hernandez' temporary job came to an end after the election. According to Hernandez, he went to the employer's offices later that month and asked Sowersby and Macaraeg for work. They responded that they were not hiring. A few minutes later, according to Hernandez, Sowersby saw Hernandez walking near his office, invited him to fill out an application, and told Hernandez "maybe I'll call you." Sowersby and Macaraeg each denied this account, stating they never saw Hernandez again after they ended his temporary employment. Sowersby testified he had personally observed Hernandez' work from the onset of his hire as a temporary employee and from the beginning had concluded that Hernandez was "very lackadaisical" in his work and he would not have rehired him.

The ALJ credited the testimony of Hernandez and Resendez and discredited that of Sowersby. To the extent that an ALJ's

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[4/] Resendez was an obvious person for Hernandez to ask for a job since Resendez was the person who had obtained the temporary job for Hernandez initially and they regularly rode together from their homes to work. It is also consistent with Sowersby's testimony that positions were filled by "word of mouth."

[5/] Sowersby was the rose grower at Matsui Nursery, overseeing all matters related to rose production. He left Matsui's in November 1982 and was succeeded by his assistant Arsenic Macaraeg.

credibility resolutions are based upon demeanor of the witness, they will not be disturbed unless a clear preponderance of the relevant evidence demonstrates that such resolutions are incorrect. (Adam Dairy dba Rancho dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1521].) We have reviewed the evidence and find the ALJ's resolution of witness credibility to be well supported by the record as a whole. Sowersby's testimony revealed inconsistencies not easily reconciled. while he testified he "knew" Hernandez never attended union rallies, he did not know whether or not he wore union buttons.[6/] His testimony that he personally observed Hernandez' poor work was not only too vague and general to credit, as found by the ALJ, but largely self-serving since Respondent's defense did not rely on an affirmative defense of refusal to hire because of poor work, but on a denial that Hernandez ever applied. Relevant to that latter contention, we find incredible that Sowersby would hold such strong opinions on Hernandez' poor work, yet not recall if Resendez inquired about a permanent job for this same "lackadaisical" worker.

We conclude, as did the ALJ, that Hernandez made appropriate applications for a permanent position, first by "word of mouth" through Resendez to Sowersby and again, later, orally and in writing directly to Sowersby. We also conclude that Respondent treated

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[6/] Hernandez was wearing his union buttons at the time Sowersby inquired, during the election, whether he had voted yet. While the context of that conversation satisfies us that no interrogation violative of the Act took place on that occasion, it is also not credible that Sowersby would have failed to notice the union buttons during that one-on-one exchange, especially since uncontradicted testimony elsewhere in the record indicates all of the "Mexican" (sic) workers wore union buttons.

these applications in a discriminatory manner. Sowersby testified that the Company's hiring policy was to hire experienced workers by "word of mouth" rather than inexperienced workers by written applications from "off the street." Yet, General Counsel Exhibit 8F shows Respondent hired three such inexperienced workers during the time Hernandez had applied.[7/] Not only did Respondent hire "off the street" contrary to company policy, but Hernandez' later written application was not retained.[8/] Previously, this Board has indicated that availability of work when applied for is not always a required element in a charge alleging a refusal to hire under section 1153(a) or 1153(c). In Golden Valley Farming (1980) 6 ALRB No. 8, and again in Sam Andrews' Sons (1982) 8 ALRB No. 69 we indicated that in certain instances General Counsel need not show that work was available when the discriminatee applied or sought to apply. In both cases, we relied upon Shawnee Industries, Inc. (1963) 140 NLRB 1451 (52 LRRM 1270)[9/] as authority for such reasoning. The NLRB stated in that case:

> Under the (NLRA) an employer must consider a request for employment in a lawful, nondiscriminatory manner, and the question whether an application has been given such consideration does not depend on the availability of a job at the time an application for employment is made. Consequently, the Act is violated when an employer fails to consider an application for employment for reasons proscribed by the Act, and the question of job availability is

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[7/] General Counsel Exhibit 8F indicates that after Hernandez' "word of mouth" application, Respondent hired Duk Hui Yi on October 19, Yong Shik Moon on October 27, and Sin Woong Kwak on October 28.

[8/] General Counsel's subpoena duces tecum requested production of this application to which Respondent replied that none existed.

[9/] Reversed on other grounds, 33 F.2d 221 (10th Cir. 1964).

> relevant only with respect to the employer's backpay obligations.
> (Cites omitted.)

We therefore affirm the findings and conclusions of the ALJ that Hernandez was denied rehire because of his support of the UFW, in violation of section 1153(c) and (a) of the Act. Because General Counsel Exhibit 8F demonstrates that work was available as of October 19, we need not defer that issue to compliance but will herein order that Hernandez be made whole from that date.

Discharge of Jesus Ornelas

Jesus Ornelas had worked for this Employer for over six years before this discharge. Ornelas' union activity is not denied by Respondent, nor does Respondent deny its knowledge that Ornelas distributed union literature, buttons, and authorization cards on company property in view of several supervisors and owner Andy Matsui himself. After the Union victory in the election, Ornelas attended meetings with the Employer as a member of the Union's ranch committee.

Ornelas was discharged after he returned from an emergency trip relating to his mother's death in Mexico. The ALJ found the Employer's defense to be confused and shifting, relying now on one personnel rule and then on another. Respondent's brief on exceptions lends no assistance to our attempt to make sense of Respondent's defense to this charge.

It is undisputed that Ornelas' mother died in Mexico and that he left to attend to that matter. It is also undisputed that he called his foreman before leaving and told him of that emergency. It is also the testimony of Respondent's personnel director that

such emergency leaves to Mexico, because of travel, customarily last two weeks. It is agreed that Ornelas reported back within that customary period; yet Respondent fired Ornelas on the day he returned. We conclude the General Counsel set forth a prima facie case that Ornelas was fired for his Union support.

We have examined the record and conclude Respondent did not present a credible legitimate reason for the discharge and therefore failed to rebut the General Counsel's prima facie case. Respondent, in its brief to this Board, continues to press the argument that Ornelas called his foreman "who admittedly had no authority to approve leave-of-absence or vacation requests." Yet, the personnel manager testified that the manner or reason for Ornelas' leaving played no part in his termination.

Much is also made of Ornelas' failure to contact the Employer during his absence regarding when he would be returning. Yet, the personnel manager testified that she thought he would be returning within the "standard" two-week period and was "waiting to see if he would contact the company by the end of the second work week." Ornelas contacted the company by reporting back to work, but was fired nonetheless.

A third reason proffered for the discharge is based upon the contention that Ornelas converted, on his own, the two-week emergency leave into vacation leave; vacation leave requires prior approval. This last offering by Respondent is devoid of merit. The legitimacy of the emergency is not at issue; the prevailing two-week period is acknowledged; the timely return is uncontested. Yet, implicit in this defense is an assertion that Ornelas misused

his emergency leave. To the extent Respondent questions the manner in which Ornelas spent his emergency two weeks, we find that the testimony of Ornelas, in this regard, which was not contested by Respondent, shows the time was spent consistent with the purpose of the leave.[10/] We affirm the ALJ's findings-and conclusions that Ornelas was discriminatorily discharged in violation of section 1153(c) and (a) of the Act.

In Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98, we stated:

> Discrimination cases involving a defense found to be a pretext differ from dual motive discrimination cases. Where an employer asserts what appears to be a legitimate business reason for its alleged discriminatory personnel action but an examination of the evidence reveals that the asserted justification is a sham, the reason advanced is pretextual and the employer in fact has no legitimate business reason for its action. A dual motive case exists where the proffered business reason exists along with the unlawful motive. (See Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)
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> In dual motive cases, this Board has adopted the test in Wright Line. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18.) Wright Line requires the General Counsel to establish a prima facie case that the alleged discriminatee engaged in union activity, or protected concerted activity, that the employer had knowledge of that activity, and that the employer took adverse action against the employee because of his/her union or protected concerted activity. Once General Counsel has established a prima facie case, the burden of production and persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the protected activity. (Royal Packing Co. (Oct. 8, 1982) 8 ALRB No. 74.)

[10/] Ornelas testified he spent the time burying his mother, returning relatives to their towns, completing the necessary paper work and paying the bills related to the hospitalization and funeral. On the same day be obtained his mother's death certificate, he boarded a bus for the three-day trip back to Salinas and reported for work--and was fired--the day following his return. All of this was within the two-week emergency leave period.

A Wright Line analysis is not required regarding the resolution of the charges relating to either Pablo Hernandez or Jesus Ornelas since we have found, in agreement with the ALJ, that the otherwise legitimate reasons advanced by the Employer regarding both discriminatees either did not exist or were not in fact relied upon; such a conclusion leaves intact the inference of wrongful motive established by General Counsel. (Frank Black Mechanical Services, Inc., (1984) 271 NLRB No. 201.)

Discharge of Miguel Morales

Charging Party excepts to the ALJ's dismissal of the allegation that Miguel Morales was terminated in retaliation for his union support in violation of section 1153(c). Respondent contended he was fired for taking flowers for his personal use without prior permission.

The ALJ found Morales' testimony regarding the taking of the flowers to have been "absolutely incredible" and "clearly improvised on the spot." We have examined the record and find the ALJ's credibility resolution well-supported. Respondent thus rebutted the General Counsel's prima facie case of discrimination by presenting a legitimate business reason for the discharge. General Counsel failed to show Respondent's action would not have taken place but for Morales' union activity. (Wright Line, supra, 251 NLRB 1083.) We therefore affirm the dismissal of this charge.

ORDER

Respondent, Matsui Nursery, Inc., its partners, officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to transfer, laying off, or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment, to discourage membership in, or activities on behalf of, the United Farm Workers of America, AFL-CIO, or any other labor organization.

(b) Discriminating against employees in regard to the hire, tenure, or conditions of employment as a result of their filing charges with the Agricultural Labor Relations Board (Board).

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Offer to Rafael Ponce Gonzalez, Jesus Ornelas and Jose Roman immediate and full reinstatement to their former or equivalent positions, without prejudice to their seniority or other employment rights or privileges.

(b) Offer to Pablo Hernandez a permanent position in the rose department and make whole Hernandez from October 19, 1982, until such time as he is offered permanent employment.

(c) Make whole the four above-named employees for all losses of pay and other economic losses they have suffered as a result of the discrimination against them, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order

in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

(d) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay and interest due under the terms of this Order.

(e) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from September I, 1982 to September 1, 1983 .

(g) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 days, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(h) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent

shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees in order to compensate them for time lost at this reading and during the question-and-answer period.

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

Dated: April 3, 1985

JEROME R. WALDIE, Member

PATRICK W. HENNING, Member

MEMBER McCARTHY, dissenting in part:

I do not concur in the majority's analysis with respect to either the nature of Respondent's "word of mouth" hiring system or the question of when Hernandez made a proper application for work.

I do not believe that Respondent's "word of mouth" system of hiring was such that Hernandez' initial oral inquiry as to the availability of a permanent position constituted a proper application for work. If that were the case, Respondent would have to record every such request and seek out the prospective employee when work became available. This was not Respondent's practice. "Word of mouth" refers to the manner by which prospective applicants learn of job opportunities, not to the manner by which they perfect their applications.

On the basis of the ALJ's credibility resolutions, I would agree that Hernandez made a direct, in-person application for work on October 28. I would further find that this was, given

my understanding of Respondent's hiring system, a proper application for work. It was then incumbent upon Respondent to treat Hernandez' application in a non-discriminatory fashion.

Given the credibility resolutions made by the ALJ, I would have to conclude that, as of October 28, Hernandez was rejected for permanent employment because of his union activities. I would leave to the compliance phase of these proceedings the question of exactly when employment became available for purposes of backpay computations.

Regarding all other aspects of this case, I concur in the results reached by the majority.

Dated: April 3, 1985

JOHN P. McCARTHY, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Matsui Nursery, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by laying off two employees, because they participated in activities in support of the United Farm Workers of America, AFL-CIO (UFW) and because they filed charges with the ALRB; and discharging one employee and refusing to hire another because of their support for the UFW. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other, farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another;
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to join and engage in activities in support of the UFW or any other union.

WE WILL NOT discriminate against you for participating in Union activities.

SPECIFICALLY, the Board found that it was unlawful for us to have discharged JESUS ORNELAS, refused to have rehired PABLO HERNANDE2, and refused to have transferred JOSE ROMAN and RAFAEL PONCE GONZALEZ and to have thereafter laid them off.

WE WILL NOT hereafter fire or otherwise discriminate against any employee for joining or supporting the UFW or any other union or for filing a charge against us with the ALRB.

WE WILL reimburse JESUS ORNELAS, PABLO HERNANDEZ, JOSE ROMAN, and RAFAEL PONCE GONZALEZ for all losses of pay and other money they have lost because we unlawfully discriminated against them.

WE WILL also offer JESUS ORNELAS, JOSE ROMAN, and RAFAEL PONCE GONZALEZ their old jobs and WE WILL offer PABLO HERNANDEZ a permanent job in the rose department.

Dated: MATSUI NURSERY, INC.

By: _____

Representative Title

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California, 93907. The telephone number is (408) 443-3161

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Matsui Nursery, Inc.
(Jesus M. Ornelas
and UFW)

11 ALRB No. 10
82-CE-126-SAL,
et al.

ALJ DECISION

The ALJ found one worker was discriminatorily refused rehire and another discriminatorily discharged, both for their protected union activities; two others were discriminatorily laid off and denied job transfers in retaliation for their protected union activities and for filing unfair labor practice charges with the Board, in violation of sections 1153(a), (c) and (d) of the Act.

The ALJ found the General Counsel failed to show a prima facie case of discrimination regarding the lay off of a worker. He also dismissed an allegation that the employer failed to give its customary year-end bonus to workers in retaliation for their electing to be represented by a union for collective bargaining purposes, concluding that the General Counsel failed to rebut the business reason defense set forth by Respondent.

BOARD DECISION

The Board affirmed all of the ALJ ' s findings and conclusions. Partial dissent by Member McCarthy.

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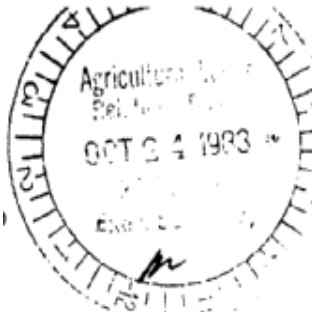
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



MATSUI NURSERY, INC., Respondent, and JESUS M. ORNELAS, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Parties.	)	Case Nos. 82-CE-126-SAL 82-CE-127-SAL 82-CE-147-SAL 83-CE-11-SAL 83-CE-21-SAL

Appearances:

Juan F. Ramirez for
the General Counsel

Dwight L. Armstrong for
the Respondent

Before: Joel Gomberg
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATEMENT OF THE CASE

Joel Gomberg, Administrative Law Judge: This case was heard by me on nine hearing days from May 17 through May 27, 1983, in Salinas, California. The Third Amended Consolidated Complaint ("Complaint") alleges various violations of section 1153(a), (c), and (d) of the Agricultural Labor Relations Act ("Act") by Matsui Nursery, Inc. ("Respondent" or "Company"). Four charges by the United Farm Workers of America, AFL-CIO ("Union") and one by Jesus M. Ornelas, all of which were filed with the Board and properly served on the Respondent, provide the basis for the allegations of the Complaint.

All parties were given a full opportunity to participate in the hearing. The Charging Parties did not make appearances. The General Counsel and Respondent filed post-hearing briefs pursuant to section 20278 of the Board's Regulations.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law:

I. Jurisdiction

Respondent has admitted that it is an agricultural employer within the meaning of section 1140.4(c) of the Act and that the Union is a labor organization within the meaning of section 1140.4 (f) of the Act.

II. The Alleged Unfair Labor Practices

The Complaint alleges that Respondent violated section 1153(a) and (c) of the Act by discharging Jesus Ornelas and Miguel

Morales because of their Union activities. The Respondent contends that it discharged both employees for cause.

The Company is also alleged to have refused to rehire Pablo Hernandez because of his Union activities. The Respondent denies that Hernandez ever applied to be rehired and maintains that, even if he did apply, he would not have been rehired because of his poor work record.

The Complaint further alleges that the Company refused to transfer Rafael Ponce Gonzalez and Jose Roman from its maintenance department to its rose department because of their Union activities, and subsequently laid them off for the same reason.[1/] The Respondent asserts that it refused to transfer the two men because they previously had filed an unfair labor practice charge with the Board which it believed contended that an earlier transfer into the rose department had been discriminatory. The Company maintains that the layoffs were motivated by business considerations, and not by the Union activities of the employees.

Finally, it is alleged that the Company did not pay its employees a customary year end bonus in 1982, and limited the October 1982 wage adjustment to 5¢ per hour, in retaliation against the Union's victory in a representation election. The Company contends that both actions were based upon the financial condition

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1. The General Counsel introduced evidence that Roman, Gonzalez, Ornelas, and several other employees complained to a Monterey County agency about Respondent's pesticide spraying practices. It also established Company knowledge of the complaint, at least with respect to Roman. I have not found it necessary to rely on this protected concerted activity in resolving the issues raised with respect to these three employees.

of the Company as well as the prevailing wage structure in the nursery industry.

A. Background

The Company grows roses and chrysanthemums ("mums") in enclosed greenhouses at its nursery in Salinas. Andy Matsui, Respondent's President and General Manager, founded the Company and continues to direct its operations. The Company's agricultural employees work in one of three department: roses, mums, and maintenance. The work of each department is directed by a supervisor: Junjiro (Mike) Toyokura (mums); Bill Thompson (maintenance); and Arsenio (Archie) Macaraeg (roses). Macaraeg succeeded Chester Sowersby as rose grower and supervisor on November 1, 1982.

The rose department's work force is divided into three crews, each of which is led in its work by a crew leader or foreman.[2/] The mum crew also has a foreman. No similar position exists in the smaller maintenance department crew.

B. The Election Campaigns of the Union and the Company

A representation election was conducted by the Board among the Company's agricultural employees on September 11, 1982.[3/]

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2. The parties introduced a substantial amount of evidence bearing on the supervisorial status of the foremen. I find that it is unnecessary to determine whether or not the foremen were statutory supervisors in order to resolve any of the issues in this case.

3. The Union was certified as the exclusive bargaining representative of Respondent's agricultural employees on August 3, 1983, after the conclusions of the hearing in this matter. (See Matsui Nursery, Inc. (1983) 9 ALRB No. 42.) Because there was no certification at the time of the hearing, the General Counsel withdrew its allegations that the Company violated section 1153(e) of the Act with respect to the wage increase and bonus issues.

Organizing among the workers began with several meetings at the home of Jesus Ornelas, an employee very active in the campaign.[4/] The first organizing activity at the ranch took place about a week before the election. Employees distributed authorization cards and Union flyers in the Company parking lot and lunch room during the lunch break. The employees also conducted everal meetings in the parking lot with a Union organizer. According to Jose Manuel Roman, one of the leaders in the organizing drive, all of the male Mexican or Mexican-American employees wore Union buttons in the week before the election.

The Company responded with a vigorous anti-Union campaign, which consisted of the distribution of literature and the holding of three to five meetings conducted by Joe Sanchez, a labor-management consultant hired by the Company.

At the Company's campaign meetings, Sanchez, who is fluent in Spanish, would speak on its behalf. Matsui, who speaks virtually no Spanish, would attend the meetings, but spoke only to answer employee questions. Sanchez acted as Matsui's interpreter. There is a direct conflict between the testimony of the General Counsel's witnesses, Ornelas and Porfirio Castillo, and that of Sanchez.

Ornelas testified that Matsui warned the employees to be careful about what they did and urged them not to be on the side of the Union. According to Ornelas, Matsui said there would be problems if the Union came in, and threatened to take the following actions if it did: close the Company, eliminate the year-end bonus,

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4. I have not relied on the inconclusive testimony of Company knowledge of the meetings at Ornelas' house.

certain parties, holiday turkeys, and reduce the number of hours in the work week. On cross-examination, Ornelas testified that Matsui had not threatened to eliminate the year-end bonus, but had instead stated that there would be a pretty good bonus if the employees were with him. Castillo, who volunteered that he had a very poor memory, corroborated most of Ornelas's testimony. He adhered to Ornelas's original statement that Matsui had threatened to eliminate the year-end bonus. He added two threats which Ornelas did not mention: elimination of the previously scheduled October raise and of the weekly bonus.

Sanchez, who testified that he has assisted employers in more than 100 Board elections and once served as President of a union local, flatly denied most of the statements attributed to Matsui by Ornelas and Castillo. He admitted that he spoke about other companies in the area which had gone out of business as a result of excessive union demands, but denied saying that Matsui Nursery was going to close. In fact, Sanchez stated that he made it clear to employees that the Company was not going to close. Sanchez also admitted telling the workers that a Union contract might result in reduced work hours for full-time employees, who currently work over 50 hour a week. He denied threatening to reduce hours as a result of a Union victory in the election. Matsui testified that he received no questions from the employees concerning the Company's economic condition or employee benefits.

I have reviewed the campaign literature distributed by the Company and have found no statements which constitute a promise of benefit or a threat. The literature is fairly predictable

anti-Union propaganda.

I have difficulty crediting the testimony of Ornelas and Castillo, in part because of conflicts in their testimony, and in part because it seems unlikely that an employer would make the ultimate threat of closing his business and then make lesser threats of eliminating benefits. On the other hand, as I will discuss later in relation to other issues, Matsui was often not a forthright witness and displayed a less than perfect memory. Because resolution of the conflicts with respect to these pre-election statements is not essential to the determination of the allegations of the Complaint, I conclude that the General Counsel has not established that threats were made by the Company in its election campaign.

C. The Alleged Refusal to Rehire Pablo Hernandez

1. Facts

Hernandez was hired on September 3, 1982, by Chester Sowersby as a temporary worker in the rose department. He was recommended to Sowersby by Jose Resendez, one of the rose department foremen. The Company also re-hired two other temporary employees, Juan Estanislau and Salvador Sabino, both of whom had originally been hired in July, 1982, and laid off in August. The Company required temporary help in the roses during the summer, the period when the plants were pruned.

During the pre-election period, Hernandez wore Union buttons to work and attended several of the Union meetings in the parking lot. On the day of the election, Macaraeg, then Sowerby's assistant, asked Hernandez and the two other temporary workers if

they were going to vote. When they indicated that they were not, he told them to return to work. They were later informed by a Board agent that they were eligible voters and they did cast ballots.

Hernandez testified that Resendez approached him about working permanently for the Company several days before the election. Hernandez replied that he was interested and Resendez said that he would speak to Sowersby. Resendez denied discussing permanent employment with Resendez before the election. He testified that Hernandez first asked about the possibility of staying on with the Company after he had lost a job he had with a cleaning company. Resendez said that this conversation occurred about three weeks after Hernandez began working.

Hernandez, Resendez, and Sowersby all gave different accounts concerning Hernandez's inquiry. Hernandez testified that Resendez never mentioned the matter again and never told him what Sowersby's response, if any, had been. Hernandez stated that he didn't inquire about the matter again, either. Resendez testified that he asked Sowersby about hiring Hernandez and that Sowersby replied that he didn't need any people. Resendez stated that he passed along Sowersby's response to Hernandez. Sowersby testified that he couldn't remember Resendez asking him about hiring Hernandez but doubted that he had.

Hernandez was laid off on October 4, 1982, along with Sabino and Estanislau.[5/]

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5. I granted Respondent's motion to dismiss an allegation in the Complaint that Hernandez's layoff was discriminatory in nature, because the General Counsel did not make out a prima facie case. The temporary employees were told when they were hired that they would only work for about a month.

Hernandez testified that he returned to the Company on October 28, 1982, and asked Sowersby and Macaraeg for work. They told Hernandez that they were not hiring. Several minutes later Sowersby saw Hernandez walking near his office and asked him if he would like to fill out an application. Hernandez completed an application form and handed it to Sowersby, who said "maybe I"11 call you." Sowersby and Macaraeg both denied that this incident occurred and maintained that they never saw Hernandez after he was laid off. Martines, the Company's custodian of records, testified that she searched for an employment application for Hernandez, other than the one he filled out before being hired in September, and found none. On rebuttal, Gumersindo Ortega testified that he saw Hernandez at the Company several days before Halloween.

Sowersby testified that he generally hired by word of mouth. That is, he let his employees know when he would be needing additional workers, and they sent applicants to him. He would sometimes get inquires from people who came in "off the street", but would usually only take applications from them if he would be needing people soon. Sowersby would review these applications, but would hire only from among those with "rose experience per se". Prior experience in roses was not a prerequisite to hiring, but was a factor that Sowersby considered favorably. Sowersby sent written applications to the Company office. He never reviewed them again before hiring. He would copy the references listed on the form in order to check on the work experience of the applicant.

Company records directly contradict Sowersby’s testimony concerning his hiring practices and undermine his credibility.

Three applicants, Duk Hui Yi, Sin Woong Kwak, and Yong Shik Moon, filed written applications in early September, 1982, a time when the rose department was not hiring workers. None had previous nursery experience of any kind. All three were hired in late October, six or seven weeks after their initial applications. According to Sowersby's testimony, he would not have allowed these persons to fill out applications. If they had filled out applications, and had come in "off the street", they would not have been considered for employment because of their lack of relevant experience. Further, Sowersby would have forwarded their applications to the office and not reviewed them again before hiring them well over a month later.

Sowersby and Macaraeg also testified about the work performance of Hernandez and the other temporary workers. Sowersby stated that none of the three was a good worker, but that Hernandez was the worst. He was lazy, required constant supervision, and engaged in horseplay. Sowersby observed this bad work almost from the beginning of Hernandez's employ, but never disciplined him or filed a written disciplinary report, because it wasn't worth the effort. Sowersby stated that he assigned one of his foremen to watch over the three, and that with constant supervision, they performed their work satisfactorily. He directed Macaraeg to be responsible for their work. Of the three workers, Sowersby rated Sabino the best, followed by Estanislau and Hernandez. He stated that he would never have recalled or rehired Estanislau and Hernandez. According to Sowersby, Estanislau and Sabino were hired by the Company for the first time in September, 1982.

Macaraeg also criticized Hernandez's work. He was a

"terrible" employee. When asked to rank the three employees, Macaraeg rated Estanislau above Sabino. Macaraeg stated that Luis Sanchez, a rose department foreman, was responsible for supervising the temporary workers along with Resendez. Neither Resendez nor Sanchez was questioned about the quality of work performed by Hernandez.

Sowersby' s self-serving testimony concerning the work of Hernandez and the other temporary workers is riddled with inconsistencies and serves to further weaken his credibility. He stated categorically that he was solely responsible for hiring in his department, that he would never have rehired Estanislau, and that Estanislau and Sabino had first worked for him in September 1982. Company records establish that Estanislau and Sabino had in fact been originally hired in July, 1982, and laid off in August. Whether Sowersby's testimony was a deliberate falsehood or a simple error is irrelevant. If he could not remember that two of the three temporary workers had been laid off and then rehired or recalled, he was certainly in no position to give opinions on their work, particularly when others were responsible for their direct supervision.

Macaraeg's testimony also lacked specificity. Furthermore, he was still training to become the Company's rose grower during the summer of 1982, and had no authority to hire or fire. The fact that he and Sowersby rated the three workers differently makes their assessments even less reliable, particularly considering the fact that neither Resendez nor Sanchez was questioned about Hernandez[1]s work performance. Resendez, who testified that he had the

opportunity to observe Hernandez, still spoke to Sowersby about the possibility of full-time work for him, and Sowersby said nothing to Resendez about his lack of competence.

Hernandez was a quiet, diffident witness, who testified consistently throughout a difficult cross-examination. He admitted going to Resendez's home a few days before his testimony to ask Resendez to be his witness. He also conceded that he told Resendez that he wasn't sure why he was pursuing the matter.[6/]

Based on these credibility determinations, I find that Hernandez asked Resendez to inquire about the possibility of full-time employment for him and that Resendez communicated this request to Sowersby. I further find that Hernandez asked Sowersby for work on or about October 28, 1982, and filled out an application at that time.

2. Analysis and Conclusions

The Complaint alleges that the Company discriminatorily refused to rehire Hernandez as a full-time employee because he participated in Union activities. In order to establish a prima facie case, the General Counsel must establish that Hernandez engaged in Union activities, that the Company had knowledge of these activities, and that its failure to rehire him was connected to those activities. (Silas Koopal Dairy (1983) 9 ALRB No. 2.) Hernandez[1]s Union activities were minimal: he wore Union buttons to work (as did the other two temporary employees and virtually every

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6. I do not equate doubts about going through tension-filled legal proceedings with doubts about the merits of one's underlying complaint.

other male Mexican worker) and attended Union meetings in the parking lot. But there is no requirement that an employee be "very active" in order to establish discrimination against him.

Respondent's knowledge of Hernandez's support for the Union is clear. Macaraeg spoke to Hernandez about voting on election day. He later talked to Hernandez extensively in an (apparently unsuccessful) effort to "get a statement from him concerning the union." Hernandez testified that the was wearing Union buttons during this conversation. It would be naive to doubt that the Company knew that Hernandez was a Union supporter. Respondent's failure to rehire Hernandez when it hired other workers without any nursery experience provides a causal connection between his Union support and the refusal to rehire. I therefore conclude that the General Counsel has established a prima facie case.

Once the General Counsel establishes that the employee's protected conduct was a substantial or motivating factor in the action taken against him, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of protected concerted activity. (N.L.R.B. v. Transportation Management Corp. (1983) ___ U.S. ___, 103 S.Ct. 2469 [113 LRRM 2857].)

The Company's defense is based on its contention that Hernandez never properly applied for rehire and that, if he had, his poor work record would have resulted in his rejection. Because I have already found that Hernandez twice applied for rehire and that the evidence concerning his work performance is vague, contradictory, self-serving, and ultimately not credible, I conclude

that Hernandez would have been rehired had it not been for his support of the Union. The refusal to rehire Hernandez constitutes a violation of section 1153(a) and (c) of the Act.

D. The Discharge of Jesus Ornelas

1. Facts

Ornelas worked for Respondent in its mum department from February, 1976, until his discharge in December 1982. He was an active and visible supporter of the Union. Ornelas distributed authorization cards, buttons, and flyers on Company property in view of several supervisors and Matsui. After the election, Ornelas attended two meetings with Matsui as a member of the Union ranch committee. Matsui acknoweldged Ornelas's attendance at one of these meetings, and did not deny knowledge of his Union activities.

On Sunday, November 28, 1982, Ornelas received a telephone call from relatives in Mexico, informing him that his mother had died. He testified that he attempted to phone Matsui[1]s home and the Company office in order to let the Company know that he needed to take an emergency leave of absence. Ornelas testified that there was no answer. Matsui testified that he was home at the time Ornelas supposedly placed the calls and that the Company phone had an answering machine to take calls. Matsui checked the answering machine on Sunday night and found no message from Ornelas. Ornelas did reach his foreman, Jose Villalobos Mendoza, and informed him that he would be leaving for Mexico. He did not tell Villalobos how long he would be gone, nor did Villalobos inquire. Villalobos told Ornelas that he would inform the Company, but also told him to call on Monday to be double sure. Ornelas denied that Villalobos told

him to call again on Monday.

On Monday, November 29, Villalobos first tried to inform Matsui about Ornelas's absence. Because Matsui does not speak Spanish, Villalobos was not sure if he had gotten through to him with his message. Matsui said nothing to Villalobos. However, Matsui testified that he asked Villalobos how long Ornelas would be gone. Villalobos replied that he did not know. I credit Villalobos[1]s testimony, because he would not have proceeded to inform Toyokura and Martines if it had been clear to him that Matsui had understood him. Villalobos then informed Martines and Toyokura, both of whom said that it was all right. Martines asked how long Ornelas would be away, and Toyokura may have.

Ornelas flew to Mexico. His mother's funeral took place on Monday, November 29. He spent the next few days driving relatives back to their homes. The rest of his time in Mexico was devoted to taking care of the details of obtaining a death certificate, paying for his mother's funeral and hospital expenses, settling her estate, and placing a tombstone on her grave. Ornelas returned to California by bus. He left Mexico on December 7 and arrived in Salinas on December 9. The long bus trip left Ornelas exhausted, so he slept late on December 10.

According to Martines, the subject of Ornelas's absence was raised at a supervisors' meeting on Tuesday, December 7. Martines was directed to review the applications of three prospective employees and prepare to hire one. One applicant was hired on December 10, but the Company does not contend that he was a replacement for Ornelas. Martines decided to send a telegram to

Ornelas's home on December 10. She stated that two weeks was the standard time for employees to take for emergency leaves to Mexico, but she wanted to know if and when Ornelas would be returning. Because telegrams could not be sent to Ornelas's address, Martines sent a mailgram instead. Martinez testified that a telegram was an effective means of communciation and provided good documentation for her files.

Ornelas came to the Company offices to speak to Matsui about 30 minutes after Martines sent the mailgram. Because Matsui was busy, she spoke to Ornelas and told him to return at 4:00 p.m. She testified that she asked Ornelas if he had received the telegram. He denied that she ever mentioned sending him a telegram.

When Ornelas returned, he again spoke to Martines. He claims that she told him that he was fired for not contacting the Company about his absence. Martines told him that talking to Villalobos was insufficient. Ornelas then asked Matsui if he could return to work. Matsui told him it was too late.

Martines told a quite different story. She testified that Ornelas did not return to the office until almost 5:00 p.m. At first they discussed funerals and mortuary procedures. Then Martines asked why he had taken so long to return. Ornelas told her that he had been visiting with relatives and had assumed he could take some vacation. Martines checked Ornelas's file and determined that he did have sufficient accrued vacation to cover the period of his absence. Martines related Ornelas[1]s explanation to Matsui, who was shocked that Ornelas had assumed that he could extend his emergency leave to take vacation. He told Martines that he was

firing Ornelas.

Ornelas denied telling Martines that he had decided to take vacation time. He asserted that the subject of vacation did not arise until his final checks were being prepared.

Martines testified that Ornelas suggested a deal: if the Company did not contest his claim for Unemployment Insurance, then he would not file a charge with the Board. Ornelas denied making any such suggestion. Martines reminded Ornelas to disregard the telegram he would be receiving. Ornelas stated that Martines never mentioned a telegram.

Ornelas received the mailgram on Saturday. He reported for work on Monday. Several hours later Toyokura took him to Martines's office. She testified that he had a sheepish grin on his face when she reminded him that he knew that the mailgram was to be disregarded.

The Employment Development Department denied Ornelas's claim for Unemployment Insurance. The denial was upheld on appeal by an Administrative Law Judge of the Unemployment Insurance Appeals Board, who found that Ornelas had stayed in Mexico longer than necessary. The ALJ found that this misconduct was a valid ground for Ornelas[1]s discharge. Ornelas was not represented by an attorney at the hearing and put on no evidence in support of his claim that he had been discharged as a result of his Union activities.

Both the General Counsel and Respondent put on evidence of the Company's past practice with respect to the granting of leaves. The General Counsel's evidence demonstrates that emergency leave requests for up to three weeks were routinely granted and that the

employee, upon his return, was not questioned about how he spent his time. One employee, Javier Solorio, left the Company on an emergency leave, stated no return date, came back three months later, and was rehired. The Company's attempt to distinguish this case from that of Ornelas, on the ground that it treated Solorio[1]s absence as a quit, is strained. The Company concedes that it had work available when Ornelas returned on December 10. Adolpho Sanchez left the Company for personal reasons, without giving any notice. His brother, Luis Sanchez, simply informed Sowersby that he had quit. On his return, Adolpho was rehired without questions, even though the Company Handbook requires two weeks prior notice when an employee intends to quit.

Respondent's evidence consisted of several employees who were discharged when they left the Company after their requests for non-emergency leave had been denied. Here, the Company concedes that it would have granted Ornelas's request for emergency leave. Matsui also testified that he refused to reinstate a worker to whom he had granted a 30-day leave without asking any questions about the reasons for the request, when he returned after the expiration of the 30-day period.

No evidence was submitted concerning any employee who returned from an emergency leave to Mexico in less than two weeks. Nor did the Company ever question returning employees about how they had spent their time while on leave. Martines freely testified that two weeks was the standard time for such leaves.

2. Analysis and Conclusions

The General Counsel has set out a prima facie case of

discrimination against Ornelas. He was an unusually active Union member, whose activities were visible to the Company. The fact that he was discharged on returning from a valid emergency leave, after being questioned about his actions during that leave, establishes a connection between his support for the Union and his discharge.

Respondent's position with respect to its reasons for discharging Ornelas has never been completely, clear. In its response to his claim for Unemployment Insurance, Martines stated that Ornelas was fired for "failure to contact the company during the period 11/29/82 until 12/10/82 . . ." Perhaps because there is no evidence that any employee on leave was required to contact the Company during his absence, Martines and Matsui maintained at the hearing that it was Ornelas[1]s misconduct in assuming that he could use vacation time that was the real basis for his discharge. I do not credit this testimony. First, Martines was an experienced personnel manager, familiar with Unemployment Insurance procedures. Ornelas's alleged misconduct would certainly be a stronger ground for discharging him than a failure to contact the Company while in Mexico to attend his mother's funeral. Yet, Martines did not even attempt to explain why she only cited his failure to contact in her response to the Unemployment Insurance claim. Interestingly, the Company's Handbook simply states that: "If you take the vacation without final approval, you will not be eligible for any vacation pay." There is no suggestion here that unauthorized vacation will result in discharge.

Certain conflicts between the testimony of Martines and Matsui also cast doubt on the nondiscriminatory nature of the

discharge. First, Matsui testified that he asked Villalobos how long Ornelas would be gone. Villalobos credibly testified that Matsui said nothing to him. Second, Martines testified that she sent the mailgram to Ornelas because it would provide good documentation for her files. No employee had ever been sent a telegram by the Company before. This testimony suggests that the Company was preparing to discharge Ornelas for failure to contact it or return within two weeks, but that he returned too early. Martines's testimony that she asked Ornelas if he had already received the mailgram and then reminded him that he would be receiving it that evening is inherently incredible. While it would be perfectly natural for her to mention the mailgram to Ornelas, this testimony is simply too pat, because Martines clearly knew the difference between a telegram and a mailgram and understood that a mailgram is not delivered until the day after it is sent.

Matines's attempt to tie together the failure to contact aspect of Ornelas's discharge with the vacation issue was unconvincing. She testified that Ornelas's error was in failing to contact the Company once he was no longer in Mexico on an emergency. But her statement on the Unemployment Insurance form makes no reference to such subtleties. Apparently, Ornelas should have telephoned the Company and asked if he could stay on a few extra days on vacation status.

On balance, I find that Ornelas did not tell Martines that he had decided to take vacation time. The basic thrust of Respondent's argument with respect to Ornelas is that he is devious, clever, and untrustworthy. It would be incongruous for such a man

to hand his employer a pretext to fire him, especially when he had never met Martines before. But, even if Ornelas did mention vacation pay, I would still find that he was discharged because of his Union activities. It is certainly not a cultural practice unique to Mexicans for a son to visit with his relatives for several days after the death of his mother. The Company, with its past practice of routinely allowing two weeks for funeral leave without questions, must have understood this. None of the Respondent's arguments contests the fact that it never questioned employees about their activities when they went to Mexico to attend a funeral, in essence, the Respondent is arguing that Ornelas was discharged for failing to tell Villalobos, moments after learning of his mother's death, that he would probably be gone for about two weeks. It does not make this argument directly, because its past practice establishes that it implicitly granted such leave requests for at least two weeks. The evidence is abundantly clear that Respondent treated Ornelas differently from all its other employees who had left on emergency leaves.

I conclude that the Respondent would not have discharged Ornelas if he had not engaged in Union activities, and that in firing him it violated section 1153(a) and (c) of the Act.

E. The Discharge of Miguel Morales

1. Facts

Morales began working for Respondent in 1981, in the maintenance department. In early 1982, he was transferred to the rose department. Morales distributed buttons and flyers in the parking lot and lunch room during the representation election

campaign. He testified that Macaraeg and Matsui observed these activities.

On Sunday, January 30, 1983, Morales was assigned to transport cut roses from the greenhouses to the refrigeration area. Morales drove an electric cart to transport the flowers.

At about 1:00 p.m., shortly before quitting time, Morales entered the refrigeration area on foot and, using the jacket of a co-worker to protect him from thorns, removed some roses from a bucket of water. He then took the flowers and the jacket to the lunchroom and laid them on the table. He stated that he intended to ask permission of foreman Alfredo Medrano before taking the flowers home. He then returned to his cart, picked up one more load of flowers, and took them to the refrigerator. On his way from the greenhouse to the refrigerator, Morales looked for Medrano and was unable to find him. Morales decided to return to the lunchroom and take the flowers back to the refrigerator. When Morales entered the lunch room, he encountered Yong Shik Moon who angrily demanded to know why Morales had gotten his jacket wet. Morales apologized to Moon and returned the flowers to the refrigerator.

Moon testified that he could not find his jacket at quitting time. He looked in the lunch room and saw a pile of jackets on top of the Coke machine, but did not see his. When further searching was unsuccessful, he returned to the lunch room and pulled down the jackets. His jacket had been covered by another. A bunch of roses was wrapped inside the jackets. Moon was angry because his jacket was soaking wet. He waited in the lunch room to see who would come for the roses. When Morales entered,

Moon, who speaks little English, asked him why he had gotten his jacket wet. Morales said: "I don't care, I don't care," and made threatening gestures to Moon. Morales took the flowers and walked out of the lunch room.

Morales's account of his taking of the flowers is absolutely incredible. His testimony was clearly improvised on the spot. For example, Morales, like other rose workers, routinely used gloves to handle roses. Morales testified that he used a jacket because he had left his gloves in the lunch room. He stated that on other occasions when he took flowers home with permission he used gloves to carry them. Clearly, Morales used the two jackets to conceal the flowers. He could not explain why he took them without first getting permission from Medrano when, on other occasions, he obtained permission first. Morales's actions were completely at odds with his supposed intention of seeking permission before taking the flowers.

There was considerable testimony taken concerning the Company's policy with respect to the taking of flowers by employees. There is no evidence that employees were ever permitted to take flowers from the refrigeration area without obtaining permission from the Company. Morales admitted that he needed permission before taking the flowers.

Morales did not work on Monday, January 31. He testified that he informed his foreman, Luis Sanchez, at about 6:30 a.m. that he needed to take his sister to the doctor. Sanchez, who testified that he never arrived at work that early, denied that Morales called him.

Moon attempted to inform Sanchez about the incident early on Monday morning. He first referred to the man who wet his jacket as "Ruben," and accused Ruben Villa. Moon then stated that it was not Ruben. Because only Morales was absent, Sanchez assumed that Moon was referring to Morales and told him to wait until the next day. Sanchez stated that this exchange took place at 7:10 a.m. When asked how he knew that Morales would be absent the entire day, Sanchez replied that Morales was never 10 minutes late. Macaraeg testified that Morales had been late to work three times in the previous few weeks. Sanchez stated that Morales had not been late for a long time. I conclude that Morales did inform Sanchez that he would be absent. There is no other reason for Sanchez's assurance at 7:10 a.m. that Morales would not be at work that day.

On Tuesday, February 1, 1983, Moon and Morales had another confrontation. Moon then informed Macaraeg that Morales had gotten his jacket wet. Morales was called to Macaraeg[1]s office to give an explanation. He admitted getting the jacket wet and told Macaraeg he had used it to get flowers from the refrigeration area.[7/]

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7. Macaraeg testified that Moon had said nothing to him about flowers and that he first learned that Morales had taken the roses when morales told him. Morales stated that Macaraeg raised the issue of the roses first. Moon's declaration indicates that he told Macaraeg about the roses. I do not find that this evidence detracts from Macaraeg[1]s credibility. He had no motive to testify that he first learned about the roses from Morales if it was not true. A more likely explanation is that Macaraeg could not understand Moon, even with the aid of a Korean interpreter. Macaraeg testified that Moon was very excited and hard to follow. He was also excited and difficult to understand, even through an interpreter, in his testimony at the hearing.

Macaraeg told Morales that he was being fired for taking the flowers. Morales protested that everybody took flowers.[8/] Macaraeg replied that he knew nothing about that. The General Counsel presented no evidence establishing that employees took flowers from the refrigeration area without permission.

Although Morales testified that he told Macaraeg that he intended to ask Medrano for permission, I do not credit this testimony. He would not have bothered to wrap the flowers in two jackets if he had really intended to ask permission. In addition, Morales's testimony about searching for, and being unable to find, Medrano was particularly unconvincing.

Macaraeg referred to Morales's actions both as "theft" and "attempted theft". Exactly why he used the word "attempted" is not clear. But Macaraeg credibly denied that Morales told him he had returned the flowers to the refrigerator.

2. Analysis and Conclusions

Morales distributed Union literature in Macaraeg[1]s presence. I will assume that the General Counsel has made out a prima facie case.

The Company has demonstrated that it would have taken disciplinary action against Morales even if he had not engaged in

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8. At first, Morales testified that Macaraeg discharged him without giving him any opportunity to explain what had happened. On cross-examination, he admitted that he told Macaraeg that the taking of flowers was not a good reason to fire him and that he had intended to ask Medrano for permission. Interestingly, Morales did not testify that he told Macaraeg that he returned the flowers to the refrigeration area. The record establishes that Macaraeg did, in fact, give Morales an opportunity to explain his actions and to protest his discharge.

Union activities. He concealed roses and took them from the refrigeration area without permission. The fact of concealment alone establishes that Morales knew that he was acting against Company rules. Roses are particularly valuable before Valentine's Day. Morales's admission was sufficient cause for Macaraeg to take action against him.

No other employee has been caught taking flowers without permission, so there is no basis for comparing the punishment meted out to Morales against that imposed on others in similar circumstances. Macaraeg testified that he did not simply suspend Morales because of previous problems. He stated that he did not have a good work relationship with Morales. The General Counsel failed to rebut this testimony. I conclude that the Company would have discharged Morales even if he had not engaged in Union activities. Paragraph 10 of the Complaint shall be dismissed.

F. The Failure to Transfer and the Subsequent Lay-Offs of Jose Roman and Rafael Ponce Gonzalez

1. Facts

Roman and Gonzalez both began working for Respondent in the maintenance department in 1981. Both were active in the Union organizational effort and were observed by Company supervisors, including Matsui, while distributing Union literature. Roman was a particularly vocal Union adherent, who challenged Matsui with pro-Union statements at the pre-election meetings conducted by the Company.

The Company transferred Roman and Gonzalez to work temporarily in the rose department several times in 1982 and 1983, when there was insufficient work in maintenance or extra help was

needed in the roses. Neither Roman nor Gonzalez voiced any complaints about these transfers, with the exception of one that occurred several weeks after the representation election. They felt that they were being isolated from other workers in the rose department. In addition, Roman was upset about being assigned to spraying pesticides, a duty for which he had not been trained. On November 9, 1982, the Union filed an unfair labor practice charge on their behalf with the Board. The charge alleged that:

> Since on or about September 14, 1982, the company, through its agents, has discriminated with respect to the employment of two of its employees, in assigning one employee to perform duties not previously performed by him, and in isolating him and another employee to work apart from the rest of the crew until approximately November 5, 1982, in retaliation for their participation in protected, concerted, union-organizing activities and to prevent them from continuing to engage in said activities.

Matsui admitted that he knew the charge referred to Roman and Gonzalez, even though it did not name them. He denied the specific allegations in the charge, but admitted that Roman and Gonzalez were assigned to weeding and cleaning work, because they were not experienced enough to perform the other tasks in the rose department.

In December, 1982, Bill Thompson, the maintenance department supervisor, told Roman and Gonzalez that Matsui had stated that they were to be laid off in a month or so because of a lack of work in the department. Although Matsui and Martines denied that any decision concerning the particular workers to be laid off had been made in December, I credit Roman's testimony because Thompson, who continues to be the maintenance department supervisor, was not called as a witness by Respondent.

In Janaury 1983, Roman and Gonzalez were once again transferred to the rose department. They neither complained to the Company nor filed a charge with the Board as a result of this transfer. Gonzalez returned to the maintenance department in February. Roman, who had left for Mexico on an emergency leave, was assigned to work in maintenance when he returned in March.

On March 18, 1983, Thompson informed the two men that they would work only two or three days per week for the next month and then would be laid off. Roman and Gonzzalez spoke to Martines that afternoon. Roman testified that he asked Martines why they had not been transferred to the rose department. Martines replied that they had been needed to work in maintenance. Martines confirmed that Roman and Gonzalez came to talk to her about their reduction in hours and impending layoffs, but stated that she couldn't remember if Roman had protested the failure to transfer them to the rose department. I credit Roman's testimony.

On April 15, 1983, Roman and Gonzalez were laid off. Gonzalez was recalled for a week to work in the packing shed. The Company has not hired any workers in the rose, mum, or maintenance departments since their layoff.

Matsui confirmed that the Company knew, as early as December, that it would need to lay off some workers in maintenance because of a lack of work. Beginning in Janaury, 1983, Matsui started giving Roman and Gonzalez make-work assignments to fill out their days. Meanwhile, the Company hired several employees in the mum and rose departments in February, 1983. None had previous experience in nursery work.

Matsui testified that he did not transfer Roman and Gonzalez to work in the rose department because they had filed a charge against him protesting their earlier transfer. Martines and Matsui stated that Ladislau Pineda, the Board agent who investigated the charge, told them that the basis for their complaint included being transferred back and forth. Pineda testified credibly that he explained to both Martines and Matsui that the charge related to allegations of isolation from other workers, assignment to spraying work, and assignment to cleaning and weeding work. Pineda stated that he was not even aware that the two men had been transferred from one department to another.

As a result of the charge and the subsequent discussion with Pineda, Matsui testified that he was afraid to transfer Roman and Gonzalez because of the likelihood that he would receive another charge. Matsui even feared asking the men if they wanted to be transferred. If the men now told him that they would agree to work in other departments, Matsui would consider them if a vacancy arose.

The Company selected Roman and Gonzalez for lay-offs because they were the least skilled of the five employees in the maintenance department. Matsui testified vaguely about the lack of skills possessed by Roman and Gonzalez. At first, he stated that they had no experience in plumbing, wiring, vehicle maintenance, and welding. Later, Matsui admitted that they had experience in all these areas, with the possible exception of welding. Again, Thompson, who was in the best position to evaluate the relative skills of the workers in his department was not called as a witness. No testimony was introduced about the skills or experience of the

three workers who were not laid off. Further, I find, contrary to Matsui's testimony, that Roman and Gonzalez had been selected to be laid off in December, long before Matsui supposedly discussed the matter with Thompson.

2. Analysis and Conclusions

Roman and Gonzalez were strong Union supporters whose activities on the Union's behalf were well known to Matsui. In his testimony, Matsui evinced a strong dislike of Roman as the kind of employee who complained too much. I conclude that the General Counsel has established a strong prima facie case that the Company refused to transfer Roman and Gonzalez and later laid them off because of their protected concerted activities.

With respect to the refusal to transfer allegation, Respondent's only defense is that Matsui reasonably believed that Roman and Gonzalez had previously filed an unfair labor practice charge with the Board protesting such a transfer. I do not credit Matsui's testimony that he believed the charge was based upon the transfer of the men to the rose department. They had been transferred out of the maintenance department many times, both before and after filing the charge, without complaint. The charge itself mentions nothing about transfers. I credit Pineda's account of his discussions with Martines and Matsui, in which he explained the charge was based upon allegations other than transfer. Finally, Matsui must surely have known that he was far more likely to be the object of an unfair labor practice charge for laying off employees than for transferrring them. Yet, he showed no hesitation about laying the men off. His statement that he was afraid even to ask

the men about transferring them is simply incomprehensible. I conclude that Respondent discriminatorily refused to transfer Roman and Gonzalez to the rose department on a permanent basis after December, 1982, because of their protected, concerted activities, in violation of section 1153(a) and (c) of the Act.

The Company's defense to the charge that it discriminatorily laid off Roman and Gonzalez is that they were the least skilled and experienced employees in the maintenance department. The Company rarely laid off employees and had no fixed practices in such situations. It had the right to select employees for lay-off based upon their skills and experience. But, Matsui's testimony concerning Roman and Gonzalez[1] s skills was perfunctory and vague. He made no attempt to compare their skills with the employees not laid off. Even though Matsui testified that Thompson was largely responsible for selecting Roman and Gonzalez, contrary to Roman's credited testimony, the Company did not call Thompson as a witness. I therefore conclude that Respondent has not established that it would have laid off Gonzalez and Roman had they not engaged in protected concerted activities, and that their layoffs violated section 1153(a) and (c) of the Act.

Because Matsui testified that he based his decisions concerning Gonzalez and Roman, at least in part, on the fact that they had filed an unfair labor practice charge with the Board, I conclude that the Respondent discriminated against them for invoking Board processes, in violation of section 1153(d) of the Act.

G. The Wage Adjustment of October 1982

1. Facts

Until 1982, the Company always adjusted employee wages on January 1. In December, 1981, Matsui posted a notice announcing that, in 1982, adjustments would be made in January and October, while, in succeeding years, adjustments would come in April and October.

The parties stipulated that the Company's basic hourly wage rates were adjusted as follows:

January 1977:	$3.15
January 1978:	$3.35
January 1979:	$3.55
January 1980:	$4.20
January 1981:	$4.40
January 1982:	$4.60
October, 1982:	$4.65

Aside from Ornelas's uncorroborated testimony, upon which the General Counsel does not rely, that Matsui promised he would increase wages by 20¢ in October, 1982, there is no evidence that the Company specified in advance what the amount of the October adjustment would be. On October 11, Matsui posted a notice informing the employees that the October increase would be limited to 5¢ per hour, as the result of "extremely unfavorable economic conditions, including the business of our Company."

Ornelas and Castillo testified that they and other members of the ranch committee met with Matsui earlier in October to find out why no increase had been reflected in their first October

paychecks. Matsui told them that he was not going to give them a raise or year end bonus and reminded them that he had said there would be financial problems if the Union came in. Matsui denied that he had any meeting with the ranch committee in October and further denied that he had any such discussion with any workers.

Matsui explained that he based his decisions on the size of wage increases on what his competitors were paying. He stated that he looked at the Sunnyside Nursery collective bargaining agreement with the Union and contacted some nursery owners in the area to find out what the prevailing rates were. He determined that the Company was paying 20% to 30% more than its competitors. Matsui then decided to give his employees a nominal 5¢ per hour raise since he had promised that there would be an adjustment.

2. Analysis and Conclusions

The General Counsel argues that the Company deviated from its past practice in limiting the October, 1982, wage increase to 5¢ per hour. Respondent points out that the total amount of raises granted to employees in 1982 was 25¢ per hour, more than in any year except 1981, when, according to Matsui, farmworker wages increased markedly.

I conclude that the General Counsel has not established that the Company has violated the Act. Even asuming that a prima facie case has been made out through the alleged statements of Matsui that, as a result of the Union victory, there would be no wage increase in October, the General Counsel has failed to demonstrate that there would have been a larger increase in the absence of the Union activities of the work force. No evidence was

submitted to counter Matsui's basic claim that the Company's wages were very competitive. No credible evidence demonstrates that the Company promised to adjust wages by a definite amount. Nor do I accept the General Counsel's argument that Respondent gave conflicting reasons for limiting the wage increase. The written announcement to workers, which cited bad economic conditions, is not necessarily inconsistent with Matsui's testimony that he relied principally on what his competitors were paying. The prevailing wage rate in an industry is clearly related to the economic conditions affecting other companies, as well as his own. Even if I were to conclude that the Union activities of the Company's workers played a part in Matsui's decision to limit the wage increase, I would have no basis whatever to determine what the raise would have been absent those activities, because the General Counsel failed to intorduce any evidence on prevailing wage rates in the nursery industry. I shall recommend that Paragraph 8 of the Complaint be dismissed, insofar as it relates to this allegation.

H. The Company's Decision Not to Award a Year-End Bonus in 1982

1. Facts

The Employee Handbook states that the Company will make "Service Awards" to its employees based on the Company’s profit for the year. These awards, which are generally paid to employees on December 24, are known as a year-end bonus. The Company paid a year-end bonus in every year except 1978 and 1982. In 1982, in the same notice informing employees that the October wage adjustment would be limited to 5£ per hour, the Company announced that it would be unable to pay a year-end bonus. It cited the same unfavorable

economic conditions as the basis for this decision.

In 1978, the Company changed its policy on compensating employees for work in weeks when there was a holiday. A group of employees, including Ornelas, went to Matsui's house the day before Memorial Day to protest this change. On Memorial Day, most employees, including those in the maintenance department did not report to work. Mike Toyokura told Javier Solorio, one of the employees who did work, that those who didn't report would not get a year-end bonus. Toyokura did not deny making this statement.

Matsui adamantly, although incorrectly, maintained that the discussion concerning compensation during weeks when there was a holiday occurred in 1977, rather than 1978. The Board found, in Matsui Nursery, Inc. (1979) 5 ALRB No. 60, that these events occurred in 1978. Matsui also testified that none of the maintenance department employees refused to work on Memorial Day. Again, the prior Board decision establishes that none of the maintenance workers reported.

Ornelas testified about two conversations later in 1978, in which Matsui stated that the workers would receive no bonus because they didn't want to work. Matsui also cited heavy expenses. Matsui denied making these statements.

No employee received a year-end bonus in 1978. Again, in 1982, no employee, including supervisors and Matsui, was given a bonus.

Matsui testified that his decision, made in mid-October, not to grant a year-end bonus in 1982, was based solely on his projections of the Company's profit for the year. The Company's

records demonstrate that its profit was only $1,000 for the year. In 1978, the profit was $56,000. In 1977 and 1981 profits exceeded $100,000, while in 1980, the profit was nearly $100,000.

In December, 1982, the Company's loss amounted to over $200,000, far more than the loss in any other month, and enough to have made the difference between a substantial profit and a slim one. Because the Company uses a cash base accounting system, it could, as the General Counsel suggests it did, manipulate its expense figures by pre-paying for certain items or building up its inventories. In particular, the General Counsel points to higher interest payments, utility costs, and fertilizer expenses. Matsui testified credibly that he took out some new loans in 1982 at high interest rates. He also testified that utility costs have increased markedly recently, something which any utility customer can verify.

The Company obviously did not know what its final profit (or loss) for 1982 would be in October. Matsui testified that he relied heavily on his production records which showed that total sales for the year were running behind those in 1981. At the end of September, total sales were down about $150,000 compared to the same period in 1981. Total expenses for the first nine months of 1982 were running nearly $500,000 ahead of expenses during the same period in 1981. By examining these figures, Matsui reasonably concluded that he would not make much of a profit in 1982.

2. Analysis and Conclusions

Because the Company deviated from its past practice in not granting a year-end bonus in 1982, the burden shifts to Respondent to demonstrate that its decision was based on economic

rather than discriminatory factors. The Company has established that its expenses were substantially higher through September, 1982 than they were in the first nine months of 1981. These expenses were incurred before the Company could have had any reason to manipulate them in contemplation of a defense to an unfair labor practice charge. The Company's production records also show that total sales were down in the first nine months of 1982 from the same period in 1981. I give these figures much more weight than the actual profit for the year, which the Company did not learn until February, 1983.

I conclude that, regardless of its anti-Union motiviation, the Company would not have granted a year-end bonus to its employees in 1982, even if they had not engaged in Union activities, because of its financial condition. I shall recommend that Paragraph 8 of the Complaint be dismissed.

THE REMEDY

Having found that Respondent discharged one employee and refused to rehire another for engaging in protected Union activities, in violation of section 1153(a) and (c) of the Act, and that it refused to transfer and subsequently laid off two employees for engaging in protected Union activities and for filing an unfair labor practice charge with the Board, in violation of Section 1153(a), (c) and (d) or the Act, I shall recommend that it cease and desist from like violations and take certain affirmative actions designed to effectuate the policies of the Act. Specifically, I recommend that Respondent be ordered to offer the four employees reinstatement to their former jobs without loss of seniority, and to

make them whole for any loss of pay or other economic losses they have suffered as a result of Respondent's unfair labor practices.

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, Matsui Nursery, Inc., its partners, officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

a. Discharging, refusing to transfer, refusing to rehire, laying off, or otherwise discriminating against any employee in regard to his or her hire or tenure of employment or any term or condition of employment to discourage membership in, or activities on behalf of, the United Farm Workers of America, AFL-CIO, or any other labor organization.

b. Discriminating against employees in regard to their hire, tenure, or conditions of employment as a result of their filing charges with the Board.

c. In any like or related manner interferng with, restraining, or coercing any agricultural employee(s) in the exercise of the rights guaranteed them by section 1152 of the Act.

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

a. Immediately offer to Rafael Ponce Gonzalez, Pablo Hernandez, Jesus Ornelas, and Jose Roman full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

b. Make whole the four above-named employees for any loss of pay and any other economic losses they have suffered as a result of the discriminatory action against them, reimbursement to be made according to the formula stated in J & L Farms (1980) 6 ALRB No. 43, plus interest in accordance with Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

c. Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying all payroll records, social security payment records, time cards, personnel records and reports, and all other ecords relevant and necessary to a determination, by the Regional Director, of the length of the back pay periods and the amounts of back pay and interest due under the terms of this Order.

d. Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

e. Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from September 1, 1982, until the date on which the said Notice is mailed.

f. Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its premises, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or

removed.

g. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all of its agricultural employees on Company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management to answer any questions the employees may have concerning the Notice and/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 in order to reimburse them for time lost at this reading and during 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 Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

DATED: October 21, 1983

Joel Gomberg

JOEL GOMBERG
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Matsui Nursery, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by discharging one employee, refusing to hire another, and laying off two employees, because they participated in activities in support of the United Farm Workers of America, AFL-CIO. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to join and engage in activities in support of the UFW or any other union.

WE WILL NOT discriminate against you for participating in Union activities or for filing charges with the Board.

SPECIFICALLY, the Board found that it was unlawful for us to discharge JESUS ORNELAS, refuse to rehire PABLO HERNANDEZ, and refuse to transfer JOSE ROMAN and RAFAEL PONCE GOMZALEZ and later lay them off.

WE WILL NOT hereafter fire or otherwise discriminate against any employee for joining or supporting the UFW or any other union or for filing a charge against us with the Board.

WE WILL reimburse JESUS ORNELAS, PABLO HERNANDEZ, JOSE ROMAN, and RAFAEL PONCE GONZALEZ for all losses of pay and other money they have lost because we unlawfully discriminated against them. We will also offer them their old jobs back.

DATED: MATSUI NURSERY, INC.

_____

(Representative) (Title)

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907. The telephone number is (408) 443-3161

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE