Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

NISHI GREENHOUSE Respondent, and. UNITED FARMWORKERS OF AMERICA AFL-CIO, Charging Party.	)	Case No. 80-CE-7-SAL 80-CE-9-SAL 7 ALRB No. 18

DECISION AND ORDER

On December 21, 1980, Administrative Law Officer (ALO) Beverly Axelrod issued the attached Decision in this proceeding. Thereafter the Respondent filed timely exceptions and a supporting brief.

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

Respondent excepts to the ALO's finding that it refused to rehire two employees because of their union activity, and to the legal standard applied by the ALO in her analysis and conclusions. Respondent argues that the ALO should have applied the standards adopted by the National Labor Relations Board in the

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case of Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169].[1/] We agree with the Respondent that the Wright Line standards should be applied in this case, but we disagree with Respondent's conclusion that application of those standards would result in the dismissal of the complaint.[2/] The Significance of the Wright Line Case,

Wright Line, Inc., supra, 251 NLRB No. 150 was decided by the NLRB on August 27, 1980. It was a direct effort by the NLRB to establish a clear standard for placing the burden of proof and determining causality La, cases, alleging violations of section 8(a)(3) of the National Labor Relations Act (NLRA).[3/]Several different standards or tests have evolved in cases of this type decided by the NLRB and the Federal circuit courts. In Wright Line, the NLRB attempted to reconcile these different tests through a restatement of the principles underlying the various causality tests. This restatement was precipitated by and consistent with the decision of the U.S. Supreme Court in

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[1/]Respondent excepted to various other findings and conclusions of the ALO. However, since no grounds are stated for those exceptions and no reference is made to the portions of the record supporting those, exceptions, the exceptions are hereby dismissed. 8 Cal. Admin. Code section 20282(a).

[2/]Respondent makes no claim that additional evidence should be or could be adduced but only that the improper legal standard was applied' to the ALO's findings of fact.

[3/]Section 8(a)(3) of the NLRA is identical to section 1153(c) of the Agricultural Labor Relations Act (ALRA), except with regard to the '"good standing" clause of the latter, not in issue here.

a non-NLRA case entitled Mt. Healthy City School District Board of Education v. Doyle (1977) 429 U.S. 274.[4/]

The major causality tests used by the NLRB and the federal courts prior to Wright Line were variously characterized as the "in part" test (whether a discriminatory motive was. a basis for the employer's adverse action); the "but for" test (whether the adverse action would have been undertaken "but for" the employee's protected activity); and the "dominant motive," test (whether the discriminatory motive was the "dominant motive" for the adverse action).[5/] Wright Line, in effect, combines certain elements of these tests by the following formula: if the General Counsel establishes that protected activity was a motivating factor in the employer's decision, the burden then shifts to the employer to prove that it would have reached the same decision absent the protected activity.

We approve of this burden-shifting approach and believe that it is consistent with the protective intent of section 1153(a) and (c). However, we also note that the Wright Line test

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[4/]We note that the federal circuit courts have not treated the Wright Line decision with either deference or uniformity, modifying its terms for their own purposes and ignoring it entirely in some cases. See NLRB v. General Warehouse Corp. (March 10, 1981), Ct.App., 3rd Cir., No. 80-1472 [106 LRRM 2927] and NLRB v. Burns Motor Freight, Inc. (4th Cir. 1980) 635 F.2d 312 [106 LRRM 2018]. This division between the NLRB and the various circuit courts can only be resolved by the U. S. Supreme Court. In the interim, since the NLRB formulation is consistent with the analogous standard for "dual motive" cases set by the Supreme Court in Mt. Healthy, we adopt the Wright Line test as applicable to the ALRA.

[5/]In terms of the burden of proof, the "in part" test is the easiest burden for the General Counsel, while the "dominant motive" test is the most difficult.

is essentially the same "but for" test this Board has applied in the past. See Royal Packing Co. (May 3, 1979) 5 ALRB No. 31, enf. den. on other grounds (1980) 101 Cal.App. 3d 826 and Abatti Farms (May 9, 1978) 5 ALRB No. 34, enf'd in relevant part (1980) 107 Cal.App. 3d 317.

Application of_ the Wright Line Standard to the Instant Case

Respondent's business operation is a small carnation nursery in Salinas with approximately eight employees, and various relatives of Mr. Nishihakamada (referred to by all parties as Mr. Nishi), the owner, working in, close proximity in four greenhouses. The two discriminatees, Luis Batres and Jose Bernal, had worked for Respondent since 1973 and 1979, respectively. In the summer of 1979, the UFW began an organizing drive among the employees of various nurseries in, the Salinas area, including Nishi Greenhouse. Batres and Bernal were the principal contacts between the union and the other employees of Respondent; they were involved openly in discussions about unionization among the other workers and in the distribution of union leaflets. The ALO found that the two discriminatees were involved in union activities and that Respondent was aware of those activities.

The parties stipulated that in January 1980, both discriminatees were charged by the Immigration and Naturalization Service (INS) with violation of the immigration laws. When they were released by the INS and returned to Respondent's premises a week later, they were refused rehire on the basis of a company policy against hiring people who had been picked up by INS.

The ALO found that Respondent engaged in certain conduct, between the initial union activity of Batres and Bernal and Respondent's subsequent refusal to rehire them, which indicated Respondent's concern about that union activity. These incidents were not argued by the General Counsel as separate violations, but as general evidence of anti-union animus, and the ALO applied them accordingly. The anti-union tactics employed by Nisni included meetings held to solicit employee grievances or complaints about working conditions, a wage increase in September 1979 of 40 cents per hour (compared to past increases of five to fifteen cents per hour), and the institution of a new medical insurance plan in November 1979. After Batres served the UFW's Notice of Intent to Take Access on Respondent, Nishi instituted a "no-talking" rule and separated the workers in the different greenhouses to' minimize such communications.

The solicitation of grievances, granting of unusual benefits, and changing company rules to prevent communication about union matters, all during a pre-election campaign, have been found to constitute unlawful interference with employee rights under section 1152 and are therefore evidence of anti-union animus. See Anderson Farms (Aug. 17, 1977) 3 ALRB No. 67; Harry Carian Sales (Oct. 3, 1980) 6 ALRB No. 55; Coachella Imperial Distributors (Dec. 21, 1979) 5 ALRB No. 73; and Hemet Wholesale (June 17, 1977) 3 ALRB No. 47. We find that Respondent here demonstrated significant anti-union animus.

Based on her findings that the discriminatees were engaged in union activity, that Respondent knew of their activity

and was concerned about this activity (having taken serious steps to curtail such activity), the ALO concluded that the employees' union activity was a "significant motivation" in Respondent's decision not to rehire Batres and Bernal. We find support for these findings and conclude that the General Counsel has shown that protected activity was a motivating factor in Respondent's decision to refuse rehire to Batres and Bernal.

Respondent's Defense

Following the Wright Line test, the burden now shifts to Respondent to show that Batres and Bernal would not have been rehired, even in the absence of their protected activities.

Respondent contends that its refusal to rehire was justified by a business policy of not rehiring workers who had been picked up by the INS. Nishi testified that this policy was established in August or September 1979, following a meeting of nursery owners in the Salinas area. It was at that meeting that Respondent was informed that he could be breaking the law by knowingly hiring undocumented aliens. Respondent claimed that the reference to possible penalties for employing undocumented aliens jogged Nishi's memory of an article he had read a year earlier which stated that persons employing undocumented workers could be fined $500,000.

This asserted business justification for the new policy is belied by a number of factors. Respondent offered no explanation for why he had not adopted a policy against hiring undocumented aliens a year earlier when he apparently first became aware that it might be illegal. It is also unexplained

why Respondent adopted the policy of not rehiring workers once they were picked up by the INS, rather than a policy of not hiring undocumented workers in the first place. Moreover, tire fact "that Respondent did not put the new policy in writing or inform his employees of the change casts substantial doubt on" the assertion that the policy existed at all prior to January 1980.

It is also significant that as of August or Sept ember 1979, when Respondent allegedly initiated this policy," there" were five workers in its employ who had already been picked up at least once by the INS. All five were rehired by Nishi when they returned from Mexico in March 1979 and Respondent did not discharge any of these workers in September 1979, when he claimed to have instituted his new policy.

In light of these contradictions and conflicts in the Respondent's proffered "business justification" for its refusal to rehire the two union activists, the ALO found that on the record in this case it simply was not reasonable to credit this explanation by Respondent. We agree with the ALO's findings in this regard and find that Respondent had no policy against rehiring of undocumented workers who had been picked up by INS until January 1980. We further find that Respondent created such a policy, not for the purpose of complying with the law prohibiting the hire of undocumented workers, but for the purpose of discouraging agricultural employees from engaging in protected union activity.

Applying the Wright Line test to this case, we conclude that Respondent has failed to present any legitimate business

justification and therefore failed to show that the discriminatees would have been refused rehire even absent, any union activity. We therefore conclude that Respondent, in refusing to rehire Bernal and Batres, violated Labor Code section 1153(c) and (a).

ORDER

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

1. Cease and desist from:

(a) Refusing to hire or rehire, or otherwise discriminate against, any agricultural employee in regard to hire or tenure of employment or any term or condition of employment because he or she has engaged In any union or concerted activity protected by section 1152 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee (s) in the exercise of the rights guaranteed them 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 Luis Batres and Jose Bernal full reinstatement to their former jobs or equivalent employment, without prejudice to their seniority or other rights or privileges.

(b) Make whole Luis Batres and Jose Bernal for any loss of pay and other economic losses they have suffered as a result of their discharge, reimbursement to be made according to

the formula stated in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest thereon at a rate of seven percent per annum.

(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 backpay period and the amount of backpay due under the terms of this Order.

(d) Sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(e) 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 during the period from January 1980 until the date on which the said Notice is mailed.

(f) Post copies of the attached Notice, in all appropriate languages, for 60 days in conspicuous places on its property, the time(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced covered, or removed.

(g) 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 time(s) and place(s) 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(h) Notify the Regional Director in writing, within 30 days after the 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 complaince is achieved.

Dated: August 5, 1981

RONALD L. RUIZ, Acting Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint that alleged that we had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by refusing to rehire two of our employees on or about January 24, 1980, because of their union activities. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do. We also want to tell you that:

The Agricultural Labor Relations Act is a law that gives you and all farmworkers these rights:

1. To organize yourselves;
2. To form, join, or help unions;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer to obtain, a contract covering your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help or protect one another; and
6. To decide not to do any of these things.

WE WILL NOT interfere with, or restrain or coerce you in the exercise of your right to act together with other workers to help and protect one another.

SPECIFICALLY, the Board found that it was unlawful for us to refuse to rehire Jose Bernal and Luis Batres. WE WILL NOT hereafter discharge or refuse to rehire any employee for engaging in union activities.

WE WILL reinstate Jose Bernal and Luis Batres to their former or substantially equivalent employment, without loss of seniority or other privileges, and we will reimburse them for any pay or other money they have lost because of their discharge.

Dated: NISHI GREENHOUSE

By:_____

(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. If you have a question about your rights as farmworkers or about this Notice you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California; the telephone number is (408) 443-3161.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

By:

Nishi Greenhouse

7 ALRB No. 18
Case No. 80-CE-7-SAL
80-CE-9-SAL

ALO DECISION

The ALO found that the employer discharged the two leading union activists because of their union activities. The employer's business justification was discredited, since the alleged policy of not rehiring undocumented workers who had been picked up by the INS was inconsistent with the employer's practice of retaining undocumented workers he knew had been picked up by the INS and with the employer's failure to inform the employees of the policy.

BOARD DECISION

The Board adopted the ALO's finding, conclusions, and recommendations, with a modification in the theory of causality. The Board expressly adopted the NLRB's causality test from Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169], that is once the General Counsel proves that protected activity was a motivating factor in the Respondent's decision, the burden shifts to the Respondent to show that the decision would have been made even absent the protected activity.

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STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATION BOARD

In the Matter of:	)	
NISHI GREENHOUSE,	)	
Respondent,	)	Case Nos. 80-CE-7-SAL 80-CE-9-SAL
and	)	
UNITED FARM WORKERS OF AMERICA, AFL-CIO,	)	
Charging Party.	)	

Boran Chertkov, Esq., and Jose H. Lopez
of Salinas, California for the
General Counsel

Bronson, Bronson & McKinnon, by
Frederick A. Morgan and Robert J. Stumpf
or San Francisco, California for the
Respondent

Ned Dunphy
of Keene, California for the
United Farm Workers of America, AFL-CIO

DECISION

Statement of the Case

BEVERLY AXELROD, Administrative Law Officer: These cases were heard before me in Salinas, California, on June 24, 25, 26, and 27, 1980. The complaint was filed on May 14, 1980, and alleges violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act, herein called the Act, by Nishi Greenhouse, herein called Respondent. The complaint is based on charges filed on February 6, 1980 and February 19, 1980, by United Farm Workers of America, AFL-CIO, herein called the Union, In its answer Respondent

initially denied service of the charges; however Respondent stipulated on June 24, 1980 to proper service of the charges.

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

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

Findings of Fact

I. Jurisdiction

Nishi Greenhouse is owned by Mr. Akiyoshi Nishihakamada. It is engaged in agriculture in Salinas, California, and is an agricultural employer within the meaning of Section 1140.4 (c'} of the Act.

The Onion is a labor organization representing agricultural employees within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Section 1153(a) and (c) of the Act by discriminatorily discharging two employees in January, 1980, for engaging in protected union activities.

Respondent denies that its actions violated the Act.

The General Counsel in its Post-Hearing Brief requests that I address and rule on three additional alleged violations of

the Act which were not charged in the complaint: that Respondent violated Section 1153(a) of the Act in 1979 by promising benefits, changing working conditions, and threatening loss of jobs, all during a union organizing campaign. Paragraph 5(a) of the complaint does refer in a general way to some of these charges. However, representation of counsel during the hearing made clear that these 1979 actions were the subject of separate Charges which had not been made part of this case, and that the only aspect of the complaint to be pressed would be the terminations. See Transcript (Tr.), 1:51-59, 67-70; 11:128-1327 III: 13-20. I did allow testimony on these 1979 events, but only insofar as they had bearing on the specific subject of this case, the termination of the two employees. Although it would be proper in some circumstances to address separate violations not pleaded-in the complaint, see Anderson Farms Co., 3 ALRB No. 67, Prohoroff Poultry Farms, 3 ALKB No. 87, Highland Ranch and San Clemente Ranch, 5 ALRB No. 54, I decline to do so in this case, particularly in light of the repeated assertions by counsel that these 1979 matters were not being litigated in this hearing as separate alleged violations. Where relevant, I have considered the testimony concerning some of those events, to the extent that it bears on the possible motivation for the termination of the two employees.

Finally, with regard to the pleading in this case the complaint charges an unlawful discharge of the two employees whereas the actual event was a refusal to rehire the two employees. However, there was no dispute whatsoever at the hearing about the event in question; indeed, counsel for Respondent stipulated to

the refusal to rehire, the only issue being whether or not the refusal was based on anti-union motivation. The refusal was fully litigated as the subject of this case. The witnesses frequently referred to the termination of the employees as a refusal to rehire. In its Post-Hearing Brief Respondent makes no issue about the complaint having referred to the matter as a discharge. In these circumstances, with no possible prejudice to Respondent, I treat the alleged violation as a refusal to rehire.

A. The Operation of the Nursery

Respondent Nishi Greenhouse is a flower nursery in Salinas, California. It is owned by Akioshi Nishihakamada. At the hearing Mr. Nishihakamada was with his concurrence (Tr. 111:27}, referred to by all counsel, parties, and witnesses as Mr. Nishi, and I will so refer to him here.

Respondent began operation approximately nine years ago. The nursery grows carnations. The flowers are planted, fertilized and irrigated in four greenhouses on Respondent's property. When ready, the flowers are cut, disbudded and packed for shipment.

Respondent's operation is relatively small. At the times material to this case it employed approximately eight employees who did the various tasks noted above. In addition to these employees Mr. Nishi, his wife, his son, and his daughter-in law all worked in the greenhouses with the employees. Respondent stipulated that Mr. and Mrs. Nishi, Mr. Nishi's son, and Mr. Nishi's daughter-in-law were either supervisors within the meaning of Section 1140.4(j) of the Act, or would be bound by

their acts as if they were supervisors. Mr. Nishi speaks Japanese. He communicates with his employees by a combination of the few English and Spanish words he knows, and signs and gestures.

All the work of Respondent's business is done on one piece of property where all the buildings are situated close "to each other. The four greenhouses are spaced approximately 30 feet apart, each greenhouse being approximately 210 feet in length. The property also contains a packing shed, a mobile home which was Mr. and Mrs. Nishi's residence for some of the time material to this case, and a new home in which Mr. and Nishi resided at the time of the hearing. The packing shed is located near the greenhouses, and the mobile home and the new home are also located within a few feet of the other buildings. The entrance to the property consists of a main gate on Spence Road, approximately 100 feet from the buildings.

Respondent is one of a number of small nurseries located in the Salinas area. Mr. Nishi estimated that there were about -ten nurseries nearby, and about thirty or more in the general area.

B. The Refusal to Rehire Two Employees

The two employees who are the subject of this case are Luis Batres Lopez (referred to at the hearing, and herein, as Luis Batres}, and Jose Bernal. Mr. Batres began working for Respondent in 1973. Mr. Bernal began working for Respondent in May, 1979. They each worked at most of the growing and planting tasks at Respondent's business. I find that at all material times Mr. Batres and Mr. Bernal were agricultural employees within the meaning of Section 1140.4(b) of the Act.

It was stipulated that on January 18, 1980 Mr. Batres

and Mr. Bernal were picked up in front of Respondent's property by the Immigration and Naturalization Service (INS). It was further stipulated that Mr. Batres returned to Respondent's property on January 23, 1980 and was refused rehire; and that Mr. Bernal returned to Respondent's property on January 24, 1980 and was refused rehire. Although I will discuss the issues and ray conclusions in the next section of the opinion, I will simply note here, in order to give a framework for the findings of fact, that the issue in this case centers on the motivation for the refusal to rehire the two employees. The General Counsel alleges that the refusal was because of union activities by the two employees. Respondent alleges that they were refused rehire because of a newly instituted neutral policy of Respondent not to knowingly rehire undocumented workers after they had been, picked up by INS.

After examination of all the evidence, I find the following facts concerning the events surrounding the refusal to rehire Mr. Batres and Mr. Bernal:[1/]

In the summer of 1979 the Union began an organizing drive among nurseries in the Salinas Area. An employee of another nursery talked to Mr. Batres about the Union, Mr. Batres in turn talked with Mr. Bernal, and the two of them began attending meetings at the Union office in Salinas. These meetings were attended by employees of nurseries in the Salinas area. Mr. Batres

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1/I have found it unnecessary to consider testimony regarding some of the alleged 1979 incidents in reaching my decision in this case. These incidents are mentioned in the text, and noted as not having been considered as part of my decision.

and Mr. Bernal began going to these meetings in August, 1979, and attended approximately seven or eight such meetings in August and September, 1979.

During these same months Mr. Batres and Mr. Bernal passed out union leaflets to the other six employees at Respondent's business (the leaflets were admitted into evidence as General Counsel's Exhibits (OCX) 5-8). There is testimony that members of the Nishi family were present when this was done. I will discuss this testimony shortly.

Mr. Batres and Mr. Bernal also began talking to the employees about the Union. They told the employees that the Union would get them benefits such as overtime pay and medical insurance. These discussions were largely held during lunchtime, during breaks, and' at the end of the day. Sometimes these discussions took place inside the nursery greenhouses during afternoon breaks. There was testimony that Mr. Nishi and members of his family were present during some of these discussions. I will discuss this testimony shortly.

During this time Mr. Batres and Mr. Bernal were chosen By their co-workers as representatives to attend further Union meetings being held at the Union's office in Salinas. Mr. Batres and Mr. Bernal were considered by their co-workers at Respondent's business as the "union leaders," Mr. Batres being considered the primary leader and Mr. Bernal the second (Tr. 11:93).

Mr. Nishi testified that he had no knowledge of any of these union activities occurring at his business during August and September, 1979. He testified that his first knowledge was not until October 10, 1979 when a Notice of Access was served on him by Mr. Batres. He testified that he had gone to several

meetings of nursery growers in the Salinas area in September, 1979. These meetings arose out of concern, over the Union's drive in the Salinas area, and. involved discussions of the meaning of the Act. Mr. Nishi testified that he attended these meetings because he shared the general concern, but he had no specific concern that union activities were going on at his nursery in August and September, 1979.

I find that Respondent did have knowledge that there were union activities at its premises during this time. Before discussing this finding in detail, r would note that, as stated above, I am not making findings regarding these or any other 1979 events as separate violations of the Act. I make no judgment on that whatsoever. My finding here is that insofar as it bears on the motivation of Respondent in refusing to rehire Mr. Batres and Mr. Bernal, and based on the testimony and evidence in this case,[2/] I find that Respondent had knowledge of the union activities on its premises by September, 1979 at the latest. Further, knowledge of these union activities meant of necessity knowledge of the active role of Mr. Batres and Mr. Bernal, since all the union activities testified to in this case centered on them.

I find Respondent's knowledge from several sources. I find that members of Mr. Nishi's family were present during some of the discussions about the Union held during breaks in the greenhouses. Mr. Batres and Hilda Garcia (an employee at Respondent's business) both testified to this fact, and Mr. Nishi

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2/A11 findings regarding 1979 events are similarly qualified and the qualification will not be repeated each time.

admitted that his wife stayed in the greenhouses during afternoon break. (Tr. IV:23). No member of Mr. Nishi's family was called to testify. Second, I credit the testimony of Hilda Garcia that Mr. Nishi and his son and daughter in law were present on one occasion when Mr. Batres gave her leaflets. Finally take into account the close and informal nature of the work at Respondent's business. The employees were frequently all in the same greenhouses together, working along side as many as four members of the Nishi family. There were only eight employees. All the work was done within a few feet of each other. There were several times a day when the Nishi family would talk among itself as there were times when the employees would gather and talk during breaks. It is difficult to believe that the employees were talking about the Union for two months, sometimes in front of the Nishi family, and were openly passing out Union leaflets, and that these items were not noticed, or if noticed, were paid no mind, by Respondent. Further, though there were language differences Mr. Nishi admitted he could make himself understood concerning

matters relating to work, and I find that he and members of his family could understand that the Union was being discussed, and that union leaflets were being passed out. This specific knowledge of the union activities at Respondent's business also helps to fully explain several events that took place in September, 1979. These consisted of several meetings held on Respondent's property for its employees and for the employees of two neighboring growers. Respondent stipulated that at these meetings it discussed the concerns of its employees. In one meeting, on September 10, 1979, Respondent announced a wage increase of 40 cents an hour to its employees, raising their

wage from $3.00 per hour to $3.40 per hour. This wage increase was put into effect on September 17, 1980. Prior wage increases had usually been 5 cents per hour, the highest being 15 cents per hour. Mr. Nishi testified that this wage increase was offered simply because his business income had increased. Respondent stipulated that at the time it was also concerned generally with the Union's drive in the area. As noted above, find that Respondent was also specifically concerned with the current union activities of its employees at the time it gave the wage increase.

At a second, meeting Respondent announced that it was giving its employees a medical-health insurance plan. This was carried out, becoming effective on November 1, 1979. I similarly find that Respondent was concerned with the union activities of its employees when it granted the insurance plan.

There was disputed testimony concerning whether Respondent, through Mr. Nishi or members of his family, threatened that it would go out of business. Mr. Nishi testified that he only mentioned this possibility to one employee, and that the reason was that he was considering purchasing another business and retiring from his current business. I find it unnecessary to my decision in this case to make any resolution of this testimony and I make no finding as to it. Similarly, there is undisputed testmony that employees were living on Respondent's property (initially in the packing shed, later in the mobile home) and that in September, 1979 Respondent ordered them to leave. Mr. Nishi testified that he did this solely because he had been informed at a grower's meeting that he could be fined and had been advised to have the employees moved. 1 likewise find

unnecessary to consider this incident in making my determination of this case, and I make no finding as to it.

On October 10, 1979 a Notice of Access was served on Respondent by Mr. Batres. On October 17, 1979 a. charge was served on Respondent by Mr. Bernal (the Charge is not one involved in this case; it was admitted into evidence solely for the purpose of showing knowledge of Mr. Bernal's union activities'). Respondent stipulated to service of both these documents and to knowledge that they were delivered by Mr. Batres and Mr. Bernal respectively.

In the month following service of the Notice of Access and the Charge, Respondent made two changes in its work procedure. First, a no-talking rule was instituted, limiting talking among employees during work. Second, the employees were separated-; previously they all generally worked together in the same greenhouse, but now they were paired off two to each greenhouse. Mr. Nishi testified that the separation of the employees was unrelated to the union activities at his business. However, his testimony was vague and internally inconsistent on this matter. At one point he indicated that the separation of the employees was no different from past practices, and at another point he indicated that it was a new practice instituted to increase productivity. I do not credit Mr. Nishi's testimony in this regard, and I find that the no-talking rule and the separation of the employees was a change instituted by Respondent out of concern over the union discussions among the employees.

There was considerable testimony, much of it undisputed, concerning the practices of Respondent regarding its employees and.

the INS It is undisputed that in the several years prior to January, 1980, there were approximately five INS raids on Respondent's property. It is also undisputed that the employees hid, or attempted .to hide, during these raids. Three employees testified further that Mr. Nishi affirmatively told them when the INS was on the property and encouraged them to hide. Mr. Nishi denied this. I. find that the employees hid during INS raids and that Respondent knew of this action of the employees and did nothing to atop them or to inform the INS. I find this because the employees frequently were working alongside the Nishi family, and because the property is small and the buildings are located a few feet apart; it would strain credulity to believe that five INS raids t«ok place with the employees hiding each time, and that the Nishi family had no. knowledge of what was going on around them. As to any more affirmative role of Mr. Nishi, I find it unnecessary in reaching my decision in this case to consider such evidence and I make no finding as to it.

There is undisputed evidence regarding the practice of Respondent, up to March, 1979, to rehire its employees after they had been picked up by the INS. It was stipulated that in late March 1979, five employees, including Mr. Batres, were picked up by the INS on Respondent's property. It was further stipulated that four of the employees, including Mr. Batres, were rehired one week later when they returned to the property, and that the fifth employee returned two months later and was rehired. They were rehired at their same pay rates and status.

There was conflicting testimony concerning a loan to Mr. Batres after he was rehired in March 1979. He asked for and

was given a loan of $200 from Mr. Nishi. The loan was paid back by payroll deductions. Mr. Nishi had made a previous loan to Mr. Batres in 1977. There was conflicting testimony regarding whether the loan was needed to repay a "coyote" who had taken Mr. Batres across the border and whether Mr. Nishi knew of this fact. I find it unnecessary to consider this evidence in reaching my decision and I make no finding as to it.

Mr. Nishi testified that in approximately September, 1979, he decided to institute a new policy in which he would not rehire undocumented workers after they had been picked up by the INS. He testified that he decided on this policy without any regard for union activities, and solely because he had been advised at a growers' meeting that he could be fined for knowingly hiring undocumented workers and because a year before he had read in a newspaper of a grower who had been fined. He also, testified that he told his employees about the policy on two occasions. Mr. Batres, Mr. Bernal, and Ms. Garcia denied having been told about the policy. I find that if there was such a policy in 1979, the employees had not been told about it. I credit the employees' testimony in this regard, and I also find it significant that Mr. Nishi admitted that the policy had never been .put in writing or communicated in some formal manner. The first time the policy was used was in January, 1980, when Mr. Batres and Mr. Bernal were refused rehire.

Mr. Nishi testified that after Mr. Batres and Mr.. Bernal had been picked up, and before they returned to his property, he phoned the INS to confirm whether or not it was illegal to hire undocumented workers. He testified he was told that it was against state law and was advised not to hire such workers. Mr. Nishi

hired two employees to fill the positions of Mr. Batres and Mr. Bernal. The no-rehire policy was also later invoked regarding another employee in March 1530.

The motivation underlying Respondent's new policy is the core issue in this case, and I discuss my findings on this issue in the next section of the opinion. Accordingly, I turn now to a discussion of the issues and my conclusions.[3/]

C. Discussion of the Issues and Conclusions

The issue in this case is whether Respondent's refusal to rehire Mr. Batres and Mr. Bernal was discriminatory, in violation of Section 1153(a) and (c) of the Act. These sections are violated when an employee has applied for rehire, has been qualified for the work, work was available, and a significant motivating factor in the employer's refusal to rehire the employee was the employee's union activities. See, e.g., Prohoroff Poultry, 5 ALRB No. 9,

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3/In addition to the facts discussed above in the text, there were several other disputed matters testified to in the hearing. One was an offer of proof by Respondent that at one time several years prior to 1979 Respondent had been concerned about Mr. Batres' absenteeism, due, allegedly, to drinking. Mr. Batres testified it was due to illness. I ruled this matter irrelevant due to the remote time period involved. However, were the matter taken as proven I would find that such relevance as it has cuts against Respondent. I will discuss this in the next section of the opinion. There was disputed testimony that after ALRB leaflets had been distributed at Respondent's business, Mr. Nishi and his family tried to take them back from the employees. I find it unnecessary in reaching my decision to consider this matter and I make no finding as to it. There was disputed testimony that after the Notice of Access was served on Respondent, Respondent locked its gates. I similarly find it unnecessary to consider this matter and I make no finding as to it. There was disputed testimony concerning whether Respondent shortened the employees' lunch time to a half hour, and if so what the motivation for that was. I find it unnecessary to consider this matter and I make no finding as to it. Finally, there was disputed testimony as to whether Mr. Nishi told Mr. Batres and Mr. Bernal at the time they applied for rehire that they were not being rehired because of union trouble, or because of the policy of not; rehiring undocumented workers. I likewise find it unnecessary; to consider this evidence and I make no finding and do not consider anything that allegedly was said at that time.

Kawano Inc., 4 ALRB No. 104, enforced Kawano, Inc. v. Agricultural Labor Relations Board (1980) 106 Cal.App.3d 937, Golden Valley Fanning, 6 ALRB No. 8.

It is stipulated that Mr. Batres and Mr. Bernal applied for work, and there is no real dispute that they were qualified. In this regard, I note preferred testimony by Respondent that several years prior to 1979 Mr. Batres had missed work for a period of time, allegedly for drinking. However, it is undisputed that for several years thereafter Mr. Batres was continuously employed by Respondent, up to January, 1980. This subsequent history shows the relative unimportance Respondent attached to the prior incident, and points out the current value to Respondent of Mr. Batres as an employee at the time surrounding the refusal to rehire. I find that both Mr. Batres and Mr. Bernal were qualified to perform the work at Respondent's business. The evidence shows that each had performed all the tasks assigned them at Respondent's business, and there is no evidence that their work was unsatisfactory.

On the specific facts of this case, the requirement that work be available at the time of rehire is merged with the final requirement of discriminatory motive. Mr. Nishi testified that he hired two workers in the five days before Mr. Batres returned (six days, for Mr. Bernal). However, it is undisputed that prior to this time Respondent's policy had been to rehire employees picked up by the INS who returned a week later, and in one case two months later. No such employee who applied for work had ever been refused rehire. If Respondent invocation of the new policy concerning INS raids was done discriminatorily with regard to Mr. Batres and Mr. Bernal, the decision in their

case to immediately hire two new workers on a. permanent basis to replace them would be part of the discriminatory use of the policy; the reason no work was available at the time of rehire would be due to the same discriminatory motive. Thus, as noted above, the specific issue in this case is whether a significant motivation for applying the new no-rehire policy to Mr. Batres and Mr. Bernal was their union activities.

I conclude from the record in this case that the union activities of Mr. Batres and Mr. Bernal were a significant motivation for Respondent's refusal to rehire them. Indeed, I believe the evidence warrants the conclusion that the discriminatory motivation was the primary one.

Respondent's argument is essentially that the new policy of not rehiring workers who had been picked up by INS should be viewed in complete isolation. Mr. Nishi testified that he went to a meeting of growers in which someone mentioned that he could be fined for knowingly hiring undocumented workers. This reminded him of an article he had read a year before about a grower who had been fined. Therefore, and solely for those reasons, he decided to change his long-standing policy of rehiring such workers. Respondent argues that it was coincidental that the first time this policy was used it happened to result in the termination of the two union leaders on Respondent's premises.

On the record in this case it simply is not reasonable to credit this explanation by Respondent. The entire record shows a clear pattern of actions of which the refusal to rehire must be seen as a part. The union activities began with Mr. Batres and Mr. Bernal talking to other employees and distributing literature. They stressed that the Union could bring

the employees wage benefits and health insurance. Within a month, Respondent conducted a series of meetings for employees. At one the largest wage increase in Respondent's history was announced. At another a health insurance plan was given to the employees. The union activities continued after these efforts by Respondent. Mr. Batres served a Notice of Access, Mr. Bernal served a Charge, and the employee discussions of the union continued. Within a month of these actions by Mr. Batres and Mr. Bernal, Respondent had instituted a no talking rule and separated the employees. Within two months of that, Mr. Batres and Mr. Bernal were picked up by the INS and Respondent invoked for the first time its new policy and did not rehire them. I am persuaded that this latter action of Respondent was motivated, as were the previous actions, by concern for the union activities on Respondent's premises and the active roles of Mr. Batres and Mr. Bernal in those activities.[4/]

The fact that Mr. Nishi telephoned the INS after Mr. Batres and Mr. Bernal had been picked up, and that the INS advised Mr. Nishi it was against state law to knowingly hire undocumented workers, is not a justification for Respondent's refusal to rehire Mr. Batres and Mr. Bernal. By itself, the call proves nothing it is as consistent with a good faith effort by Mr. Nishi to datermine his obligations as it is with covering.

4/I have found in the previous section that Respondent did not communicate its new policy to the employees prior to the January, 1980, INS raid. However, this factor was not essential to my decision. Even if I found that Respondent did tell the employees of the new policy, on all the facts of this case I would still find that the new policy was instituted out of anti-union motivation. I also found in the previous section of the opinion that the employees hid, with Respondent's knowledge, during prior INS raids. The slight relevance of this evidence is simply cumulative, adding to the undisputed evidence that Respondent's prior policy was to retain and rehire its employees despite INS

intentionally or not, an anti-union motivation for not rehiring the two employees. As with ail the other events, it must be viewed in the context of the over-all pattern, and on this basis I find Mr. Nishi's action here to have been self-serving.[5/]

I am not making any finding concerning a neutrally adopted rehire policy such as Respondent's. In this case I find that the policy was adopted and used as part of Respondent's efforts to counter the union activities led by Mr. Batres and Mr. Bernal on its premises. With this discriminatory motivation, I conclude that the use of the policy to refuse rehire to Mr. Batres and Mr. Bernal was a violation of Section 1153(a) and (c) of the Act.

In sum, I find and conclude that Respondent knew of the union activities of Mr. Batres and Mr. Bernal on its premises, and that primarily because of these activities Respondent refused to rehire Mr. Batres and Mr. Bernal, on January 23 and 24, 1980, respectively, in violation of Section 1153(a) and (c) of the Act.

At various points in the text and footnotes of this decision I have noted that certain testimony played no part in reaching my decision. The reason I find it unnecessary to consider these additional alleged incidents urged by General Counsel is that I have already found sufficient clear and persuasive evidence of a pattern of actions by Respondent, and any further alleged anti-union-motivated actions by Respondent

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5/I have found it unnecessary to resolve the disputed testimony as to whether Mr. Nishi told the employees at the time of refusal of rehire that the reason was because of union trouble, or because of being picked up by INS. Even if I found the latter, it would not change my conclusions since, as noted in the text, I find that while Respondent may have outwardly followed the form of a neutral policy, the reason the policy was being used was a discriminatory one.

would be cumulative.

III. The Remedy

Having found that Respondent engaged in unfair labor practices within the meaning of Section 1153(a) and (c) of the Act, I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully refused to rehire Mr. Batres on January 23, 1980 and Mr. Bernal on January 24, 1980, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former or Substantially equivalent jobs. I shall further recommend that Respondent make whole Mr. Batres and Mr. Bernal in accordance with the formula used by the National Labor Relations Board in F. W. Woolworth Co., 90 NLRB 289, and Isis Plumbing and Heating Co., 133 NLRB 716.

I shall also recommend that Respondent post a Notice in English and Spanish on its premises, such Notice being attached hereto and labelled "Appendix."

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

ORDER

Respondent, its officers, agents, and representatives, shall:

(1) Cease and desist from:

(a) Discouraging membership of any of its employees in the Union, or other labor organization, by in any manner dis-

criminating against individuals in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153(c) of the Act.

(b) In any other 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 requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

(2) Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer Luis Batres and Jose Bernal immediate and full reinstatement to their former or substantially equivalent jobs without prejudice to any rights and privileges as employees, and make them whole for any losses they may have suffered as a result of the refusal to rehire them, in accordance with the manner described above in the section entitled "The Remedy."

(b) 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.

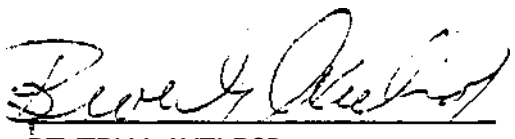
(c) Give to Mr. Batres and Mr. Bernal, and post on its premises in a conspicuous place copies of the attached Notice (marked "Appendix"). Copies of this notice, including an

appropriate Spanish translation, shall be furnished Respondent for distribution by the Regional Director for the Salinas Regional Office.

(d) Notify the Regional Director in the Salinas Regional Office within twenty (20) days from receipt of a copy of this Decision of steps Respondent has taken to comply therewith, and continue to report periodically thereafter until full compliance is achieved.

As noted, the only unfair labor practices which were pleaded and tried before me at this hearing were the refusal to rehire Mr. Batres and Mr. Bernal, and I decline to make any recommendations concerning any other alleged independent violations of the Act.

Dated: December 21, 1980



BEVERLY AXELROD
Administrative Law Officer

Appendix

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have violated the Agricultural Labor Relations Act, and has ordered us to post this notice telling you that we will remedy those violations and that we will respect the rights of all our employees in the future. Therefore, we are telling you:

(1) We will reinstate Luis Batres and Jose Bernal to their former jobs and give them back pay for any losses that they had while they were off work.

(2) All our employees are free to support, become or remain members of the United Farm Workers of America, or of any other union. Our employees may wear union buttons or pass out literature, or pass out and sign union authorization cards, or talk to their fellow employees about any union of their choice provided this is not done at times or in a manner that interferes with the performance of their job. We will not discharge, lay-off, or in any other manner interfere with the rights of our employees to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act.

Dated:

Signed:

NISHI GREENHOUSE

By: _____

(Title)