Union City, California

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

KITAYAMA BROS. NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case Nos. 75-CE-54-S 76-CE-19-S 4 ALRB No. 85

DECISION AND ORDER

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.

On February 16, 1978, Administrative Law Officer (ALO) Sheldon L. Greene issued the attached Decision in this proceeding. Thereafter, Respondent filed timely exceptions and a supporting brief. General Counsel and the United Farm Workers of America, AFL-CIO (UFW) each filed briefs in response to the exceptions.

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

The ALO found that Respondent violated Labor Code Section 1153 (c) and (a) by its failure to rehire employee Samuel Rodriguez in the spring and summer of 1976, and by its discharge of employee Jose Elizondo in September, 1975.

Respondent excepts to the ALO's finding of an anti-union bias on its part. We agree with Respondent that the ALO engaged in circular reasoning when he relied upon Respondent's failure to rehire Samuel Rodriguez as a factor establishing anti-union bias, and then analyzed the failure to rehire Rodriguez in light of that bias. Nevertheless, we find that the remaining factors upon which the ALO relied are sufficient to establish Respondent's anti-union animus.

We affirm the other findings the ALO made with respect to Samuel Rodriguez as well as his conclusion that Respondent violated Labor Code Section 1153(c) and (a) by its failure and refusal to rehire Rodriguez.

Respondent also excepts to the ALO's finding that it knew of Jose Elizondo's union activities. The record indicates that Elizondo was an early supporter of and organizer for, the UFW. At one time he expressed his pro-union sentiments by shouting "Viva Chavez" as he walked between greenhouses, during a break. Uncontroverted testimony establishes that Josephina Huerta - who is a supervisor, as stipulated in the record - was fifteen feet away from Elizondo at the time he shouted. It is also uncontroverted that the shout could be heard from as far as thirty feet away. Rick Sealana testified that Josephina Huerta, his second-in-command, reported occurrences in the field and greenhouses to him. Two or three weeks after Elizondo shouted, Rick Sealana, his supervisor, called him in and asked him if he was satisfied with his job. There is no evidence that Sealana questioned any other employee at that tine. Three days later, Sealana discharged Elizondo. We

find that the preponderance of the evidence establishes Respondent's knowledge of Elizondo's pro-union activities.

Respondent excepts to the ALO's finding that its business justifications for discharging Jose Elizondo were pretexts. Elizondo testified that Sealana told him the reason for his discharge was the lack of available work due to the return of regular employees from their vacations. 'The record indicates, however, that two part-time sprayers were hired to fill spraying positions on a weekend spray program Respondent instituted at the time of Elizondo's discharge. Elizondo was qualified to spray and had been spraying full-time until his discharge.

At the hearing, Rick Sealana asserted Elizondo was discharged for lack of work. He also stated, for the first time, that Elizondo was not given a job on the weekend spray program -for which the two new employees were hired immediately after Elizondo's discharge - because he had an inadequate command of English. Sealana explained that the lack of supervision on weekends necessitated his hiring workers who could understand and follow English instructions easily. According to Sealana, Elizondo was not such a worker.

First, we note that this justification for Elizondo's discharge was not disclosed to him at the time of his discharge. Second, Samuel Rodriguez stated that Antonio Lopez, a Spanish-speaking worker, did spraying with him on Saturdays after the weekend spray program had been discontinued. Rick Sealana testified that Lopez spoke no English. He admitted Elizondo spoke and understood English, and that Elizondo's command of English

was superior to that of Lopez. This evidence belies Respondent's asserted Language justification for Elizondo's discharge. Respondent allowed a worker who spoke and understood no English to spray during partially-unsupervisad Saturdays. This was contrary to its stated concern about the lack of supervision in the initial weekend spray program. No reasons were offered to justify this change in Respondent's attitude. Therefore, Respondent's asserted English-language justification for discharging Elizondo and not retaining him for the weekend spray program is unconvincing. This provides additional support for finding an unlawfully motivated discharge. McCain Foods, 236 NLRB No. 53, 98 LRRM 1345 (1973); Hemet Wholesale, 3 ALRB No. 47 (1977).

We find the preponderance of the evidence supports the ALO's conclusion that Respondent's justifications for discharging Jose Elizondo were pretextual.[1/]

Respondent excepts to the admission of testimony of four incidents involving Cohinta Ramirez, Drew Maran, Tom Kitayama, Jr., and Mrs. Rodriguez, Sam Rodriguez' mother. It argues that these incidents were not alleged in the complaint as unfair labor practices, and that receiving testimony thereof deprived Respondent of the opportunity to defend against each. We disagree. The incidents were used as background evidence, to establish Respondent's anti-union bias.

On the basis of the above and the entire record, we

1/ In so finding, we do not rely on a factor on which the ALO relied: The hiring of a Spanish-speaking employee one month after Elizondo was discharged.

conclude that the Respondent violated Labor Code Section 1153 (c) and (a) by its discharge of Jose Elizondo.

Remedy

Charging Party requested as part of its remedy that *L*-be granted access for one period with an unlimited number of organizers. The ALO included this remedy as part of his recommended order on the authority of Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977).

We find nothing in this record to justify an extra period of access by the union. Sunnyside Nurseries, supra, is distinguishable from the facts of the instant case. The employer in Sunnyside Nurseries discharged more than 20 employees from its work-force within one to two weeks after a representation election was held on its property. The vote tally indicated the union had received a majority of the valid votes counted: 89 for the UFW, 80 for no union, with 14 outcome-determinative challenged ballots outstanding. The employees discharged by the employer were all UFW supporters. In that case, we ordered the granting of an additional access period, in addition to the four access periods allowed under 8 Cal. Admin. Code Section 20900 (e) (1) (A), if the UFW was not ultimately certified as the bargaining representative, because we considered that the additional access period was necessary for the Union to reorganize employees after the discharge of 25% of its known supporters. The record herein does not compel a comparable holding. Therefore, such a remedy will not be included in our Order.

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ORDER

Pursuant to Labor Code Section 1160.3, it is hereby ordered that the Respondent, Kitayama Bros. Nursery, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, and coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

(b) Discharging, laying off, refusing to rehire, or in any other manner discriminating against any employee in regard to hire or tenure of employment, or any term or condition of employment because of his or her membership in or activities on behalf of the UFW or any other labor organization.

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

(a) Offer to the employees, Jose Elizondo and Samuel Rodriguez, immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges.

(b) Reimburse Jose Elizondo and Samuel Rodriguez for any loss of earnings and other economic losses they may have suffered as a result of Respondent's discrimination against them. The back-pay award to each of the named employees, together with

interest thereon at the rate of seven percent per annum, shall be determined pursuant to the formula used in Sunnyside Nurseries, Inc., 3 ALRB Mo. 42 (1977).

(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 employees.

(d) Sign the Notice to Employees attached hereto. After its translation by a Board Agent into appropriate languages, Respondent shall reproduce sufficient copies of the Notice in each language for the purposes set forth hereinafter.

(e) Distribute copies of the attached Notice in appropriate languages to all present employees and to all employees hired by Respondent during the 12-month period following issuance of this Decision.

(f) Mail copies of the attached Notice in all appropriate languages, within 30 days from receipt of this Order, to all employees employed by Respondent between September 1, 1975 and July 31, 1976.

(g) Post copies of the attached Notice in all appropriate languages in conspicuous places on its property, including places where notices to employees are usually posted, for a 90-day period to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(h) Arrange for a Board Agent or a representative

of Respondent to distribute and read the attached Notice in all appropriate languages to its employees assembled on company time and property, at times and places to be determined 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 the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

(i) Notify the Regional Director in writing, within 30 days from the date of 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: October 30, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a trial where each side had a chance to present its facts, the Agricultural Labor Relations Board has found that we interfered with the right of our workers to freely participate in a union and discriminated against two of our workers, by refusing to rehire Samuel Rodriguez and by discharging Jose Elizondo, so as to discourage membership in the United Farm Workers. The Board has told us to send out this Notice to our past and present workers, to post this Notice on our premises and to have it read to our workers.

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

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

(1) To organize themselves;

(2) To form, join, or help unions;

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

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

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT fire, lay off, refuse to rehire, or do any thing against you because of your feelings about, actions for, or membership in any union.

WE WILL offer Samuel Rodriguez and Jose Elizondo their old jobs back, and we will pay each of them any money they lost because of our discriminating action against them.

KITAYAMA BROS. NURSERY,

Dated: _____ 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.

CASE SUMMARY

Kitayama Bros. Nursery,

4 ALRB No. 85
Case Nos. 75-CE-54-S
76-CE-19-S

ALO DECISION

The ALO found that Respondent violated Section 1153 (c) and (a) by its discriminatory discharge of Jose Elizondo and its failure to rehire Samuel Rodriguez. The ALO rejected Respondent's defense that Elizondo was discharged because of lack of work on the grounds that the defense was pretextual. He also noted that Rodriguez should have been rehired because he qualified under Respondent's seniority or merit plan.

BOARD DECISION

The Board affirmed the findings, rulings, and conclusions of the ALO with some modifications. It noted that the ALO engaged in circular reasoning with regard to one factor he used to determine Respondent's anti-union bias. The Board found, however, that the remaining factors the ALO relied upon were sufficient to establish Respondent's anti-union bias.

The Board found the circumstantial evidence established Respondent's knowledge of Jose Elizondo's union activities. It further found that Respondent's business justification for discharging Elizondo was pretextual. The Board expressly did not, however, rely on a factor the ALO had relied upon - the hiring of a Spanish-speaking employee one month after Elizondo's discharge - to reach its conclusion.

ORDER The Board's Order requires Respondent to reinstate the two discriminatees, to pay them back pay plus seven percent and to sign, post, distribute, mail, and read an appropriate Notice to Employees.

The Board did not order the one period of access with an unlimited number of organizers on the grounds that Sunnyside Nurseries, Inc., 3 ALRB No. 42 (1977), upon which the request for the expanded access was based, was distinguishable from the facts of this instant case.

* * *

BEFORE THE

AGRICULTURAL LABOR RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
KITAYAMA BROS. NURSERY,	)	
Respondent,	)	
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	Case Nos. 75-CE-54-S 76-CE-19-S

DECISION AND RECOMMENDATION

OF ADMINISTRATIVE LAW OFFICER

SHELDON L. GREENE

Administrative Law Officer

345 Franklin Street
San Francisco, CA 94102
Telephone: (415) 626-9301

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DECISION AND RECOMMENDATION

OF ADMINISTRATIVE LAW OFFICER

A hearing on the matter was heard by Sheldon L. Greene, Administrative Law Officer, at Centenial Hall, 22292 Foothill Boulevard, Hayward, California, on November 16, 17 and 18, 1977. The General Counsel's office was represented by Betty Buccat. Respondent was represented by Frederick A. Morgan, Bronson, Bronson & McKinnon. Intervenors, the United Farm Workers of America, were represented by Diana Lyons, legal worker. Evidence was introduced, witnesses testified and the representatives of the respective parties submitted post-hearing briefs.

Having considered the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs of the parties, I make the following Findings of Fact.

JURISDICTION

Kitayama Bros. Nursery, the respondent, is and was an agricultural employer within the definition of section 1140.4(c) of the ALRA. Supervisorial employees, as defined in ALRA 51140.4(j) included Richard Sealana, Tom Kitayama, Josephina Huerta, and Robert Cooper. The United Farm Workers of America, AFL-CIO, is and was at all times mentioned, a labor organization as contemplated in ALRA §1140.4(f).

On January 30, 1976, the Agricultural Labor Relations Board conducted an election to determine whether the employees of Respondent desired to be represented by the United Farm Workers. Seventy-nine employees voted for the union, seventy-eight votes were for "no union," and thirty-seven ballots were challenged. The ALRB subsequently charged respondents with violations of ALRA §1152 in discharging Jose R. Elizondo for engaging in union activities on or about September 20, 1975, and for refusing to rehire Samuel Rodriguez as a result of his activities on behalf or the United Farm Workers on or about June 10, 1976. The complaint claimed that such acts were violative of ALRA §1153(a) and (c) .

FINDINGS.

DISCUSSION

Kitayama Bros. Nursery engages in the cultivation of flowers. The department which was the particular subject of this dispute was particularly engaged in the cultivation of pom-poms and carnations. Approximately forty to fifty full time workers were employed in this work with an additional ten to fifteen temporary workers. The cultivation of flowers involves a 12-month cycle of soil preparation, planting, pest control, and harvesting. Employees were hired as needed for temporary work. Workers retained

more than ninety days, other than part time seasonal workers, were considered permanent, but employee benefits, such as hospital programs, were not vested until the employee had completed six months of continuous employment.

In August, 1975, the United Farm Workers of America commenced organizing activities with the Kitayama Bros. Nursery employees. Union organizers appeared frequently on the premises and an initial committee of employees assisted the union in passing out literature, authorization cards, and discussing the benefits of the union with small groups of employees on breaks, at lunch time, and before and after work. The employer was opposed to the union's efforts and, for its own part, conducted meetings with employees explaining the employer's position, passed out leaflets opposing the union, hired a consultant to explain the issues to employees and sensitized the supervisors to the situation. As indicated, the results of the election were close and a number of the ballots were disputed. Several months after the election, the employer mailed certified letters to past employees in order to establish an active list of prospective employees for future positions at that time. The employer's policy for hiring and firing was based upon seniority of permanent employees while temporary employees were hired or fired on merit.

SAMUEL RODRIGUEZ

Samuel Rodriguez was first employed by respondents in June, 1973. He worked through the summer and his duties included service as a crew chief in the planting operation. He was hired the following spring and worked through November 28, 1974 performing a variety of duties. He was again employed in the summer of 1975 and performed various services, including planting and

spraying. He was an outstanding worker, and his supervisor, Richard Sealana rated him as nine on a scale of ten on the spray crew. When the organizing drive commenced, he became involved in the UFW and was, with several other employees, engaged in the solicitation of union support of other workers. In September, 1975, he was transferred to a weekend spray program with several other part time students. This was the first time the respondents had initiated such a weekend program. It was intended to minimize the scheduling problems necessitated by spraying. A weekday spray program was continued at the same time, however. In February, 1976 the weekend program was discontinued and he was laid off. He was recalled to work in March, 1976, but for less time and was again laid off in May, 1976. In June, 1976, he indicated on several occasions to Richard Sealana that he desired to return to work for the summer, but he was not rehired. He continued to seek reemployment, even in August, 1976, but was not taken back.

He testified that during the fall he was quite visible as a union activist. He was engaged during breaks and lunch hours in conversation with his fellow employees in the greenhouse aisles and in the parking lots. He handed out authorization cards and leaflets. On one occasion, prior to the election, he was seen in the company of *a.* union organizer by his supervisor and Tom Kitayama. Ben Lopez, the employer consultant to the respondent was also present on that occasion, and he and the union organizer exchanged pleasantries. He testified that his supervisor shook his head at his presence indicating to him disapproval of his association. The evidence is uncontroverted that, several weeks before the election, union supporters, including Rodriguez, wore union buttons.

He testified chat on other occasions, when he was not working, he would appear with union organizers to distribute flyers and assist in organizing efforts prior to the election. He had discussions with his supervisor on the subject of the union. On one occasion his supervisor identified his mother as a union supporter. His mother was, at the time, employed as a foreman at Kitayama Bros. At one of the employer meetings called to discuss the union, he asked what might be characterized as a "pro-union" question. In December, 1975, he was one of the Kitayama Bros.' employees who went to Sacramento to testify on behalf of the continuation of the Agricultural Labor Relations Board. In June, 1976, he testified that he was present on the parking lot passing out flyers accouning a union rally and had an exchange with respondent's supervisor, Bob Cooper, who offered to .take one of the flyers from him.

Although he was not rehired in the summer of 1976, approximately fifteen new employees were hired, eleven of whom appeared to be summer employees and two of whom were full time sprayers.

JOSE ELIZONDO

Jose Elizondo began work for respondent in March, 19.75. He had previously been employed for a time in 1973. He worked in several jobs, and, after a brief leave of absence, was assigned to spraying. He worked for the union early in the campaign passing out union authorization cards and talking to workers. On one occasion, in September, he shouted "Viva Chavez, Viva La Causa" on respondents' premises. On another occasion he went to see his supervisor, Sealana, requesting the replacement of a torn coat. Coats of this nature, as well as other clothing, were issued to sprayers to protect them from exposure to pesticides. He interrupted his supervisor in a conversation with Agriculture

Department personnel and was rebuffed. Subsequently, his supervisor asked him if he was dissatisfied with his work. He responded that he was not. Several days after the conversation, he was discharged for lack of work.

At no time during his employment was his work criticized. He was regarded as a satisfactory employee. His termination roughly coincided with the establishment of the weekend part time student weekend sprayers. Although he had performed other work satisfactorily, he was not reassigned to other duties at that time .

Approximately one month after he was terminated, another employee was hired. No effort was made by respondent to call Elizondo back to work at that time. He remained on the active list of former employees, however, and the following spring he received a certified letter advising him of possible job opportunities and requesting him to indicate his interest to the respondent or be striken from the active list.

ANTI-UNION ANIMUS

Respondent was consistent and vigorous in opposing the efforts of the UFW to organize the Kitayama Brothers' employees. Meeting were conducted with the employees for the purpose of explaining the benefit of voting against the union. Leaflets were distributed to the employees on more than one .occasion to the same end. Respondent hired Ben Lopes, a consultant to employers on labor-management relations, who conducted meetings with the employees discussing the employees' rights under the Act. Meetings were held with the supervisors as well to educate the supervisors.

regarding their rights and responsibilities under the ALRA. The principal supervisor, Richard Sealana, testified that the management was tense during the period of the organization drive. They frequently came on groups of employees and observed that they would stop talking as the supervisor approached. Some effort was made by the supervisors and management to identify employees who were possibly sympathetic to the union. He described potential union supporters as persons who were outspoken, unsatisfied or disgruntled. Several weeks before the election, many employees openly wore pro-union buttons. Following the election, a list was prepared of employees, past and present, and certified letters were sent to past employees advising them of the possiblity of future employment and suggesting that they immediately contact respondents to indicate their willingness to be employed, or they would be striken from the list of active employees.

During the course of the organization drive, one of the union activists who spoke only English and whose effectiveness was limited to his exposure to English-speaking employees, was transferred to a solitary position in the pom-pom greenhouse. As indicated, Rodriguez was transferred to part time employment on weekends with several other part time employees as a result of the implementation of the singular weekend spray program. Following the election, certified letters were, as mentioned, sent to former employees advising them of the need to indicate their, willingness to be reemployed or they would be striken from the active rolls. Cohinta Ramirez responded affirmatively and timely to this request. An acknowledged union activist, Cohinta Ramirez was not rehired. Neither was Sam Rodriguez notwithstanding his many requests and his exemplary record of performance in a

variety of tasks.

BUSINESS JUSTIFICATION

Several reasons were given for the discharge of Jose Elizondo. Initially, lack of work was communicated to him. Subsequently, respondents stated that he was terminated because his English was not sufficient to adequately take the instructions of the supervisor regarding spraying of pesticides. At no time was his work criticized. Respondents explained that the weekend spray program was established to avoid conflict between spraying and agricultural activities and to minimize the exposure of employees to toxic pesticides. It appears that Elizondo was at least in part a casualty of that shift of activity. No business justification was provided for the failure of respondents to rehire Elizondo the following month. Nor was an explanation provided for the refusal to hire Sam Rodriguez the following summer. The only possible explanation was that the company accepted no obligation to hire on a seniority basis, persons categorized as temporary workers. But the related policy which suggested that the company would hire temporary workers based on merit somewhat dilutes the distinction between permanent and temporary employees however. Indeed, applying the respondents' policy regarding the rehiring of temporary workers, there is no justification for not rehiring both Redriguez and Elizondo. The failure to rehire Elizondo is moreover circumstantial evidence that his termination was retaliatory and that a motivating factor in the part time weekend spray program was the reduction of employee efforts on behalf of the UFW.

ANALYSIS AND CONCLUSIONS

The General Counsel's office asserts that the termination of Elizondo and Rodriguez and the refusal to rehire them when

other individuals were hired in their stead violates Labor Code §1153 (a) and (c). It is argued that the refusal to rehire Elizondo and Rodriguez discouraged membership in the labor union (§1153(c)) and interfered with their rights to assist and participate in the union (§1153(a)). A finding of violation of Labor Code §1153 (c) does not require specific proof of the employer's intent to interfere with an employee's right to participate in a labor union if that is the natural and probable consequence of the termination or refusal to rehire the specific employee. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

No business justification is presented for the refusal to hire Samuel Rodriguez for the summer of 1976. Even assuming that he had not obtained a permanent employment status and that he was not entitled to a straight rehiring based upon seniority, his experience was sufficiently varied and his merit so unquestionable as to justify rehiring him prior to the fifteen new employees who were hired subsequent to his inquiry. Also, since the majority of the new employees hired were temporary employees, no argument can be made that Mr. Rodriguez was passed over because his service would be temporary.

He had been previously identified as a union activist by management on more than one occasion. His testimony that he was discovered by supervisor, Bob Cooper, distributing union leaflets in the late spring at a time when he was not employed by respondents, provided confirmation to the intensity of his activities in support of the union. It must be concluded from the circumstances that the singular consideration in the discriminatory application of the respondents' rehiring rules was to interfere with Rodriguez[1] participation in the UFW.

Accordingly, it is my conclusion that the failure of respondents to rehire Samuel Rodriguez in the spring and summer of 1976 violates Labor Code §1153 (c). Amalgamated Clothing Workers v. NLRB, 302 F.2d 136 (1962).

Jose Elizondo was terminated in September, 1975 in the early stages of the union's organizing drive for lack of work. Part time sprayers were hired for weekend duty to fill the position which he occupied on termination. Prior to his termination he testified that he had shouted "Viva Chavez" in the vicinity of one of respondent's greenhouses during the work day. He and others also testified to his active and consistent participation in the organization drive contacting workers on behalf of the union.

Approximately one month after his termination, a Spanish speaking worker was hired to do spraying. Prior to Elizondo's termination, he met with his supervisor, Sealana, who asked him if he was discontented with his work. Respondent's dispute that Elizondo was identified as a union supporter prior to his termination. Saalana, however, testified at length on the state of mind of the respondents and supervisors during the organizing drive in the fall of 1975. He indicates that respondents speculated as to the identify of union supporters by their outspokenness, their negativism, or discontent. In light of this testimony, the question posed to Elizondo by Sealana prior to his termination is persuasive circumstantial evidence that he had directly or indirectly been identified as an active union supporter prior to his termination. The hiring of another Spanish-speaking sprayer one month later is similarly circumstantial evidence that the business reason given at the time of his termination was pretextual. Subsequent efforts of respondents to justify the termination shifting from the lack of work theory

to problems with communication or inadequate English tend to bolster the pretextual nature of the reason given for termination. The secondary and subsequent justification for the termination, the communication problems, lacks credibility in light of uncontroverted testimony that Spanish-speaking sprayers were, at the time of Elizondo's termination, in the employ of respondent. Moreover Spanish-speaking sprayers were subequently hired by respondent. The testimony reflected that communication was not a problem with Elizondo except in relative terms.

An additional factor in his termination was its probable effect on other employees. Identitifed as he was as a union supporter, his termination given his satisfactory performance would be taken by other employees as' a warning against overt support for the union. The termination therefore had the dual effect of interferring with his opportunity to participate in the union by removing him from the respondents' premises during an organization drive, and the even more significant effect of coercing other employees into a position of silence and secretiveness regarding the union.

It appeared from the record, as indicated, that one of the ostensible factors in the termination for lack of work of Jose Elizondo was the implementation of the part time spraying program. The fact that this was the first time that such a program had been implemented, that it was discontinued after the election, and that it had a subsidiary effect of isolating one union activist from the rest of the work crew and providing a rationale for the termination of a second materially erodes the business justification for this innovation- and provides additional support for the premise that the lack of work justification

for Elizondo's termination was pretextual. NLRB v. Ayer Lar Sanitorium, 436 F. 2d 45 (9th Cir., 1970).

The respondents' knowledge of Elizondo's union activities can be readily inferred from the circumstances, particularly his union activities, the respondents' attempts to identify the union supporters and his supervisor's judgment that Elizondo was dissatisfied with his work. Texas Aluminum Co. v. NLKB, 435 F.2d 917 (1970). See also NLRB v. Joseph Antell Inc., 358 F.2d 880 (1966). The inconsistent explanations of the justification for Elizondo's discharge is additional evidence that the termination was discriminatroy. Harry F. Berrgren and Sons, Inc., 165 NLRB 353 (1967).

Taken together, tbe circumstances of Elizondo's termination and the hiring of a replacement one month later constitute a violation of Labor Code 11153(a) and (c).

REMEDIES

The General Counsel's office requests the conventional remedies for cases of discriminatory discharge and refusal to rehire union activist. Specifically, the General Counsel requests that the employer offer the employees reinstatement and back pay with interest. As a preventative measure, the General Counsel requests the additional relief of a cease and desist order forbidding further acts of discrimination, the distribution of a notice of the order to all workers employed by respondent during 1976-1976, and a reading of the notice to employees during the peak season combined with a question and answer period to give a Board agent an opportunity to explain employee's rights under the AL^A. Finally, periodic reports by the employer to the Regional Director advising the Regional Director of respondent's compliance is requested.

The intervenor asks, in addition, that respondent be required

to reimburse the General Counsel and the UFW for costs of suit and attorneys' fees. Additionally, the UFW requests affirmative steeps to redress the impact of past discrimination in the form of expanded access. Intervenor reasons that expanded access is necessary because both Elizondo and Rodriguez were leaders in the organization drive and their absence creates a leadership vacuum among the existing union supporters employed by respondents. Intervenor also requests that the notice be mailed not only to former employees, but employees hired within the next twelve months and that the notice be posted in a prominent place on the premises. Intervenor also requests that notices be printed in red in Spanish, English and the two principal Filipino languages, Tagalog and Iloucano. Finally, the UFW requests space on a bulletin 'board on the premises for UFW notices and the names and addresses of all employees who will receive the notice.

The Board's position on the subject of award of attorneys' fees was stated in Western Conference of Teamsters, Respondents and V.B. Zaninovich and Sons, Inc., 3 ALRB #57.
In its decision the Board acknowledged the propriety of an award of attorney's fees to the prevailing party in the event that the defense interposed justifying the hearing was essentially "frivolous." The Board further stated that the question of frivolous defense should be weighed in conjunction with the "remedies requested in the complaint." In the instant case, the respondent raises a number of defenses, such as, the intervening hiring and layoff of Rodriguez, the mailing of a certified letter to Elizondo in the spring advising him of possible job openings, the fact that both workers were temporary and that a seniority rule, even if it existed, would not obligate the

respondent to hire them. Taking into account the weight of the-evidence, the defenses were not persuasive, however, they were of sufficient substance to avoid the assertion that they were, to any extent, frivolous. Accordingly, applying the current test to the claim for costs and attorneys' fees, the request must be rejected.

Consistent with the findings of violation of Labor Code §1153(a) and (c), it is my recommendation that respondents be ordered to offer Samuel Rodriguez and Jose Elizondo reinstatement to their former or substantially equivalent jobs. In the case of Jose Slizondo, it is recommended that he be offered a full time position. Samuel Rodriguez should be offered seasonal employment for the summer months.

Respondents should additionally compensate Rodriguez and Slizondo for any loss of pay determined by the Board with interest in conformity with the Board's decision in Sunnyside Nurseries, Inc. 3 ALRB £42 (1977), citing F.W. Woolworth Company, 90 NLRB 289, 60 LRRM (1950). It will additionally be my recommendation that the notice attached hereto as Appendix One be mailed to all employees of respondents during 1975, 1976 and 1977 that the notice be posted in a conspicuous place on the premise, that a copy be distributed to each current and new employee during 1978, that it be read at a meeting of all employees during the peak season and that a Board representative be present to answer questions of the employees and to explain the rights of employees and duties of employers under the ALRA. I will further recommend that the Board issue an order requiring respondents, their agents, officers, successors and assigns, to cease and desist from unlawfully discharging, laying off, or in any manner, discriminating against employees with reference to their hire or tenure of employment or any other term or condition of employment except as authorized

by §1153 (c) of the Act and from discouraging, interferring with , membership by employees in the United Farm Workers.

It is reasonable to conclude from the evidence that the actions of respondent had a coercive effect on existing employees, inhibiting their participation in the UFW or demonstrating support for it. Affirmative action in the form of expanded access by union representatives would have a tendency to dispel the coercive atmosphere which resulted from respondent's discriminatory acts. It is my recommendation that, consistent with Sunnyside Nurseries, Inc., 3 ALR8 42, that upon the UFW's filing of a written notice of intention to take access pursuant to 8 Cal.Admin. Code §20900 (e) (1) {3) the UFW shall have the right to take one thirty-day period of access as provided by 8 Cal.Admin. Code §§ 20900(e)(3) and 20901(b) without restriction as to the number of organizers.

It is further recommended that the respondent be ordered to make availabe to the UFW sufficient space on a convenient bulletin board for its posting of notices and the like for a period of six months from respondent's beginning compliance with the mandates of this Decision and Order, and to provide the UFW the names and addresses of all employees who will receive the NOTICE TO WORKERS.

ORDER

Accordingly, IT IS HEREBY ORDERED that the respondent Kitayama Bros. Nursery, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement the type of which is authorized by §1133(c) of the Act.

(b) Discouraging membership of any of its employees in the UFW, or any other labor organization, by unlawfully discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment, or any term or condition of employment, except as authorized by §1153(c) of the Act.

(c) Dominating or interfering with the formation or administration of any labor organization or contributing financial or other support to such labor organization, except as authorized by §1153(c) of the Act.

2. Take the following affirmative action:

(a) Offer to the following employees immediate and full reinstatement to their former or equivalent jobs, without prejudice to their seniority or other rights and privileges: Samuel Rodriguez and Jose Elizondo.

(b) Make each of the employees named above in sub-paragraph 2(a) whole for all losses suffered by reason of their termination.- Loss of pay is to be determined by multiplying the number of days the employee was out of work by the amount the employee would have earned per day. If on any day the employee was employed elsehwere, the net earnings of that day shall be subtracted from the amount the employee would have earned at Kitayama Bros. Nursery for that day only. The award shall reflect any wage increase, increase in work hours or bonus given by respondent since the discharge. Interest shall be computed 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 employees.

(d) Distribute the the following NOTICE TO WORKERS (to be printed in English, Spanish, Tagalog and Iloucano) to all present employees and to all employees hired by respondent within six months following initial compliance with this Decision and Order and mail a copy of said NOTICE to all employees employed by respondent between September 1, 1975 and the time such NOTICE is mailed if they are not then employed by respondent. The NOTICES are to be mailed to the employees' last known address, or more current addresses if made known to respondent.

(e) Post the attached NOTICE in prominent places at respondent's nursery in an area frequented by employees and where other NOTICES are posted by respondent for not less than a six-month period.

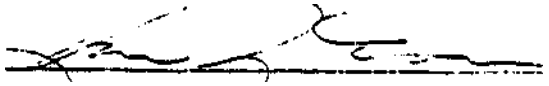
(f) Have the attached NOTICE read in English, Spanish Tagalog and Iloucano on company time to all employees by a company representative or by a Board agent and to accord said Board agent the opportunity to answer questions which employees may have regarding the NOTICE and their rights under §1152 of the Act.

(g) Make available to the UFW sufficient space on a convenient bulletin board for its posting of notices and the like for a period of six months from respondent's beginning compliance with the mandates of this Decision and Order, and to provide the UFW the names and addresses of all employees who will receive the NOTICE TO WORKERS.

(h) Allow the UFW the right of access for one thirty-day period upon the filing of a written notice of intention to take access. This right of access shall be taken in accordance with 8 Cal.Admin. Code §§ 20900(e)(3) and 20901(b), but shall not be restricted as to the number of organizers. The right of access shall be available immediately.

(i) Notify the regional director of the regional office within 20 days from receipt of a copy of this Decision and Order of steps the respondent has taken to comply therewith, and to continue reporting periodically thereafter until full compliance is achieved.

Dated: February 16, 1978



SHELDON L. GREENE
Administrative Law Officer

NOTICE TO WORKERS

After a trial where each side had a chance to present their facts, the Agricultural Labor Relations Board has found that we interferred with the right of our workers to freely participate in a union and discriminated against two of our workers, Samuel Rodriguez and Jose Elizondo, in terminating one and refusing to rehire the other, so as to discourage membership in the United Farm Workers. The Board has told us to send us this notice to our past and present workers, to post this notice and to read it to our workers. We will do what the Board has ordered and also tell you that: The Agricultural Labor Relations Act is a law which gives all farm workers these rights:

1. To organize themselves.

2. To form, join or help unions.

3. To bargain as a group and to choose whom they want to speak for them.

4. To act together with other workers to try to get a contract or to help or protect one another.

5. To decide not to do any of these things.

Because this is true, we promise that:

We will not do anything in the future that forces you to do, or stops you from doing, any of the things listed above.

Especially:

We will not fire, lay off, refuse to rehire, or do anything against you because of your feelings about, actions for, or membership in any union.

APPENDIX I--OFFICIAL NOTICE

We will offer Samuel Rodriguez and Jose Elizondo their old jobs back if they want them, and we will pay each of them any money they lost because we either laid them off and did not rehire them.