Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| SUNNYSIDE NURSERIES, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party. | ) | Case Nos. 79-CE-l-SAL<br>79-CE-10-SAL<br>79-CE-37-SAL<br><br>6 ALRB No. 52 |

DECISION AND ORDER

On October 10, 1979, Administrative Law Officer (ALO) Arie Schoorl issued the attached Decision in this proceeding. Thereafter, the General Counsel, Respondent, and the Charging Party each filed timely exceptions with a supporting brief.

The Board has considered the record and the ALO's Decision in light of the exceptions and 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 Discharge of Urbano Hernandez

Respondent excepts to the ALO's conclusion that the discharge of employee Urbano Hernandez on February 7, 1979, violated section 1153 (c) and (a) of the Agricultural Labor Relations Act (Act) . We find this exception to be without merit.

Following certification of the United Farm Workers of America, AFL-CIO (UFW) as bargaining representative

of Respondent's employees on November 7, 1978, Respondent's employees prepared for the anticipated contract negotiations by forming employee committees, holding meetings, distributing leaflets, and petitioning Respondent to bargain with the UFW. Respondent stipulated to knowledge of Hernandez' union activity, including organizing for the election campaign, serving as a member of the employees' negotiating committee, and distributing UFW leaflets at Respondent's premises.

On February 7, 1979, Respondent discharged Hernandez following an altercation between that employee and supervisor Louis Carrillo. Hernandez and Carrillo had related contradictory explanations of the details of the altercation. However, assistant production managers, Bruce Phillips and Candice DePauw, accepted Carrillo's version of events and decided to discharge Hernandez. Approximately twenty minutes after Hernandez was discharged, he approached DePauw and Phillips, this time in the company of four fellow employees. In reply to an inquiry by Hernandez, DePauw informed him that he had been discharged for threatening Carrillo and that the decision to discharge him was final. At that point, one of the other employees, Miguel Sanchez, indicated that Hernandez had not threatened Carrillo during the altercation. Neither DePauw nor Phillips questioned Sanchez about his version of events. Instead, they confirmed the finality of Hernandez' discharge, stated that he had not mentioned *a* witness before, and asked him to leave the premises.

Failure to conduct a full and fair investigation of an employee's alleged misconduct, particularly in the face of

contrary evidence, is evidence of the employer's discriminatory intent. Norfolk Tallow Co. (1965) 154 NLRB 1052 160 LRRM 1220]. Here, although Phillips and DePauw listened to the versions of Hernandez and Carrillo, they refused to interview Miguel Sanchez, an independent witness to the altercation. Further, Respondent's production managers took drastic action in firing Hernandez, a dependable employee for over three years, without seeking the recommendation of his immediate supervisor. Carrillo's testimony indicates that he, in fact, did not feel it was necessary to fire Hernandez. Such precipitous action by upper-level management is evidence of discriminatory motives. Condec Corporation (1971) 193 NLRB 931 [78 LRRM 1507].

Respondent here knew that Hernandez was a prominent UFW activist. Since Respondent's discharge of Hernandez would tend to discourage membership in the Union and interfere with the section 1152 rights of Respondent's agricultural employees, the burden was on Respondent to show a legitimate and substantial business justification for Hernandez' discharge. NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S., 26. Given the suspect nature of the investigation by Phillips and DePauw, and Hernandez' satisfactory work record, we are not convinced that Hernandez was discharged for a legitimate and substantial reason.[1/] Having failed to prove its defense, we conclude that Respondent

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1/The ALO based his finding of discrimination, in part, on the fact that Respondent made a thorough investigation of a 1978 knife incident and failed to thoroughly investigate the 1979 glove

(Fn. 1 cont. on p. 4)

discriminatorily discharged Urbano Hernandez in violation of section 1153(c) and (a).[2/]

Discriminatory Layoff of Six Employees

The General Counsel alleged that Respondent laid off six employees on December 29, 1978, at the end of the poinsettia season, because of their support for the UFW. The ALO, however found that the six employees were hired specifically for the poinsettia season. Their termination in December was therefore the natural end of a fixed term of employment. Moreover, since the employees were called back to temporary work in February 1979 and later offered permanent jobs, the ALO found no evidence of anti-union animus against these individuals.

Based on these findings, we affirm the ALO's conclusions that their termination was motivated by the end of the poinsettia season, and therefore that Respondent did not violate section 1153(c) and (a).

Refusal to Bargain Over the Termination of the Six Employees

Although we do not view the termination of the six

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(Fn. 1 cont.)

altercation. Contrary to the ALO, we do not rely on a comparison of these investigations, since the former involved two disputing employees and the latter involved a dispute between an employee and a supervisor.

[2/]We reject Respondent's suggestion that "a general animosity toward the union or union activity" must be proved to support a violation of section 1153(c). An employer's expressed dislike for the union, or the concept of unionism, is simply a factor to be considered in determining whether a causal nexus exists between the employer's action and the intent "to encourage or discourage membership in any labor- organization," Labor Code section 1153(c); Royal Packing Co. v. Agricultural Labor Relations Bd. (1980) 101 Cal. App. 3d 826, 834.

employees as a layoff in the general sense of that term, we do find that the decision to hire temporary employees for a fixed term was a change in hiring practices. The record indicates that the decision to institute this change was made by Respondent's new assistant production manager, Bruce Phillips, in August 1978.

Contrary to the ALO, we find that Respondent had a duty to meet and consult with the union concerning changes in working conditions during the period between the election in October 1975, and certification of the exclusive representative in November 1978, See Highland Ranch and San Clemehte Ranch, Ltd. (Aug. 16, 1979) 5 ALRB No. 54. Respondent therefore "acted at its peril" in failing to notify the UFW in August 1978 of its intent to institute temporary hiring for the poinsettia season. Because the UFW was subsequently certified as the exclusive representative of Respondent's agricultural employees, we conclude that Respondent's conduct violated section 1153(e) and (a).

Surveillance

Respondent excepts to the ALO's conclusion that supervisor Ramon Galindo's attendance at Union meetings constituted unlawful surveillance. We find merit in this exception.

Galindo was invited to the Union meetings, on at least two occasions, by two. employees. Respondent did not ask Galindo to attend nor did it subsequently request or receive a report of what occurred at the meetings. At the meetings, no employee or Union representative objected to Galindo's presence. Under these circumstances, we find that Respondent's supervisor was not engaged in illegal surveillance. See Hickory Farms, 209

NLRB 502 [85 LRRM 1528] (1974); Fraley & Schilling, Inc., 211 NLRB 422 [87 LRRM 1378] (1974).[3/] Accordingly, this allegation of the complaint is hereby dismissed.

Denial of Access

On October 15, 1975, a representation election was held at Respondent's Salinas premises. The UFW was certified as the collective bargaining representative of Respondent's agricultural employees on November 7, 1978. Following certification, the UFW requested access to Respondent's Salinas premises on January 11, March 22, and in April, 1979. Respondent denied all of those requests.

The ALO found that the UFW had adequate alternative means of communication with Respondent's employees and, therefore, that Respondent's refusal to allow the UFW post-certification access to its premises did not constitute a violation of section 1153(a) of the Act. General Counsel and the UFW have excepted to those findings. We find no merit in these exceptions.

In O. P. Murphy Produce Co., Inc. (Dec. 27, 1978) 4 ALRB No. 106, we held that a certified bargaining representative is entitled to take post-certification access at reasonable times

[3/]The ALO cited Merzoian Brothers Farm Management, Inc., 3 ALRB No. 62 (1977), wherein we held that an employer's illegal surveillance of its employees' union activities violated section 1153(a) of the Act, if the surveillance tends to restrain employees in the exercise of statutory rights guaranteed by section 1152 of the Act. Our finding here is not inconsistent with that holding. In the instant case we find no illegal surveillance in the mere presence at union meetings of a known supervisor who attended at the invitation of employees and without objection from anyone.

and places for any purpose relevant to its duty to bargain collectively as the exclusive representative of the employees in the unit. The need for post-certification access is based on the right and duty of the exclusive representative to bargain collectively on behalf of all the employees it represents.[4/]

In deciding 0._P. Murphy, the Board noted certain general conditions in agricultural employment that reduce the effectiveness of most alternatives to direct personal contact with employees at the work site. The seasonal nature of the work, combined with a migratory labor force, makes the workers' residential pattern mobile and unstable. This diminishes the union's opportunity for home visits, mailings, or telephone contacts. The openness of most farm land makes it difficult to personally contact or leaflet the workers as they enter or leave work. Moreover, many farm workers in California are either illiterate or speak no English, inhibiting contact through leaflets and mass media. Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392.

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4/Respondent has argued that it has no obligation to allow access since it is testing in the court of appeals the Board's certification of the UFW as collective bargaining representative of its agricultural employees. However, the pendency of court proceedings does not, in and of itself, excuse Respondent's refusal to grant the union access. The duty to bargain in good faith, which is the wellspring of post-certification access, is not held in abeyance by the pendency of Respondent's testing of certification. See Irwundale Division of Lau Industries, 219 NLRB 364 [90 LRRM 1192] (1975); Regal Aluminum, Inc., 190 NLRB 468 {77 LRRM 1303] (1971). Moreover, even though negotiations may not be currently in progress due to Respondent's appeal, post-certification access may still be necessary for the union to obtain current information about working conditions and to keep the employees advised of developments in the court litigation challenging the Board's certification of the UFW.

Because of these general conditions, and because of the lengthy delays that often occur between the election and certification, we held that the exclusive representative enjoys a rebuttable presumption that worksite access is necessary. The burden of proof rests with the employer in each case to show by a preponderance of the evidence that alternative means of communication exist.

In the instant case, Respondent presented evidence that the employees all enter and leave work at the same times through a central gate, allowing mass leafletting and some degree of personal contact off the employer's premises. Further, the number of employees in the work force tends to be stable year-round, reducing the seasonal turnover.5/ This indicates that many of Respondent's employees have permanent residences within commuting distance of Respondent's premises. Finally, the testimony of Gregorio Giron, a member of the negotiating committee, indicates that a communication committee existed which had no problem leafletting fellow workers and making personal contacts during breaks.6/

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5/The record indicates that Respondent normally employed 140-150 workers year-round; however, between September and December 1978, Respondent hired 71 new employees. While these figures indicate significant turnover, they also show a basic continuity and stability in the work force during 1978.

6/A union meeting held in December 1978 to discuss the status of negotiations was attended by at least 70 workers out of approximately 140. Moreover, a petition started at this meeting ultimately obtained 1Q7 employee signatures. This indicates the ability to communicate, the ability to gather workers together, and a substantial degree of existing support and participation in union matters, despite the three-year delay in certification.

In eliciting these facts, Respondent made a prima facie showing that alternative means of communication are available to the Union in this case. Once that showing was made, the burden shifted to the General Counsel to rebut Respondent's evidence and prove that the Union was not able to discharge its duty to represent all of Respondent's employees. We find that the General Counsel did not carry its burden in this regard and therefore that Respondent has effectively rebutted the 0. P. Murphy presumption. We therefore affirm the ALO's dismissal of the charge that Respondent violated section 1153(a) by denying the UFW post-certification access to its premises.

## ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board hereby orders that Respondent, Sunnyside Nurseries, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any agricultural employee for engaging in union activity.

(b) Changing its hiring practices or any other term or condition of employment without first notifying and affording the UFW a reasonable opportunity to bargain with respect thereto.

(c) In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of those rights guaranteed by Labor Code section 1152.

2. Take the following affirmative actions which are

deemed necessary to effectuate the policies of the Act:

(a) Immediately offer to Urbano Hernandez full reinstatement to his former job or equivalent employment, without prejudice to his seniority or other rights or privileges.

(b) Make whole Urbano Hernandez for any loss of pay and other economic losses, according to the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven per cent per annum, he has suffered as a result of his discharge.

(c) Preserve and, upon request, make available to this Board and its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the back-pay period and the amount of back pay due under the terms of this Order.

(d) Upon request, meet and bargain with the UFW concerning the unilateral change in hiring practices made in August 1978.

(e) Sign 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 hereinafter.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all employees employed by Respondent at any time between September 1, 1978, and the time such Notice is mailed

(g) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the period and place(s) of posting 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 representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to its employees 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 nonhourly 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 after the date of issuance of this Order, of the steps Respondent has taken to comply therewith, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: September 11, 1980

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

NOTICE TO EMPLOYEES

After a hearing in which each side had a chance to present evidence, the Agricultural Labor Relations Board has found that we violated the Agricultural Labor Relations Act by discriminating against an employee by firing him for his union activity and also by changing our hiring practices without first notifying the United Farm Workers of America, AFL-CIO (UFW) as your representative. The Board has ordered us to post this Notice and to mail it to those who worked at the company between September 1, 1978, and the present. 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 the above things.

Because it is true that you have these rights, 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.

WE WILL OFFER Urbano Hernandez his old job back and we will pay him any money he lost, plus interest computed at 7 percent per annum, as a result of his discharge.

WE WILL NOT fire or otherwise discriminate against any other employee with respect to his or her job because he or she belongs to or supports the UFW or any other union.

WE WILL NOT change our hiring practices or other working conditions without first notifying the UFW and giving them a chance to bargain over these changes as your representative.

Dated: SUNNYSIDE NURSERIES, 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.

# CASE SUMMARY

Sunnyside Nurseries, Inc.

6 ALRB No. 52
Case Nos. 79-CE-l-SAL
79-CE-10-SAL
79-CE-37-SAL

## ALO DECISION

The ALO concluded that Respondent violated Section 1153( c ) and ( a ) of the Act by discriminatorily discharging Urbano Hernandez. The ALO also found illegal surveillance in violation of Section 1153 ( a ) where supervisor Ramon Galindo was present at a union meeting.

He dismissed allegations that Respondent violated Section 1153( a ) , ( c ), and ( e ) by discriminatorily laying off six employees, by laying off the six employees without giving the union a chance to negotiate, by unilaterally changing a past practice by closing for half a day before New Year's Day, and by refusing to grant the union post-certification access to its premises.

## BOARD DECISION

The Board adopted the ALO's conclusion as to the discharge of Urbano Hernandez. The decision was based on the failure of Respondent to adequately investigate the alleged misconduct of Hernandez.

The Board rejected the ALO's reasoning as to supervisor Galindo's presence at a union meeting, finding no tendency to coerce where the supervisor was invited by two employees and was not asked to leave after his presence was made public.

The Board adopted the ALO's conclusions as to the layoff of the six employees, finding no evidence of discriminatory motive, and as to the half-day closing before New Year's Day, since there was insufficient evidence that a change in past practice had occurred.

As to the alleged refusal to bargain over the decision to lay off the six employees, the Board rejected the ALO's reasoning that no duty to bargain existed prior to certification. Finding that Respondent had unilaterally changed its past practice by hiring six employees specifically for the poinsettia season, without notice to the union, the Board found a violation of Section 1153( e ) and (a).

Finally, the Board upheld the ALO's conclusion that Respondent did not violate Section 1153( a ) by denying the UFW post-certification access. Applying the presumption created in P . P . Murphy Produce Co., Inc. (Dec. 28, 1978) 4 ALRB No. 106, review den. by Ct. App., 1st Dist., Div. 4, April 19, 1979, hg. den. June 14, 1979, the Board found that Respondent had presented prima facie evidence that effective alternative means of communication were available to the union. Since the General Counsel failed to rebut this evidence, the allegation was dismissed.

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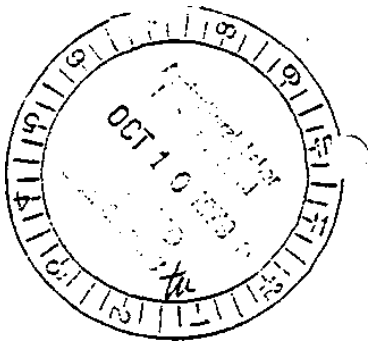
STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD



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| In the Matter of: | ) | |
| SUNNYSIDE NURSERIES, INC., | ) | |
| Respondent, | ) | |
| UNITED FARM WORKERS | ) | |
| and | ) | Case Nos. 79-CE-l-SAL<br>79-CE-10-SAL<br>79-CE-37-SAL |
| OF AMERICA, AFL-CIO, | ) | |
| Charging Party. | ) | |

Cpnstance Carey, Esq.
for the General Counsel

Jordan L. Bloom
Littler, Mendelson, Fastiff & Tichy
for the Respondent

## DECISION OF ADMINISTRATIVE LAW OFFICER

ARIE SCHOORL, Administrative Law Officer: This case was heard by me on May 22, 23, 24 and 31 and June 1 and 4, 1979 in Salinas, California. The complaint herein, which issued on March 29, 1979, based on charges filed by the United Farm Workers of America, AFL-CIO (hereinafter called UFW), and duly served on Respondent Sunnyside Nurseries, Inc. on January 17 and February 3, 1979, alleges that Respondent committed various violations of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act). A first amended complaint, based on the above-mentioned charges and an additional charge filed by the UFW and duly served on Respondent April 2, 1979, issued on May 21, 1979. The General Counsel and Respondent were represented at the hearing but

the Charging Party did not participate. The General Counsel and Respondent filed timely briefs after the close of the hearing. Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the post-hearing briefs submitted by the parties, I make the following:

## FINDINGS OF FACT

### I. Jurisdiction

Respondent admitted in its answer, and I find, that it is an agricultural employer within the meaning of Section 1140.4(c) of the Act, and that the United Farm Workers of America, AFL-CIO, is a labor organization within the meaning of Section 1140.4(f) of the Act.

### II. The Alleged Unfair Labor Practices

The complaint alleged that the UFW was duly certified as the exclusive collective bargaining representative of all the agricultural employees of Respondent at its Salinas Nursery on November 7, 1978, and since that date Respondent has denied access to its facility to representatives of the UFW and therefore has violated Section 1153(e) of the Act. As the General Counsel failed to present a prima facie case to prove this allegation, I granted Respondent's motion at the hearing to dismiss the allegation.

The complaint, as amended, also alleged that Respondent discharged its employee, Victor Sanchez, because of his support for and activities on behalf of the UFW. Subsequent to the hearing herein, the Regional Director for the Salinas Regional Office dismissed with prejudice the charges filed in Case No. 79-CE-10-SAL due to the failure of the alleged discriminatee to appear at the hearing herein, and his failure to explain his absence.

The amended complaint also alleged that Respondent: (1) through its supervisor Ramon Galindo, engaged in surveillance of the union activities of its employees; (2) through its supervisor Bruce Phillips, discharged six employees because of their union activity; (3) failed to advise or consult with the UFW, the certified bargaining representative, about the discharge of said six employees; (4) unilaterally, without discussing the matter with the UFW, changed the operation of its business by shutting down its business for one half day; and (5) through its supervisor Bruce Phillips, discharged employee Urbano Hernandez because of his union activity or concerted activity.

In its answer, Respondent denies having committed the alleged unfair labor practice.

III. Background Information

Respondent Sunnyside Nurseries, Inc. is a corporation which operates nurseries in Salinas and Hayward, California and also in Ohio and Texas, and has its headquarters in Hayward, California. It raises a variety of potted plants, including poinsettias, which are sold during the Christmas season, and lilies, which are sold during the Easter season. A representation election was conducted among Respondent's agricultural employees at its nursery in Salinas on October 15, 1975. After the issuance of the Regional Director's Decision on Challenged Ballots, an amended tally of ballots on January 16, 1376 indicated that the UFW was the winner. However, it was not until after a hearing on objections to the election that the Board certified the UFW as the bargaining representative of Respondent's Salinas employees on November 7, 1978. Thereafter Respondent has failed and refused to bargain with the UFW, and it

has challenged the legitimacy of the Board's certification. A complaint was issued on December 27, 1978 alleging that Respondent violated Labor Code Section 1153(e) and (a) by its refusal to bargain. Respondent, General Counsel and the Charging Party stipulated to the facts and the Board thereafter issued *a* decision (5 ALRB No. 23), in which it concluded that Respondent had unlawfully refused to bargain with the UFW. Respondent has appealed that Board decision to the Court of Appeals where it is now pending. Before the certification issued, groups of Respondent's employees twice traveled from Salinas to Sacramento for meetings with ALRB officials to discuss the delay in the issuance of the Board decision and certification. In connection with each of these meetings, the Salinas Regional Director asked Respondent to allow its employees unpaid time off to make the trip and Respondent granted that permission. After certification, the employees had two or more union meetings at the UFW office in Salinas, where they chose members of a negotiations committee, a communications committee, a health-and-safety committee, etc. After Respondent refused to bargain, a majority of the employees signed a petition, on December 27 and 28, 1978, requesting Respondent to bargain with the UFW. They sent that petition to Respondent's president, Eiicho Yoshida, at Respondent's headquarters in Hayward.

## IV. The Alleged Discriminatory Discharge of Urbano Hernandez

### A. Facts

Urbano Hernandez had been employed since 1975 as a nursery worker by Respondent and had been active in the union since 1975 when the election was held. On November 7, 1978, the ALRB certified the UFW as the exclusive collective bargaining representative for

Respondent's agricultural employees and immediately thereafter Respondent's employees, led by Urbano Hernandez and 3 or 4 other employee activists, stepped up their union activities of holding meetings, forming committees, distributing union literature to and conversing with employees on Respondent's premises, gathering signatures among the employees to petition Respondent to bargain with the UFW, etc. They kept up these increased activities during the months of November and December of 1973 and January and February of 1979. Respondent stipulated that it had knowledge of these union activities engaged in by Hernandez.

Prior to his discharge, Hernandez had worked in Louis Carrillo's crew for about 3 months. On Monday, February 5, the crew members were lifting plastic baskets, containing 6 dirt-filled plastic pots each. Hernandez asked foreman Carrillo for some gloves to use while doing this work. Carrillo said he had none but would see about getting some.

The next day, Tuesday, February 6, Carrillo's crew continued to do the same work and once again Hernandez asked Carrillo for some gloves. The latter explained he had ordered some but they had not arrived. Tuesday afternoon Carrillo delivered some white cotton gloves to Hernandez. Carrillo explained that Bruce Phillips, a production manager, had sent them but Hernandez said they were just cotton weather-gloves and would not serve the purpose of protecting his hands.[1/]

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[1/] Respondent argues that Hernandez never needed the gloves and that he insisted on the gloves as a ruse to provoke Carrillo and to bring about a confrontation. At the hearing, I lifted a basket full of dirt-filled pots and it was evident that repeated lifting would cause discomfort as the plastic edges would dig into the hands, especially if the edges were broken, as testified to by (continued)—

On Wednesday morning Hernandez reminded Carrillo about the work gloves and the latter replied, "Why are you always bothering me about the gloves? If you need them so bad, I'll buy some for you out of my own pocket." Hernandez replied that it was not necessary for Carrillo to buy him some gloves since it was Respondent's duty to supply them.

Both Carrillo and Hernandez became very angry and exchanged insults in vulgar language at close range. Carrillo testified that Hernandez then approached him, challenged him to fight, and touched his stomach with his fist. Hernandez denied that he touched or challenged Carrillo to fight. Miguel Sanchez, a fellow worker present at the altercation, corroborated Hernandez' testimony.

I find that Carrillo, Hernandez and Sanchez were forthright and sincere in their testimony, although there were indications that none of the three had a good memory. I believe that the truth of what occurred during the confrontation lies somewhere between the testimony of Carrillo and that of Hernandez and Sanchez, and that the ultimate issue of discrimination may be resolved without specific findings as to exactly what transpired on that particular occasion.

Carrillo then left the area and located Bruce Phillips and related to him what had happened. They returned to the office and Phillips had Carrillo repeat his version to Mas Kato, the nursery superintendent and then write it down on a piece of paper and sign it. Later that morning Phillips and his co-production manager

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[1/](continued)—Hernandez. I examined the white cotton gloves and it was evident they would not provide adequate protection against the sharp edges of the basket. Consequently, I find that Hernandez' request for gloves was based on a reasonable need for him to protect his hands from the basket edges.

Candace De Pauw discussed the incident and then contacted Respondent's lawyer for advice on what to do. Phillips and De Pauw then summoned Hernandez into the conference room and, with supervisor, Richard Gutierrez acting as interpreter, Hernandez told his side *of* the story to Phillips, De Pauw and Kato. Hernandez made no mention of having a witness nor did anyone ask him whether he had one. Phillips and De Pauw discussed the matter in English while Kato only listened. According to the testimony of Phillips and De Pauw, they did not find Hernandez' story convincing and, since Carrillo had been with the company for 15 years, they decided they could not permit that kind of insubordination i.e. a threat to a foreman. They decided to terminate Hernandez and so informed him in Spanish through the interpreter.[2/]

Hernandez left and in about twenty minutes returned with employees Raul Carbajal, Gregorio Giron, members of the UFW's negotiating committee,[3/] Alfonso Bravo and Miguel Sanchez. Hernandez asked whether he was being fired just because he had requested some gloves and said he wanted to talk to Superintendent Kato. De Pauw told Hernandez that Kato was unavailable. She then informed him that he had been discharged for threatening foreman Carrillo and the decision was final. Hernandez retorted that he had a witness. Sanchez spoke up in English and said, "It did not happen that way". Phillips and De Pauw repeated that the decision was final, commented that Hernandez had not previously mentioned

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[2/]There was no evidence that Hernandez was informed of the reasons for his termination at that time.

[3/]Hernandez was a member of this committee.

that he had a witness, and asked Hernandez to leave the premises. Hernandez and the other employees then left. Richard Gutierrez acted as the interpreter during this conversation.

Hernandez returned to his work. About an hour later Phillips seeing Hernandez was still at the nursery called two deputy sheriffs and had them escort Hernandez off the premises.

At the hearing, Carrillo testified that Hernandez was a good worker, had never been reprimanded and was considered by Carrillo as a personal friend. He testified that he did not want Hernandez to be fired but had left that decision up to his superiors.

Approximately 6 months before this incident, Urbano Hernandez had been involved in another incident which was investigated by Bruce Phillips but did not result in any action against Hernandez. In September 1978, employee Miguel Sanchez reported to John Oliveira, his foreman, that he had had an argument with Urbano Hernandez and the latter had pulled *a* knife on him. According to Oliveira, Sanchez appeared to be very nervous and scared. Oliveira asked him whether he had *a* witness and Sanchez answered in the affirmative. Oliveira told Sanchez to go back to work and stated that he would look into the matter. Oliveira quizzed both Hernandez and the witness and both denied that Hernandez had pulled a knife.

Oliveira went to Bruce Phillips and reported the incident and the results of his investigation. Phillips and Oliveira talked to Sanchez and he again repeated his accusation against Hernandez. Phillips conferred with Personnel Manager Bert Watanabe who advised him to try to identify some more witnesses and interview them.

Phillips and Oliveira contacted Hernandez and he again denied having threatened Sanchez with *a* knife. Oliveira talked to two witnesses and they denied that Hernandez had threatened Sanchez with a knife. Phillips testified that although pulling a knife was a very serious offense which would call for dismissal he decided not to do anything about it, not even to prepare a written reprimand, because he did not feel he had enough proof against Hernandez. So Phillips asked Hernandez and Sanchez to cooperate so that the work could proceed and told them that he would appreciate it if they would conduct themselves in a gentlemanly fashion.

At the hearing, Hernandez testified that he had never pulled a knife on Sanchez and the latter denied that he had ever been physically threatened by Hernandez or that he had ever reported such a threat to Respondent's foremen or management.

B. Analysis and Discussion

Section 1153(c) of the Act makes it an unfair labor practice to discriminate "in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization."

The ALRB has held that an employer who discharges a worker because of his or her union activity violates Section 1153(c) and, derivatively, Section 1153(a) of the Act. See Maggio-Tostado, Inc. (1977) 3 ALRB No. 33.

General Counsel has the obligation to prove by the preponderance of the evidence that the discharge was a consequence of the dischargee's union activities. In discrimination cases there is often no direct evidence that the employer discriminated against an employee because of his union activities. With respect to the

connection between the union activity and the subsequent discharge, the Board stated in S. Kuramura, Inc. , 3 ALRB No. 49 (1977), "It is rarely possible to prove this by direct evidence. Discriminatory intent when discharging an employee is 'normally supportable only by the circumstances and circumstantial evidence'. Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F.2d 186, 190 (C.A. D.C. 1962)."

A preliminary factor in finding that an employer discharged an employee for union activity is the determination that the employee engaged in union activities and that the employer had knowledge of such activities. In this case, Respondent stipulated to both these facts.

The timing of Hernandez' discharge provides additional circumstantial evidence of the nexus between his union activity and the employer's decision to discharge him. The ALRB certified the UFW as the bargaining representative of Respondent's employees on November 7, 1978. Immediately thereafter, the employees began to prepare for negotiations. Led by Hernandez and 3 or 4 other employees, they organized various committees i.e. negotiating, health and welfare, communications, etc., and began to hold periodic meetings. Most of this organizational activity was carried out on Respondent's premises and in full view of Respondent's supervisors. After three months of intense union activity by Urbano Hernandez, Respondent discharged him. These facts create a strong inference that Respondent did so because of his union activity.

Respondent attempted to offset this inference by introducing evidence to show that it had independent grounds for discharging him. Respondent's two supervisors testified that they decided to

discharge Hernandez because of his insubordination toward his foreman, Louis Carrillo. According to them, Carrillo had been with the company 15 years and because they could not permit that kind of insubordination they decided to terminate Hernandez.

There are some important factors which indicate that the alleged insubordination was not the moving force behind Respondent's decision to discharge Hernandez. Foreman Louis Carrillo never recommended that Hernandez be discharged. In fact, neither Phillips nor De Pauw ever asked him what he thought an appropriate penalty would be. There is a certain inconsistency in the two managers' stating that they decided to discharge Hernandez because of his insubordination against a foreman with 15 years service when they did not even consult with the said foreman before making that decision.

Another factor which creates doubt as to whether Hernandez' insubordination was the true basis for the discharge is the refusal of Phillips and De Pauw to hear a third pary witness' version of the confrontation between Carrillo and Hernandez. Twenty minutes after they told Hernandez that he had been fired, he returned with a witness who said in English that Hernandez had not threatened Carrillo. If Phillips and De Pauw had been interested in finding out whether they actually had just cause to discharge Hernandez they would have heard the witness' account of what had happened. In the incident involving Miguel Sanchez some six months earlier, Oliveira and Phillips had carefully investigated the complaint of Sanchez and had listened to the neutral witnesses before deciding there was no basis or disciplinary action against Hernandez.

In my opinion the limited investigation by Phillips and

De Pauw demonstrated that they were not attempting to determine whether there was in fact insubordination or an actual threat, but were merely endeavoring to elicit some plansible basis for an expeditious discharge.

The most persuasive factor here is the comparison between the method used by management in investigating the knife incident of September 1978, before Urbano Hernandez stepped up his union activities, and the method used in investigating the glove-confrontation of February 1979, after Hernandez had become the union's chief proponent at the nursery. The difference can only be explained by Respondent's changed attitude toward Hernandez, between September and February, because of his union activities.

The investigation into the September knife incident was marked by an even-handed, painstaking and thorough investigation which included interviewing the accused, the complaining witness and neutral witnesses. Management took an active role in searching out witnesses and listening to their versions. Most of the interviews were on a one-to-one basis in a low-key manner. Witnesses were interviewed not once but twice. Then the supervisor, after due deliberation, decided that he would take no disciplinary action against Hernandez, because he did not have adequate proof of misconduct.

By comparison the investigation into the February glove-confrontation is marked by a one-sided, superficial and accelerated investigation and a hasty decision. The complaining witness Carrillo was interviewed and his written statement obtained in the morning. The accused Hernandez was interviewed at noon time on a three-to-one basis, three supervisors confronting him in the

conference room, and a decision was then immediately made to discharge him. Twenty minutes later, the supervisors refused to listen to the account of a neutral witness because according to their testimony, their decision was final. An hour later, they enforced their decision by calling two deputy sheriffs to the grounds to escort Hernandez off the premises.

In summary, I find, after consideration of the record as a whole, that the manner in which the investigation of the Carrillo-Hernandez confrontation was carried out clearly indicates that Respondent was not attempting to determine whether there was insubordination or an actual threat, but was merely seeking to create a plausible basis for a summary and discriminatory discharge. In other words, I am convinced that even if Carrillo's version of the incident be credited, a discharge would probably not have occurred had it not been for Hernandez' union activities. In this connection, I have considered that: (1) Hernandez was a competent, dependable employee with 3 years employment with Respondent; (2) Respondent had knowledge of Hernandez' role as the leading union activist at their Salinas Nursery; (3) the discharge occurred in early February 1979 after three months of Hernandez' intense union activity in November and December 1978 and January 1979; (4) the comparison, between the methods utilized by management in investigating the September 1978 knife incident and the February 1979 glove confrontation which indicates management changed its attitude toward Hernandez because he had become so active in union activities; (5) Respondent's failure to interview a neutral witness who

presented himself just four hours after the incident and 20 minutes after Hernandez was given notice of the discharge; and (6) Respondent's failure to consult with the foreman to verify his story or to obtain his recommendation about the appropriate discipline to invoke.

Although Respondent may have had other reasons to discharge Hernandez, such as Hernandez' asserted malfeasance or simply management's desire to sanction the prerogatives of its foreman Carrillo (although, as above noted, Carrillo did not make any recommendations respecting the disciplinary action to be imposed) *a* violation accrues if the moving cause for the discharge is the employee's union activity.

As the Board stated the rule in S. Kuramura Inc., 3 ALRB No. 49:

> "Even though there is evidence to support a justifiable ground for the discharge, a violation may nevertheless be found where the union -activity *is* the moving cause behind the discharge or where the employee would not have been fired "but for" her union activities. Even where the anti-union motive is not the dominant motive but may be so small as "the last straw which breaks the camel's back," a violation has been established. NLRB v. Whitfield Pickle Co., 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967).

Accordingly, I conclude that the discharge of Urbano Hernandez on February 7, 1979 was in violation of Section 1153(c) and (a) of the Act, and I will recommend an appropriate remedy.

Respondent has stated in its brief that it is incumbent

upon the General Counsel to establish Respondent's "anti-union motivation" in firing Hernandez. Respondent goes on to claim that the case is bereft of any legitimate evidence of Respondent's "anti-union motivation" related to the Hernandez discharge and therefore no unfair labor practice of a discriminatory nature can be found.

I assume Respondent means by "anti-union motivation' an intent to discourage membership in a labor organization, a requisite element in a Section 1153(c) violation and not to the "anti-union motivation" (which signifies not "intent" but a general animosity on the part of the employer toward a union and/or union activities) an element to be proved separately in cases where there has been comparatively slight interference with Section 1152 rights (Section 7 under the NLRA) and the employer has already proven a legitimate and substantial business justification[4/] In the case at hand I find that the employer has not proven a legitimate and substantial business reason for its action in discharging Hernandez, so there is no need of independent proof of this latter kind of "anti-union motivation".

In this case Respondent's "intent to discourage membership in a labor organization" which is a necessary element in a 1153(c) violation as mentioned above is inferred since the foreseeable consequences of this discretionary act by Respondent necessarily supplies the requisite intent.

As stated by the Supreme Court in the majority opinion

[4/]See NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).

in Radio Officers Union v. NLRB (1954) 847 U.S. 39, 33 LRRM 2417:

> "it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of 8(a)(3)...Recognition on that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct...".

V. Alleged Discriminatory Layoff of Six Employees and Refusal to Bargain

A. Facts

In the latter part of August 1973, Assistant Production Manager Bruce Phillips decided that he needed six new employees to work in the poinsettia crop on a temporary basis. As Phillips had only recently started to work for Respondent, he conferred with superintendent Carlos Ramirez. Ramirez informed him that he knew some workers experienced in poinsettias who wanted to work for Respondent and stated that he would contact them. Phillips authorized him to do so and the six employees Francis Felix Estrada, Pedro Rodriguez, Jesus Lara, Jose Medrano, Guadalupe Flemate and Jose Renteria began to work the latter part of September and the first part of October.

Four of the six employees had worked for Respondent at least one full season from September or October to April or May in previous years after which they voluntarily left to work in the local strawberry fields of other employers. Estrada had worked for Respondent only one month in the spring of 1978 before he left to work in the strawberries. The sixth employee, Flemate, had never worked for Respondent before.

None of Respondent's representatives advised these six employees whether they had temporary or permanent employment, with

the exception of Jose Renteria who told Phillips he wanted to work on a temporary basis. Respondent's personnel records indicate that Lara, Estrada, Medrano and Rodriguez were hired on a temporary basis, to work in the poinsettia crop and that Renteria was rehired on a temporary basis. Respondent could not locate Flemate's "personnel change form" which would indicate whether he was hired on a temporary or permanent basis.

These six employees worked in the poinsettias until after Christmas day 1978. During this period they attended union meetings at the union headquarters in Salinas and saw Galindo, one of Respondent's foreman, at the meetings. All six signed the petition on December 27 and/or 20 requesting Respondent to bargain with their certified collective bargaining representative, the UFW.

During the week after Christmas day, the six employees brought in the lilies from the field and since there was no more work for them to do, Phillips decided to lay them off.[5/] They were the only temporary employees working for Respondent at that time; so when Phillips laid them off he was in effect laying off all the temporary employees at Respondent's.

On December 29, foreman Carlos Ramirez informed five of the six employees (the sixth, Renteria was notified by foreperson Cathy) that this was their last day of work as there was no more work for them. Both Ramirez and Cathy asked them to go to the office to sign a paper. All six refused to do so because they suspected it was a statement to the effect that they had quit

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[5/] Phillips credibly testified that he had decided at the time the six were hired that they were to be hired only for the poinsettia season.

voluntarily. No new employees were hired by Respondent between the layoff of the six employees on December 29, 1973 and their recall on February 20, 1979.

On or about February 20, 1979 Respondent sent a letter to all six employees offering them employment in the Maintenance Department. They all accepted and when they resumed work they were all informed it would be temporary work. Later they were all offered permanent jobs but all declined except Flemate. Near the end of April the other five quit to work in strawberries for other employers.

B. Analysis and Conclusion

1. Alleged Discriminatory Layoff of Six Employees

The law is well established that if Respondent laid off the six employees because they had participated in union activities, it thereby violated Section 1153(c) and (a) of the Act.

The General Counsel has the burden of proving this discriminatory motive by a preponderance of the evidence. Due to the inherent difficulties of presenting direct evidence of a discriminatory discharge or layoff, such a violation is usually established only by circumstantial evidence.

A preliminary factor in finding that an employer has discharged or laid off an employee for union activities is the determination that the employee engaged in such activities and that the employer had knowledge of same. It is clear from the record that the six employees did engage in union activities, i.e., they signed the petition dated December 27, 1978 which requested Respondent to begin negotiations with the UFW and they attended

two union meetings in November and December 1977. As one of Respondent's foreman was also at those meetings it can be inferred that Respondent had knowledge of the six employees' attendance, in addition to its presumed knowledge that the six were among those who signed the petition.[6/]

Assuming that the employer had found out that the six employees had signed the petition, it then could be argued that the timing of the discharge immediately after the employer learned *of* this latest union activity would point toward a discriminatory motive.

In summary General Counsel has presented a very dubious prima facie case if any at all. Even if it can be considered that General Counsel has presented a prima facie case, Respondent has successfully rebutted it with a showing of independent grounds for the discharge. I find merit in Respondent's contention that it laid off these six temporary employees for a legitimate business reason, i.e., the poinsettia season for which they were hired had come to an end and there was no more work for them to do.

There is ample evidence in the record that these six employees were employed just for the poinsettia season. Although none of them was informed that his employment was temporary, with the exception of Jose Renteria, none of them was told that his job

[6/]There was some evidence that Respondent may have received the petition before the lay-offs on December 29, 1978.

would be permanent and the records of five of them indicated their employment was just for the poinsettia season.[7/] The records also show that they were laid off because the poinsettia season had come to an end.

General Counsel argued that this whole procedure of hiring employees just for the poinsettia season was different from past practices. According to General Counsel, in previous years five of the six employees had worked through to April and then quit voluntarily to go work in the strawberries. Therefore General Counsel claims the only reason the six workers were not permitted to work all the way through April in 1979 was because of their union activities.

However, the evidence in the record clearly established there was a new factor in the situation for the year 1978-79 and that was the advent of Bruce Phillips as an assistant production manager. His decision in September 1978 to hire the six employees to work only during the poinsettia season is amply supported by Respondent's personnel records and Bruce Phillips' testimony. Moreover, the fact that they were called back to temporary work in February by mail and were later offered permanent jobs belies any argument that their layoff on December 29 was based on or related to their union activities or sympathies. The changes instituted by Phillips merely reflect the new methods of a new assistant production manager rather than an attempt by Respondent to discourage union activities by discriminatorily laying off six employees.

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[7/]The complete personnel record of the sixth employee, Guadalupe Flemate, was subpoened by the General Counsel, but Respondent could not locate it.

Accordingly I find that General Counsel has failed to prove by a preponderance of the evidence that the six employees were laid off because of their union activities and I recommend that this allegation of the complaint be dismissed.

2. Alleged Refusal to Bargain Regarding the Layoff

It is well established under NLRB precedent that an employer whose employees are represented by a union may not effect unilateral changes in employees' working conditions. When an employer makes such changes without notifying the union and providing it with an opportunity to bargain, such conduct is held to be *a* per se violation of the duty to bargain. NLRB v. Katz 369 U.S. 736, 50 LRRM 2177 (1967).

In the instant case, Respondent refused to meet and bargain with the UFW in order to test the validity of the election and the Board's subsequent certification of the union. However, Respondent's duty to bargain is not affected or diminished in any way, despite the "technical" reason for its refusal to bargain.[8/]

General Counsel argues that the layoff or termination of bargaining unit employees is a mandatory subject of bargaining. This may be true in some instances but in the instant case Respondent, in September and October 1978, before the union was certified, hired the six employees on a temporary basis, for the poinsettia season only, and laid them off on December 29, 1978 after the certification when the work was completed. Therefore Respondent's

[8/] Dixon Distributing Co., Inc., 211 NLRB No. 2, 86 LRRM 1418 (1974).

action was not a "unilateral change" requiring notice to the union, but merely the carrying out of a decision already made before the UFW was certified. In these circumstances Respondent clearly had no duty to bargain, and I so find. Accordingly, I recommend that this allegation in the complaint be dismissed.

VI. The Alleged Refusal to Bargain; The Half Day Closing Before New Year's Day

A. Facts

On Thursday afternoon, December 28, 1978, assistant production managers Bruce Phillips and Candace De Pauw decided to close the nursery on Friday afternoon December 29. It would be an unpaid half-holiday for the employees. They decided on the closure because they could see that they would be all caught up with their work on Friday noon and it was also in keeping with the desires of the management at Hayward to have its nurseries throughout the country closed that afternoon. Neither they or anyone else in authority at either Hayward or Salinas consulted with representatives of the UFW.

In 1975, Respondent's nursery was closed on the week-day afternoon before New Year's Day,[9/] without pay for the employees. The employees were informed of the closing by means of a notice which was posted on the bulletin board on December 15 of that year. Jose Medrano, one of the alleged discriminatees, credibly testified, on cross-examination by Respondent's counsel, that he remembered that the Salinas nursery had closed down the weekday afternoon

[9/] For the sake of clarity the year mentioned will be the year corresponding to the afternoon before New Year's Day and not the year of New Year's Day, e.g. "in 1975" refers to the afternoon before New Year's Day of 1976.

before New Year's Day every year he had worked for Respondent. He was not sure whether he had worked in 1975 or 1976. However he was sure he worked one of those two years and also in 1977. Raul Carbajal, an employee, and member of the negotiating committee testified that the Respondent had never closed on the afternoon of the weekday before New Year's Day when he had worked there in 1975, 1976 and 1977. In 1977, a notice was posted on December 14. It contained information about the coming holidays but no information about closing on the Friday afternoon before New Year's Day.

B. Analysis and Conclusion

As previously stated, it is well established that an employer whose employees are represented by a union may not effect unilateral changes in working conditions without prior notice and bargaining with the union.

In the case at hand, Respondent had refused to meet and bargain with the UFW in order to test the validity of the election and the subsequent certification of the union. However Respondent's duty to bargain does not cease despite the "technical" reason for refusing to bargain.

Nevertheless, I find that Respondent did not have a duty to bargain regarding the closure of the nursery on the Friday afternoon before New Year's Day 1978 because there is insufficient evidence in the record to indicate that this action of closure was in fact a change in employees' working conditions.

There is substantial evidence that the nursery closed down the weekday afternoon before New Year's Day in 1975 and 1977, i.e., the notice posted on the bulletin board in 1975 and Jose

Medrano's testimony in respect to 1977. There is no substantial evidence that the nursery remained open on the weekday before New Year's Day in 1276. Consequently, General Counsel has failed to prove that Respondent remained open the week day before New Year's Day in the past. General Counsel has not shown through a preponderance of the evidence that Respondent made any changes in the working conditions of its employees in closing the nursery on Friday afternoon December 29, 1978. Therefore Respondent had no duty to notify or bargain with the union about this subject. Accordingly I recommend that this allegation of the complaint be dismissed.

VII. Alleged Surveillance by Respondent's Supervisor Ramon Galindo

A. Facts

In December 1978, Ramon Galindo, one of Respondent's foremen, attended two UFW meetings in Salinas. He credibly testified that he attended those meetings because he had been invited by the two employees in his crew. He spent approximately 10 to 15 minutes at each meeting and stood in back of the room. After the first meeting, the employees who invited him told him they had not seen him at the meeting but he assured them that he had been there. At the second meeting, Galindo spoke up so they would realize that he was there. Urbano Hernandez was passing around an attendance list and asked Galindo to "sign it but Galindo declined to do so, explaining that he would be there only a short time. The six dischargees testified that they had seen Galindo at the meetings. No one in authority at Respondent's requested that he attend the meetings nor did he report back to anyone in authority at Respondent's about attending the meetings.

B. Analysis and Conclusion

The ALRB has held that an employer's surveillance of its employees' union activities violates Section 1153( a ) , if the surveillance tends to restrain employees in the exercise of statutory rights guaranteed by Section 1152. Merzonian Brothers Farm Management Company, Inc., 3 ALRB No. 62 (1977).

Respondent argues that Respondent is not guilty of illegal surveillance because of the following facts:

1. Supervisor Galindo had been invited to the union meetings by two employees.

2. There was a constructive consent to Galindo's presence at one of the meetings by Urbano Hernandez, one of the union's chief proponents, when he asked Galindo to sign an attendance list.

3. Respondent's management neither told him to attend nor later learned of his attendance.

4. There is no evidence that Galindo's presence had an inhibiting effect on the employees attending the meeting.

Respondent cites NLRB cases that hold, according to Respondent, that under the circumstances of the instant case, no illegal surveillance can be found.

However the three cases cited stand for the following proposition: There is no illegal surveillance when a supervisor attends a meeting solely on his own initiative and with the knowledge and consent of Respondent's employees.

In this case there is no evidence in the record of any actual or implied consent of Respondent's employees. The only

consent was that of three employees including union organizer Urbano Hernandez. In the cases cited by Respondent, either all or almost all of the employees present at the meeting in the instant case consented.[10/] There were more than eighty employees at the two meetings and there is no evidence of any general consent on their part.

Respondent goes on to argue that there can be no violation absent evidence that Galindo's or any other Company official intended to discourage union-related activity. This argument runs counter to the long-established principle that proof of intent is not a requisite element to establish a Section 8(a)(l) violation (ALRB Section 1153(a)). The NLRB's well settled test has been that:

> "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on- whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[11/]

In applying that test to a case involving surveillance, the NLRB held that there is still a violation when the employer had neither instructed supervisors to attend *a.* union meeting nor had received a report on said meeting from them. Majestic Metal Specialties Inc., 92 NLRB 1854, 27 LRRM 1332 (1951).

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[10/] In the cases cited by Respondent, the presence of the supervisor(s) was called to the attention of the employees present and the employees gave their express or implied (by not objecting) consent.

[11/] Cooper Thermometer Co., 154 NLRB 502, 59 LRRM 1767 (1965).

So the fact that Respondent did not order Galindo to attend the meeting or even learn of it later does not preclude finding that Galindo engaged in illegal surveillance.

Respondent also argues that there can be no violation, absent evidence that Galindo's presence had an inhibiting effect on the employees attending the meeting. However the Board in Merzonian Brothers Farm Management, supra, held that it is unnecessary to prove that the surveillance actually interfered with employees' union activities in order to establish that illegal surveillance occurred.

To establish unlawful surveillance, it is only necessary to prove that the actions of the Employer or its agent reasonably tend to interfere with, restrain or coerce employees in the exercise of their Section 1152 rights. In the instant case, the employees had the right to attend the two union meetings and participate in them to the full extent that they wished. *I* find that the unexplained presence of a supervisor at those meetings, a person who clearly represented management in the eyes of the employees, does have a reasonable tendency to inhibit their participation.[12/] It is reasonable to infer that the employees will feel restricted to participate at the union meetings due to *a* fear that the supervisor will report back to management the details of their participation. In the cases cited by Respondent, the employees' consent, actual or implied, was evidence that they did not harbor these fears; but in the instant

[12/]There may be some question of how many employees noticed the presence of Galindo at the first meeting, but it is clear that at the second meeting his presence was noticeable to all the employees since he spoke up to make a comment on a need for a Korean interpreter.

case no such consent was evidenced.

Accordingly I conclude that in the circumstances of this case, Respondent violated Section 1153( a ) of the Act by the presence of its supervisor, Galindo, at the two union meetings.

VIII. Alleged Denial of Access

On March 22, 1979 the UFW, by letter requested Respondent to grant them access to Respondent's Salinas nursery premises in order to communicate with Respondent's employees for the purpose of obtaining their views concerning terms and conditions of work for a collective bargaining proposal and of security information regarding working conditions.

Respondent declined to grant the UFW the requested access. It is Respondent's position that the UFW has alternative means to communicate with its employees regarding collective bargaining negotiations and therefore Respondent has no duty to grant said access.[13/]

I agree with Respondent that the UFW does have alternative means at its disposal to communicate with the employees and thus obtain the information it needs to carry out its duty to adequately represent the employees as their exclusive bargaining agent in negotiations with Respondent.

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[13/]Respondent also contended in its brief that since Respondent is challenging the UFW's certification, it would be pointless and inconsistent with Respondent's position with respect to the certification, for any bargaining to take place and consequently when no negotiations are taking place there is no need to grant access to the UFW to enable it to acquire information it need only if negotiations were actually taking place. However since I have decided that the UFW does not have any right to access on other grounds I need not pass on Respondent's contention as above described.

The Board in O.P. Murphy ruled that the employees' bargaining representative has the right to communicate with the employees during collective bargaining negotiations and this includes the right to access to the employer's premises, unless the bargaining representative has alternative means to contact the employees.

The Board went on to state that there is a presumption in California agriculture that no alternative means exist for union representatives to communicate with the employees about the collective bargaining negotiations. I find that the record as a whole in this case indicates that this presumption has been overcome.

In the O.P. Murphy case, supra, the Board mentioned in support of this presumption, the migratory nature of the agricultural employees and the short seasons that they will be working for any given agricultural employer. In the case at hand, Respondent is a nursery with year-round employment whose employees are not migratory but live within daily commuting distance of the nursery.

In addition, the UFW has formed a communications committee with employee members in each work section at the nursery. The UFW can thus communicate through these members to the workers in each section. The UFW is able to and has distributed flyers at the employee entrance to the nursery to the employees as they pass through this entrance.

The proof of the effectiveness of these means of communication were the large turnouts at the union meetings in November and December 1978 and also the large number of employees who signed the Petition to the Employer of December 27, 1978 which the UFW circulated among the employees.

Over 80 employees attended the two union meetings and 107 employees signed the petition. As Respondent's work force fluctuates between 125 and 150 employees, these numbers indicate that the union was able to communicate with a large majority of the employees and perhaps even more because some of those contacted may have elected not to attend the union meetings or to sign the petition.

Accordingly, I find that as the UFW had adequate alternative means available to communicate with Respondent's employees, Respondent's failure to provide the UFW with post-certification access to its premises is not a violation of Section 1153(a) and I confirm my granting of Respondent's motion to dismiss this charge and recommend its dismissal.

ORDER

IT IS HEREBY ORDERED THAT Respondent, Sunnyside Nurseries, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

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

(b) Surveilling employees when they engage in union or protected activities; and

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

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Offer Urbano Hernandez immediate and full reinstatement to his former position;

(b) Make Urbano Hernandez whole for any loss of pay and other economic losses incurred by reason of his discharge, plus interest thereon at the rate of 7% per annum.

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

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

(e) Post copies of the attached Notice at conspicuous places on its premises for 60 consecutive days, the posting period and places to be determined by the Regional Director. Respondent shall exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(f) Mail copies of the attached Notice in appropriate languages, within 30 days after issuance of this Order, to all employees employed in November and December 1978 and January and February 1979.

(g) Arrange for a representative of Respondent or a Board agent to read the attached Notice in appropriate languages to the assembled employees of Respondent on company time. The reading or readings shall be at such times and places as are specified by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may

have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by 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 30 days after the date of issuance of this Order, what steps have been taken to comply with it. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing what further steps have been taken in compliance with the Order.

DATED:

Arie Schoorl

ARIE SCHOORL
Administrative Law Officer

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.

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

(a) To organize themselves;
(b) To form, join, or help unions;
(c) To bargain as a group and to choose whom they want to speak for them;
(d) To act together with other workers to try to get a contract or to help and protect one another; and
(e) To decide not to do any of these things.

2. Because this is true, we promise you that:

WE WILL NOT do anything in the future that interferes with your rights under the Act, or that forces you to do, or stop doing, any of the things listed above.

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

WE WILL NOT conduct surveillance while you are engaging in union activity.

3. The Agricultural Labor Relations Board has found that we discriminated against Urbano Hernandez by discharging him. We will reinstate him to his former job and give him back pay plus seven percent interest for any losses that he suffered as a result of his discharge.

DATED:

SUNNYSIDE NURSERIES, INC.

By: _____
(Representative) (Title)

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

DO NOT REMOVE OR MUTILATE.