

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

SACRAMENTO NURSERY GROWERS, INC.)
(OKI NURSERY, INC.),)
)
Respondent,) Case No. 76-CE-5-S
)
and) 3 ALRB No. 94
)
UNITED FARM WORKERS)
OF AMERICA, AFL-CIO,)
)
Charging Party.)
)

DECISION AND ORDER

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

On August 2, 1977, Administrative Law Officer (ALO) Matthew Goldberg issued his attached Decision in this case, in which he found that Respondent had discriminatorily discharged Jose Silva Lopez in violation of Sections 1153 (c) and 1153 (a) of the Act. Respondent, General Counsel, and Charging Party each filed timely exceptions and a supporting brief.

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

Respondent's exceptions are based primarily upon its disagreement with the ALO's credibility findings and with the significance or accuracy of certain findings of fact. Although we find nothing in the record which would warrant

reversal of the ALO's credibility findings, we disagree with certain of his findings of fact.^{1/} However, we conclude that these findings do not constitute, either individually or cumulatively, sufficient basis to reverse his finding of an unfair labor practice.

We find merit in the General Counsel's contention that the ALO's recommended remedial order should require the mailing, reading and distribution of the Notice to Employees, in addition to the customary posting of the notice at the Employer's premises. Therefore, our Order will require an appropriate mailing and also handing a copy of the notice to each employee immediately prior to a reading thereof to the assembled employees. We also find merit in the General Counsel's contention that Respondent should be required to provide sufficient copies of the Notice to Employees for posting, distribution and mailing after translation by the Regional Director into appropriate languages.

ORDER

By authority of Labor Code Section 1160.3, the Agricultural Labor Relations Board hereby orders that the Respondent, Sacramento Nursery Growers, Inc. (Oki Nursery, Inc.), its officers, agents, successors and assigns, shall:

1. Cease and desist from:

^{1/}We agree, with Respondent that: (1) Mr. Oki had checked the attendance records before the conversation with his foreman wherein it was concluded that Mr. Lopez should be discharged; (2) there is no real inconsistency in the statements of supervisor Linda Duncan with regard to the memorandum of November 10, 1975; and (3) supervisor Hanson's conversation with Lopez concerning the latter's tardiness did not necessarily take place during- the month preceding the discharge.

(a) Discouraging membership of its employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by discharging or, in any other manner, discriminating against any employee with respect to such employee's hire, tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining or coercing any employee in the exercise of rights guaranteed by Section 1152 of the Act.

2. Take the following affirmative actions which will effectuate the policies of the Act:

(a) Offer Jose Silva Lopez immediate and full reinstatement to his former job, or if that no longer exists, to a substantially equivalent one without prejudice to his seniority and other rights and privileges.

(b) Make Jose Silva Lopez whole for any loss of pay by reason of his discriminatory discharge on December 22, 1975, from the date of such discharge to the date on which he is offered reinstatement, together with interest thereon at the rate of 7 percent per annum.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and other records necessary to analyze the back pay due to the foregoing named employee.

(d) Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate

languages, Respondent shall reproduce sufficient copies in each language for the purposes set forth hereafter.

(e) Post copies of the attached Notice to Employees at times and places to be determined by the Regional Director. The notices shall remain posted for 60 days. Respondent shall exercise due care to replace any notice which has been altered, defaced, or removed.

(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 payroll periods which include the following date: December 22, 1975.

(g) Have the attached Notice distributed and read in appropriate languages to the assembled employees of the Respondent on company time. The distribution and reading, by a representative of Respondent or a Board Agent, 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 nonhourly 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 date of 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.

Dated: December 21, 1977

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

ROBERT B. HUTCHINSON, Member

NOTICE TO EMPLOYEES

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this notice.

The Act gives employees the following rights:

- (a) To engage in self-organization;
- (b) To form, join or assist any union;
- (c) To bargain collectively through representatives of their own choosing;
- (d) To engage in activities together for the purpose of collective bargaining or other mutual aid or protection;
- (e) To refrain from the exercise of any such activities.

WE WILL NOT discharge or otherwise discriminate against any employee because such employee exercised any of such rights.

The Agricultural Labor Relations Board has found that we discriminated against Jose Silva Lopez by discharging him, and has ordered us to offer him immediate reinstatement to his former job, or to a substantially equivalent one, and to reimburse him for any loss of pay he may have suffered because of our discrimination against him, together with interest as provided in the Board's Order.

WE WILL immediately notify the said Jose Silva Lopez, if presently serving in the Armed Forces of the United States, of his right to reinstatement, upon application after discharge from the Armed Forces.

WE WILL comply with the Board's Order.

Dated:

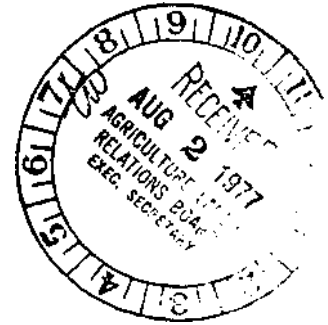
SACRAMENTO NURSERY GROWERS, INC. (OKI
NURSERY, INC.)

By: _____ (Representative) _____ (Title)

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

DO NOT REMOVE OR MUTILATE.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD



In the matter of)
)
SACRAMENTO NURSERY GROWERS,)
INC. (OKI NURSERY, INC.),^{1/})
)
Respondent,)
)
and)
)
)
UNITED FARM WORKERS OP AMERICA,)
AFL-CIO,)
)
Charging Party.)

CASE NUMBER:76-CE-5-S

Daniel G. Stone, Esq., for the General
Counsel of the Agricultural Labor
Relations Board.

Frederick A. Morgan, of BRONSON, BRONSON and
Me KINNON, for the Respondent.

^{1/}During the course of the testimony at the hearing, it became apparent that the corporate entity "Oki Nursery, Inc." was merely the marketing arm of the production company, Sacramento Nursery Growers, Inc., and the two companies were actually separate and distinct legal entities. The president of Oki Nursery, Inc. is the secretary of Sacramento Nursery Growers, Inc.; the president of Sacramento Nursery Growers, Inc. is the secretary of Oki Nursery, Inc. The parties stipulated at the hearing that the name of the Respondent, Sacramento Nursery Growers, Inc. be substituted for the original Respondent, Oki Nursery, Inc. wherever the latter appeared in the original complaint; that the former and its attorney had full notice of all matters involved in this proceeding; that neither Sacramento Nursery Growers, Inc. nor its attorney was in any way prejudiced in its preparation for this case by the originally inaccurate designation of Oki Nursery, Inc. as the respondent herein; that at all times material, the alleged discriminatee, Jose Silva Lopez, was an employee of the Sacramento Nursery Growers, Inc. and was paid from that corporation's accounts; and that all matters noted in this complaint involved alleged conduct on the part of Sacramento Nursery Growers, Inc. and not Oki Nursery, Inc.

Curt Ullman, for the United Farm
Workers of America, AFL-CIO,
Charging Party.

Before: Matthew Goldberg, Administrative Law Officer

DECISION OF THE ADMINISTRATIVE

LAW OFFICER

STATEMENT OF THE CASE

On February 6, 1976, the United Farm Workers of America, AFL-CIO (hereinafter referred to as the "Union"), filed an original charge in case number 76-CE-5-S alleging that Oki Nursery (Sacramento Nursery Growers, Inc.), hereinafter referred to as "Respondent," violated Sections 1153(a) and (c) of the Act. Based on said charge, a complaint was issued by the General Counsel of the Agricultural Labor Relations Board on March 17, 1977.

The Respondent named above has filed an answer denying, in substance, that it committed the unfair labor practices alleged.

A hearing in the matter was noticed for and held on May 17 through May 19, 1977.^{2/} Respondent, the Charging Party, and the General Counsel for the Board appeared through their respective counsels or representatives. All parties were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and submit briefs.

Upon the entire record, from my observation of the demeanor of the witnesses, and having read and considered the briefs submitted to me since the hearing, I make the following:

^{2/} Copies of the Charge, the Complaint and the Notice of Hearing have been duly served on Respondent.

FINDINGS OF FACT

I

JURISDICTION OF THE BOARD

1. Respondent is and was at all times material an agricultural employer within the meaning of Section 1140.4(c) of the Act.

2. The Union is and was at all times material a labor organization within the meaning of Section 1140.4(f) of the Act.^{3/}

II

THE ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary Statement

The Respondent is engaged in the propagation and sale of various types of container plants, and greenhouse products, including "foliage" or house plants, bedding plants, ground cover, and "ornamentals" or outdoor plants utilized for landscaping.

Jose Silva Lopez was an employee of Respondent for a short period in February 1974, and again worked for Respondent from September 1974 until he was terminated on December 22, 1975. Respondent at that time stated that the reason for Lopez' termination was "tardiness and not meeting minimum productivity standards..."

Lopez had a general Job classification in this latter period although his duties consisted primarily of "assembly pick-up" work, or picking up cartons of potted plants that had been assembled by

3/ The Jurisdictional facts were admitted by Respondent in its answer.

production workers, placing these cartons on a Jeep or wagon, and bringing the cartons of plants from the area where they were assembled to the loading dock area where they were to be shipped to customers. From time to time, Lopez was assigned briefly to other tasks, including working on the "soil pile," where empty pots were filled with soil; general clean-up duties; stapling cartons together; and working on tables pulling out bad plants, and separating and recycling the soil therefrom. His work was supervised by one John Hanson. Lopez, in the words of his fellow employee, Dennis Johnson, "worked as hard, fast and efficiently as he could," and was, on at least one occasion, complimented on his job performance by supervisor Ed Kubo.

Lopez testified that he became interested in labor organizations while employed by the Respondent in the Summer of 1975, since he was aware that when the ALRA "came into effect, we knew we could take advantage of it." Initially, Lopez approached the Retail Clerks Union and obtained authorization cards from them. Soon thereafter, he called a meeting of his fellow employees after work "by the back gate of the nursery." Between twenty-five and forty employees attended. Lopez passed out organizational literature and tried to acquaint his fellow workers with the relative merits of union membership and participation -- in his words, he "tried to introduce the system to the people." Lopez further testified that supervisors Hanson, Linda Duncan and Catalina Romo took note of the employee gathering. However, none of the evidence presented demonstrated that any of these individuals was precisely aware of the reason for the

gathering, or the fact that Lopez had initiated 10.^{4/}

At some point following this meeting, a Mr. Nikki, a spray operator at the nursery, informed supervisor Kubo that Lopez had contacted the Retail Clerks. Although Kubo denied that he spoke with Lopez about the incident (or could not recall doing so), Lopez testified that Kubo privately discussed the Retail Clerks with him, saying that he knew what Lopez was doing, that he wanted him to stop harassing and antagonizing the people, but that ultimately it made no difference to him whether the company went union or not.

B. The August 1975 Company Meetings

Shortly following the events noted above, Respondent held a series of meetings in August of 1975, attended by supervisors and employees. At the first of these meetings the entire body of employees from the location where Lopez worked attended. Representatives were elected from among the rank and file who would participate in smaller, future meetings on their behalf. As many of Respondent's employees came from varying ethnic backgrounds ^{5/} and were not able to communicate in English, it was felt that bi-lingual employee

^{4/} Lopez' chronology of the events leading up to the termination was somewhat confused and inaccurate in light of the testimony of other witnesses. Apart from this factor, however, the essential elements of his testimony were substantially corroborated by other employee witnesses. As will later be discussed, I have found the testimony of Respondent's supervisors Hanson and Duncan to be fundamentally unreliable. Accordingly, whenever their testimony conflicts with that of Mr. Lopez, except in those particulars involving the date of various events, I have credited Lopez' version of a particular incident. For example, employee Evangelina Saavedra supported Lopez' account of the employee meeting; Duncan testified that she knew such a meeting was held but she "didn't know if Jose Lopez was there."

^{5/} Approximately 30% of Respondent's employees were Spanish speaking, The remainder included workers of Filipino, Vietnamese or Korean origins.

representatives could translate employee suggestions and proposals and present them to the Respondent, as well as being able to return to the groups they represented following the meetings and translate the Respondent's proposals to the respective, groups.

A group of 10 to 15 employees of Mexican descent were initially reluctant to participate in the company meetings. Supervisor Ed Kubo tried to convince these employees "just to come and listen" to what the company had to offer. Although when he testified Kubo could not recall whether these workers stated that they were pro-union, employee Mary Ellen Perez testified that the group and Jose Lopez voiced to Kubo at that time their preference for union representation. However, Lopez assisted Kubo in urging the group's involvement, and eventually Kubo's point of view prevailed: the Mexican group did actually participate in the meetings, with Jose Lopez as their representative and spokesman. 6/

The purpose of these meetings was clear: to develop and implement new personnel policies and programs before the effective date of the ALRA, or August 28, 1975. George Sam Oki, executive assistant and a supervisor for Respondent,7/ testified that Respondent was "concerned

6/The testimony concerning how Lopez attained status as a representative was conflicting. Lopez stated that he had been elected to the position; Kubo, however, testified that he "appointed" Lopez. Given the fact that all other employee representatives were elected, that the Respondent in a circular to its employees distributed at that time set forth that representatives were to be elected to the "Employee Relations Committee" (see discussion infra), and that Lopez had been known among employees, inferentially, as somewhat of a leader as a result of the employee meeting he initiated some time previously, it is more likely that Lopez was in fact elected an' employee representative.

7/ George Sam Oki, also known as "George Sam" and named incorrectly in the complaint as "George S. Oki, Jr." is the son of George S. Oki, corporate secretary of the Respondent.

about the effect of the AURA on the company and on the industry"; that it was felt that there would be a lot of unionization; that rather than being "forced into" implementing certain personnel policies, the company wished to retain as much managerial discretion as possible and institute its own program. Supervisor Kubo admitted on cross-examination that the primary purpose behind the changes in employee wages and benefits introduced by the Respondent in August 1975, was to "head off the intrusion of unions." Before matters reached the stage of unionization, Respondent "wanted the workers to know what the company had to offer."

Respondent introduced a set of documents collectively labeled its Exhibit 10 which contained summaries or minutes of the meetings which took place on August 8, August 15 and August 22, 1975.^{8/} Also contained in this exhibit were two circulars given Respondent's employees or posted for their information at some point prior to the August meetings. One of these circulars informs employees of the enactment and impending implementation of the ALRA, telling them they have the right to decide whether or not to be represented by the Union, and acquainting them with some of the negative aspects of union representation. The other circular introduces "a better plan" to Respondent's employees: a program under which Respondent's workers

8/ Respondent represented that the minutes in no way contained all of the matters discussed at the various meetings or all of the issues which were resolved therein. Furthermore, the minutes are only for meetings which involved the employee representatives, and not for those meetings attended by the entire body of Respondent's employees. It appears from the record (which admittedly, is somewhat confusing on this point) that a number of meetings were held in August which were attended by all of Respondent's employees during which wage increases and fringe benefit changes were discussed and announced.

elect their own representatives from among the rank and file to participate in an "Oki Nursery/SNG [Sacramento Nursery Growers] Employee Relations Committee" which "will discuss with you and your representatives the same things we would talk and negotiate with a union," including wages, fringe benefits, and working conditions. 9/

According to the minutes of the August 8 meeting, fifteen separate topics relating to wages, hours and terms and conditions of employment were discussed. Lopez testified that when he went to this meeting, he was "under the impression that the company had something to offer us." Instead, when he got there, Supervisor Kubo asked "what did we want."10/ After suggestions were made by employee representatives concerning each of the areas under consideration and discussions were had with management, the meeting was adjourned to give management time to prepare its program.

At 3:30 that afternoon a proposal was presented by management to the representatives for distribution to all employees. Respondent's Exhibit No. 7, the circular embodying this proposal, outlines the changes to be made in their personnel policies, although it omits a reference to a substantial wage increase which was also made part of the program.11/ It sets forth formalized procedures and regulations

9/ As the formation of this committee took place before the effective date of the Act, this conduct was not alleged to have been an unfair labor practice under Section 1153(b).

10/ Lopez' recollection and credibility were enhanced by this testimony, as the minutes themselves corroborate these statements, to wit: "Representatives from the employees suggested management views be presented from the start, however, management felt a discussion of what the employees expected should be heard first." (Respondent's Exh. 10, Minutes of August 8, 1975 meeting, p. 1)

11/ George Sam Oki testified that the majority of employees in general labor job classifications received at that time a \$.90 per hour wage increase to be added to a base pay rate of between \$2.15 and \$2.25 per hour.

applicable to such matters as vacations, paid holidays, sick leave, premium pay, seniority, etc. The effective date of the program and wage increases was August 13, 1975.

The minutes of the August 15, 1975 meeting reveal that matters relating to vacations and holidays, income tax withholding, layoffs, and grievance committees, among other things, were discussed. Lopez testified that at one of the meetings ~~he~~ himself made a demand concerning repair of inadequate restroora facilities. Once again, his testimony is corroborated by the August 15 minutes, which includes under the heading "Requests" the statement that "maintenance people are checking on the plumbing problems."

The minutes of the August 22 meeting demonstrate that the company was indeed concerned about the imminent implementation of the ALRA. According to these minutes, George S. Oki, president of Oki Nursery, Inc., and secretary of Respondent was "present at the installation of the new Agriculatural Labor Relations Board." The names of the new Board's members and that of the then General Counsel are set forth, along with brief remarks concerning their respective backgrounds. There is the representation that "[t]here has been some union visitation of nurseries in the Valley and Bay Area." Wage schedules, employee handbooks, safety committees, and salary increases were among the topics also discussed at this meeting.

Although none of the aforementioned minutes referred to the fact that a United Farm Workers' contract was distributed to employees at one of the meetings, uncontradicted testimony was presented to that effect, and that the contract was utilized in order to compare it with what the Respondent had to offer employees. Lopez testified

that at one of the meetings supervisor Kubo stated that if the union came in, the Respondent would close down. However, this assertion was not corroborated by any of the employee witnesses and was denied by Kubo himself. Accordingly, I find that there is insufficient evidence to attribute this statement to supervisor Kubo and through him to Respondent, or to substantiate the contention that the statement was actually made.

C. The Concerted Activities of Employee Lopez and Respondent's Knowledge Thereof.

It is undisputed that Jose Lopez was a very vocal and active participant in at least some of the August meetings outlined above. Each of the witnesses who were Respondent's rank and file employees at that time – Dennis Johnson, M. E. Perez, Evangelina Saavedra, and Terao Coreneo – attested to that fact as did supervisors Kubo, Oki and Duncan. At one of the meetings-attended by the entire complement of Respondent's employees and supervisors from the location where Lopez worked, Lopez raised the issue of whether the company's new program was to be memorialized in a written contract, or whether it would simply be embodied in an oral agreement. The issue provoked harsh words on the part of management via Supervisor Ed Kubo, who, in front of this large gathering of employees levelled disparaging remarks at Lopez.^{12/} As this meeting concluded, employee Coreneo

^{12/}Exactly what Kubo said at that particular time is unclear, since several witnesses presented differing versions of his response. Lopez testified that after he, Lopez, had asked about a written contract, Kubo said: "Joe, any Jackass knows that a verbal agreement would hold as much weight in court as in water." Employee Perez testified that after Lopez asked management why they did not put their-offer down in a written agreement, Kubo stated: "Even a jackass knows a gentleman's word is worth more than his signature." According to employee Coreneo, Kubo responded to Lopez' query by stating that "Any fool would know that a gentleman's agreement could be broken at any

testified that Supervisor Kubo, after being asked what Lopez was "trying to prove," stated: "I don't know. Jose Lopez is Just an ass -- Just a troublemaker.. Jose Lopez doesn't know what he's doing."

Although supervisors Hanson and Oki could not recall whether Lopez made any pro-union statements at the August meetings, employee Johnson stated that Lopez, at a full company meeting in the presence of numerous supervisors, voiced his personal preference for unions. Employee Perez essentially corroborated this testimony.

In addition to Lopez' activities alluded to previously in connection with the Retail Clerks union, he became involved with the United Farm Workers union, discussing the union openly with fellow workers during breaks and before and after work, and likewise passing out UPW literature and authorization cards. These activities were carried on in full view of various supervisors 13/ and took place from about the same time as the August meetings up until the time he was actually terminated in December, 1975.

Employee Saavedra testified that in August, 1975 Lopez, she and other employees participated in a series of meetings held at employees'

12/ (Continued) time. Which version of Kubo's statement is credited is of little significance, since each carries a roughly equivalent import: it is evident that Kubo sought to denigrate Lopez in front of his fellow employees and to minimize the impact of Lopez' raising a legitimate collective bargaining issue.

13/ Supervisors Hanson, Duncan and Kubo all denied knowledge of such activities, notwithstanding the fact that Lopez and other former employees supplied mutually corroborative testimony in this regard. For example, employee Coroneo stated that Lopez' actions took place in areas where workers and supervisors alike took lunch and coffee breaks. In light of the credibility resolutions discussed below which discredit these supervisors' versions of the circumstances leading up to Lopez' discharge, I find that these supervisors, and Respondent, had full knowledge of Lopez' activities on behalf of the United Farm Workers.

homes. Discussions at the meetings centered on the subject of unionization. At a number of them, United Farm Workers organizers were present. After one of these meetings, Saavedra was asked by Catalina Romo (stipulated to by one of Respondent's supervisors) whether she had had a meeting about the union. When Saavedra responded negatively, Romo stated that if employees did have such a meeting, they could be fired.

At some point during the course of the August meetings, Supervisor Kubo removed Lopez from his position as an employee representative, despite the fact that Lopez had been elected to the position. Kubo, in his testimony, attempted to justify this action by saying that Lopez' constant speaking out at meetings was preventing effective communication, and that certain people complained to him that Lopez was talking too much and interfering with their desires to hear what the company had to say. I find that Lopez' removal from an elective position as an employee spokesman provides further evidence of Respondent's knowledge of his union activities: the inference is quite strong that Respondent did not want Lopez to utilize his representative status at company meetings as a platform on which he could express his pro-union views, question or oppose Respondent's newly formulated personnel policies, and influence the opinions of his fellow employees.

In September 1975, Lopez circulated a petition among his fellow employees which requested that Respondent's management alleviate a particular condition of employment, namely a problem with the unavailability of employee parking facilities. This petition, signed by

Lopez, was presented to Supervisor Kubo (G.C. Exh. No. 4), and provided further evidence of Lopez' attempts to ameliorate certain conditions of employment on behalf of his fellow workers, and of Respondent's knowledge of these actions.

D. The "Quota System"

As noted previously, the stated reasons for Lopez' discharge were "tardiness and not meeting minimum productivity standards." Much testimony at the hearing on the part of Respondent's witnesses was devoted to an explication of their particular production quotas and how these provided an indicia of Lopez' poor Job performance, thus Justifying his discharge.

The origins of Respondent's production quotas were somewhat unclear. Supervisor Kubo testified that production standards "have been used since the work started," and dated from 1959 or 1960. Supervisor Hanson, however, stated that he had set certain production quotas, but later changed his testimony to the effect the quotas were already in existence when he became a supervisor. Supervisor Duncan testified that although greater efficiency and productivity were stressed, quotas were not mentioned at the August 1975 meetings. However, Respondent's executive assistant George Sam Oki said that work standards were discussed at the meetings, as was the establishment of employee-supervisor committees for the purposes of developing such standards.

14/

14/ The minutes of the August 8, 1975 meeting, Section 15, "Standard of work Performance," substantiate this aspect of Oki's testimony.

Respondent Introduced Exhibit 8B, dated August 19, 1975, which sets forth by job classification definite production quotas. These quotas, according to Oki, were based on standards which already existed, but which were reviewed and modified by the employee-supervisor committees. Originally drawn up for use at another of Respondent's locations, the quotas were to be implemented at the location where Lopez was employed.

Although supervisor Hanson testified that he informed assembly pick-up workers of the quotas they were required to meet, both Lopez and Coroneo (who, like Lopez, worked principally in assembly pick-up) denied being so informed and did not, in fact, know what their production rate was supposed to be. Former employee Johnson also testified that when he worked with Lopez he was not informed of any quota. Oki essentially corroborated this testimony by stating that he could not recall whether supervisors announced the standards set forth in Respondent's Exhibit 8B, or whether the document was distributed to employees.

Several of Respondent's supervisors testified that the production rate for all assembly pick-up work was set at sixty cartons per hour (see also General Counsel Exh. No. 5). However, both Lopez and co-worker Coroneo testified, in essence, that it would be difficult, if not impossible, to set a standard rate for pick-up work, since the size and weight of the cartons which were to be picked up varied greatly. Despite Hanson's somewhat Incredible statement that a "person could load heavy cartons just as quickly as others," it is apparent that any standard set for pick-up work would perforce be dependent on the size and weight of the cartons to be picked up.

This conclusion is reinforced by Respondent's Exhibit 8B, which sets a carton pick-up rate only in reference to one of Respondent's particular products, "P4 Instant Garden."

Furthermore, it became apparent from the testimony that all pick-up work on a given day had to be completed within that day. If it were not finished by the normal quitting time, workers would have to stay late for that purpose (parenthetically without receiving any overtime pay). Supervisor Duncan testified that production levels for assembly workers ranged any where from zero to three to four hundred cartons on an average day to up to eight hundred cartons on exceedingly busy days. Thus, if only three hundred cartons were actually filled during the course of a normal eight-hour day, and a pick-up worker fulfilled all of his duties that day by picking up all of those cartons, the worker would seemingly not be meeting his "quota" of sixty cartons per hour or 480 cartons per day, despite the fact that he was doing all that was required of him. 13/

In sum therefore, while ample Justification could be offered for setting standard productivity rates for assembly-line types of Jobs within Respondent's operations, no such rates would or could be relevant to the type of pick-up work in which Lopez was engaged.

15/ George Sam Oki testified that even if all the cartons had been picked up by the end of the day, the assembly process might still be messed up, since this process had to be related to time: the loading work, if not done properly, would slow down the loading crews since often products were loaded in in a particular sequence. Oki further stated that, if for example only 240 cartons were assembled on a given day, Lopez would be meeting his "quota" only if the pickup work were performed in four hours. This statement is somewhat illogical, however. Since Lopez could only pick-up what had already been assembled, it is conceivable that if less than sixty cartons per hour are assembled, nothing that Lopez could do would enable him to meet the "quota."

As the quota system had little or no meaning vis-a-vis Lopez' principle duties while employed by Respondent, his termination based on his failure to meet such quotas smacks of a pretext.

Respondent produced two booklets which ostensibly, were kept for the purpose of maintaining the production records of particular employees (see Respondent's Exh. Nos. 3A and 3B). The records were allegedly part of Respondent's program to increase worker efficiency and to maintain certain production rates after wages were raised and fringe benefits introduced in August, 1975. They were also allegedly utilized for the purpose of making projections of production capabilities. Respondent's witnesses testified that despite the institution of a company policy in August, 1975 that such records were to be kept daily by each supervisor for the employees under his or her direction, not many supervisors actually did so. On November 10, 1975, Respondent Issued a memo re-iterating that policy, and charging supervisor Linda Mochizuki (Duncan) 16/ with the overall responsibility of maintaining the records (Respondent's Exh. No. 4). Respondent's exhibits 3A and 3B apparently were the result of the efforts of supervisors to comply with the company directive.

An examination of these record booklets provides insights in to the true nature of the Lopez termination. Only twelve daily entries for Lopez appear in supervisor Hanson's record book (Respondent's Exh. No. 3B) for the period between November 11 and December 22, the date of Lopez' termination, despite the fact that there were twenty-

16/ Mochizuki was supervisor Duncan's maiden name.

nine working days In this period. 17/ No entries whatsoever appear in Hanson's book for Lopez' production between November 25 and December 22.

When the records for Lopez and fellow pick-up worker Coroneo ("Temo") are examined closely, it appears that a significant number of these have been altered 18/ with the obvious intent of increasing Coroneo's output and decreasing that of Lopez in the event that a comparison might be made between the performances of the two workers engaged in the same task.

For example, on November 11, Coroneo's count for the 8:30-10:00 A.M. period was increased from "42" to "142" by inserting a "1" in front of the four in the number. (The number "1" is in a different color ink than that initially noted.)

On November 12, Coroneo's count for the period between 8:3P-12:00 noon that day was modified from 143 units to 243 by ineptly inscribing a "2" over the "1" which appeared originally. This same practice was followed the next day when Coroneo's count was changed from "164" to "264," on November 17 when it was altered from "180" to "280" and on November 18 when the number "158" was changed to "258."

Time periods stated in Hanson's records were also modified with the same object. On November 18, Lopez' ending time was obviously

17/ Lopez was apparently absent from work for approximately three and one-half days during this time.

18/ Eight of the twelve entries in Hanson's booklet setting forth the production rates of Lopez and Coroneo have clearly been changed. When the changes were made, however, is not discernible.

changed from 4:00 P.M. to 6:00 P.M., thus increasing the length of time recorded for the given task, consequently decreasing the production rate. The opposite procedure was followed to increase Coroneo's rate on November 25, where his ending time appears to have been revised downward from 4:00 P.M. to 12:00 noon. Parenthetically, it should be noted that the records for other workers do not contain nearly as many changes, if they contain any at all. The inference is quite strong, if not overwhelming, that the production records have been deliberately altered in an attempt to provide further "evidence" of Lopez' inferior job performance which would ostensibly justify his discharge. The introduction of these records reinforces a contrary theory and lends added credence to the conclusion that his termination on this ground was a pretext.

Likewise, an inspection of the records made for employee Coroneo buttresses the theory that Lopez was the object of a discriminatory discharge. Despite the fact that Coroneo was engaged in the same or similar tasks as Lopez, his performance was not monitored nearly as closely: an overwhelming number of entries for him are only for a half-day period, whereas Lopez' records were noted for an entire day. Coroneo's work production was not recorded on those days where Lopez' name did not appear, even though the output of other workers was noted on those days. Although Coroneo was employed by Respondent under Hanson's supervision well after Lopez was terminated, and Hanson's booklet contains entries up until February 23, 1976, Coroneo's "pick-up" output was recorded only once during the two months following Lopez' termination. 19/

19/ Even this record has been modified. Respondent's supervisors testified that worker production was often recorded on yellow slips. The information on the slips was then transferred to the record booklet. The yellow slip for February 12, 1976, sets forth "285 cartons" as

At some point prior to Lopez' discharge, Lopez and Ooroneo were instructed to initial each carton which they had picked up. The practice continued for several weeks, and then was abandoned and never re-instituted. Ostensibly, this method was utilized to aid Hanson in keeping production records. However, one may also infer from it that Respondent sought to keep better track of Lopez' output in order to "set him up" for his eventual termination: although Hanson continued to have difficulty keeping production counts, it was only Lopez' pick-up count that seemed to have any importance, since no pick-up worker before or since Lopez has been responsible for initialling the cartons he has picked up.

E. The Credibility of Respondent's Witnesses.

Reference has been made in several sections of this decision to the inherent unreliability of the testimony presented by a number of Respondent's witnesses. Simply stated, if the version set forth by these witnesses of the circumstances leading up to Lopez' discharge were accepted, no violation of the Act could be found. For the following reasons, it has been decided to discredit major portions of their respective testimonies.

Supervisor John Hanson, employed by Respondent for nearly seven years, appeared to be a reluctant witness. Eyes cast downward throughout a great deal of his testimony, his responses to a large

^{19/} (continued) Coroneo's count for pick-up work between 7:30 and 12:00. The booklet however, contains an entry of "389" for the same period, with the 3" in the number being superimposed over a previously existing two, e.g., 389.

number of questions were prefaced by long, pregnant pauses as if he were groping for the right answer. The testimony itself was vacillating and self-contradictory in spots, while in others it was contradicted by other testimonial or documentary evidence.

Hanson stated that he had been a supervisor with Respondent for the past five years, and that throughout that time he has kept records of each worker's production output. Yet Hanson was unable to produce any such records other than haphazard ones he kept from November 1975 through January and February 1976. (Respondent's Exh. No. 3B) Hanson further testified that when he contemplated Lopez termination, he discussed the matter with George Sam Oki, Respondent's executive assistant responsible for personnel. At that time, he allegedly showed Oki Lopez' recent production counts from the booklet Hanson kept which included them. An examination of this booklet (Respondent's Exh. No. 3B) reveals that Hanson's record keeping was slipshod at best (despite his testimony denying that he had trouble keeping track of the work under his supervision), and that as noted above, other than entries made for ten days in November 1975, and one day in December 1975, he actually had no reliable records for Lopez' output for the several weeks immediately preceding Lopez' termination.

When testifying about the August 1975 meetings, Hanson stated, incredibly, that he did not hear anything at the meetings about the "farm bill" or unions, that he never heard anything about "Chavez' union" in the context of Respondent's nursery. Yet this was the prime focus of these meetings, as previously discussed. Hanson later vacillated from this position and admitted that Respondent explained

at these meetings that employee wages were being increased in August 1975 "because of a bill being passed," "about the UPW" which "must be some kind of union," and that the Respondent's spokesman at the meetings were "going back and forth checking each side out," the "UPW" being the "other side."

While testifying about Lopez' Job performance immediately prior to Lopez' termination, Hanson stated that Lopez was "gone about one week in December" and failed to report his absence to him. Respondent's own personnel records belie this statement, as their Exhibit 15, garnered from such records, shows that Lopez actually did notify Respondent of his December illness.

Furthermore, in Respondent's Exhibit No. 7 listing fringe benefits and personnel policies effective August 13, 1975, Section 6d, it states: "Employees who do not report for the regular scheduled work for three days without an approval in writing from your supervisor and/or your notification of illness to the office, will be terminated as a voluntary quit..." If Lopez had in fact failed to notify anyone of the week-long illness, as Hanson testified, surely his termination could have been ostensibly Justified for violating a stated company rule. No such Justification was preferred by Respondent.

In his discussions of production standards, Hanson originally testified that he himself had set the quotas "four years ago," that "no production standard was set up by his superiors," and that "no supervisor told him to make quotas up." Later in his testimony, Hanson stated that there were quotas extant before he became a supervisor and that he did not make up the quotas for assembly

pick-up work. Additionally, Respondent's own witness, Supervisor Kubo, testified that production standards had been used since the inception of Respondent's operations, and that formalized quotas were set in "1959 or '60."

Similarly, the testimony of Supervisor Duncan was marked by inconsistencies and contradictions. For example, Ms. Duncan's recollection of the August 1975 company meetings was somewhat selective. Although she stated that she "didn't hear everything that was said" there and she "wasn't paying attention," she did recall that when the wage increase was announced, George S. Oki stated that the company wanted to keep pace with the rest of the world; better record keeping and greater production efficiency were stressed; the impact of the farm labor bill was explained, as were the particulars of the "access rule" (which parenthetically, Duncan was able to paraphrase on the witness stand). Duncan testified that Lopez was "always talking" during the meetings, yet she could not remember anything that he said.

Duncan further testified that during the two weeks or so prior to his termination, Lopez was working in her department and she was able to monitor Lopez' performance closely since she "didn't have much to do on those days." Yet at another point in her testimony, Duncan stated that this period was a "busy time" for Respondent. Despite her statement that she was "able to count every carton Lopez picked up" and that she was charged with the responsibility of maintaining production records, during the entire period in question she made only two entries in her records, on December 11 and

December 15, setting forth Lopez' output (see Respondent's Exh. No. 3A). When questioned about this random record keeping, Duncan first testified that it was her responsibility to "see that [production] records were accumulated every day and re-recorded In her books." Yet, in barely the next sentence, she stated that because Lopez was technically under Hanson's supervision, not here, when Lopez worked in her department, it was Hanson's responsibility to count Lopez' production.

Similarly, when examined about the origins of Respondent's Exhibit No. 4, a memo dated November 10, 1975, charging Duncan with the responsibility of keeping production records, Duncan initially stated that she prepared the memo. Then almost within the same breath, she said that she did not "know who wrote it." During a subsequent voir dire, Duncan again contradicted herself and admitted that she wrote the rough draft of the memo.

Given the above sampling of the testimony of supervisors Hanson and Duncan, their obvious bias in favor of Respondent, and their general demeanor while testifying, where these witnesses have presented testimony which differs from that of other witnesses, I have chosen to treat the statements of the latter as more credible, and have resolved any factual conflicts counter to the versions supplied by Hanson and Duncan.

F. The Discharge

In late November of 1975, Lopez was assigned by Hanson to work under the direction of supervisor Duncan for several weeks. It became his function to perform pick-up duties solely from the output of Duncan's production crew.

Hanson and Duncan both testified that during this period Lopez was not performing adequately. Duncan stated that at that time she was able to observe Lopez' performance fairly carefully, and that she was having recurrent problems with Lopez' work: cartons which should have been removed by him and brought to the loading dock were continually stacking up, thus restricting the work area and efficiency of her production crew. At times she was unable to locate Lopez or she found him in areas where he was not supposed to be. These complaints were allegedly conveyed by Duncan to Hanson.

Despite these representations by Duncan, only two entries actually appear in her production record books for Lopez' output. If Lopez was indeed slacking off during this time, and Duncan was watching him closely as she testified, then more extensive records could easily have been entered in the books to provide concrete support for Respondent's contentions. Given the untrustworthiness of this witness' testimony as discussed above, and the statements of employee witness to the effect that during his tenure Lopez worked at the same pace as his fellow workers, I find that there is a strong inference that if more extensive records had been kept they would exculpate Lopez and contradict supervisor Duncan's assertion that Lopez was, in effect, "goofing off."

As noted previously, actual "quotas" had little relevance to the type of work Lopez was doing. Both of the entries made by Duncan indicate that Lopez worked up until the normal quitting time, or approximately 4:15 P.M. Since he did not stay late on those occasions, he did all the pick-up work he was then required to do, bringing the entire output of Duncan's crew to the loading dock

within the normal eight-hour work day. If Lopez were in fact slacking off on those two days, he would necessarily have taken more than eight hours to complete his work.

Furthermore, one of the Lopez entries, that for December 11, appears to be extremely suspect. It and the two entries for other workers which immediately precede it are the only ones in Duncan's booklet which are made in pencil. The pencil entries for December 9 and December 4 for employees other than Lopez give entirely different production counts for those workers than the ball pen entries made on the lines above for the same dates. The total production count stated for Lopez on December 11 in Duncan's booklet (368) differs from the production count for that day set forth on the warning slip given Lopez dated December 15 (418) (G. C. Exh. #5).

The warning slip itself was allegedly the result of a discussion between supervisors Duncan and Hanson wherein Duncan re-iterated her problems with Lopez and the two concurred on this as an appropriate course of action. Lopez had not received any written warnings prior to this time, although he testified that after one of the August meetings he was orally reprimanded by Hanson to "speed it up" or he would be terminated. 20/

The essence of this warning slip does not bear up under close scrutiny. As noted above, the production count stated for December 11 on the slip differs from that recorded in Duncan's booklet. It also

20/ Hanson testified that this oral warning was conveyed to Lopez in November 1975. Given the credibility resolutions outlined previously, I credit Lopez' testimony in this regard. The assertion that Lopez was warned of a possible termination after one of the August meetings at which he was exceedingly vocal lends added support to the General Counsel's position that Lopez was viewed by Respondent as a threat and his discharge was discriminatory and came about as a result of his concerted activities.

appears from the booklet entry that Lopez was engaged in pick-up work for only six and one-half hours on December 11, and not the eight hours noted on the slip. Likewise, the counts stated on the slip for November 24 and November 25 for eight and eight and one-half hours work, respectively, are somewhat misleading: they do not take Lopez' lunch hour and break times into account, which would effectively reduce the time actually worked at least one hour and bring him more nearly within the so-called "quota" of sixty cartons per hour.

The slip contains the language: "Only one warning is issued. If work does not improve you will be terminated." The fact that the information set forth on the slip is inaccurate and suspect provides additional evidence that Lopez was, by December 15, 1975, being set up for his imminent discharge. 21/

The day following his receipt of the warning slip, Lopes went to see supervisor Kubo about the matter. He complained that he was having trouble working with Duncan, that she was always pointing her finger at him, and that he would like to be transferred. Duncan also participated in the discussion. Kubo stated that he also then warned Lopez about his tardiness and absenteeism, but Lopez denied that any mention was made of this. I credit Lopez' version of this meeting.

In any event, Kubo apparently attempted to alleviate the situation by transferring Lopez from Duncan's department to the "soil pile." Witnesses stated that "soil pile" work was exceedingly more strenuous than pick-up work. Lopez testified that at some point in December of

21/ On that date, also from the entries which were made in Duncan's booklet, it is apparent that she was scrutinizing Lopes' work extremely carefully, making notes every half hour concerning his work. No other employees, according to the records, were watched nearly as closely. This fact also lends support to the theory that Lopez was by this time being set up for termination.

1975 his back began to bother him, and following the conference with Kubo on December 16, he took a number of days off after reporting in sick, when he returned to work on December 22 and was assigned to the soil pile, Lopez testified that supervisor Hanson kept checking on him, reminding him of what the quota was for soil pile work. Lopez felt at that time he was "pretty sure [he] didn't make the quota," but he "kept on working at a steady pace."

George Sam Oki testified that Hanson consulted him that day concerning whether or not Lopez should be terminated. Hanson was allegedly asked what Lopez' counts were and what they were supposed to be. 22/ After receiving this information from Hanson, it was mutually decided that Lopez should be terminated.

Following this conference, Oki himself informed Lopez about the production quota, and that Respondent was "going to have to let him go." Lopez' dismissal was indeed precipitous: when he inquired of Oki when he would be terminated, Oki stated "today...right now..." Lopez was then instructed to get his time card, punch out, and leave Respondent's premises immediately.

The termination slip Lopez received from Respondent was written the day following his discharge. In addition to citing Lopez' failure to meet minimum production standards, it sets forth "tardiness" as a reason for the dismissal, and states: "previous warning given for low productivity and tardiness." (Respondent's Exh. No. 16.) Although Oki testified that he informed Lopez orally when he was discharged that the reasons for the termination were Lopez' absences, tardiness, and

22/ As noted above, Hanson stated that he showed Oki Lopez' production counts which were recorded in his booklet (Respondent's Exh. No. 3A). The records themselves proved to be suspect as well as sporadic. Hanson actually had no records in his booklet for Lopez' work for the period between November 25 and the date Lopez was discharged.

failure to meet production standards, Lopez denied that he was ever reprimanded for any deficiencies in his attendance or punctuality, either on the date of his termination or previously. 23/ The written warning slip dated December 15 makss no mention of these alleged shortcomings. In addition, it appears from the testimonies of both Oki and Hanson that nothing other than Lopes' failure to meet his quotas was discussed during their conference outlined above. Although Oki stated that he checked Lopez' attendance and tardiness records, it appears that he did so after the decision to terminate Lopez had already been made.

Lopez was absent for a total of eight days in October, 1975, allegedly without notifying Respondent, (see Respondent's Exh. No. 15) This alleged failure to notify was in violation of a stated company rule (see Respondent's Exh. No. 7), and could have furnished a possible ground for his discharge at that time. However, since Lopez had not been previously warned about possibly losing his Job due to these absences without notification, it may be inferred that this conduct was condoned by Respondent. From October 24, 2975 until the date of his termination, other than for an excused illness in December, Lopez had been absent only once.

Likewise, Lopez was not late for work at all in November, . 1975, His tardiness record for December was no worse than his tardiness records for June, July, August and October of 1975. Respondent apparently did not see fit to reprimand him for his tardiness in these months, therefore, by inference condoning such conduct.

27/ Supervisors Kubo and Hanson said that they had mentioned these problems to Lopez at least on one occasion. However, given Kubo's bias and Hanson's general lack of credibility, I credit Lopez' testimony concerning this issue, particularly when it Is considered that his attendance and tardiness problems were condoned for at least six months prior to his discharge (see discussion infra).

III
CONCLUSIONS OF LAW

A. Respondent's Anti-Union Motivation

A discharge which is discriminatory and which tends to encourage or discourage participation in concerted activities by definition violates §1153(c) of the Act. See, e.g., Tex-Cal Land Management, Inc., 3A.L.R.B. No. 14 (1977). Generally speaking, in order for a discharge to constitute a violation of the Act in cases where, as here, a "substantial business justification for the conduct" has been offered by a Respondent, it must be shown that the actual motive behind the termination was the anti-union attitude of an employer and the discouragement of participation in concerted activities. N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); cf. N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 233 (1963). Despite the denials on the part of several of Respondent's witnesses that they were unaware that Lopez was distributing UFW organizational literature and authorization cards, or that he ever stated to them directly his pro-union attitudes, Lopez' outspokenness at company meetings, the meeting he initiated in Respondent's parking lot, his credited testimony that he voiced a preference for unionization to various supervisors, the "parking" petition he circulated among fellow employees and presented to Respondent, and the inference that can reasonably be drawn from the size of Respondent's operations (see, e.g., N.L.R.B. v. Mid-State Sportswear, 412 P. 2d 537 (C.A. 5, 1969)), all indicate that Respondent had knowledge of Lopez' concerted activities.

Mindful of the difficulty in establishing the actual motive for the Lopez discharge via direct evidence, circumstantial evidence

presented herein amply supports a finding of Respondent's union animus from which a finding of unlawful motivation for the Lopez discharge can logically be inferred.^{24/} (ef. Shattuck Denn Mining Corp. v. N.L.R.B., 362 P 2d. 466, 470 (C.A. 9, 1966)) The obvious reason for its granting substantial wage increases and fringe benefits precipitously before the operative date of the A.L.R.A. was to "head off the intrusion of unions." ^{25/} Respondent also sought to establish through its "employee committees" what was, in effect, a "company union," which it could easily dominate (as demonstrated by the manner in which the vocal Lopez was removed from such a committee), and not have to be concerned with the demands of a properly constituted labor organization. Quite clearly, Respondent had, in August of 1975, embarked on a program- which was motivated by a definite concern to insulate its employees from any potential organizational efforts and to nip in the bud their manifest nascent desires for organization. The statements by several of Respondent's supervisors that it wished to establish and maintain a "pro-company" rather than an "anti-union" position in instituting the August 1975

^{24/} Supervisor Romo's statement to the effect that certain of Respondent's employees could lose their jobs as a result of their attending union meetings was the only direct evidence presented of Respondent's anti-union attitudes.

^{25/} Supervisors Oki and Duncan attempted to establish that Respondent had always maintained a "progressive" stance with regard to labor relations, and that the August 1975 personnel policy changes were in keeping with their philosophy. However, the evidence, both testimonial and documentary (Respondent's Exh. No,2A) demonstrates that prior to these wage increases, Respondent's employees were paid at minimum wage levels, often working eleven or twelve days and averaging ten hours per day within a two week period, without being paid any overtime or premium pay. These facts belie any protestations of the "progressive-ness" of Respondent's labor relations attitudes.

personnel policy changes is plainly contradicted by the fact that it was not until the imminent implementation of the A.L.R.A. and the spectre of employee organization loomed large that Respondent saw fit to raise wages and promulgate fringe benefits and other personnel programs. 26/

"The fact that the explanation of the discharge offered by the Respondent did not stand up under scrutiny" (N.L.R.B. v. Bird Machinery Co., 161 P. 2d. 589 (C.A. 1, 1947)) lends added support to the position that the stated reasons for the Lopez discharge were pretextual, and the termination was actually motivated by Respondent's anti-union attitudes. Respondent's urging of the quota system as the prime rationale for the termination, when closely examined, appears to be a fairly transparent pretext. "Pick-up" work of the type which Lopez had usually performed was not susceptible of rate measurement on a strict hourly basis: as the sizes and weights of cartons varied, the speed by which they could be loaded also perforce varied. Additionally, the pick-up rate was directly related to production output, as only those cartons which had been fully assembled could be transferred by Lopez to the loading area. If the production rate per hour was less than Lopez' so-called "quota," it would be impossible for him to meet it, even-working "as fast and efficiently as he could." The "counts" discussed by Hanson and Oki prior to Lopez' termination thus had little relavence as an indicia of Lopez' job performance,

26/ Although Respondent's pre-Act conduct cannot be utilized as the basis for possible violations of the Act, such conduct can be considered as evidence of Respondent's motives in subsequent situations. See Bryan Manufacturing Co. v. N.L.R.B., 362 U.S. 411 (1960).

particularly in light of the fact that such counts were, for the most part, non-existent for the several weeks immediately prior to the discharge, as well as being unreliable and suspect due to their not-so-subtle alteration. That Respondent saw fit to make extensive alterations on Lopez' production records lands added support to the contention that the Lopez discharge was unlawfully motivated.

Likewise, the addition of "tardiness" as a justification for the Lopez discharge after the discharge was a fait accompli provides further-evidence, by inference, of Respondent's union animus (see, e.g., Goodyear Tire and Rubber Co., 197 NLRB 666, 80 LRRM 1701 (1972)), as Respondent suspiciously shifted from its original position of "failure to meet minimum productivity standards" as the prime factor in Lopez' termination. Further support for this contention can be garnered by the fact that Lopez' tardiness was in effect condoned for the six months preceding his discharge (see Hackett Precision Co., 190 NLRB 408, 77 LRRM 1230).

B. The Discriminatory Nature of the Discharge

From the evidence presented it is apparent that once Lopez had become involved in concerted activities he was designated for disparate treatment by Respondent which would eventuate in his termination. The natural and foreseeable consequences of such discrimination, when applied to a known union adherant such as Lopez would be to discourage union membership, thus making out the essence of a violation of §1153 of the Act (see Radio Officers Union v. N.L.R.B., 347 U.S. 17, at pp. 44-45 (1954)). Beginning with Kubo's singling him out as a "jackass" and a "troublemaker" in August of 1975, and removing

him as an employee representative, Respondent's supervisors embarked on a program to treat Lopez altogether differently than his fellow employees and in so doing sought to "set him up" for termination, ostensibly for business reasons.

Respondent's production records amply demonstrate the discriminatory treatment accorded Lopez. Only those records which ostensibly and in the main showed Lopez' sub-par performance were set down in the record booklets. Despite a company directive to maintain the daily production counts of each worker, several weeks' worth of Lopez' performance rates, including records for his production for the weeks immediately preceding his termination were conspicuously absent from the record booklets. It was in this period that Respondent allegedly experienced its greatest difficulties with Lopez' performance.

Lopez' work performance was subject to far more intensive scrutiny than was that of his fellow pick-up worker, Coroneo. By December 15, 1975, Supervisor Duncan had seen fit to note his output and whereabouts at half-hour intervals.

Convincing evidence of discrimination vis-a-vis employee Lopez is manifested in the apparent alteration of Lopez' production records, with the object of minimizing his output rate and maximizing that of employee Coroneo to create an adverse impression of Lopez' performance in the event that a comparison might be made between him and Coroneo. This disparate handling of Lopez' tenure is also shown by the lack of any production records for employee Coroneo where none appeared for Lopez during the period preceding Lopez' discharge, and the lack of any pick-up records, save one, in the two months which followed the discharge. The inference is quite strong, if not inescapable, that

the records themselves concerning Jose Lopez were kept primarily to provide an ostensible rationale for his termination. Once that end was reached, the importance of maintaining such records diminished considerably, and was abandoned altogether by Hanson two months after Lopez was discharged.

In an attempt to demonstrate that the Lopez discharge was not discriminatory, Respondent introduced two exhibits consisting of personnel records, chosen at random, for previous employees who had been terminated for "inability to meet production standards" or for "poor attendance or excessive tardiness" (Respondent's Exh. Nos. 11 and 12). Careful scrutiny of these records supports a contrary result, that Lopez was in fact the object of discrimination. None of the employees discharged for "inability to meet production standards" were assembly pick-up workers like Lopez, and none had worked under the supervision of John Hanson (see Respondent's Exh. 11). Of the five "samples" of employees discharged for "poor attendance or excessive tardiness," none were discharged solely for "tardiness": four of the five were terminated for irregular attendance or absence without notification; the remaining worker was discharged for "excessive absence" as well as tardiness "without notifying the office or superiors." (See Respondent's Exh. No. 12.)

27/

Admittedly, on the last day of his employment, Lopez did not meet the production standard for the soil pile work to which he was assigned. 28/ It should be kept in mind, however, that Lopez' absence

27/ Notably, Lopez was not discharged for excessive absenteeism.

28/ Soil pile work involving the filling of particular size pots, being of a production or assembly-line nature, was susceptible of measurement and a designated quota.

from work for the several days Immediately preceding his discharge was for an authorized illness which, barring Lopez' full recovery, would naturally have effected his work performance, particularly at a task which was more strenuous than pick-up work. Given the strong inference that Lopez' discharge had by this time been pre-ordained, his sub-par performance for approximately five and one-half hours on that day cannot supply the sole or additional Justification for his termination, particularly when it is considered that such performance was in some sense explainable. 29/

Therefore, it Is concluded that Jose Silva Lopez was discriminatorily discharged from employment with Respondent in violation of Sections 1153(a) and 1153(c) of the Act. See Tex-Cal Land Management, Inc., supra; Maggio-Tostado, Inc., 3 A.L.R.B. No. 33 (1977).

29/ The allegation in the original complaint and argued by the General Counsel In his brief that Lopez was on December 22, 1975, the subject of a discriminatory demotion in violation of the Act by being assigned to soil pile work, even if successfully established, is considered de minimis in light of the remedy provided herein for Lopez' discriminatory discharge. Lopez had performed soil pile work from time to time throughout his tenure with Respondent; his assignment to the soil pile was arguably the result of his complaints regarding working under Duncan's supervision and his request to Kubo to transfer to another department; and the assignment itself was not lengthy or permanent, given the fact that Lopez worked at the task for only five and one-half hours before being terminated.

IV

RECOMMENDED ORDER

Having found that Respondent violated Sections 1153(a) and (c) of the Act in discharging employee Jose Silva Lopez, 30/ I recommend that the Board issue the following order:

Sacramento Nursery Growers, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership of its employees in the United Farm Workers of America, AFL-CIO, or any other labor organization, by discharging or, in any other manner, discriminating against any employee with respect to such employee's hire, tenure, employment or any term or condition of employment.

(b) In any other manner interfering with, restraining or coercing any employee in the exercise of rights guaranteed by Section 1152 of the Act.

2. Take the following affirmative actions which, I find, will effectuate the policies of the Act:

(a) Offer Jose Silva Lopez immediate and full reinstatement to his former job, or if that no longer exists, to a substantially equivalent one without prejudice to his seniority and other rights and privileges;

(b) Make Jose Silva Lopez whole for any loss of pay by reason of his discriminatory discharge, dated December 22, 1975, from the date of such discharge to the date on which he is

^{35/} A discharge in violation of §1153(c) of the Act clearly restrains and coerces employees in the exercise of their rights guaranteed in 1152, thus giving rise to a derivative violation of §1153(a) of the Act. See Morris, *The Developing Labor Law*, p.66 (1971), citing 3N.L.R.B. Annual Report 5.2 (1939).

offered reinstatement, together with interest compiled at the current legal rate;

(c) Post in conspicuous places at Respondent's place of business in Sacramento, California, including all places there where notices to employees are customarily posted, copies of the attached notice marked "Appendix"; Copies of the said notice, in Spanish, English and any other language spoken by at least ten percent of Respondent's employees, 31/ to be furnished by the appropriate Regional Director of the Agricultural Labor Relations Board, shall, after being duly signed by an authorized representative of Respondent, be posted by it immediately upon receipt thereof and maintained by it for sixty consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by said Respondent to insure that said notice is not covered, altered or defaced by any other material.

(d) Notify the appropriate Regional Director, in writing, within twenty days from the date of the receipt of this order, what steps have been taken to comply herewith.

Dated: August 2, 1977



Matthew Goldberg
Administrative Law-officer

31/ Within five days after this Recommended Order becomes final, Respondent shall furnish to the Board appropriate data concerning the ethnic composition of its work force.

A P P E N D I X

NOTICE TO EMPLOYEES

Posted by Order of the Agricultural Labor Relations Board, An Agency of the State of California

After a hearing at which all sides had an opportunity to present evidence and state their positions, the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization;
- To form, join or assist any union;
- To bargain collectively through representatives of their own choosing;
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection;
- To refrain from the exercise of any such activities.

WE WILL NOT discharge or otherwise discriminate against any employee because such employee exercised any of such rights.

The Agricultural Labor Relations Board has found that we discriminated against JOSE SILVA LOPEZ by discharging him, and has ordered us to offer him immediate reinstatement to his former job, and to reimburse him for any loss of pay he may have suffered because of our discrimination against him, together with interest as provided in the Board's Order.

WE WILL comply with the Board's Order.

SACRAMENTO NURSERY GROWERS, INC.

Dated: _____ By _____
(Representative) (Title)

WE WILL immediately notify the said JOSE SILVA LOPEZ, if presently serving in the Armed Forces. of the United: . States, of his right to reinstatement, upon application after his discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 915 Capitol Mall, 3rd Floor, Sacramento, California 95814. Telephone number: (916) 322-4612