STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

S. KURAMURA, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	No. 75-CE-133-M 3 ALRB No. 49

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

On October 17, 1975, the Regional Director of the Agricultural Labor Relations Board issued a complaint based on unfair labor practice charges filed by United Farm Workers of America, AFL-CIO ("UFW") on September 23, 1975. The complaint alleges that respondent interfered with employees' rights as guaranteed by § 1152 of the Agricultural Labor Relations Act by discharging Filogonio Zarazua and Maria Inez Zarazua for engaging in union activities, interrogating Maria Inez Zarazua regarding her union sympathies, activities and membership and threatening to close the nursery and deport employees if the union became the exclusive bargaining agent.

A hearing was held before an administrative law judge on November 12, 13, 19 and 20, 1975. The administrative law officer issued a decision on January 29, 1976. He found that respondent did not commit any of the unfair labor practices with which it was charged, and recommended dismissing the complaint in its entirety. Both the General Counsel and the UFW filed timely exceptions to all aspects of the ALO's decision.

For the reasons set forth below we decline to accept the findings and recommendations of the hearing officer (hereafter referred to as ALO).

The "findings" portion of the ALO's report virtually restated the allegations in the complaint except for the insertion of the word "not" in front of each allegation. [1/] The only premise for the conclusions contained in the report is the finding that "the testimony of the general counsel's witnesses was not credible."

[1/] His findings consist of the following:

"A. It was not established that Shigetoshi Kuramura and Yoshiko Kuramura, or either of them, ever interrogated respondent's employees regarding their union membership, activities, and sympathies as alleged in paragraph 6(a) of the complaint.

B. It was not established that Shigetoshi Kuramura ever threatened to close respondent's business operation if a union became its employees' exclusive bargaining agent, as alleged in paragraph 6(b) of the complaint.

C. It was not established that Shigetoshi Kuramura ever threatened to have respondent's employees who engaged in Union activities deported, as alleged in paragraph 6(c) of the complaint

D. On September 13, 1975, respondent, by and through Shigetoshi Kuramura, discharged Filigonio Zarazua. He was discharged because Mr. Kuramura believed that Mr. Zarazua was not keeping accurate records of his working hours and because he frequently was absent from work. It was not established that Mr. Zarazua was discharged for engaging in union activity or to discourage membership in the UFW, as alleged in paragraphs 6(d) and 8 of the complaint.

E. On September 13, 1975, respondent, by and through Shigetoshi Kuramura, discharged Maria Inez Zarazua. She was discharged because Mr. Kuramura believed she was dishonest and because she was frequently absent from work. It was not established that Mrs. Zarazua was discharged for engaging in union activity or to discourage membership in the UFW, as alleged in paragraphs 6(e) and 8 of the complaint."

It should be noted that respondent stipulated at the hearing that Maria Zarazua was not discharged because of absenteeism.

No other discussion of the evidence is presented. [2/] In fact, the report does not contain findings "upon all material issues" as required by our regulations. 8 Cal. Admin. Code Section 20235.l(a) (1975) .

The Board's function is described in 8 Cal. Admin. Code S 20286(b)(1976) which provides:

> Where one or more parties take exception to the decision of the administrative law officer, the Board shall review the applicable law and the evidence and determine whether the factual findings are supported by the preponderance of the testimony taken.

The U.S. Supreme Court stated in Universal Camera Corp. v. NLRB, 340 U.S. 474, 27 LRRM 2373 (1951), that reviewing courts should give the examiner's report "such probative force as it intrinsically commands." There is no requirement that the examiner's findings be accorded more weight "than in reason and in the light of judicial experience they deserve." The findings of the examiner should be considered together with the consistency and inherent probability of the testimony. Cf. NLRB v. Elias Big Boy, Inc., 327 F.2d 421, 55 LRRM 2402 (6th Cir. 1964); Halliburton Co. v. NLRB, 409 F.2d 496, 70 LRRM 3439 (5th Cir. 1959).

[2/] The sum total of the ALO's basis for his recommendation that the complaint be dismissed reads as follows:

> The testimonial evidence introduced by the complainant and the respondent was diametrically opposed. In determining the credibility of the witnesses, the administrative law officer has carefully reviewed the entire record and has given particular consideration to the demeanor of the various witnesses, their manner of testifying, and the character of their testimony. Having done so, it concluded that the testimony of the General Counsel's witnesses was not credible.

In Glenroy Construction Co. v NLRB, 527 F. 2d 465, 91 LRRM 2074 (7th Cir. 1975), the ALO stated that, "All credibility resolutions made herein are based on a composite evaluation of the demeanor of the witnesses and the probabilities of the evidence as a whole." This type of finding and conclusion was characterized by the court as a "threshold stereotype footnote" and was not accepted, even though the ALO presented other bases for his findings and conclusions. In that case, the court maintained that the Board is not required to uphold automatically the ALO's decision on issues of fact, even though that decision is not "clearly erroneous." The Board made an independent review of the record and overturned the findings of the ALO. (See also W.T. Grant Co., 214 NLRB 698, 88 LRRM 1059 (1974), where the credibility resolution of an ALO based on demeanor and other factors was reversed as contrary to the clear preponderance of the evidence).

In the case at bar, the ALO's report contains only such a "threshold stereotype footnote"; there are no other bases for his findings and conclusions. There is discussion neither of the uncontroverted evidence nor of the conflicting evidence in the record. The report does not suggest how the ALO weighed specific items of evidence, how he analyzed the facts, or how he judged credibility of individual witnesses on specific issues in dispute.[3/] Therefore, we do not feel bound by the credibility resolutions of the ALO. Neither do we make contrary credibility resolutions.

[3/] Our current regulations state that the law officer's decision "shall contain findings of fact, conclusions of law, and the reasons for the conclusions". 8 Cal. Admin. Code §20279. The report must be written so that it aids the parties in framing exceptions, the Board in reviewing the evidence and the report itself, and the courts in reviewing decisions of the Board. A report which merely refers to the allegations in the pleadings is clearly insufficient for these purposes. § 20279 is intended to require the law officer

(footnote 3 continued on p. 5)

We must examine the undisputed facts and the reasonable inferences which can be drawn therefrom and test them against the ALO's ultimate conclusions.

Unless otherwise indicated the facts recited herein are entirely or substantially uncontroverted.

DISCHARGES

Respondent is a corporation engaged in a nursery operation in Monterey County. It is owned and operated by Shigetoshi and Yoshiko Kuramura. The company grows carnations on 10 acres of land and employs between 10 and 16 people depending on the season. Of the employees, six are relatives of the owners. The owners personally supervise all operations and Mrs. Kuramura is in virtually constant contact with the employees.

On September 13, 1975, husband and wife Filogonio Zarazua and Maria Inez Zarazua were discharged. At that time, respondent, cited "lack of work" as the reason for the discharges and told the Zarazuas that they might be rehired later if more labor was needed. No one else was laid off at that time including several employees with less experience than the Zarazuas. Mr. Kuramura testified that it was his policy to lay off workers with the least experience first.

(footnote 3 continued)
to state the reasons for his or her findings of fact, as well as for his or her conclusions of the law.

While the extent of discussion necessary will vary as the nature of the evidence varies from case to case, we think that the report should contain a discussion of the relevant evidence, noting whether contradicted or not. Where evidence is contradicted, the report should note the factors, including credibility findings, on which the law officer bases his or her resolution of contradictions. Specifically regarding credibility findings, they should be made in every case in which they would be helpful in understanding the testimony of a witness, whether or not the witness's testimony is ultimately relied on to support a finding.

At the hearing/ respondent claimed that Filogonio Zarazua was fired because he had not kept accurate records of his working hours and because he was frequently absent from work. He maintained that Maria Zarazua was fired because she was dishonest.

Filogonio Zarazua had been employed by respondent for one year and two months when he was fired. His tenure was longer than that of any other non-relative employee. At the time of his discharge he was earning $2.80 per hour, the top wage paid to field workers. A month before the firing, his salary was raised twice, increasing by a total of 25%. These were the first raises he received during 1975. Mrs. Zarazua worked for the Kuramuras from July 1974 to December 1974, when she left to go to Mexico and care for her handicapped child. Mr. Zarazua continued to work for respondent during Mrs. Zarazua's absence, and on at least one occasion respondent asked him when Mrs. Zarazua would return to work. She was rehired in May of 1975, and at that time she stated that she would have to miss some work to take her son to the doctor. Respondent nevertheless agreed to employ her, stating that he could use her since she already knew the work. At the time of her discharge Mrs. Zarazua was also earning $2.80 per hour, having received two raises at the same time as her husband.

At the hearing Mr. Kuramura testified that Mr. Zarazua often failed to punch in properly on his time card, instead writing in his hours. However, when this occurred, Mrs. Kuramura or

the bookkeeper would correct the error. [4/] This conduct was first noticed by the Kuramuras in March but Mr. Zarazua was never apprised of their displeasure until September. There was no evidence that Mr. Zarazua cheated in computing his hours or that he was ever overpaid.

Mr. Kuramura further testified that Mr. Zarazua would leave work without telling him. Mr. Zarazua stated that he missed work to drive his son to the doctor, always with permission from Mrs. Kuramura. Mr. Kuramura stated that Mr. Zarazua's absences had taken place for about six months prior to the firing. However, Mr. Zarazua was not told that his conduct was objectionable until the week before the firing. [5/]

At the hearing, respondent stipulated that Mrs. Zarazua was not fired for absenteeism. [6/] Rather, it was claimed, she was fired because she was dishonest and not to be trusted. The sole basis for this charge was an incident which occurred when Mrs. Zarazua returned to work in May of 1975. Mrs. Zarazua allegedly asked Mrs. Kuramura to change her name on the payroll records from

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[4/] Although most of the policy decisions at the nursery were made by Mr. Kuramura, he had minimal direct contact with the employees. They were constantly supervised by Mrs. Kuramura.

[5/] Mr. Kuramura stated in his declaration that he noticed no time card irregularities for Mr. Zarazua after the latter was admonished,

[6/] When asked about the complaints against Mrs. Zarazua's work habits, Mrs. Kuramura stated that "she has the radio on and she constantly talks to the workers around and disrupts the work, and on top of that...at times she just leaves." Later, however, Mrs. Kuramura recanted and said that Mrs. Zarazua did not play the radio nor could she recall an instance where Mrs. Zarazua left work without permission.

"Zarazua" to "Zamora", and to change her social security number as well. Mrs. Kuramura testified that she complied with the request but never questioned Mrs. Zarazua about the reasons for the request. She further stated that about seven weeks later Mrs. Zarazua asked that the records be changed back to the original name and social security number. Mrs. Zarazua denied ever making the request; however, payroll records were introduced showing that two names were in fact used. The record does not provide a full explanation for the conflict, and it is possible that there was a clerical error; but whatever the reasons are, there is no evidence that Mrs. Zarazua was actually engaged in any illegal activity or that the name and number change had any effect on her work performance.

Our review of the record reveals little if any justification for the discharges consistent with the respondent's claims, The Zarazuas maintain that they were fired because of their union activities in violation of § 1153(c) of the Act. We turn to an examination of the evidence in support of the charge.

Filogonio Zarazua was active in the United Farm Workers of America, AFL-CIO. He had discussed the UFW with other employees of respondent on respondent's premises during lunch and after work, distributed authorization cards during lunchtime, regularly attended UFW meetings, and had accompanied one Florentine Gonzales, a UFW organizer, during a visit by Gonzales to respondent's premises during lunchtime approximately one month prior to the discharges.

Mr. Kuramura denied having any knowledge of union activity by the Zarazuas before the discharges. He further professed to have limited knowledge of union activity in general in the area. He testified that he had heard from people at his church of "all the commotions of the union" and of petitions that had been filed at other nurseries. Later he found a UFW leaflet on his windshield which was written in Spanish (which he does not understand); however, he surmised that it was a union leaflet because he had seen union leaflets and a Board agent at Kyutoku Nursery. [7/]

On the occasion of Florentine Gonzales' visit, Mr. Kuramura was present and taking photographs. Mr. Kuramura testified that he did not know Mr. Gonzales and did not notice him at the time. He asserted that he was actually photographing two friends who were visiting him from the East. Later in his testimony he acknowledged that he did notice stranger present during the picture taking but denied knowing that Mr. Gonzales was a UFW organizer. [8/] Mr. Gonzales testified that on the occasion in question he was wearing a T-shirt with the words "grapes of wrath" written over a picture of a bunch of grapes and carried a

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[7/]He contradicted this testimony later when he said that at the time he noticed the handbill on his car, he did not possess knowledge of union activity elsewhere.

[8/]Mr. Kuramura testified that the film did not develop so actual proof of who was being photographed was not available.

black portfolio with a yellow eagle insignia and the words "Support the Farm Workers" -— "AFL-CIO". Gonzales testified that a Japanese man pointed a camera directly at him and snapped two pictures; that five or six other people were in the room at the time; that after the pictures were taken another man, an American, and then another American came into the room, and then he (the photographer) went outside with them.

Maria Zarazua testified that after Gonzales[1] visit, she and other employees discussed their feelings about the union. She also testified that about three weeks before she was discharged, Mrs. Kuramura came to her at work and engaged her in a conversation about her and her husband's feelings for the UFW. Mrs. Zarazua indicated that she wasn't sure-whether she liked the union but was interested in learning more and stated that she didn't know how her husband felt. According to Mrs. Zarazua, she then questioned Mrs. Kuramura about the disparity in wages between what respondent paid and what other nurseries in the area paid. Mrs. Kuramura denied that she questioned Maria Zarazua about her feelings toward the UFW and those of her husband, but she did acknowledge that the two discussed salaries before the raise was given.

The General Counsel offered, as an exhibit, a declaration signed by Mr. Kuramura which stated, "[w]orkers do not get a raise unless their work is good and they show that they are experienced." Later, however, he testified that raises were given solely because of general inflationary conditions.

Both Mr. & Mrs. Zarazua received $100 vacation bonuses approximately one month prior to their discharge. The bonus was

apparently given only to employees who had been employed for more than one year.[9/] This is significant because Mr. Kuramura testified that another reason for Mrs. Zarazua's lay off was because she was the "newest" employee, having just started work in May of 1975.

While we can partially agree with the hearing officer that some of the testimony is "diametrically opposed," that is hardly a fair characterization of the entire record, especially as it bears upon the issue of the lawfulness of the discharges. We find that, by a preponderance of the evidence, the moving reason for the discharges of Filogonio and Maria Zarazua was their union activities and sympathies.

Section 1153 (c) of the Act prohibits employers from engaging in the following unfair labor practice: "By discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

The degree of proof required to establish that any person has engaged in an unfair labor practice is by a "preponderance of the testimony taken." Calif. Labor Code Section 1160.3

[9/] Mr. Kuramura's testimony is also in conflict on this issue. At one point he stated that he gave the bonus only to employees who had worked more than one year; later, he said that he gave the bonus only to anyone who wanted to take a vacation; and finally, he maintained that he gave the bonus only to anyone who actually took a vacation.

Of course, the General Counsel has the burden to prove that the respondent discharged the employee because of his or her union activities or sympathies. It is rarely possible to prove this by direct evidence.

Discriminatory intent when discharging an employee is "normally supportable only by the circumstances and circumstantial evidence." Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F.2d 186, 190 (C.A.D.C. 1962), citing NLRB v. Link-Belt Co., 311 U.S. 584, 597, 602, 61 S. Ct. 358, 85 L.Ed. 368 (1941). The Board may draw reasonable inferences from the established facts in order to ascertain the employer's true motive. Even though there is evidence to support a justifiable ground for the discharge, a violation may nevertheless be found where the union activity is the moving cause behind the discharge or where the employee would not have been fired "but for" her union activities. Even where the anti-union motive is not the dominant motive but may be so small as "the last straw which breaks the camel's back", a violation has been established. NLRB v. Whitfield Pickle Co., 374 F. 2d 576, 582, 64 LRRM 2656 (5th Cir. 1967).

The NLRB has found discharges to be discriminatory where: The employer gives "shifting reasons" for the discharge, indicating "mere pretenses" for an anti-union cause, Federal Mogul Corp., Sterling Aluminum Co. Div. v. NLRB, 391 F. 2d 713, 67 LRRM 2686 (8th Cir. 1968); no reason is given at the time of discharge and no warning is given about objectionable behavior, NLRB v. Tepper, 297 F. 2d 280, 49 LRRM 2258 (10th Cir. 1961); there is prior tolerance of conduct which the employer relies on to justify the discharge after union activity has begun,

NLRB v. Princeton Inn Co., 424 F.2d 264, 73 LRRM 3002 (3rd Cir. 1970); a more experienced worker who has participated in union activities is fired rather than a less experienced worker, Federal Mogul Corp., Sterling Aluminum Co. Div. v. NLRB, supra; or a relative of a known union activist is discharged without justification, Forest City Containers, Inc., 212 NLRB No. 16, 87 LRRM 1056 (1974) Hickman Garment Co., 216 NLRB No. 16, 88 LRRM 1651 (1975).

The evidence bearing upon the discriminatory nature of the Zarazua's discharge is substantial. They were laid off allegedly because of "lack of work", yet other employees who were not laid off had less experience and seniority than they, in spite of the professed company policy of laying off employees with the least experience first. The employer's reasons for the discharges had shifted by the time of the hearing, and vacillated somewhat more during the hearing, each of which was inconsistent with the raises and bonuses paid to the Zarazuas shortly before their discharges and the utter lack of any evidence that the quality of their work was not acceptable. Moreover, the conduct alleged by the respondent to justify the discharges had, in each case, occurred months prior thereto and had either been tolerated in silence or corrected upon admonition.

There is substantial evidence to support a conclusion that respondent knew about the Zarazuas[1] union activities. Respondent employed a relatively small number of employees, a third of which were related to the owners of the nursery. Mrs. Kuramura was in daily contact with the employees, was constantly supervising them in confined quarters, and could hear everything that was said in the greenhouse where they worked. Mr. Zarazua engaged

in many of his union activities on respondent's premises and Mrs. Zarazua participated in discussions with other employees about the union. There is authority, using these facts alone, to infer employer knowledge of the union activities of its employees. In NLRB v. Joseph Antell, 358 F. 2d 880, 62 LRRM 2014 (1st Cir. 1966), the NLRB described the "small plant" doctrine to find that the employer did discover the employee's union activities because of the ample opportunity to observe them.

Respondent's knowledge of the Zarazuas' union activities can also be logically inferred from an examination of the sequence of events leading to the discharges. The conduct allegedly justifying the discharges occurred months prior to August of 1975. Filigonio Zarazua's alleged absenteeism had been occurring since March of 1975. The incidents giving rise to the concerns over Maria Zarazua's honesty occurred in June and July of 1975. In mid-August the UFW organizer visited the nursery accompanied by Filigonio Zarazua. Mr. Kuramura appeared in the room at the same time and took photographs. He claimed he was photographing friends of his, yet those, photos, inexplicably, did not develop. A few days later Mrs. Zarazua and Mrs. Kuramura had a conversation about wage rates. This conversation, according to Mrs. Zarazua also included questions by Mrs. Kuramura as to the Zarazuas[1] union sympathies. Substantial pay raises followed within the week. In early September Mr. Kuramura discovered union leaflets on his car and had conversations with friends at his church about the union "commotions" at other nurseries.

Approximately one week prior to September 13, Mr. Zarazua was admonished about following proper procedures in punching in on the time clock after which, Mr. Kuramura acknowledged, no irregularities took place. Then, without prior warning, both Mr. and Mrs. Zarazua were told there was no more work at the time they were given their checks.

Considering the timing of the events, and circumstances surrounding them, together with the unconvincing justifications offered by respondents for the discharges, we conclude that the greater probability of truth lies with a finding that respondent knew of the Zarazuas[1] union activities. To conclude that the discharges were not motivated, at least in substantial part, by a desire to discourage union activity defies logic and common sense.

We find, therefore, that respondents violated Section 1153(c) of the Act when the Zarazuas' employment was terminated on September 13, 1975.

INTERROGATION

Respondent is also charged with the unlawful interrogation of Maria Inez Zarzua concerning her protected activities. Section 1153(a) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their Section 1152 rights.

The charge of interrogation is supported only by the testimony of Mrs. Zarazua concerning a single conversation which allegedly transpired between her and Mrs. Kuramura. It is clear from the record that this conversation occurred prior to August 28,

1975, the effective date of the Act. Thus, it cannot provide the basis for an unfair labor practice charge and the allegation is dismissed.

THREATS

Respondent is charged with threatening to close the nursery and deport employees if the union became exclusive bargaining representative.

Both Maria and Filogonio Zarazua testified that Mr. Kuramura addressed the employees as a group and stated that if the union came in, he would throw out the flowers, send the Mexicans to Mexico and plant marijuana. Mr. Zarazua testified that Mr. Kuramura spoke with employees, either separately or in groups, on a daily basis following Florentine Gonzales' visit to the premises, each time repeating the same message: that if the union came in there would be no more work.

Mr. Kuramura denied making statements about dumping the flowers. He admitted making a statement that he could make more money growing marijuana, but asserted that it was said in a joking way. Mrs. Kuramura confirmed that a statement about growing marijuana was made and testified that the employees laughed at the remark.

Again, we are faced with a direct conflict in the testimony, but unlike the charge relating to the discharges, there is no additional evidence to shed light on the truth of the allegation. We therefore find that the General Counsel did not meet his burden of proof and we dismiss the allegations.

REMEDIES

We order the following remedies consistent with those set forth in Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977).

IT IS HEREBY ORDERED THAT respondent, S. Kuramura, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

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

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

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

(a) Offer Filogonio Zarazua and Maria Inez Zarazua immediate and full reinstatement to their former positions;

(b) Make Filogonio Zarazua and Maria Inez Zarazua, and each of them, whole for any loss incurred by reason of their discharge including interest thereon at the rate of 7% per annum;

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due;

(d) Issue the following NOTICE TO EMPLOYEES (to be printed in English, Spanish, and Japanese) in writing to all present employees, and mail a copy of said Notice to all of the employees listed on the master payroll for the payroll period encompassing September 13, 1975 (excluding employees who are current employees), and post such Notice, for a period of not less than 60 days, at appropriate locations proximate to employee work areas, including places where notices to employees are customarily posted and

(e) Have the attached NOTICE read in English, Spanish and Japanese at the commencement of the 1977 harvest season on company time, to all those then employed, by a company representative or by a Board agent and to accord said Board agent the opportunity to answer questions which employees may have regarding the Notice and their rights under Section 1152 of the Act.

(f) Notify the Regional Director in the Salinas Regional Office within twenty (20) days of receipt of a copy of this order of steps respondent has taken to comply therewith, under penalty of perjury, and continue to report periodically thereafter until full compliance is achieved.

We further order the Regional Director of the Salinas Regional office to conduct an investigation to determine the amount of back pay due the discriminatees and calculate the interest thereon consistent with this Board's decision in Sunnyside Nurseries, 3 ALRB No. 42 (1977).

Dated: June 21, 1977

ROBERT B. HUTCHINSON, Member RONALD L.

RUIZ, Member

NOTICE TO WORKERS

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

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

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

(1) to organize themselves;

(2) to form, join or help unions;

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

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

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

Because this is true we promise that:

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

Especially:

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

WE WILL OFFER Filogonio Zarazua and Maria Inez Zarazua their old jobs back if they want them, beginning in this harvest and we will pay each of them any money they lost because we laid them off.

Dated:

S. KURAMURA, INC,

By: _____
(Representative) (Title)

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

MEMBER JOHNSEN, Dissenting:

I disagree with my colleagues who decline to accept the credibility findings of the administrative law officer. I agree with the findings and recommendations of the administrative law officer and would dismiss the complaint in its entirety.

The majority establishes this Board's authority for an independent review of the record and the overturning of the findings of the administrative law officer. This position I fully endorse. However, in this case my independent review of the record leads me to uphold the credibility findings of the administrative law officer. The evidence reveals diametrically opposed positions concerning the alleged discriminatory discharges of Mr. and Mrs. Zarazua. This situation augments the need to rely upon the credibility findings of the administrative law officer, who had the opportunity to observe the demeanor of all of the witnesses. Although the credibility findings were not

as specific as they should have been, they nonetheless went beyond what the majority deemed a threshold stereotype footnote. In describing the basis for his findings and conclusions, the administrative law officer stated:

> The testimonial evidence introduced by the complainant and the respondent was diametrically opposed. In determining the credibility of the witnesses, the administrative law officer has carefully reviewed the entire record and has given particular consideration to the demeanor of the various witnesses, their manner of testifying, and the character of their testimony. Having done so, it is concluded that the testimony of the general counsel's witnesses was not credible.

It is well established, under NLRB precedent, that a clear preponderance of the evidence is required in order to reject the law officer's credibility findings based on the demeanor of witnesses. Standard Drywall Products, Inc., 91 NLRB 544, 26 LRRM 1531 (1950); Tidelands Marine Service, Inc., 140 NLRB 288, 52 LRRM 1005 (1962); Charmin Paper Products, Co., 186 NLRB 601, 75 LRRM 1389 (1970). My reading of the hearing transcript does not show the evidence to preponderate clearly in favor of the Charging Party.

The majority has established that Mr. Zarazua was actively involved with the United Farm Workers Union, but no direct evidence was presented to show that the employer knew of the union activities of either Mr. or Mrs. Zarazua. In uncontradicted testimony Mr. Zarazua related that he was careful to hide his union activities from his employer. Moreover, the concealment of union activities was facilitated by the language barrier between the Japanese employer and the Spanish employees.

In addition, it is my opinion that the General Counsel failed to demonstrate that the employer possessed an anti-union

animus. In finding an unlawful motivation on the part of the employer, the majority relies on such inconclusive factors as a disputed picture-taking incident which occurred before the Act became law, the employer's testimony that he found a Spanish language union leaflet on his car window and threw it away, and comments he heard from friends at church concerning union commotions at other nurseries.

The General Counsel has the burden of proving affirmatively, by substantial evidence, that the discharges were due to union activities. Indiana Metal Products Corp. v. NLRB, 202 P. 2d 613, 31 LRRM 2490 (7th Cir. 1953). While it is not necessary that knowledge or motive be established by direct evidence, the circumstantial evidence used to establish knowledge or motive "must do more than give rise to a mere suspicion". NLRB v. Shen-Valley Meat Packers, Inc., 211 F. 2d 289, 33 LRRM 2769 (4th Cir. 1954). The circumstantial evidence adduced by the General Counsel does not, in my opinion, meet that test. The evidence might have raised more than a mere suspicion among my colleagues, but it is still insufficient to warrant overturning the credibility findings of the administrative law officer.

Dated: June 21, 1977

Richard Johnsen, Jr., Member

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

S. KURAMURA, INC., Respondent. and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Intervenor.	CASE NO. 75-CE-133-M L-10565 Administrative Law Officer's Decision

This matter came on regularly for hearing before Philip V. Sarkisian, administrative law judge of the Office of Administrative Hearings, duly appointed by the Agricultural Labor Relations" Board to act as an administrative law officer. The hearing was held at Salinas, California, on November 12, 13, 19, and 20, 1975.

The general counsel, complainant, was represented by G. Alison Colgan and Elise Manders, staff counsel. S. XXX Inc., respondent, was represented by attorney Frederick A. Morgan. of the law firm of Bronson, Bronson and McKinnon. An oral motion to intervene was made by the United Farm Workers of America., AFL—CIO (U.F.W.). The motion was granted and the intervanor was represented by Brian Spears, Frank Huerta ,and Linton XXX

Oral and documentary evidence was introduced at the hearing. The record was held open to permit the parties to file briefs. Briefs were filed by the general counsel and by the respondent. No brief was filed by the intervenor. The case was than submitted and the record was closed.

The administrative law officer, upon the entire record, his observation of the demeanor of the witnesses, and upon consideration of the briefs, now makes the following decision:

FINDINGS OF FACT

I

A true and correct copy of the original charge in this case filed by the U.F.W. on September 23, 1975, was duly served by the U.F.W. on respondent on September 23, 1975.

II

Respondent,S. Kuramura, Inc.,is a corporation, engaged in agriculture in Monterey County.Respondent is now and has been at all material times herein an agricultural employer within the meaning of section 1140.4, subdivision (c),of the Agricultural Labor Relations Act(the Act).

III

The U.F.W. is now and at all times relevant herein has been a labor organization within the meaning of section 1140.4, subdivision (f), of the Act.

IV

At all times material herein the following named persons have been and now are supervisors and owners within the meaning of section 1140.4., subdivision (j), of the Act and agents of respondent acting on its behalf:

Shigetoshi Kuramura

Hoshiko Kuranura

V

At all times material herein Filogonio Zarasua and Maria Inez Zarazua are now and have been agricultural employees within the meaning of section 1140.4, subdivision (b), of the Act.

VI

The material allegations continued in paragraph 6, 7, and 8 of the complaint were not established by a preponderan of the evidence.

A. It was not established that Shigetoshi and Yoshiko Kuramura, or either of them, over interrogated respondent.

employees regarding their union membership, activities, and sympathies as alleged in paragraph 6(a) of the complaint.

B. It was not established that Shigetoshi Kuramura ever threatened to close respondent's business operation if a union became its employees' exclusive bargaining agent, as alleged in paragraph 6(b) of the complaint.

C. It was not established that Shigetoshi Kuramura ever threatened to have respondent's employees who engaged in union activities deported, as alleged in paragraph 6(c) of the complaint.

D. On September 13, 1975, respondent, by and through Shigetoshi Kuramura, discharged Filigonio Zarazua. He was discharged because Mr. Kuramura believed that Mr. Zarazua was not keeping accurate records of his working hours and because he frequently was absent from work. It was not established that Mr. Zarazua. was discharged for engaging in union activity or to discourage membership in the U.F.W., as alleged in paragraphs 6(d) and 8 of the complaint.

E. On September 13, 1975, respondent, by and through Shigetoshi Kuranura, discharged Maria Inez Zarazua. She was discharged because Mr. Kuraniura believed she was dishonest and because she was frequently absent from work. It vas not established that Mrs. Zarazua was discharged for engaging in union activity or to discourage membership in the U.F.W., as alleged in paragraphs 6(e) and 8 of the complaint.

CONCLUSIONS OF LAW

Violations of section 1153 of the Act, subdivisions (a) and (c), were not established.

BASIS FOR FINDINGS AND CONCLUSIONS

The testimonial evidence introduced by the complainant and the respondent was diametrically opposed. In determining the credibility of the witnesses, the administrative law officer has carefully reviawed the entire record and has given particular

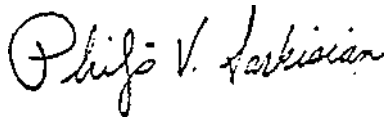
consideration to the demeanor of the various witnesses, their manner of testifying, and the character of their testimony. Having done, so, it is concluded that the testimony of the general counsel's witnesses was not credible.

* * * * *

WHEREFORE, the administrative law officer recounds the following order:

The complaint is hereby dismissed in its entirety.

Dated: January 29, 1976.



PHILIP V. SARKISTAN
Administrative Law Judge
Office of Administrative Hearings

PVS: mh