STATE OP CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KYUTOKU NURSERY, INC. Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party.	)	No. 75-CE-115-M 3 ALRB No. 30

On February 9, 1976, administrative law officer Franklin Silver issued his decision dismissing the complaint in this case. The general counsel, the intervenor, and the respondent filed timely exceptions. Having reviewed the record, we adopt the law officer's findings, conclusions and recommendations to the extent consistent with this opinion.

Respondent's employees struck on September 2nd, 1975, when respondent refused to grant their demand for a wage increase. On September 4, 1975, the employees filed a petition for certification, and an expedited election pursuant to Labor Code Section 1156.3[1/] was conducted on September 6, 1975. The United Farm Workers of America, AFL-CIO, was certified as the collective bargaining representative of respondent's employees on January 12, 1977.

The issues in this case center around the efforts of the employees to be reinstated to their jobs both before and after the election.

1/Labor Code Section 1156.3 provides in part: If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a strike, the board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition. The holding of elections under strike circumstances shall take precedence over the holding of other secret ballot elections.

I.

A UFW representative asked respondent to reinstate the strikers on September 3, 1975, at a time when most, if not all of them, had not yet been permanently replaced. The complaint charged that Mr. Kyutoku committed an unfair labor practice when he failed to grant this request. The law officer found that the request was conditioned by a demand that Mr. Kyutoku bargain with the UFW over the wage dispute which triggered the strike.[2/] He concluded that Mr. Kyutoku was not obligated to deal with the Union as an intermediary in reinstating the strikers, or in resolving the underlying wage dispute.

We think it is clear on this record that these employees were unwilling to return to work on September 3rd without some agreement from the employer to deal with the union on wages. We therefore agree that the September 3rd request was conditioned and that Kyutoku committed no ULP in rejecting a conditional request for reinstatement. However, we note that it is the existence of the condition, and not the fact that the request was communicated by a union representative which relieved him of his obligation to grant the request to reinstate these economic strikers. We thus do not reach in this case the question, to which the law officer indirectly alludes in his decision,

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[2/]He also found that the employees at all times intended to return only if all were reinstated in a group. Respondent urges us to find this as a further condition on their request for reinstatement on September 3rd. However, by Mr. Kyutoku's own testimony, respondent was coming into peak and could have reinstated all the strikers on that date. Under these circumstances, the employees' determination to return only as a group did not condition their request for reinstatement on September 3rd. See Ernie Grissom Chevrolet, Inc., 168 NLRB 1052; 67 LRRM 1109 (1972).

of the effect of Labor Code §1153(f)[3/] in a case where a representative of an uncertified union is acting solely as a spokesperson for the employees. See e.g., NLRB v. Phaostron Instrument and Electronic Co., 344 F2d 855, 59 LRRM 2175 (9th Cir., 1965); NLRB v. I. Posner, Inc., 304 F2d 773, 50 LRRM 2680 (2nd Cir., 1962).[4/]

II.

On September 9, 1975, the employees again requested reinstatement. It is undisputed that they had all been permanently replaced at this time. Since we do not find that the employer committed an unfair labor practice in his earlier refusal to reinstate them, we also reject the argument of the general counsel and intervenor that the strikers were entitled to reinstatement as unfair labor practice strikers. Mastro Plastics v. NLRB, 350 U.S. 270, 37 LRRM 2587 (1956); see also NLRB v. International Van Lines, 409 U.S. 48, 81 LRRM 2595 (1972). However, both the general counsel and the intervenor make the further argument that "recognitional" strikers under the ALRA should be entitled to reinstatement even though permanently replaced. They reason that Labor Code Section 1156.3, in providing for expedited elections when a strike is in progress, creates a right to such an election when employees strike to obtain it. It is argued that the

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[3/] Labor Code Section 1153(f) provides that it is an unfair labor practice for an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part."

[4/] We note that the employees, accompanied by a union representative, also approached Mrs. Kyutoku on September 4th, at which time she refused to speak with them in the presence of the union representative. This refusal standing alone was not charged as a separate unfair labor practice, nor did any of the parties treat it as such in their briefs.

ALRA embodies a trade-off, in which employees give up the right to obtain recognition of a union by striking in return for the right to obtain expedited elections by striking. On this basis, they would have us treat "recognitional" strikers differently from economic strikers, granting the former *a* right to reinstatement whether or not permanently replaced.[5/]

We agree with the law officer that the language of Section 1156.3 is not susceptible of such an interpretation. It does not require that the Board hold an election within 48 hours under strike conditions, but only directs the Board to give precedence to such cases and to attempt to hold them within 48 hours with all due diligence. Had the legislature intended to create a right, we do not think it would have used such discretionary language to do so. Nor do we think it likely that the legislature would establish a right aimed at obtaining recognition through the election process which could be exercised only by striking, and which is at most five days faster than the normal process invoked by filing a petition.

However, while we do not agree with the proposed interpretation of the 48-hour provision discussed above, we recognize that some of the most significant differences in our Act and the NLRA are precisely in the area of procedures for raising and resolving questions concerning representation and in the related area of the regulation of recognitional

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[5/]The NLRB gives economic strikers a right to reinstatement until permanently replaced, and thereafter a right to preferential hiring. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938); The Laidlaw Corporation, 171 NLRB 1366, 68 LRRM 1252 (1968), enforced, 414 F2d 99, 71 LRRM 3054 (7th Cir. 1969), cert., denied 397 U.S. 920, 73 LRRM 2537 (1970). Unfair labor practice strikers are entitled to reinstatement whether or not permanently replaced. Mastro Plastics v. NLRB, supra.

picketing. These differences are based on legislative recognition of conditions peculiar to agricultural labor relations. In determining the rights of strikers to reinstatement in the context of this Act, we are faced with the task of

> "weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct."

NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963). In light of the differences in the ALRA and the NLRA and of particular conditions of agricultural labor, a weighing of interests of employees in concerted activities against the interests of employers may not always lead to the same results reached by the National Board under its Act.

In this case, the intervenor argues that it is necessary to grant greater reinstatement rights to these strikers than they would have under NLRB precedent, in order to protect the right to strike in the face of the ease with which strikers may be permanently or temporarily replaced in a seasonal industry with a highly mobile labor force. We note that this argument *is* as relevant to weighing the rights of economic strikers generally as it is to weighing the rights of "recognitional" strikers or strikers in a 48-hour election context. However, we are not persuaded on the facts of the case before us of the need to take such a step. As noted by the law officer, the employment pattern at this nursery employer is much closer to the typical NLRB case in offering year-round employment for most of its

employees; and as the law officer also noted, the right to reinstatement until permanently replaced and the subsequent right to preferential treatment in hiring would not have been inconsequential in this case. With these rights as presently applied by the NLRB, all of these strikers could have returned to year-round employment with respondent by the end of November, 1975, at the latest.

III.

The Intervenor excepted to the law officer's failure to rule on the charges arising out of the meeting of its employees called by respondent on August 28, 1975. We find no prejudicial error herein. The law officer's description of the events of the meeting is accurate, and we note that the alleged violations clearly did not deter these employees from exercising their rights under Labor Code Section 1152 or from selecting the union as their bargaining representative on September 6. We believe imposing a remedy would serve no purpose.

The complaint is dismissed in its entirety.

Dated: April 5, 1977

Gerald A. Brown, Chairman

Richard Johnsen, Jr., Member

Ronald L. Ruiz, Member

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

Kyutoku Nursery, Inc.

and

United Farm Workers of America, AFL-CIO

Case No. 75-CE-115-M

DECISION OF ADMINISTRATIVE LAW OFFICER

Statement of the Case

Franklin Silver, Administrative Law Officer: This proceeding was initiated by charges filed by the United Farm Workers of America, AFL-CIO (hereafter Union), with the Salinas Regional Office of the Agricultural Labor Relations Board (hereafter Board), On October 17, 1975, a complaint was issued against Kyutoku Nursery, Inc. (hereafter Employer or Respondent), alleging that it engaged in and was engaging in unfair labor practices within the meaning of Sections 1153(a) and (c)[1/] of the Act by threatening its employees, on September 2, 1975, with reduced hours of work if any union became their exclusive bargaining agent, and by refusing, on September 9, 1975 and thereafter, to reinstate the employees after they had engaged in a strike in protest against the above threat, and had presented an unconditional request for reinstatement. This matter was heard in Salinas, California, on November 4 and 5, 1975, at which time a motion to amend the complaint was made by the General Counsel and was granted over the

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[1/] All statutory citations herein are to the Labor Code, unless otherwise specified.

Employer's objection. The Employer made no request for continuance to prepare its case in light of the amended complaint. The amended complaint alleges that on August 28, 1975, the Employer promised a wage increase and threatened a reduction of hours if a union came in; that on September 2 the Employer denied a requested pay increase, at which time the employees engaged in strike activity; that on September 3, before the employees had been permanently replaced, the Employer denied an unconditional request for reinstatement; that prior to September 9, the Employer permanently replaced the employees; and that on September 9 and thereafter, the Employer denied the employees' unconditional request for reinstatement.

Upon the entire record, and my observation of the witnesses and their demeanor, and after consideration of the briefs filed by the General Counsel, the Union, and the Employer, I make the following findings of fact, conclusions of law, and recommendations:

Findings of Fact

I. BUSINESS OF THE EMPLOYER

Kyutoku Nursery, Inc., is engaged in the business of growing carnations in Monterey County. It is owned by Mr. and Mrs. Kahei John Kyutoku, who perform all supervision of the work. The work force at the nursery varies between approximately ten employees during the planting season to 15 or more during peak season. Peak season occurs twice a year when the new crop comes up. The first half of September, 1975, was a peak season. At

all material times, the nursery has been an agricultural employer within the meaning of Sections 1140.4(a) and (c) of the Act.

II. THE LABOR ORGANIZATION

The United Farm Workers of America, AFL-CIO, has at all material times been a labor organization within the meaning of Section 1140.4 (f) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On September *2,* 1975, ten employees of the Respondent left their jobs when Mr. Kyutoku refused their request that he raise their pay to a uniform rate of $2.50 an hour. Prior to that date, there had been discussions between various workers and Mr. and Mrs. Kyutoku about a pay increase and the possibility of unionization. Viola Hernandez, one of the workers who left on September 2, worked closely with Mrs. Kyutoku and was on friendly terms with her. While working, Ms. Hernandez mentioned that she and the other employees understood that other nurseries in the area were getting higher wages and asked what she (Mrs. Kyutoku) thought about having a union. Mrs. Kyutoku replied that the nursery could not afford a union and that she and her husband would fight it.

On August 28, Mr. Kyutoku called a meeting of all the workers who were present that day and offered them a 25-cents an hour increase in wages. At least some of the workers expressed dissatisfaction with that offer and wanted to know how much the union rates were. Mr. Kyutoku stated that he did not want a union

at the nursery. Two of the workers who were present at the meeting testified that Mr. Kyutoku said that if a union came in it would harm them because he would reduce the number *of* hours they were working. Mr. Kyutoku, however, denied making such a statement. The meeting ended inconclusively with some of the workers asking for $2.50 per hour and rejecting the raise offered by Mr. Kyutoku.

On September 2, after the morning break, some of the workers gathered outside the packing shed and did not report back to work. According to one of these workers, Jose Valdominos, they wanted to have a meeting with Mr. Kyutoku to find out once and for all if they were going to get a raise to $2.50 per hour. Approximately 15 minutes after the break the remainder of the employees, who were at work inside the packing shed, also stopped working. Mrs. Kyutoku came in shortly thereafter and asked the employees to go back to work. The employees refused and demanded that everybody be paid $2.50. Mrs. Kyutoku rejected this demand, and the workers threatened to leave. Mr. Kyutoku, who had been working in the greenhouse, at this point came to the shed to find out why nobody had returned to work after the break. He ordered the employees back to work, and again the employees refused, demanding a pay raise to a uniform rate. Mr. Kyutoku stated that only certain of the workers who had been there the longest could get $2.50 an hour. The workers stood fast to their demand that they all should receive $2.50, and when this was not granted, a walk-out ensued. At this meeting, no mention was made by anyone of the possibility of a reduction of hours nor of unionization.

The communication between the workers and the Kyutokus was always imperfect. With the exception of Viola Hernandez, none of the workers can speak more than a few words of English. Ms. Hernandez testified in English at the hearing, and had some difficulty with the language. The Kyutokus' native language is Japanese. Mr. Kyutoku testified in English, but had *a* great deal of difficulty with the language. Mr. Kyutoku generally spoke with the workers by using a mixture of the little bit of Spanish which he knew and the little bit of English which the workers knew.

The September 2 meeting was conducted in English, with Ms. Hernandez speaking for the workers. She testified that when Mr. Kyutoku came into the shed:

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"I told him we were discussing about the $2.50. He said no, only to these persons (those with most seniority), and he said that if you don't like it, you can go home.

Q. (by Employer's counsel) What did you say?

A. I said: Well, if you are not going to pay $2.50, then we are going to go home.

Q. Did you say anything else?

A. *I* just said we were going to go home and that we were walking out.

Mr. Kyutoku testified that after he had stated that only those with highest seniority could get $2.50 per hour (Ms. Hernandez had the highest seniority of any of the employees and would have been eligible for this wage), Ms. Hernandez responded as follows:

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[2/] In her declaration taken by a board agent during the investigation of the charge, Ms. Hernandez at one point used the word "quit" to describe the workers' action. This declaration was produced for purposes of cross-examination pursuant to the Board's "Jencks rule" regulation, 8 Cal. Admin. Code § 20600.2(b)(1). It was subsequently introduced into evidence, by stipulation, for purposes of impeachment only. However, Ms. Hernandez was never cross-examined specifically about her use of the word "quit" in the declaration, nor given the opportunity to explain the apparent inconsistency between the declaration and her testimony. Under such circumstances, her declaration cannot be considered as impeaching her testimony. Evid. Code § 770. Beyond this, under the total circumstances discussed in the text, I do not consider that the possible use of the word "quit" reflected intention to permanently resign, see NLRB v. Phaostron Instrument & Electronic Co., 344 F.2d 855, 59 LRRM 2175, 2178 (C.A. 9, 1965), and certainly the possible use of this word by Ms. Hernandez sheds no light on the intentions of the other workers who do not speak English.

"She says just we accept or not, yes or no. She just wants yes or no.

Q. (by Employer's counsel) What did you-say in response to that?

A. We can't do it.

Q. Then what did she say?

A. She said: Does that mean — that means we are going to quit.

Q. What did you say?

A. My wife — Viola is going to quit. She asks Viola, are you?

Q. She asked Viola, are you too going to quit?

A. Yes.

Q. What did Viola say?

A. She said: Yes, I'm going to quit because we talked — we told everybody together, and we decided together, so can't help."

The workers then asked when they would be paid. Mr. Kyutoku at first told them Saturday, the regular pay day, but then decided to pay them immediately. The checks were made out, and ten employees accepted the checks and left.[3/] As they were leaving, Mr. Kyutoku told them that they could stay on the job if they wanted to, that they were not being fired. The workers made no reply because, as Ms. Hernandez stated, "We figured that we had nothing else to say to him until we had discussed it with a union or something else."

[3/] Two other employees, who lived on the property, remained at work.

Although Mr. Kyutoku may have understood the workers to state that they were quitting, his obvious difficulties with both English and Spanish make it likely that he does not understand the semantic distinctions between terms such as "quit" and "leave" or "walk out," and he is therefore not a reliable witness on the usage of such terms. It is quite likely that a worker could say, "I am leaving," and Mr. Kyutoku would understand this as, "I am quitting." Indeed, all conversations between Mr. Kyutoku and the workers are subject to misinterpretation due to the pervasive semantic difficulties on all sides. For this reason, I do not place great weight on the various versions of particular conversations as related by the different witnesses. Rather *I* view the circumstances surrounding particular actions as more clearly reflecting meaning to be attributed to those actions.

By consistent and credible testimony, the workers who testified stated that their intention upon leaving was to return to work if the Kyutokus agreed to the workers' wage demand. The workers immediately solicited the help of the Union to realize this objective and returned the following morning with two organizers for the Union to seek reinstatement along with the pay in-

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[4/] Mr. Kyutoku's testimony reveals that the term "no mas trabajo" was customarily used by his workers when they were quitting for the day, but that he might also understand the term to signify a permanent quit or a strike.

crease.[5/] At this time, Ms. Hernandez accompanied the two organizers to talk with Mr. Kyutoku, while the other workers remained outside the premises. According to Ms. Hernandez, one of the organizers, Bill Howes, spoke on behalf of the workers:

> "He introduced himself to Johnny (Mr. Kyutoku), and he said that for the moment, he would try to get the workers back to work, and then sit down and agree on some kind of an agreement.
>
> Johnny said: What workers? He didn't have any workers.
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> Bill Howes said: These are your workers from September 2.
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> * * * *
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> Q. (by attorney for General Counsel) What did Mr. Kyutoku say after he said that his employees had quit the day before, and Mr. Howes replied that he would like to discuss it with him?
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> A. He said that he had nothing to say, that he was going to talk to his lawyers first, and then he would get back to him."

The conversation ended, and the organizers left their cards with Mr. Kyutoyu. It is apparent from all the testimony

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[5/] At this time, there was a total of seven employees at the nursery: two of the workers who lived on the property and had not joined the walkout on the previous day, plus five workers who had been hired earlier that morning. There is some ambiguity in the record due again to semantic difficulties, as to whether these workers were hired permanently. In fact, however, three of them worked for only one day. Irrespective of whether these employees were hired permanently, Mr. Kyutoku's own testimony is that due to the fact that the nursery was coming into peak, he could have reinstated at this time all of the workers who had walked out the day before.

that the "agreement" contemplated by Mr. Howes was a resolution of the wage dispute which had precipitated the walk-out, and that the reinstatement of the workers and the resolution of the wage dispute constituted the dual purpose of this conversation. Implicit in the conversation was a further demand that Mr. Kyutoku deal with the Union in negotiating the wage increase. In addition, at all times after the walk-out, the workers intended to go back only if they were all reinstated at the same time.

Later that day, after consulting his attorneys, Mr. Kyutoku mailed to the ten workers and posted on his property the following letter:

"To our employees:

> We hereby offer to continue you in your employment at your rate of pay which was in effect on September 2, 1975. If you would like to continue working at those rates, please come to work immediately, or telephone me as soon as possible at (408) 422-5973.

John Kyutoku"

The workers returned on September 4, this time accompanied by Union representative Linton Joaquin. At this time, Mr. Kyutoku was not present, and so they spoke briefly with Mrs. Kyutoku. They served on Mrs. Kyutoyu a petition for certification pursuant to Section 1156.3 (a) , and Mrs. Kyutoku indicated that she would talk with the workers but not in the presence of

Mr. Joaquin. This was unacceptable to the workers, and they left without discussing reinstatement.

On September 6, an election was held under the 48-hour provision of Section 1156.3(a).[6/] The Union received a majority of the votes cast, and on September 9, most of the workers who had walked out returned to the nursery accompanied by Linton Joaquin and delivered the following letter addressed to John Kyutoku and signed by Marshall Ganz, an official with the Union:

> "Dear Sir:
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> This letter is to serve notice that the eleven[7/] striking employees of your company desire to be immediately reinstated in their jobs. The employees of your company having selected the United Farm Workers of America, AFL-CIO, to represent them, by a secret ballot election pursuant to the new Farm Labor Law, we will be contacting you upon certification regarding the negotiation of a contract.
>
> Yours,
>
> /s/ Marshall Ganz"

[6/] This provision states as follows:

"If at the time the election petition is filed a majority of the employees in a bargaining unit are engaged in a strike, the Board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition."

[7/] The eleventh worker referred to in the letter is apparently an individual who did not work on September 2 when the others walked out, but returned on September 3, at which time he was fired for absenteeism and tardiness. Although this firing took place when the nursery needed workers, the uncontradicted testimony of Mr. Kyutoku is that this worker had been repeatedly absent and had failed to come to work on the critical day following Labor Day when peak was beginning. It therefore appears that this employee was discharged for cause.

When the above letter was delivered, a full complement of 15 employees had been hired at the nursery. Mr. Kyutoku refused to reinstate any workers, and indicated that he was contesting the results of the election.

Subsequent to September 9, Mr. Kyutoku mailed individual offers of reinstatement at different times to all members of the group that had walked out. It was his testimony that the offers were made according to the jobs which became available.[8/] Only two of the offers were accepted due to the consistent intent of the other workers that they be reinstated as a group or not at all.

It is contended by the General Counsel and the Union that the walk-out on September 2 was an economic strike which was converted to an unfair labor practice strike on September 3 when the Employer refused to reinstate the strikers and discharged them for engaging in protected activity. From that point, it is argued, the strikers had an absolute right to reinstatement, notwithstanding the hiring of permanent replacements. Thus, the failure to reinstate all strikers following the request for reinstatement on September 9 constitutes further illegal activity.

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[8/] The General Counsel contends that the offers were made with the intention of isolating and dividing the workers, and that the leaders of the walk-out were the last to receive such offers. I find it unnecessary to resolve the issue because (1) an independent unfair labor practice based on discriminatory offers of reinstatement is not charged, and (2) under my recommendations, this evidence is irrelevant with respect to possible union animus.

A separate argument by the General Counsel and the Union is that the 48-hour provision of Section 1156.3(c), which is unique to the Agricultural Labor Relations Act, would be rendered meaningless unless workers who strike to gain a 48-hour election are protected from permanent replacement. Therefore, it is argued that workers engaged in a strike which triggers a 48-hour election must have reinstatement rights comparable to unfair labor practice strikers.

The Employer contends that the walk-out on September 2 was a voluntary quit rather than a strike, and that even if the walk-out be considered a strike, it was an economic strike entitling the strikers to reinstatement only to the extent that they had not been permanently replaced and only after unconditional applications for reinstatement. It is contended that no such unconditional application has been made by any of the former workers, although the Employer has made offers of reinstatement whenever the work has become available.

The Employer responds to the argument regarding the 48-hour provision on the basis that the Act does not contemplate a strike to trigger a 48-hour election but merely provides for such an election if such a strike is in progress. Consequently, the provision does not convey any right which requires that the strikers be treated differently than recognitional strikers under the National Labor Relations Act, and that the Employer acted properly in hiring permanent replacements and denying reinstatement on that basis.

Conclusions

I. THE SEPTEMBER 2 WALK-OUT CONSTITUTED AN ECONOMIC STRIKE.

Section 1152 of the ALRA is identical to Section 7 of the NLRA, 29 U.S.C. § 157, in protecting the right of employees to participate in " . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Under this statutory language, the right of unorganized employees to bring their individual complaints into concert and to spontaneously embark upon collective action is fully protected. NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

The single most conspicuous feature about the circumstances in the present case is the unanimity of purpose with which these workers acted. Certainly, they were conscious at all times that they were acting for the purpose of "mutual aid or protection."[9/] This fact is of paramount importance in judging their motivation for walking out. Although the fact that they waited to be paid before walking out might be consistent with an intention to quit, the action of the workers in immediately seeking the aid of the Union, in returning the following morning to repeat their wage demand, and in thereafter filing for a certification election lends a high degree of credibility to their assertions that they intended to return to work upon the granting of their wage demands. As in all

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[9/] This fact alone distinguishes the present facts from, most of the cases cited by the Employer for the proposition that employees who voluntarily quit are not entitled to reinstatement upon application. See Royal Aluminum Foundry, Inc., 208 NLRB No. 8 (1974); Beacon Moving & Storage, Inc., 201 NLRB No. 72 (1973); Western Wirebound Box Co., 191 NLRB 126 (1971).

spontaneous walkouts, these workers were uncertain how they should proceed when Mr. Kyutoku refused to grant the pay increase on September 2. The substantial difficulties in trying to overcome the language barriers also contributed to the fact that the workers may not have acted with textbook precision in going on strike. The total circumstances of this case, however, compel the conclusion that the walkout of September 2 constituted an economic strike.[10/] See NLRB v. Phaostron Instrument and Electronic Co., 344 F.2d 855, 59 LRRM 2175 (C.A. 9, 1965); Liberty Cork Co., 96 NLRB 372, 28 LRRT. 1530 (1951).

II. NO UNFAIR LABOR PRACTICE WAS COMMITTED WHEN THE EMPLOYER REFUSED TO REINSTATE THE STRIKERS ON SEPTEMBER 3.

The argument of the General Counsel rests on the assertion that what had begun as an economic strike on September 2 was converted to an unfair labor practice strike on September 3 when Mr. Kyutoku

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[10/] Delta Engineering Corp., 194 NLRB No. 194, 79 LRRM 1220 (1972), and Eaborn Trucking Service, 156 NLRB No. 121, 61 LRRM 1268 (1966), do not indicate a different result. In Delta Engineering, a group of workers spontaneously struck the employer over complaints concerning wages and working conditions. One worker, who three days earlier had stated that he intended to quit and had not reported to work in the interim, requested and received his final paycheck on the day following the walkout. This worker was found to have quit, while the group acting in concert was found to have been entitled to reinstatement as strikers. In the present case, the workers acted entirely in concert and their acceptance of paychecks does not clearly evidence an intention to quit. See Barr Marketing Co., 96 NLRB 875, 28 LRRM 1607 (1951).

In Eaborn Trucking, five workers took their personal belongings and left work after having been refused *a* pay increase. They made no further demand on the employer although their union had won an election immediately prior to their leaving. In finding that the workers voluntarily quit, the NLRB explicitly noted that they had given no indication that they were striking and that there was nothing in the record to support such a conclusion.

refused to reinstate the striking workers. Economic strikers remain employees within the meaning of the Act[11/] and are entitled to reinstatement unless they have been permanently replaced. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 2 LRRM 610 (1938). Where workers are on strike in protest against the employer's unfair labor practices, however, the strikers are entitled to reinstatement even though the employer has hired permanent replacements. Mastro Plastics v. NLRB, 350 U.S. 270, 37 LRRM 2587 (1956). A refusal to reinstate economic strikers at a time when they have not been permanently replaced constitutes an unfair labor practice, unless the employer can show legitimate and substantial business justifications. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 66 LRRM 2737 (1967). An employer is not obligated to reinstate economic strikers absent an unconditional application for reinstatement. Laidlaw Corp., 171 NLRB No. 175, 68 LRRM 1257 (1968).

On September 3, when the striking employees returned to the nursery along with two Union representatives, they had not been permanently replaced. (See n. 5, supra.) Thus, they would have been entitled to reinstatement at that time had they presented an unconditional request.

[11/] The traditional principle that economic strikers remain employees is based upon the NLRA definition of "employee", NLRA Section 2(3), 29 U.S.C. § 152(3), which includes by its terms "any individual whose work has ceased as *a* consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ." Although the ALRA definition of "agricultural employee" [§ 1140.4 (b)] does not contain this language, the legislative intent that strikers remain employees is evident from Section 1157, which provides that economic strikers are eligible to vote in certification elections.

The evidence shows that one Union representative did request that the strikers be put back to work, but that request was conditional. When the Union representative spoke with Mr. Kyutoku on September 3, it was intrinsic in the request for reinstatement that Mr. Kyutoku bargain with the Union over the wage dispute.

Although it is entirely permissible that a request for reinstatement be communicated by union representatives rather than by the employees themselves, NLRB v. Phaostron Instrument & Electronic Corp., supra; NLRB v. I. Posner, Inc., 304 F.2d 773, 50 LRRM 2680 (C.A. 2, 1962), such a request is made conditional by a requirement that the employer bargain with the union. Flambeau Plastics Corp., 172 NLRB No. 33 (1968), enf'd 401 F.2d 128, 71 LRRM 2498 (C.A. 7, 1969); Electric Auto-Lite Co., 80 NLRB 1601, 23 LRRM 1268 (1948). This is certainly true under the ALRA, which makes it an unfair labor practice for an employer to "recognize, bargain with, or sign a collective-bargaining agreement with any labor organization not certified pursuant to the provisions of this part." Section 1153(f).

It is contended by the General Counsel that Mr. Kyutoku's refusal to discuss reinstatement on September 3, and his statement, "I don't have any workers," in response to the Union representative's request to discuss the situation, constitute a discriminatory discharge of the strikers. While it is true that an explicit discharge of economic strikers is an unfair labor practice, see, e.g., Brookville Glove Co., 116 NLRB 1282, 38 LRRM 1460 (1956), Mr. Kyutoku's actions were no more than a rebuff of the representative's efforts and did not independently amount to a discharge.

Mr. Kyutoku was not obligated to deal with the Union as an intermediary in reinstating the strikers nor in resolving the underlying wage dispute. He did not act illegally in rejecting the conditional request for reinstatement, and the economic strike, therefore, was not converted to an unfair labor practice strike. Under such circumstances, the strikers had no right subsequently to displace the permanent replacements who had been hired. When the demand for reinstatement was made on September 9, it was made on the basis that the strikers be reinstated as a group. As economic strikers, they had no right to be reinstated as a group after replacements had been hired, and again the Employer did not act illegally in refusing the demand.

III. THE STRIKERS GAINED NO ADDITIONAL RIGHTS TO REINSTATEMENT UNDER THE 48-HOUR ELECTION PROVISION OF THE ACT.

The Union and the General Counsel each make an argument that workers who strike in order to gain a 48-hour election under Section 1156.3 have an unconditional right to reinstatement. The argument is premised on the unique nature of this provision of the law, and the fact that due to the existence of a large migrant labor force in California agriculture, strikers can ordinarily be replaced within 48 hours. It is argued that the statutory provision is mean ingless if workers can be permanently replaced before the election is held.

This argument assumes that the workers here struck in order to obtain a 48-hour election and that in so doing they exercised a right which cannot be adequately protected by treating them as economic strikers. There is no factual basis for the first assumption.

The workers struck over a wage dispute, and only when it became

apparent that there would be no immediate resolution of this dispute did they file for an election. The second assumption, while highlighting the extreme vulnerability of any strikers in an agricultural context, does not suggest a tenable basis for distinguishing between the rights of economic strikers and those of "48-hour" strikers. To conclude that the latter category has an unconditional right to reinstatement because of the nature of the agricultural work force implies that economic strikers should have the same right.

There is no basis for concluding that the legislature intended to create such a right.

While it is argued that the 48-hour provision resulted from a legislative trade-off in which unions were deprived of the right to strike for recognition in return for the right to trigger an expedited election, the language of the statute is not susceptible to such an interpretation. Section 1156.3 provides:

> "If at the time the election petition *is* filed a majority of the employees in a bargaining unit are engaged in a strike, the Board shall, with all due diligence, attempt to hold a secret ballot election within 48 hours of the filing of such petition."

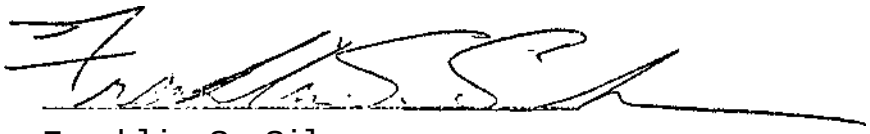
This language contemplates the existence of a strike at the time a petition is filed, rather than a strike for the purpose of triggering an election. Even if this provision could be interpreted as providing for a limited recognitional strike, there is no reason to suppose that recognitional strikers should be accorded greater rights to reinstatement than under the NLRA, which allows for recognitional strikes and which treats such strikers as economic strikers. See, e.g., Philanz Oldsmobile, Inc., 137 NLRB 867, 50 LRRM 1262 (1962).

In the present situation, each of the strikers did in fact have the opportunity to return to work after voting in the election. Although they chose to remain on strike as a body, it does not appear that their right to individual reinstatement as economic strikers would have been an inconsequential protection in these circumstances. Barring an illegal act by the Employer, there does not appear to be justification for granting more sweeping protection. I therefore conclude that the strikers have only those rights to reinstatement accorded to economic strikers under the NLRA.

Recommendations

For the above reasons, I recommend that the complaint against the Employer be dismissed.

Dated: February 9, 1976



Franklin S. Silver
Administrative Law Officer