STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MORIKA KURAMURA, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party,	Case No. 76-CE-l-M 3 ALRB No. 79

DECISION AND ORDER

On March 25, 1977, Administrative Law Officer (ALO) Ernest Fleischman issued the attached Decision in this proceeding, Thereafter, the General Counsel and the Charging Party each filed timely exceptions and a supporting brief, and Respondent filed a reply brief in opposition to the said exceptions.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the ALO, as modified herein, and to adopt his recommended Order.

We do not adopt the finding of the ALO that Lopez testified he "may have" told employees, after the union's organizing campaign began, that Respondent could not make any improvements or give any raises "at this time." The testimony of Lopez reflects, and we find, that he did in fact make that statement during his November 8, 1975 meeting with employees; However, we do not equate

a mere statement of present inability with a promise, express or implied, of future benefits, and we agree with the ALO that Lopez's statement does not serve to corroborate the hearsay testimony of union agents that Lopez had promised employees improved benefits or wage increases if they rejected the union.

We expressly do not adopt the ALO's apparent conclusion that only proof of actual organizing at the Kuramura Nursery would have been sufficient under the evidentiary guidelines of the Gotham Industries decision which he cites. There are many factors which, in a given case, may tend to show that an employer knew or had reason to know of an active union interest in organizing its employees. So to the extent that the ALO's decision may be read to establish a per se rule in this area, it is hereby rejected.

At the hearing, the General Counsel amended the complaint to add an allegation that Respondent violated Section 1153(a) of the Act by increasing the wage rates of its employees on August 29, 1975. Contrary to the ALO, we conclude that as the initial charge herein was filed within 6 months after the wage increase, the amendment is not barred by Section 1160.2 of the Act. Ace Drop Cloth Company, Inc., 178 NLRB 664, 665; Dinian Coil Co., 96 NLRB 1435; Cathey Lumber Company, 86 NLRB 157, 162-163. However, we find that the August 29 wage increase did not constitute a violation of Section 1153(a) of the Act, for the same reasons relief upon by the ALO with respect to the wage increase of October 24, 1975.

ORDER

Pursuant to Labor Code Section 1160.3, the Agricultural Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Officer and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated: October 27, 1977

GERALD A. BROWN, Chairman ROBERT

B. HUTCHINSON, Member

HERBERT A, PERRY, Member

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MORIKA KURAMURA, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 76-CE-1-M

Francis Fernandez, Esq., of Salinas, Calif., for the General Counsel.

Frederick A. Morgan, Esq. , and Robert J. Stumpf, Esq., Baonson, & McKinnon, of San Francisco, Calif., for the Respondent

E. Michael Heumann II, Esq., and Allyce Kimmerlinq of Salinas, Calif, for the Charging Party

DECISION

Statement of the Case

Ernest Fleischman, Administrative Law Officer: This case was heard before me on February 23, 24 and 25, 1977, in Salinas, California.

The complaint alleges violations 01 §§1153 (a) and (b) of the Agricultural Labor Relations Act, herein called the Act, by Morika Kuramura, herein called the Respondent or

Kuramura. The complaint is based on charges filed on November 12, 1975[1/] by United Farm Workers of America, AFL-CIO, herein called the Union or the UFW.

Respondent contends that a true and correct copy of the original charge was not served on him in that the papers served by the Union on Respondent did not contain a signature of declarant. In light of the provisions of §20210 of the current ALRB regulations which provides that the Board may disregard any error or defect in the charges which does not substantially effect the right of the parties, and in view of the fact that the Respondent can show no prejudice by the defect, if any, the contention of the Respondent in this respect is without merit. See also, Safeway Stores, 136 NLRE 479, 480.

References will be made in this brief to applicable precedents of the National Labor Relations Act, as amended, as provided by §1148 of the Act.

During the hearing General Counsel amended the complaint by adding thereto a Paragraph 6 d reading as follows: "On or about August 29, 1975, the Respondent raised the hourly rate of its agricultural employees for the purpose of causing Respondent's employees not to organize and join a union." Reference to this amendment will be made later in this decision.

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[1]Unless otherwise specifically specified, all dates herein refer to 1975.

All parties were given full opportunity to participate in the hearing and after the close thereof, General Counsel and Respondent each filed a brief in support of its respective position.

Upon the entire record, including my observations of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a sole proprietorship, engages in agriculture in Salinas, California, and it is admitted and stipulated to by him that he is an agricultural employer within the meaning $$1140.4(c) of the Act, and I so find.

Respondent also admits and stipulates that the Union is a labor organization within the meaning of §1140.4(f) of the Act, and I so find.

II. The Alleged Unfair Labor Practices

The complaint alleges that the Respondent violated §1153 (a) and (c) of the Act in that on or about August 29 (new Paragraph 6 d) and en or about October 24, in response to the Union's organizational activity, it raised the pay of its agricultural employees. It further alleges that as a response to a Petition for Certification

filed by the Union on November 12, the Respondent promised them an additional raise if the agricultural employees rejected the Union, and finally that on or about the week preceding December 5, the Respondent rewarded the agricultural employees for their rejection of the Union with an additional wage increase.

Although the complaint alleges both §1153(a) and (c) violations, the brief of General Counsel makes reference to §1153(c) in its Statement of the Case, but does not treat with the (c) violation in the remainder of the brief and at its conclusion only requests that the Administrative Law Officer "find that the Respondent violated §1153(a) of the Act." Furthermore, in the Suggested Findings of Fact and Conclusion of Law; General Counsel only proposes that the Respondent be found to have violated 1153(a) of the Act as alleged in paragraphs 6 a,b,c and d of the complaint as amended.

Respondent denies that he engaged in the unfair labor practices set forth in the aforementioned paragraphs of the complaint as amended.

A. The Operation of the Nursery

The Respondent for the past nine years owns a nursery in Salinas, Monterey County, where he grows and markets carnations. The operation comprises 10 acres, five of which are greenhouses and the remaining five acres are

taken up by roads, housing, a packing shed, and other miscellaneous buildings and uses. The Respondent is a family-run business and in 1974 and 1975 his wife (who died before the hearing) and children actively participated in the operation of the nursery. The children are Supervisors within the meaning of the Act. The Respondent further employed anywhere from 5-12 employees, the number is geared to seasonal requirements and these non-family employees will be referred herein as the employees. During the later half of 1975 there were approximately eight employees. The Respondent and his family live on the premises as do some of the employees. All employees work one shift - 7:00 a.m. to 4:30 p.m. and arrive for work ten minutes before starting time;. There is a fixed lunch break from 12:00 to 12:30 and two 15-minute rest breaks --one at 10:00 a.m. and the other at 3:00 p.m. The employees take their lunch and rest breaks in the greenhouses, the trailer, the packing shed, or in cars.

The employees are hourly paid and enjoy certain benefits. Most employees are employed approximately for a three-month period, but some have worked for more than one year. The nursery packs and ships its flowers from its premises.

B. Significant Dates and Events

As an aid in analyzing "he testimony and record, the

following are important dates and events:

1975	Event
June 28	The Act is approved
August 27	Wage increases given to three employees
August 28	The Act becomes effective
August 29	Wage increases given to the balance of 5 employees
August 31	Kuramura and son, Mitsumori Kuramura, go to Japan
October 20	Kuramura returns from Japan
October 24	All employees received wage increases
On or about Nov. 7 or 8	Union actively begins organizing nursery
November 8	Ben Lopez came to nursery and held his first meeting with the employees
November 12	Union filed Petition for Certification
November 13	Ben Lopes held his second meeting with the employees
November 15	Petition withdrawn
November 17	Ben Lopez held his third meeting with the employees
November 28	Ben Lopez held his fourth meeting with the employees
December 5	Ben Lopez held his fifth meeting with employees and 7 employees received wage increases, 2 employees who started on November 21 received no increases, and one other employee received no increase
1976	
January 18	Mitsumori Kuramura returned to the U.S.

C. The Issues

The major issues in this case turn on the significance of wage increases given on or about August 29 and October 24 and December 5.

The evidence presented on the hearing is unusual in that in the instant case the critical testimony was offered through the Respondent and his alleged agent Ben Lopez. No employee took the stand.

1. The October 24 end August 27-29 Wage Increases

Wage records for the years 1974 and 1975 concerning the agricultural employees appear on schedules prepared by the Respondent's accountant and were turned over to General Counsel for examination, and are marked as General Counsel's Exhibits Nos. 5a, 5b, 6a and 6b. 5a covers the first half of 1975, 5b the second half, 6a the first half of 1974, and 6b the Second half.

The general observation can be drawn from an examination of these exhibits as to the wage rates, and the frequency and amounts of the increases when comparing those in 1974 to those in 1975.

In the first half of 1974 some wage increases were given at random. On the other hand, two clusters, one covering a March payroll period and the other on May *25* period, also are revealed. The increases were generally in five-cent increments. In the second half of 1974

(G.C. Exh. 6b) the raises were infrequent, with a cluster in the three successive weeks beginning with July 6 and mostly five cents each. In 1975, the same pattern is reflected for the first half of the year, with a cluster of increases on April 12 and June 17. In the second half of the year, there are three clusters of raises, namely, August 29, October 24, and December 5. The amounts of the increases given on October 24, ranging from five to thirty cents, and on December 5, were sharply higher than those granted in the three preceding calendar half years.

Respondent is the owner and director of operations in his nursery. His business is profitable and enjoyed an increase in profits in 1975 over 1974. He is a member of two employer associations, one being the Monterey Chapter of the State Floral Council. Kuramura and his son went to Japan on August 31; he returned on October 20 and his son on January 18, 1976. Shortly after his return his wife told him that the "new law", referring to the Act, had gone into effect and that there were Union activities among the employees of other growers. After consultations with his wife, Kuramura gave the employees increases on October 24. Respondent testified that he had heard that the Union was active among other flower growers but that there was no organizational activity in his nursery and that he first became aware of Union activity in

his nursery activity in his nursery two or three weeks after the October 24 raises were given. This was continued by Frank Huerta, a full-time organizer for the UFW from the end of October to the end of December, when he testified that he began his organizational activities in the Kuramura nursery in the first week in November. General Counsel fixes the date as November 7.

According to Respondent's testimony, wage increases were predicated on rises in the cost of living, provided the employees did well. He also made reference to the fact that 1975 was a good year in that profit were higher than those in 1974 and that commodity prices, the prices received by him for flowers, were rising month to month. There was no testimony adduced as to whether the increases were predicated on either higher wages paid by his competitors or whether they were prompted by the fear that organizational activities among other growers might be extended to his nursery.

General Counsel, over the objection of counsel for the Respondent, amended the complains during the hearing by adding thereto a new paragraph 6d alleging that on or about August 29, 1975, the Respondent raised the hourly rate of its agricultural employees for the purpose of causing Respondent’s employees not to organize and join a union. Counsel's objection was grounied or the argument that the new allegation was barred by the six-month

statute of limitation set forth in §1160.2 of the Act. Although proof of this allegation could not of and by itself be deemed an unfair labor practice and thereby subject the Respondent to a remedial order, the evidence of such earlier misconduct could be received as background for the purpose of throwing light on events which fell within the six-month period. NLRB v. Lundy Corp., 316 F.2d 921, 53 LRRM 2106 (CA 2, 1963). A further objection was made to the admission of evidence concerning the August 27-29 increases in the hourly rates because of the failure to comply with the requirements set out in §20222 of the Regulations in that the amendment was not reduced to writing and filed with the Executive Secretary of the Board within twenty-four hours after the order. If there were no such filing, this failure may be disregarded because it was a technical violation at best and non-prejudiced to Respondent.

The August 27 and 29 across-the-board increases bracketed August 28 the effective date of the Act and ranged from fifteen to thirty cents per hour. Kuramura testified that when he left the United States on August 31 he did not know the "new law" had gone or was about to go in effect.

2. The Post-October 24 Events

The complaint alleges that in response to the Petition

for Certification, the Respondent, through his agent, Ben Lopez, promised the employees an additional raise if they rejected the Union, and that on or about the week preceding December 5, which was after the Union withdrew its Petition, the Respondent rewarded its employees with an additional twenty cents per hour increase. (Paragraphs 6b and 6c).

Kuramura initially made the acquaintance of Lopez at Green Valley Nursery, his shipper. He had heard through the "grapevine" and Jun Uchida, another grower, that Lopez "knew the law", meaning the Agricultural Labor Relations Act, and he wanted to be enlightened as to it. Even before he spoke to Uchida he knew that Lopez had "talked at other nurseries". He testified that when he hired Mr. Lopez he did not know whether Lopez was in favor of or against unions.

Ben Lopez had been the local director of the bracero program from 1545 to 1965. This program had been established pursuant to a treaty entered into by Mexico and the United States and was primarily calculated to provide Mexicans with gainful employment in agriculture and to provide U_0S. growers with agricultural labor. The duties of Lopez were to determine in cooperation with the Department of Employment the number of workers needed to transport them to reception centers in Salinas, to allocate them to the growers, to see that their contracts and

the international agreement were complied with and to return them to Mexico at the expiration of their contracts He was also charged with the responsibility to provide continuity of employment if possible; to see that the proper wages were paid; that proper housing was provided; that vehicles were inspected periodically and that medical care was provided. This was done with a staff and he worked closely with the Mexican government. Lopez testified that there were many instances of non-compliance and he spoke quite frequently with the workers.

At one time he was director of research for the Growers and Shippers Association of California and was involved in its program on seed diseases. Lopez also worked in the area of the use of machinery to increase productivity and thus to reduce the work force.

Following his retirement, Lopez had been retained from time to time by growers as a labor consultant. This had required him to investigate grievances and to ascertain the reasons for low employee morale.

Lopez said that he was familiar with the Act and its legislative history and that when compared to others, he had expertise in this area.

On November 8 Lopez went to the nursery and had a conversation with Kuramura, through an interpreter, for about a half hour or so. Kuramura asked him to speak to the workers. Although Kuramura gave him no instructions

as to what to say, he told Respondent what he would tell the employees. He asked about the employment practices with a view of advising him about improving working conditions if they were too low and non-competitive. In fact he did so after Kuramura described his employment records, wages paid, benefits enjoyed, continuity of employment, starting pay and schedule of raises.

Lopez explained the Act to the Respondent and told him what he could and could not do; among these were:

1. He couldn't do anything to deprive the workers of their rights under the law.
2. Although he had the right to ask union organizers for identification, they had access rights but probably not co enter the greenhouses.
3. He couldn't threaten the employees as to their jobs because they joined or wanted to join the Union, but he could make his position clear, as to his attitude towards the union.
4. He could recommend that they not sign a Petition for Certification.

Lopez assumed that Kuramura did not want a union. Lopez had always presented an anti-union, pro-employer position, and he referred to instances when he did so, namely, when he did labor consultation for sun uchila, the Sunnyside Nursery and the kyosoku Nursery.

Lopez when outlined what he was going to say to the

employees. He would explain the law and the rights of the workers under it; that they had the right to have a union or not to have a union and they could report any violation of law to the Agricultural Labor Relations Board; who could and who could not sign a petition; the benefits they now have and what they may be trading them for. He would also tell them that Kuramura was not in favor of a union, but they had the right to have a union.

The employees were called into a meeting during working time. They were informed as to the background of Lopez and, although Kuramura and his sons were present, they left almost immediately. Lopez addressed the workers in Spanish. He explained the law to the employees, the benefits they were enjoying, and, in general, followed the lines which he had outlined to Kuramura. He stated that the Respondent preferred they not sign a petition or, if an election were to be held, that they vote nonunion even if they signed a petition.

Lopez testified that he made no mention" of pay raises except that he may have said that the employer could not make any improvements or raises "at this time".

When he left on the 8th he recommended to Kuramura that he speak again to the employees and Kuramura replied that if he thought that would be best he should do so.

In response to a telephone call, Lopez returned to the nursery on the 13th and he spoke to the employees

along the same lines as he had on the 8th. One of the employees asked him what a petition was. Lopez showed them an authorization card and told him that this was what he meant by a petition. Some of the employees then said they had signed such cards. Lopez advised the employees that they could sign for two unions; that if they signed they could still vote non-union and even if they didn't sign they could vote for the union. Lopez testified that he did not tell the workers that Kuramura would be displeased if they signed authorization cards. He only said that Kuramura would prefer that they did sign.

He enumerated some of the consequences which would follow if they selected a union, such as payment of dues and that most contracts required union membership that Kuramura could no longer hire at the gate but would have to hire through a hiring hall; that if the Union were selected by a majority vote, the Union would represent everyone, whether or not an individual had voted for or against the union. Finally, Lopez testified-that all benefits would have to be negotiated and they may or may not be better than what they had. He also said that Kuramura did not want a union and that they would be better off without a union.

On November 17, following a telephone call, Lopez went to the nursery. Kuramura asked him to tell the workers that the Petition had been withdrawn. Lopez

testified that Kuramura did not ask him to speak about wage raises and when he spoke to the employees that day he made no mention of benefits or why they were better off without a union.

On November 28, in response to a telephone call advising him that the workers wanted to see him, Lopez met with them. They told him that because there was no election they wanted to get more money, uniform rates, higher starting rates and better fringe benefits. Lopez informed the employees that he would convey their desires to Kuramura. Lopez did so advise Kuramura.

Lopez again appeared at the nursery on December 5 after receiving a call that the workers wanted to speak to him. He listened to them. They wanted to know "what happened to the raises we wanted". Lopez surmised that they contacted him because they had no one to turn to and no one of them indicated that he spoke English. He said he would speak[1] to Kuramura, which he did. Kuramura said that his attorneys were working on this matter. Kuramura in his presence made a telephone call and then advised Lopez that he would give wage increases and Lopez so informed the employees.

Lopez testified that at no time did he tell the workers that they would get raises if the union was kept out and he did not know until December 5 that they receive raises.

Lopez was paid for each of the first four visits although he did not request nor did he expect payment for the November 28 visit, inasmuch as he came to the nursery at the instance, of the employees. He was not paid for the December 5 visit.

Marian Steeg and Frank Huerta were UFW organizers called by General Counsel. Ms. Steeg had been director of the Union's Watsonville and Hollister field offices and was the assistant to the director at the Salinas office.

After the petition was filed on November 12, the director and she went out to the Kuramura nursery and spoke to the workers who informed them that they had two or three closed makings with someone brought in by the owner and that they would get another wage increase if they showed confidence in the company and prevented the Union from coming in at that time. Only one or two of the employees wanted to go ahead, but the majority did not think that the election should be held at that time. The two Union representatives told the employees that if they were not sure or felt threatened, the Petition would be withdrawn and they would return at another time. Some of the employees stated that the workers needed the money and some were afraid of "immigration".

Frank Huerta began organizational activities at the Kuramura nursery during the first week in November. He had one incident involving access when he was entering

the property. Kuramura saw him and motioned him to keep out. He also spoke to one of his sons who told him to keep out and if he didn't he would call the sheriff. Huerta and the other organizer then spoke to the workers and passed out leaflets while Kuramura and his son watched them. Huerta noted a member of the family was always present when he was on the property and that the demeanor of the employees differed when they were in conversation with the organizers on or off the premises. In the first instance they spoke in low tones with heads down; in the latter, they spoke in normal tones and kept their bodies erect.

Huerta testified that he had secured eight or nine signed authorization cards and the Petition was filed on November 12. A meeting was held on one occasion with the workers for the purpose of selecting an observer for the then forthcoming election. No one was willing to act as one and he was told that some of the workers had changed their minds because the person talking to them had said "something about giving a raise".

Huerta went out to the nursery a few days before the pre-election conference and the workers told him they did not want the election because they had changed their minds but they did not want to talk to him about this. The Petition was withdrawn on November 15.

Huerta testified that he later spoke to Salvador Branvilla, a former employee whose affidavit was rejected

and was told by him that Lopez promised raises and improved benefits if the Union were rejected.

Analysis and Conclusions

1. The August 29 and October 24 Wage Increases

Paragraph 6a of the complaint alleges that on or about October 24, Respondent, in response to UFW organizing activities, raised the hourly rate of pay of its employees by 10 cents per hour and thus interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in §1152 of the Act.

Section 1152 of the Act provides:

> "Employees shall have the right of 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, and shall also have the right to refrain from any and all of such activities ..." (Section / of the NLRA.)

Section 1153 of the Act provides:

> "It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 1152." (Section 8(a)(l) of the NLRA.)

Because paragraph 6d of the complaint relates to the August 29 increases and inasmuch as the paragraph was added to the complaint at the hearing and fails to comply with the previously discussed “six month” provision of the Act,

the thrust of this analysis will be directed to the October 24 raises.

The only evidence adduced which related to the raises was the testimony of Kuramura and the wage schedules set forth in General Counsel's Exhibits 5a, 5b, 6a and 6b.

The data contained in the aforesaid Exhibits with respect to the wage rates, increments and timing thereof may be summarized as follows:

Wage increases conferred on the employees on August 29 and October 24 were far greater than those given in the three preceding calendar halves. The earlier increases were mainly 5 cents each, while those conferred on August 29 and October 24 ranged from 5 to 30 cents.

The August arid October raises were what has been often described as across-the-board increases, but across-the-board raises also appear in the three preceding calendar halves.

Finally, an examination of the said exhibits does not indicate a definite pattern for the timing of increases, so that no employee could state that a raise was due him at any particular time.

The above analysis raises the question as to the reason for the granting of the comparatively sharply higher increases on August 29 and October 24. More specifically, were they given to frustrate successful union organization among the Kuramura Nursery employees,

and, if so, would this constitute a §1153(a) violation.

No person who was an employee during the time in question testified so that apart from the data contained in the aforesaid exhibits, we must examine the relevant testimony of Kuramura.

Because Kuramura speaks little if any English, he was undoubtedly handicapped in that he had to express himself through an interpreter. The distilled testimony results from all the hazards associated with the necessity of translating the questions from English to Japanese and the answers from Japanese to English. Respondent's demeanor and appearance gave one the impression that he was lacking in those qualities which we usually associate with the successful businessman. However, his business abilities are attested to by the fact that he has operated the nursery for nine years and has provided employment for 12 to 18 persons, including the family working members. The nature of commercial nursery operations is such that it requires an extensive knowledge of such matters as the technology of growing flowers, setting of prices, determining costs, and setting wage rates, wage increases and benefits, if any, the timing of the same and how to be competitive with other growers. The fact that the nursery made a profit in 1974 and a larger profit in 1975 attests to the business acumen of the Respondent.

Kuramura testified that he found out about the "new

law" when he returned to the United States on October 20. He was a member of a flower growers' association and associated with other flower growers such as with his friend Jun Ushida. In light of this and the publicity generated beginning with the time farm labor legislation was first considered, through the enactment of the law, the boycott activities of the UFW and the intensive organizing activities engaged in by the International Brotherhood of Teamsters and the Farm Workers Union, I find his testimony regarding the time when he first learned about the Act as not credible.

Kuramura was questioned about his practice governing the giving of wage increases. He said they are normally granted because of rises in the cost of living, provided however the employee does better then standard work. He also stated that the wage increases conferred in 1975 were prompted by the month-by-month rise in commodity prices, meaning the prices he received for his carnations, and the favorable profit picture in his nursery.

Kuramura was asked whether he gave the October 24 raises in the hope that "there would not be a union". He answered in the negative. I again do not find this testimony credible for the reasons previously assigned by me. I find that Kuramura was motivated to a large extent by his desire to prevent the Union from obtaining a foothold in his nursery.

Two issues remain, namely, is motive or intent a necessary element in proving a §1153(a) unfair labor practice, and, further, is the granting of increases at a time when a union was not as yet actively engaged in organizational activity in the particular nursery permissible employer conduct when the giving of the increases is prompted by a desire to keep the union out.

The NLRB held in its early years that motive is not an element of a §8(a)(1) violation,

> "Interference, restraint and coercion under Section 8(a) (1) of the does not turn on the employer's motive or on whether coercion succeeded or failed. The test is whether the employer engaged in conduct which it may reasonably be said tends to interfere with the free exercise of employee's rights under the Act." 8 NLRB Ann. Rsp. 52 (1939).

In NLRB v. Exchange Parts Co., 375 U. F. 405, 55 LR. —— 2098 (1964), the employer in a pre-election .setting increased, his employees' wage benefits. The Court of Appeals refused to enforce the NLRB's order, but the Supreme Court reversed the lower court and reinstated the Board's decision which was based on the trial examiner's finding that the wage increases were given for the purpose of inducing the employees to vote against the union. Thus, the Court; held that in a §8(a)(1) situation involving the granting of wage increases in a pre-election situation, proof of motive or intent to deprive the employees of their § 7 (§ 1162) rights is a necessary element.

The U.S. Supreme Court, in American Shipbuilding Co.

v. NLRB, 380 US 300, 58 LRRM 2672 (1965), in a lockout case involving §8(a)(1), seemingly makes a distinction as to whether the acts are so inherently discriminatory or destructive of employees' rights that the employer may be held to have foreseen the unlawful consequences and those not inherently destructive or discriminatory. Therefore, if the acts complained of are neither inherently discriminatory nor per se unlawful, the lack of a hostile motive is determinative. See NLRB v. Brown Food Stores, 380 US 278, 58 LRRM 2663 (1965).

The granting of wage increases, even during the time when a union is engaged in an active organizing campaign, may be permissible or even mandatory under some circumstances. See NLRB v. Otis Hospital, Inc., 93 LRRM 2778, (official citation not available) (1st Cir. 1976). Therefore, the granting of increases in the instant case is not per se unlawful and motivation is an element to be considered. This very point was discussed by the Court in NLRB v. Gotham Industries, Inc., 106 F.2d-1306 (1969) in fn. 5 at p. 1309:

> "5 ... Although improper motivation is not a required element in all 8(a)(l) violations as it usually is in 8(a)(3) violations, the Court's rulings are applicable to the situation in this case where the Board has in effect made motivation an essential element to this 8(a)(l) violation. It seems appropriate that the grant of benefits should come within the second category established in the Great Dane case - conduct causing a comparatively slight harm to employee rights - and not the first category, of inherently destructive conduct." (Emphasis added.)

The testimony of both Kuramura and Frank Huerta, a Union organizer, was in agreement that the organizational activities of the UFW among the employees of Respondent did not commence until the early part of November, some weeks after the October 24 increases were given.

Paragraph 6a of the complaint refers to the October 24 wage increases as being in response to UFW organizing activities. Thus, the complaint itself does not specifically contend that organizational activities among the Respondent's employees were actually taking place on October 24.

The question as to whether wage increases given on October 24, a date prior to the commencement, of active organization among Respondent's employees, and motivated by a desire in part to keep the Union out, in an unfair labor practice, is answered in NLRB v. Gotham Industries, Inc., supra, when the Court, said at page 1309:

> "Passing the exceptional employer who may raise wages out of fraternal generosity, we suppose that most non-union employers give raises for one or both of two reasons: to keep employees, old and new, in the plant, and to keep unions out. As to the latter it cannot be that every time it can be shown that an employer was seeking to stay one step ahead of unionization he was guilty of an unfair labor practice; the situation must have sufficiently crystallized so that some specific orientation exists. It would be a sorry consequence if the Labor Relations Act were to be construed as causing every non-unionized employer to think twice before initiating a wage increase lest some union should appear and claim that it had been frustrated. Of Bok, The Regulation of Campaign Tactics in Representation Elections

> Under the National Labor Relations Act, 78 Harv.L.Rev. 38, 114 (1964). At a minimum it must be that to establish improper motivation requires a showing that an employer knows or has knowledge of facts reasonably indicating that a union is actively seeking to organize, or else that an election is, to use the Board's word, impending. See Norfolk Livestock Sales Co., 1966, 158 NLRB 1595; Sigo Corp., 1964, 146 NLRB 1484, 1486; Imco Container Co. v. NLRB etc., 4 Cir., 1965, 346 F. 2d 178, 180. Cf. NLRB v. Radcliffe, 9 Cir., 1954, 211 F.2d 309, 315, cert, denied Homedale Tractor & Equipment Co. v. NLRB, 343 U.S. 833, 75 S.Ct. 56, 99 L.Ed. 657. We are concerned here only with the latter alternative as there was no suggestion of any organizational activities, let alone activity that might have come to respondents' attention."

In summary, I find that Respondent was motivated to give the October 24 wage increases for the purpose of keeping the Union out of his nursery, but inasmuch as the UFW had not as of that date actively sought to organize the employees of the Kuramura Nursery, the said motivation was not improper or impermissible.

Because the August 29 increases can only be used to shed light on events which fell within the six-month period and because they are more remote in point of time than the October 24 increases from the date the Union actively commenced organizing at the Kuramura Nursery, no further consideration need be given as to whether Respondent engaged in unfair labor practices as alleged in paragraph 6d of the complaint.

I therefore conclude that General Counsel has failed to prove by a preponderance of the evidence that Respondent has engaged in unfair labor practices as alleged in paragraphs 6a and 6d of the complaint.

2. The December 5 Wage Increases

Paragraph 6b of the complaint alleges that in response to a Petition for Certification filed by the UFW on November 12, 1975, Lopez, on behalf of the Respondent, promised the employees an additional raise if they rejected the Union.

Paragraph 6c alleges that on or about the week preceding December 5, 1975, after the withdrawal of the Petition by the UFW, Respondent rewarded its employees with an additional 20-cent per hour raise.

Respondent admits that Lopez was his agent on the occasion of his first three visits, but denies that Lopez was his agent on November 28 and December 1 in that Lopez came to the nursery on these two dates at the request of the employees and not at his request. The argument is without merit. Lopez was paid for his November 28 appearance and I find that Lopez continued to act as Kuramura's agent through December 5. The employees considered Lopez the representative of Kuramura, albeit that on the two occasions they wanted him to act as a courser with respect to their demands. Section 1140.4(c) of this Act provides that the term "agricultural employer" shall be construed liberally to include any person acting directly or indirectly in the interest of an employer relation to an agricultural employee. The employees unsubtedly considered Lopez the Respondent's agent on all five occasions

and the intent of §1140.4(c) would be nullified if the agency relationship in this instance were dependent on whether the employer or the employees requested Lopez' attendance at *a* meeting.

General Counsel did not produce a single employee witness who attended any of the five meetings, and if the testimony of Lopez is credible, his denial that he made any promise of benefits to the workers requires General Counsel to sustain his burden of proof by a preponderance of evidence.

Lopez flatly stated that when he spoke to the employees he never mentioned pay raises except that he may have said that the employer could not make any improvements or give any raises "at this time". He also testified that at no time did he tell the employees that they would get a raise if the union were kept out and it was not until December 5 that he learned that the employees would receive wage increases. General Counsel argues that Lopez must have promised benefit improvements and wage increases because when he was summoned to the November 28 and December 5 meetings he was asked by the employees as to when they would receive their raises "now that there was no longer any union activity at the nursery". Even under the General Counsel's version, this does not necessarily imply that Lopez had promised the employees wage increases, let alone that such increases would be dependent

on the rejection of the Union by the employees.

The testimony of Lopez was that at the November 28 meeting the workers told him that because there was no election they wanted to get more money, uniform wage rates higher starting pay and better fringe benefits. The version presented by Lopez places the initiative for the making of the demands on the employees and does not imply a prior promise by him. Lopez agreed to present the demands to Kuramura.

At the December 5 meeting the employees wanted to know what happened to the raises they requested. This inquiry was a logical followup to the requests made by them at the November 28 meeting. The testimony of Lopez is at. odds with the conclusion drawn by General Counsel.

Paragraph 6c of the complaint alleges the "reward" for the promise set forth in paragraph 6b, given on December 5, was an hourly increase of 20 cents per hour. General Counsel's Exhibit 5b shows the following employees on the December 5 payroll roster and the wage rates and increases given to each:

Name	Previous Rate	New Rate	Increase
Andres Cruz	2.40	2.60	.20
Manuel Mes	2.40	2.40	None
Miguel Comacho	2.40	2.50	.10
Jose Ochoa	2.40	2.50	.10
Mariano Lopia	2.30	2.50	.20
Roberto Campo	2.30	2.50	.20
Agapeta Lopez	2.30	2.50	.20
Joshia Sondera*	2.10	2.10	None
E. Usura*	2.10	2.10	None

* Hired November 21

The increases do not jibe with the allegation in paragraph 6c of the complaint that the employees received 20 cents per hour raises. Manuel Mes, a longtime employee, received no increase and the fact that he was passed over would indicate that considerations other than "rewards" were a factor in determining whether an increase should be given and the extent of the same. If, as alleged, the employees were "rewarded" with increases of 20 cents each, why were three employees excluded and why were the increases in varying amounts?

Steeg, an organizer for the UFW, testified that employees had informed her that they had been promised another increase over the October 24th one, if they showed confidence in the company and prevented the Union from "coming in" at that time. She also testified that most of the employees who met with her did not want to go ahead with the election and this prompted the Union to withdraw the Petition. Huerta, another organizer, testified along the same lines."

The testimony of Steeg and Huerta as to the statements made to them by employees that they were promised wage increases if they prevented the union "from coming in" was admitted for limited purposes only. These statements made by non-witness persons to Steeg and Huerta are excludable hearsay. The statements cannot be admitted for the purpose of proving the truth of the statements themselves,

namely, that they were promised "rewards" if they rejected the Union. (Section 1200 of the Evidence Code.) Section 1160.2 of the Act provides that unfair labor practice proceedings "shall, as far as practicable, be conducted in accordance with the Evidence Code.

The testimony was admitted for a limited purpose in that the statements attributed to the employees while not admissible to prove the truth of the ultimate facts could of and by themselves indicate what prompted the UFW to withdraw the Petition. In that respect the testimony was not hearsay.

General Counsel also argues that the statements of the non-witness declarants was admissible under the state of mind exception to the hearsay rule. In that connection, Steeg sought to fulfill the need to prove[1] the unavailability of the declarants by stating that the workers were in Mexico and therefore beyond. the State's jurisdiction. No serious effort was made to substantiate thus and Steeg's testimony was sketchy and unconclusive.

The testimony of Steeg and Huerta regarding the statements made to them by the employees was admitted subject to corroboration. General Counsel argues that the testimony of Lopez to the effect that ha allegedly said that the employer could not make any improvements at that time, corroborated the promise of benefits attributed to him.

Lopez testified that he <u>may</u> have told the employees that Kuramura could not make any improvements or give any

wage increases at that time, but even if Lopez did make the statement, it would not corroborate an assertion that he had promised improvements in benefits or wage increases if the Union were rejected.

Assuming that Lopez did inform the employees that wage increases could not be given during the period of active union activities, the issue as to whether such a statement was impermissible would turn on motive; that is, did Lopez by making this statement intend to influence employee organizational choice or was Lopez merely taking a precautionary position. As previously discussed 'in this decision, motive is an essential element in a §1153(a) proceeding involving the granting of benefits (Gotham Industries, supra) and there is no substantial evidence that Lopez' motive was improper or impermissible.

In Newberry v. NLRB, 442 F.2d 847 (CA2, 1971), an employer was upheld in suspending wage increases during an or organizational campaign, advising the employees that they deserved wage increases but stating that none could be granted until the union matter was settled. See NLRB v. Big Three Industrial Gas Equipment Co., 441 F.2d 774, 77 LRRM 2120 (CA5, 1971).

The question of rewards as evidenced by the December 5 increases is conditioned on proof of a promise of benefits (Paragraph 6b of the complaint). Thus, my finding that there was no promise of benefits should dispose of

the question as to whether the December 5 wage increases constituted rewards to the employees for their rejection of the Union.

3. Credibility of the Testimony of Lopez

The testimony of Lopez was credible. He was not evasive, argumentative or overly hesitant in answering questions and he gave the appearance of being a fair person. He has held many responsible positions and offices in the public arid private and private sector. By reason of his training and experience his agents, conversations and “talks” were plausible. His testimony was both internally consistent and compatible with other relevant evidence. Lopez was asked once or twice whether he was anti-union. He stated he was, but an analysis of his testimony indicates that he was pro-employer rather than anti-union in the sense that he did not indicate any anti-union animus or hatred. In this sense the use of the term "anti-union" is one of semantics.

4. Surveillance

Huerta testified that someone in the family was always present when he was on the property and in much instances the employees to whom he spoke would talk in low voices, with eyes down, whereas, when they spoke to him cutside of the property, they spoke in normal tones and appeared

more at ease. He did state that one of the employees spoke out even when inside the property line.

The testimony was sketchy as to place, time, duration, the identity of the family members, how far away they were, etc. In any event, these incidents when viewed in the entire context of the case were trivial and not supported by substantial evidence. NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, LRRM 2444, at 2447 (CAl, 1965).

General Counsel has at no time maintained that apart from the incident involving the alleged statement made by Lopez that no increase in benefits or wages could be made at that time, that Lopez in his conduct vis-a-vis the employees did or said anything which was proscribed by §1153(a) or was not within the ambit of the free speech provisions of §1155 of the Act. The General Counsel's case rests entirely on insubstantial circumstantial evidence which fails to meet the obligation imposed on him to prove the facts in question by a preponderance of evidence.

Conclusion and Order

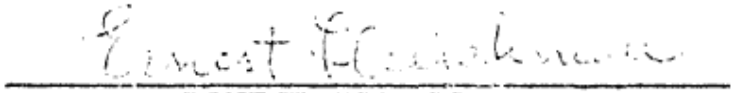
In that General Counsel has failed to prove by a preponderance of the evidence that Morika Kuramura, the Respondent herein, has engaged in unfair labor practices as alleged in the complaint, as amended, and upon the basis of the entire record, the findings of fact and

conclusions of law and pursuant to §1160.3 of the Act, I hereby issue the following recommended

ORDER

IT IS ORDERED that the complaint, as amended, be dismissed

March 25, 1977



ERNEST FLEICHMAN
Administrative Law Officer