STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AKITOMO NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	No. 75-CE-164M 3 ALRB No. 73

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

On May 7, 1977, administrative law officer Walter N. Kaufman issued his decision in this case. The respondent filed timely exceptions.

Having reviewed the record, we adopt the law officer's findings, conclusions and recommendations to the extent they are consistent with this opinion.

The ALO concluded that the respondent violated §§ 1153 (a) and (c) of the Act by laying off Juanita Lopez, Blanche Lopez, and Octavia Cortez a month after a representative election at the nursery. The respondent contends the ALO's conclusion is not supported by the record. We disagree.

The respondent's general anti-union sympathies are clear from the evidence. Further, the Lopezes and Cortez were all members of a family whom respondent publically "blamed" for getting other workers to support the union, and the

respondent had previously retaliated against another family member by terminating his health insurance benefits.[1/] Thus, the General Counsel established a prima facie case of impermissible discrimination, and the burden shifted to the respondent to justify its conduct.

Although the respondent established an economic justification for a reduction in the number of transplanters, it was unable to justify its decision to include three Lopez family members in the group laid off. Despite respondent's contention that the layoffs were based on seniority and attendance records, there was no showing that these women, who had been employed by respondent for two to four seasons, had less seniority and were less reliable than workers retained.

Because the respondent failed to rebut the General Counsel's showing that the women were laid off in. retaliation for their support of the union, the ALO was correct in concluding the layoffs violated the Act.

We modify the ALO's proposed remedies to conform them to those imposed in our other cases.

[1/] The ALO concluded that the termination of Jose Lopez' insurance benefits violated § 1153(a) but did not amount to discrimination, and thus was not a violation of 1153(c), because no employees other than Lopez had ever had such benefits. Such a conclusion is based on an erroneous analysis of the law. The issue is not whether Lopez was treated differently than similarly situated employees, but whether he was penalized in order to discourage his union activity. In this case, the ALO specifically found that the respondent terminated the insurance in retaliation for Lopez[1] support of the union. A withdrawal of benefits, prompted by an employee's union activity, clearly discourages union membership and is the type of conduct forbidden by § 1153 (c), as well as 1153(a).

Although the ALO's conclusion was incorrect, we do not expressly overrule it because none of the parties excepted and an additional finding that the respondent violated 1153 (c) in this case would not affect our remedy.

ORDER

By authority of Labor Code § 1160.3, the Agricultural Labor Relations Board orders that the respondent, Akitomo Nursery, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Interrogating employees concerning their union affiliation or sympathy or their participation in protected activities.

b. Threatening employees with layoff or other loss of employment or with an adverse change in working conditions, because of their protected activities or choice of bargaining representative.

c. Granting increases in the piece rates for the purpose of causing employees to reject a union as their collective bargaining representative.

d. Discontinuing health insurance payments on behalf of any employee because of his or her union activities or sympathies.

e. Discouraging membership of employees in the UFW or any labor organization by unlawfully discharging or laying off employees, or in any other manner discriminating against employees in regard to their hire, tenure, or terms and conditions of employment, except as authorized by Labor Code § 1153 (c).

f. In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Labor Code § 1152.

2. Take the following affirmative action which is

necessary to effectuate the policies of the Act:

a. Immediately reinstate the health insurance policy on behalf of Jose Lopez, unless an alternative provision for such insurance has been made; reimburse Jose Lopez for any medical expenses which he incurred as a result of the cancellation of said policy on or about August 31. 1975.

b. Immediately offer Juanita Lopez, Blanche Lopez, and Octavia Cortez reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any losses they may have suffered as a result of their lay-off.

c. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records and other records necessary to analyze the amount of back pay due and the rights of reinstatement under the terms of this Order.

d. Post copies of the attached notice at times and places to be determined by the regional director. Copies of the notice shall be furnished by the regional director in appropriate languages. The respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

e. Hand out the attached notice to all present employees and to all employees hired in the next six months.

f. Mail copies of the attached notice in all appropriate languages, within 20 days from receipt of this Order, to all employees employed during the period from August 15, 1975, through October 15, 1975.

g. A representative of the respondent or a Board agent shall read the attached notice in appropriate languages to the assembled employees of the respondent on company time. The reading or readings shall be at such times and places as are specified by the regional director. Following the reading/ the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or their rights under the Act. The regional director shall determine a reasonable rate of compensation to be paid by the respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question and answer period.

h. Notify the regional director in writing, within 20 days from the receipt of this Order, what steps have been taken to comply with it. Upon request of the regional director, the respondent shall notify him periodically thereafter in writing what further steps have been taken in compliance with this Order.

It is further ORDERED that all allegations contained in the complaint and not found herein are dismissed.

Dated: September 1, 1977

Gerald A. Brown, Chairman

Robert B. Hutchinson, Member

Richard Johnsen, Jr., Member

NOTICE TO WORKERS

After a trial where each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. 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 ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union;

WE WILL NOT threaten you with closing the nursery or being fired or laid off or getting less work because of your feelings about, actions for, or membership

in any union;

WE WILL NOT grant piece-rate increases for the purpose of causing you to reject a union as your bargaining representative;

WE WILL NOT discontinue any insurance or other benefits because of your feelings about, actions for, or membership in any union.

WE WILL buy health insurance for Jose Lopez as before, if he needs it, and pay him any money he may have lost because we cancelled his health insurance.

WE WILL offer Juanita Lopez, Blanche Lopez and Octavia Cortez their old jobs back, if they want them, and we will pay each of them any money each may have lost because we laid them off.

Dated:

Akitomo Nursery

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.

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

AKITOMO NURSERY Respondent and UNITED FARM WORKERS OF AMERICA, AFL-CIO Charging Party	No. 75-CE-l64-M

Ron Greenberg, Esq.,
for the General Counsel

Dressier, Guttero & Stoll,
by Scott Wilson, Esq.,
for the Respondent

Thompson, Lyders, Laing &
Childers, by Edwin L.
Laing, Esq., for the
Charging Party

DECISION

Statement of the Case

WALTER N. KAUFMAN, Administrative Law Officer: The Notice of Hearing and Complaint in this matter were issued November 14, 1975, upon charges and amended charges filed by the United Farm Workers of America, AFL-CIO ("Union") against Akitomo Nursery ("Respondent"). The Complaint alleges that Respondent engaged in various acts interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 1152 of the Agricultural Labor Relations Act ("Act") and committed unfair labor practices in violation of Sections 1153(a). (b) and (c) of the Act. Respondent filed an Answer dated November 22, 1975, denying the substantive allegations of the Complaint.

The case was heard before me in Ventura, California, on December 8. 9, 10 and 11, 1975- At the hearing, the Union's motion to inter-

vene was granted; the Complaint was amended on its face, as was the Answer; and Respondent's motion to dismiss certain allegations of the Complaint for mootness was denied. All parties were afforded an opportunity to participate in the hearing, and thereafter the General. Counsel and Respondent filed briefs.

Upon the entire record and my observation of the witnesses, and upon consideration of the briefs. I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a California corporation engaged in agriculture in Ventura County, California, and at all material times has been an agricultural employer within the meaning of Section 1140.4(c) of the Act.

The Union is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. Motion to Dismiss for Mootness

At the hearing, Respondent moved to dismiss the allegations of the Complaint "that relate to affecting the outcome of the election," as the Union had won the election notwithstanding the alleged violations, and Respondent had apparently not filed objections (TR 9). Counsel for the Respondent alluded to the pendency or prospect of negotiations. 1/

As already noted, the motion was denied. Although Respondent was free to present post-hearing argument in support of its motion, it did not do so.

Without a settlement and without any concession by Respondent that its conduct was unlawful, a controversy remains to be determined; and there is a public interest in having a determination made as to whether such conduct was lawful or unlawful. Accord. Local 74 United Bhd. of Carpenters v. NLRB. 341 U.S. 707, 715 (1953) NLRB v. United Bhd. of Carpenters, 321 F.2d 126, 129 (9th Cir. 1963); NLRB v. General Motors Corp., 179 F-2d 221, 222 (2d Cir. 1950). See also United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953).

1/ The transcript at page 9, lines 8-9, is inaccurate. See TR 85-86.

III. Alleged Unfair Labor Practices

A. Pre-election Events

Respondent operates a small nursery in Oxnard, California, growing celery seedlings as well as flowers. At the peak of season in 1975i Respondent's work force numbered about thirty employees. Respondent's principals and supervisors are Kay Akitomo, May Iwai, Yo Iwai, Diane Kawaguchi and Mas Kawaguchi. May Iwai and Diane Kawaguchi are sisters of Kay Akitomo, Respondent's president.

In August 1975, the Union began an organizing campaign among Respondent's employees, and the owners were aware of it. In response to the Union activity, Respondent became a member of an agricultural employers' association, and some of the owners were in touch with a representative of that organization from time to time as the Union campaign progressed.

At various times, May Iwai expressed her opposition to the Union in the presence of employees and disparaged the Union's leader. In August 1975. she told some employees that if they wanted a union, they should join the Teamsters.

A number of Respondent's employees were members of the Lopez family, which favored the Union. Irma Camacho, an employee not a member of the family, testified that May Iwai had said she "blamed" the Lopez family for getting employees to support the Union (TR 125).

On August 31, 1975, Yo Iwai told Jose Lopez that Respondent would be discontinuing payment -of the health insurance premiums which it had paid on his behalf for two or more years, Jose Lopez had worked for Respondent six years. As he testified, Yo Iwai said that "he was paying too much money for myself alone," and that "we were going to have insurance for everybody by Chavez" (TR 13-14). Yo Iwai testified that the "major" reason for discontinuing the insurance was that "wages had risen" (TR 241). He also testified that "I said if we belonged to [the] Union, we had to follow the Union's [insurance] policy" (TR 241). The insurance for Jose Lopez was discontinued that day.

On September 5, in the presence of about seventeen employees working in the greenhouse, May Iwai had one of them read aloud an antiunion statement in Spanish, issued by the employers* association. Jose Lopez testified that May Iwai then said "they were going to close the work" and "there was going to be less work" if the Union won the election (TR 15. 16). Blanche Lopez testified that May Iwai said, "I guess I will just go ahead and close my nursery" (TR 154). Almost all of Respondent's employees were Spanish-surnamed, and according to Juanita Lopez, May Iwai also said "she should bring [in] her [own] race" (TR 66). May Iwai

denied threatening to fire anyone; instead, she testified, "I was trying to have the workers understand" that the Union "means more burden on us" - "that we would have to pay more" (TR 342). But she "didn't mention anything about the cancellation" of contracts by Respondent's customers (TR 291).

Juanita and Blanche Lopez also testified that on the same occasion, May Iwai asked Juanita, in effect, what more her husband, Jose, could want by way of better terms and conditions of employment, and that she said she had increased the piece rates. May Iwai denied making that statement at that time, but admitted telling the employees "in groups" between September 1 and 15 that they were going to get an increase and admitted that effective September 1» piece rates for both plant-pulling and transplanting were increased (TR 320). She also acknowledged that the piece rate for transplanting was increased because of the "commotion going on" (TR 294):

> "Well, when this union thing started, everybody was, I guess, referring to raises, that they wanted a raise, so we called the other nurseries to find out exactly how much they were paying because some girls were telling us this 'nursery was paying so much, and we were sure we were paying the average price at that time. But we found out that a nursery has raised their price and we raised it at that time too." (TR 295)

B. Election Day Events

The election was held September 19 between 2«00 and 2:30 P.M. May Iwai and Diane Kawaguchi testified they did not know when the election would be held until 11:00 A.M. that day, when a Board agent appeared. However, May Iwai had received the petition and had been called by a Board representative several days before; and she had referred the petition to the employers' association. By September 14, every member of her family knew of the petition.

On the day of the election, Kay Akitomo and Mas Kawaguchi entered the greenhouse during the morning break, sometime between 8tOO and 9:00 A.M., and spoke to a group of women employees who were seated apart from certain members of the Lopez family and other Union adherents. Afterwards, these women laughed at the Lopez women and the others in their group and said they would be fired.

Kay Akitomo then asked Irma and Alicia Camacho and Luciano Navarro how they were going to vote. Irma Camacho and Navarro testified that Akitomo said that "the rest" or "the majority" were against the Union (TR 112, 184). Akitomo denied such questioning "at that time" (TR 224).

The same day, Mas Kawaguchi asked Nabor Lopez and Evaristo Rodriguez how they would vote or whether they wanted the Union.

The Union won the election by a vote of 15 to 12, according to Irma Camacho.

C. Post-election Events

After the election, Irma Camacho, an outspoken Union adherent, was assigned to pulling plants three times in six weeks, she testified, although she had done such work much more often in the past. Plant-pulling is more remunerative than transplanting. However, she admitted that less work was also being done by the others assigned to plant-pulling, and that the others had greater seniority than she had.

Juanita and Blanche Lopez, ordinarily transplanters, testified that after the election they were assigned to plant-pulling when the pulling became more difficult because of bad weather. However, Blanche testified that "everybody" was pulling plants then (TR 159-160); and Juanita testified that she was assigned to pulling "just once" after the election and formerly had sometimes done pulling as well as transplanting (TR 70).

On or about October 9, Juanita Lopez was told that she, her sister Blanche and her mother, Octavia Cortez, were being laid off "until there was more work" (TR 76). There had been no layoffs so early in past seasons. Jose and Tomas Lopez testified that they had been ordered to dump many more plants in early October 1975 than in previous years. Yo Iwai testified that the plants, eighty percent of them healthy, were dumped because certain customers had cancelled or curtailed their usual orders. The laid-off employees were primarily transplanters, and as May Iwai testified, the decrease in business obviated the need to transplant seedlings.

May Iwai denied that these employees were laid off because they supported the Union. She testified that "one of the main reasons" for laying off Juanita Lopez was that she was "not a reliable worker" - a reference to her absenteeism and lateness -and she said much the same of her sister and mother (TR 252). May Iwai had not warned or criticized Juanita Lopez before, nor her sister or mother, at least in 1975t but had kept them on rather than discharge them, she testified, only because of Juanita's and Blanche's husbands, who were "very good workers" (TR 350).

May Iwai also testified that "how many years they have work[ed] for us" was a factor in these layoffs (TR 288). Juanita Lopez had been with the nursery since 1971; her mother, since 1972; and her sister, since 1973. Two other employees - Alta Ramos and one Rebecca - were laid off at the same time, Rebecca having worked about a month. Fourteen others, doing the same work, were not laid

off. Respondent's available work records, on the basis of which the laid-off and other employees were paid for transplanting in 1974 and 1975. were received in evidence.

On or about October 11, Nabor Lopez, *a.* member of the same Lopez family, was also laid off, allegedly for lack of work. Yo Iwai testified that he had been hired to replace Sergio Chavez, who was on medical leave and returned shortly before Nabor Lopez was laid off. In all, Lopez worked for Respondent about two months.

D. Analysis and Conclusions

1. Alleged Section 1153(a) Violations

Section 1153(a) makes it an unfair labor practice for an agricultural employer "to interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." Section 1152, in turn, defines the rights of agricultural employees to include:

> ". . . the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

Sections 1152 and 1153(a) are, of course, the counterparts of Sections 7 and 3(a)(l) of the National Labor Relations Act ("NLRA"); and Section 1148 of the Act directs the Agricultural Labor Relations Board to "follow applicable precedents of the National Labor Relations Act, as amended."

It has long been recognized that some acts constitute independent unfair labor practices under Section 8(a)(l) - that is, acts which interfere with, restrain or coerce Section 7 rights, but are not specifically prohibited by other subsections of Section 8(a). In this case the Complaint, as amended, alleges that Respondent, through its principals, committed such independent violations, including threats by May Iwai on or about September 5, 1975. that Respondent would cease operations or replace its employees with Japanese workers; a promise of a wage increase by May Iwai on or about the same date: and interrogation of employees concerning their Union sympathies by Kay Akitomo and Mas Kawaguchi on or about September 19, 1975.

a. Threats of Reprisal

Insofar as the statements of any of Respondent's principals - notably May Iwai - expressed antiunion "views, arguments or

opinions," they were protected by Section 1155 of the Act, the counterpart of Section 8(c) of the NLRA. But the statutory protection does not extend to a "threat of reprisal."

Both the General Counsel and Respondent agree that the applicable standard in such cases was set forth by the Supreme Court in NLRB v. Gissel Packing Co.. 395 U.S. 575. 618-619 (1969):

> ". . .[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific, views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See Textile Workers v. Darlington Mfg. Co. , 380 U.S. 263, 274, n. 20, (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that [c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d 157, 160. As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.' NLRB v. River Togs. Inc., 382 F.2d 198, 202 (C.A.2d Cir. 1967)."

In the present case, communication was imperfect, requiring the use of interpreters. But whichever version of May Iwai's statements on September 5 is accepted, including May Iwai's own version, Respondent's message to its employees was clear enough -that their jobs might be lost or work opportunities lessened if the Union were to win. Surely that message was more a threat than a prediction "carefully phrased on the basis of objective fact." May Iwai cited no proof whatever that Respondent would have to close the nursery or curtail its operation solely because of unionization.

b. Promise of Benefit

Like a "threat of reprisal," a "promise of benefit" is exempt from the protection of Section 1155.

In the present case, there was not so much a promise of benefit as the announcement and grant of a benefit - the increase in all piece rates. Again, the General Counsel and Respondent agree as to the applicable authority - in this instance, NLRB v. Exchange Parts Co., 375 U.S. 405 (196*0, where the Supreme Court recognized that in voting for or against a bargaining representative, employees "may be induced by favors bestowed by the employer as well as by his threats or domination." Id. at 409. The Court went on to hold that, such conduct on the employer's part constitutes unfair interference even if the promise or grant of a benefit is not explicitly contingent on rejecting a union.

Again it is clear from May Iwai's testimony that in granting the increases, Respondent's goal was more to offset the Union's campaign than to meet competition.

c. Interrogations

It is clear that Kay Akitomo and Mas Kawaguchi questioned employees concerning their Union sympathies and did so on the day of the election. Akitomo's denial is too qualified, and Kawaguchi did not testify. In none of the instances did either Akitomo or Kawaguchi disclose a valid purpose for their inquiries or express any assurance against reprisals. They were, of course, two of Respondent's owners, and by the election date Respondent's position concerning the Union was unmistakable. I am also satisfied they knew the election would be held that day. Moreover, the interrogations followed in the wake of other instances of interference, restraint and coercion.

As the General Counsel notes, citing Union News Co., 112 N.L.R.B. 420, 424 (1955). the Union had not formerly requested recognition, so that it was unnecessary for Respondent to engage in interrogation to ascertain the Union's majority status. The impending election would, of course, better nerve that purpose. However, the General Counsel's citation of Struksnes Construction Co., 165 N.L.R.B. 1062 (1967) is, strictly speaking, inapposite; for the policy enunciated in that case was that an employer's poll, to be lawful, must be by secret ballot (among other requirements), whereas the present case does not so much involve systematic polling an it does individual questioning. R.M.E., Inc., 171 N.L.R.B. 213 n. 1 (1968).

In this case, then, suffice it to say that in light of all the circumstances, summarized above. Respondent's interrogations reasonably tended to restrain or interfere with its employees' rights under the Act. Chris & Pitta of Hollywood. Inc., 196

N.L.R.B. 866 n. 2 (1972): accord ,Blue Flash Express. Inc., 109 N.L.R.B. 591. 593-594 (1954).

2. Alleged Section 1153(c) Violations

Under Section 1153(c), it is an 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."

Violations of Section 1153(c) are also derivative violations of Section 1153(a), just as violations of counterpart Section 8(a)(3) of the NLRA are derivative violations of Section 8(a)(l).

Section 1153(c) violations alleged in the Complaint include terminating health insurance for Jose Lopez on or about August 31, 1975; increasing the piece rates on September 5. 1975; changing work assignments after September 19, 1975; and laying off four employees on or about October 9. 1975.

a. Terminating Insurance

Respondent condends that discontinuance of health insurance payments on behalf of Jose Lopez was purely for economic reasons. However, there is evidence that termination of the insurance was motivated by Jose Lopez' Union sympathies. May Iwai asked Juanita Lopez "what did my husband [Jose] want," and she "blamed" the Lopez family for getting employees to support the Union (TR 63, 125). That testimony was not rebutted. Furthermore, Yo Iwai's statement to Jose Lopez at the time - that Respondent would have "to follow the Union's [insurance] policy," pursuant to a Union contract presumably (TR 241) - was certainly premature on August 31, so that it is reasonable to infer that cancellation of the policy was retaliatory.

In proving antiunion motivation, it is permissible "to consider circumstantial evidence or inferences therefrom as direct evidence is not always obtainable" NLRB v. Putnam Tool Co., 290 P.2d 663. 665 (6th Cir. 1961). In such cases, "the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." NLRB v. Great Dane Trailers. Inc., 388 U.S. 26, 34 (1967). Although Respondent relies on economic reasons, Yo Iwai's testimony does not so much as disclose the amount of the discontinued insurance premiums.

It is clear, then, that the denial of this benefit interfered with Jose Lopez' rights under the Act and was, therefore, a violation of Section 1153(a). However, the gist of a violation under Section 1153(c) is discrimination, just as it is under Section 8(a)(3). Nu-Car Carriers. Inc., 187 N.L.R.B. 850, 851 (1971), aff'd sub nom. Rosen v. NLRB, 455 F.2d 615 (3d Cir. 1972).

The Supreme Court made the very point much earlier in Radio Officers' Union v. NLRB 347 U.S. 17, 42-43 (1954):

> "The language of §8(a)(3) is not ambigous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. ..."

So far as appears, Jose Lopez was the only employee on whose behalf health insurance payments had been made, so that discrimination does not come into play by reason of the termination of those payments. However, as noted in Moore Mill & Lumber Co., 212 N.L.R.B. 26k n. 1 (1974. "the remedy would be the same in any event."

b. Increase in Piece Rates

The increase in the piece rates has already been discussed as an independent violation of Section 1153(a). However, so far as appears, all employees were given the increases, so that, notwithstanding antiunion motivation, there was no discrimination and, therefore, no violation of Section 1153(c), for reasons discussed under the preceding point.

c. Changing Work Assignments

As to the alleged change in Irma Camacho's assignments following the election, it does not appear from the evidence that this employee, although an outspoken Union adherent, was discriminated against. It is true that other employees were assigned more plant pulling than Irma Camacho, but she acknowledges that even they were doing less work than previously and had greater seniority.

As to alleged changes in the working assignments of Juanita and Blanche Lopez, they were primarily transplanters, not plant pullers, so that no significance can be attached to the fact that they were not often assigned to the more remunerative plant pulling after the election. As for their being assigned to that duty when the weather wan bad, Blanche acknowledged that "everybody" was pulling plants at that time, and Juanita acknowledged she was assigned to pulling plants "just once" after the election (TR 70, 159-160).

Thus, the General Counsel has not sustained his burden of proving that Respondent violated either Section 1153(c) or (a) by changing work assignments following the election.

d. Layoffs

(1) Juanita Lopez, Blanche Lopez, Octavia Cortez

These employees, transplanters primarily, were told they were being laid off for lack of work, Respondent's witnesses testified to the cancellation of contracts, and there was no testimony contradicting the alleged loss of business, which would affect transplanting primarily. Indeed, the testimony of Jose and Tomas Lopez corroborates the loss of business; for it is unlikely that Respondent would deliberately dump so many healthy plants without business justification.

Nevertheless, laying off employees on a selective basis must be considered conduct that is "'inherently destructive' of important employee rights," so that "no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations." NLRB v. Great Dane Trailers. Inc., supra, at 388 U.S. 34.

A discriminatory layoff is no less a violation of Section 8(a)(3) than a discriminatory discharge. Colonial Press. Inc., 204 N.L.R.B. 852 (1973). Moreover, even if layoffs may be economically justified, that would be no defense if the selection of the employees for layoff was based on their union sympathies or activities. NLRB v. Bedford-Nugent Corp., 379 F.2d 528, 529 (7th Cir. 1967); Tex-Gal Land Management. Inc., 3A.L.R.B. No. 14 (1977).

In the present case, the affirmative, if circumstantial, evidence of antiunion motivation on Respondent's part has already been set forth. Moreover, the case for discrimination is strengthened by Respondent's explanations for these layoffs given at the hearing, which differ from the reasons given when these employees were laid off. Thus, May Iwai testified that they were laid off because they were not "reliable" workers, referring to their absenteeism and lateness, although these shortcomings had been amply tolerated for several years (TR 252, 253). Respondent's work records are not especially helpful in making comparisons, as they do not indicate whether an absence is excused or unexcused; and the records are incomplete besides.

May Iwai also testified that Respondent relied, in part, on seniority, but it was not shown what the seniority status of these employees was. It appears only that they were employed two to four years and that one of the other two employees laid off the same day, October 9, had worked only a month.

Such shifts in position tend more to corroborate than to contradict the conclusion that these employees were laid off in retaliation for their Union support. Terminal Equipment Inc.,

219 N.L.R.B. 261, 265-266 (1975); Diamond Motors, Inc., 212 N.L.R.B. 820, 829 (1974). Moreover, for purposes of Section 1153(c), it suffices that these layoffs were motivated at least in part by that factor. NLRB v. Tom Wood Pontiac. Inc., 447 F.2d 383, 386 (7th Cir. 1971).

Lastly, it may also be noted that "the mere fact that other known union adherents were not laid off . . . does not disprove or preclude a finding of a violation of the Act as to those incidents charged." Tex-Cal Land Management. Inc., supra.

(2) Nabor Lopez

The General Counsel did not rebut Respondent's showing that Nabor Lopez was hired to replace another employee who was on sick leave and was laid off after the other employee had returned to work two months later. In view of Respondent's loss of business, it goes too far to say, despite Respondent's antiunion animus, that Respondent could not lay off even a Lopez under these circumstances without violating either Section 1153(c) or (a).

3. Alleged Section 1153(b) Violation

The Complaint also alleges violation of Section 1153(b), which makes it an unfair labor practice "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

The Complaint alleges that Respondent violated that provision, as well as Section 1153(a), when it urged employees to join the Teamsters. There was testimony that on one occasion in August 1975, May Iwai told some employees to join the Teamsters if they wanted a union. However, it does not appear the Teamsters were attempting to organize Respondent's employees; and even if they were, it is not an unfair labor practice for an employer merely to express such a preference. Stewart-Warner Corp., 102 N.L.R.B. 1153, 1157 (1953).

Significantly, the General Counsel does not allude to this alleged violation in his brief. I will recommend, therefore, that the complaint be dismissed in this regard.

Upon the foregoing findings of fact and upon the entire record, I make the following:

Conclusions of Law

1. The Respondent is an agricultural employer within the

meaning of Section 1140.4(c) of the Act.

2. The Union is a labor organization within the meaning of Section 1140.4(c) of the Act.

3. None of the allegations of the Complaint, as amended, is moot because the Union won the election.

4. By interrogating its employees concerning their Union sympathies, by threatening them with the loss of their jobs or with reduction of work if the Union won the election, by increasing the piece rates prior to the election in order to counteract the Union's campaign, and by discontinuing the payment of health insurance premiums on behalf of Jose Lopez because of his Union sympathies, the Respondent violated Section 1153(a) of the Act.

5. By laying off Juanita Lopez, Blanche Lopez, and Octavia Cortez on or about October 9, 1975, because of their Union sympathies, Respondent violated Sections 1153(c) and (a) of the Act.

6. The Respondent did not violate Section 1153(c) or (a) of the Act when it laid off Nabor Lopez on or about October 11, 1975.

7. The Respondent did not violate Section 1153(c) or (a) of the Act by the manner in which it assigned work after September 19, 1975.

8. The Respondent did not violate Section 1153(b) or (a) of the Act when it urged employees, on one occasion in August 1975, to join the Teamsters.

9. The Respondent did not commit any violations of the Act alleged in the Complaint other than those specified in paragraphs 4 and 5 of these conclusions of law.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The recommended order shall be confined to forms of relief which the Board has ordered in its decisions to date. The General Counsel's brief does not address the matter of appropriate relief. Whether or not the additional, more innovative, forms of relief requested in the Complaint are to be granted, is a matter more appropriately referred to the Board's consideration after argument by the General Counsel and the other parties.

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

ORDER[2/]

Respondent Akitomo Nursery, its principals, officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Interrogating employees concerning their Union sympathies, in a manner constituting interference with or restraint and coercion of employee rights under the Act.

(b) Threatening employees with the loss of their jobs or with reduction of work because of their union activities or sympathies.

(c) Granting increases in the piece rates, in order to interfere with or restrain or coerce employees in the exercise of their rights under the Act.

(d) Discontinuing health insurance payments on behalf of any employee because of his or her union activities or sympathies.

(e) Discouraging membership in the United Farm Workers of America, AFL-CIO, or any labor organization, by laying off employees.

(f) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 1152 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Reinstate the health insurance policy on behalf of Jose Lopez, unless an alternative provision for such insurance has been made; reimburse Jose Lopez for medical expenses, if any, incurred as a result of the cancellation of said policy on or about August 31, 1975, to the extent such expenses may be verified.

2/ In the event no exceptions are filed as provided by Section 1160.3 of the Act, the findings, conclusions, and recommended Order shall become the findings, conclusions, and Order of the Board and become effective as herein prescribed.

(b) Recall Juanita Lopez, Blanche Lopez and Octavia Cortez to their former positions without loss of seniority or other rights and privileges, beginning with the date in the 1977 season when the activity in which they were customarily employed commences.

(c) Make each of the employees named in the preceding paragraph whole for loss of earnings suffered by reason of discrimination against them, including interest thereon at the rate of 7% per annum, both loss of earnings and interest to be computed in the manner described by the National Labor Relations Board in F. W. Woolworth Co., 90 N.L.R.B. 289 (1950), and Isis Plumbing & Heating Co.,138 N.L.R.B. 719 (1962).

(d) 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 pursuant to this Order.

(e) Post in conspicuous places, including all places where notices to employees are customarily posted, copies of the attached NOTICE TO WORKERS. Copies of said notice shall be posted by Respondent immediately upon receipt and shall be signed by Respondent's representative. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material. Said notice shall be posted for a period of sixty days and shall be in English and Spanish.

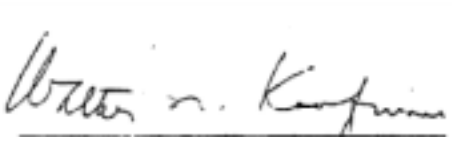
(f) Issue to each current employee, and mail to all employees on the payrolls for the period August 15, 1975. to Octo-ber!5» 1975« a copy of said notice in Spanish and in English.

(g) Have the attached notice read in English and Spanish, and any other language deemed appropriate by the Regional Director, at the commencement of the 1977 season on company time by *a.* representative of Respondent or by a Board agent, the Regional Director to determine a reasonable rate of compensation for piece-rate workers in attendance, and following the reading, 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.

(h) Notify the Regional Director of the Salinas regional office, within 20 days from receipt of a copy of this decision, of steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

IT IS FURTHER ORDERED that all allegations of the Complaint, as amended, not specifically found herein to be violations of the Act shall be and hereby are dismissed.

DATED: May 7, 1977



WALTER N. KAUFMAN

Administrative Law Officer

NOTICE TO WORKERS

After a trial in which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. 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 ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union;

WE WILL NOT threaten you with closing the nursery or being fired or laid off or getting less work because of your feelings about, actions for, or membership in any union;

WE WILL NOT grant piece-rate increases in order to influence your decision to support or not support a union;

WE WILL NOT discontinue any insurance or other benefits because of your feelings about, actions for, or membership in any union.

WE WILL buy health insurance for Jose Lopez as before and pay him any money ho may have lost because we cancelled his health insurance.

WE WILL offer Juanita Lopez, Blanche Lopez and Octavia Cortez their old jobs back, beginning this season, and we will pay each

of them any money each may have lost because we laid them off.

DATED:

AKITOMO NURSERY

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.