Fallbrook, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

RULINE NURSERY, Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos.	79-CE-20-SD 79-CE-21-SD 79-CE-22-SD 79-CE-23-SD 80-CE-7-SD 80-CE-8-SD 80-CE-10-SD
	8 ALRB No. 8	

DECISION AND ORDER

On September 19, 1980, Administrative Law Officer (ALO) Arie School issued the attached Decision and recommended Order in this proceeding. Thereafter, General Counsel, Respondent, and Charging Party each timely filed exceptions and a supporting brief. General Counsel filed a timely reply brief to Respondent's exceptions.

Pursuant to the provisions of California Labor Code,[1/] section 1146, the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.

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

Respondent has excepted to various credibility

[1/]All citations are to the Labor Code unless otherwise specified,

resolutions made by the ALO, contending that no evidence exists to support the ALO's determinations. To the extent that an ALO's credibility resolutions are based on the demeanor of the witnesses, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. Adam Dairy dba Rancho Dos Rios (Apr. 26, 1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].

In the course of the hearing in this matter, which lasted 26 days, there was a considerable amount of conflicting testimony, which the ALO carefully considered and evaluated in resolving issues of credibility. We have conducted an independent review of all the testimony and other evidence in this matter, and we find that the ALO's credibility resolutions are supported by the record as a whole. Andrews v. ALRB (1981) 28 Cal.3d 78, 794 [171 Cal.Rptr. 590, 596-7].

We reject any implication, however, which might be drawn from the ALO's Decision that this Board may sit in judgment over the manner in which an agricultural employer chooses to conduct its business. FPC Advertising, Inc. (1977) 231 NLRB 1135 [96 LRRM 1235]. The fact that Respondent operates seasonally while other nurseries operate on a year-round basis does not in itself support an inference that Respondent violated the Agricultural Labor Relations Act (Act). Rather, we affirm the ALO's finding, based on the particular facts of this case, that Respondent changed from a year-round operation to a seasonal operation as a means of discriminating against its employees because of their union activity. The violation lies not in

Respondent's manner of doing business but in its change from one mode to another for impermissible reasons. McCoy's Poultry Services, Inc. (Mar. 30, 1978) 4 ALRB No. 15; Abatti Farms, Inc. (Oct. 28, 1981) 7 ALRB No. 36; Textile Workers v. Darlington Manufacturing Co. (1965) 380 U.S. 263 [58 LRRM 2657]. We also affirm the ALO's finding that Respondent's preferred explanation for the change in its operations was a pretext, to mask the anti-union basis for that change.

We therefore adopt the ALO's recommended Order directing Respondent to cease and desist from discriminatorily changing its employees' terms and conditions of employment because of their union membership, sentiments, or activities. The NLRB adheres to the well-established principle that restoration of the status quo ante is an appropriate remedy in cases involving an employer's discriminatory acts or conduct unless the employer can demonstrate that such a remedy would endanger its continued viability. R & H Masonry Supply, Inc. (1978) 238 NLRB 1044 [99 LRRM 1714]: Sunflower Novelty Bags, Inc. (1976) 225 NLRB 1331 [93 LRRM 1186]. See also Lion Uniform (1980) 247 NLRB No. 123 [103 LRRM 1264]. As section 1148 of the Act requires us to follow applicable precedents of the National Labor Relations Act (NLRA), we shall issue an appropriate cease-and-desist order with provisions requiring Respondent to restore the employees' status quo ante.

We find no merit in the Charging Party's exception to the ALO's finding that Respondent did not intentionally misinform Elvira Martinez about her coverage under the Workers' Compensation Act. The ALO's finding, and his analysis of the testimony and

evidence, are supported by the record as a whole and will not be disturbed.

Both the Charging Party and General Counsel have excepted to the ALO's findings and conclusions regarding Respondent's revocation of Justina Wichware's seniority when she reported to work after an unexcused absence. We affirm the ALO's findings and conclusions on this matter as they are supported by the record evidence.

The General Counsel has excepted to the ALO's finding that the General Counsel failed to prove by a preponderance of the evidence that the permanent replacement of Pedro Rivas on a soil-making machine was a violation of section 1153 (c) and (a) of the Act. We agree with the ALO that General Counsel did not adduce sufficient evidence to overcome Respondent's defense as to that allegation of the complaint. See, Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18; Wright-Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169]. Accordingly that allegation is hereby dismissed.

ORDER

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

1. Cease and desist from:

(a) Discharging, laying off, refusing to rehire, changing employment conditions of, issuing disciplinary notices to, or otherwise discriminating against, any agricultural employee because of his or her union membership or union activities.

(b) Discharging, laying off, refusing to rehire, changing employment conditions of, issuing discriminatory notices to, or otherwise discriminating against, any agricultural employee because of his or her recourse to the Agricultural Labor Relations Board (ALRB) for the protection of the employee rights guaranteed by section 1152 of the Act, or because he or she gave testimony to any Board agent or at any ALRB hearing.

(c) In any like or related manner interfering with, restraining, or coercing any agricultural employee(s) in the exercise of their rights guaranteed by section 1152 of the Act.

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

(a) Offer Elias Gonzalez, Pedro Rivas, Justina Wichware, Victorino Olivas, Juana de Varela, Guadalupe Ruiz, Jose Oliveros, Miguel Pereda, Yolanda Navarro, Maria Cortes, Augustin Madrid, and Luz Elva Euyoque immediate and full reinstatement to their former positions, or substantially equivalent positions, without prejudice to their seniority or other employment rights and privileges.

(b) Make whole Elias Gonzalez, Pedro Rivas, Justina Wichware, Victorino Olivas, Juana de Varela, Guadalupe Ruiz, Jose Oliveros, Miguel Pereda, Yolanda Navarro, and Maria Cortes for any loss of pay and other economic losses incurred by them as a result of Respondent's layoff of said employees on or about June 30, 1979, and/or as a result of the continuing discriminatory employment policy utilized by Respondent thereafter, reimbursement to be made in accordance with the formula established by the Board in

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

(c) Make whole Luz Elva Euyoque for any loss of pay and other economic losses incurred by her as a result of Respondent's failure or refusal to recall her to work on or about July 30, 1979, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1980) 6 ALRB No. 43, plus interest computed at the rate of seven percent per annum.

(d) Make whole Augustin Madrid for any loss of pay and other economic losses incurred by him as a result of his layoff by Respondent on or about August 25, 1979, reimbursement to be made in accordance with the formula established by the Board in J & L Farms (Aug. 12, 1930) 6 ALRB No. 43, plus interest computed at the rate of seven percent per annum.

(e) Preserve and, upon request, make available to the Board or its agents, for examination, photocopying, and other copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to *a* determination, by the Regional Director, of the back pay period and the amount of back pay due under the provisions of this Order.

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

(g) Post copies of the attached Notice, in all

appropriate languages, for a period of 60 consecutive days in conspicuous places on its premises, the period and places of posting to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered, or removed.

(h) 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 from December 1, 1978, to the date of issuance of this Order,

(i) Arrange for a representative of Respondent or a Board agent to read the attached Notice in all appropriate languages, to all of its agricultural employees on company time and property, at time(s) and place (s) to be 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.

(j) 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 with its terms, and continue

to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: February 9, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME R. WALDIE Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the San Diego office of the Agricultural Labor Relations Board (Board), the General Counsel of the Board issued a complaint which alleged that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the Board found that we interfered with and discriminated against our workers because of their union activities and/or because of their filing charges with or testifying before the Board. The Board has ordered us to post and distribute 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 other farm workers in California 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 about 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 and protect one another; and,
6. To decide not to do any of these things.

Because this is true, we promise that:

WE WILL NOT do anything in the future that interferes with your rights as set forth in the Act, or forces you to do, or prevents you from doing, any of the things listed above.

Especially:

WE WILL NOT discharge, lay off, refuse to rehire, change employment conditions of, or issue disciplinary notices to employees because of their union activity, union sympathies, or because they went to the Board to seek protection of their rights as farm workers.

The Board has found that we discriminated against Maria Cortes, Elias Gonzalez, Augustin Madrid, Yolanda Navarro, Jose Oliveros, Miguel Pereda, Pedro Rivas, Guadalupe Ruiz, and Juana de Varela by laying them off. We will reinstate them to their former jobs and give them backpay plus seven percent interest for all economic losses that they suffered as a result of such layoffs. The Board has also found that we discriminated against Justina Wichware and Victorino Olivas by discharging them. We will reinstate them to their former jobs and give them backpay plus seven percent interest for all economic losses they suffered as a result of their discharges. The Board has also found that we discriminated against Luz Elva Euyoque by failing to recall her to work. We will reinstate her to her former job and give her backpay plus seven percent interest for all losses that she suffered as a result of our failure to rehire her.

If you have a question about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor

Relations Board. One office is located at 1350 Front Street, Room 2056 San Diego, California 93101. The telephone number is 714/237-7119.

Dated: RULINE NURSERY

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

By: Ruline Nursery

8 ALRB No. 8
Case Nos. 79-CE-20-SD, et al

ALO DECISION

The ALO concluded that Respondent, a nursery in Fallbrook, California, engaged in a concerted campaign to rid itself of adherents of the United Farm Workers of America, AFL-CIO (UFW). He found a long history of anti-union activity, stretching back to 1975 and culminating in the discharge, layoff, and retaliation against employees. Specifically, the ALO found violations of the ALRA in the issuance of warning notices based on pretextual reasons, the discriminatory assignment of work and the discharge of employees for union activities and for resorting to the processes of the ALRB. The ALO further concluded that Respondent altered the operations at the nursery from the usual non-seasonal employment to employment practices more common to seasonal industries. The ALO concluded that Respondent implemented this change to render the employment of his long term employees undesirable to those employees. Respondent abetted that end by engaging in the resulting layoff and recall of employees in a discriminatory manner. The ALO noted that nurseries are, as a rule, non-seasonal industries and fluctuation in operations could be handled by judicious use of vacation assignments. The ALO ordered Respondent to cease and desist from changing operations to those of a seasonal nature and to otherwise remedy the above violations.

The ALO also concluded that the General Counsel had failed to meet his burden of proof on several of the charges contained in the complaint. Specifically, the ALO found that certain employees had not been demoted, reassigned or stripped of seniority for discriminatory reasons, that certain working conditions had not been impermissibly retaliatory and some of the complained of warning notices had been not improperly administered.

BOARD DECISION

The Board affirmed the findings, rulings, and conclusions of the ALO. The Board, in adopting the proposed remedy restoring the status-quo ante to a non-seasonal operation, specifically rejected any implication in the ALO's opinion that might be read as permitting the Board (or the ALO) to substitute its business judgment for the judgment of Respondent. Rather, the Board confined itself to remedying the discriminatory practices of Respondent.

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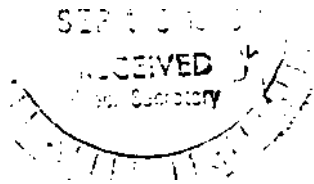
STATE OF CALIFORA

AGRICULTURAL LABOR RELATIONS BOARD



RULING NURSERRY,	Case No. 79-CE-20-SD
	79-CE-21-SD
Respondent,	79-CE-22-SD
	79-CE-23-SD
and,	79-CE-7-SD
	79-CE-8-SD
UNITED FARM WORKERS OF AMERICA, AFL-CIO	79-CE-10-SD
Charging Party,	8 ALRB No. 8

Octavio Aguilar, Esq.
For the General Counsel

Thomous E. Campage, Esq.
Thomous Giovacchini,Esq.
For the Respondent

Ned Dunphy,
For the Charging Party

DECISION OF THE ADMINISTRATIVE LAW OFFICER

ARIE SCHOORL, Administrative Law Officer: This case was heard on October 11, 1979 in Sylmar, California and on January 21, 22, 23, 24, 25, 30 and 31, February 1, 4, 5, 6, 7, 27, 28 and 29, March 6, 7, 10, 11, 12 and 13, April 17, 24 and 25, and May 9, 1980 in San Diego, California. Charges 79-CE-20-SD, 79-CE-21-SD, 79-CE-22-SD and 79-CE-23-SD were originally consolidated with Charge 79-CE-8-SD for purposes of hearing. However, subsequently they were severed from this latter charge and General Counsel proceeded to hearing by filing a Fourth Amended Complaint on

January 21, 1980 based on the four aforementioned charges which were filed by the United Farm Workers of America, AFL-CIO, (hereinafter called UFW), and duly served on Respondent Ruline Nursery, on June 22, 1979, June 26, 1979, July 2, 1979 and July 2, 1979 respectively. Said complaint alleges that Respondent committed certain violations of the Agricultural Labor Relations Act (hereinafter referred to as the ALRA or the Act).

After the commencement of the hearing, General Counsel filed a subsequent complaint alleging that Respondent had committed additional violations during the course of the hearing. Respondent stipulated that the allegations in the subsequent complaint could be consolidated for purposes of hearing with the complaint in the instant case and General Counsel stipulated that all the substantive allegations in the subsequent complaint would be considered denied by Respondent so Respondent would not have to file a formal answer to the subsequent complaint. I granted General Counsel's motion to consolidate and charges 80-CE-7-SD, 80-CE-8-SD and 80-CE-10-SD were thereby consolidated for purposes of hearing.

The General Counsel, Charging Party and Respondent were represented at the hearing. 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. The UFW, the Charging Party herein, is a labor organization within the meaning of Section 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

Respondent is alleged to have violated Sections 1153(c), 1153(d) and 1153(a) of the Act by committing the following acts because of its employees' support for and activities on behalf of the UFW and because they filed unfair-labor-practice charges against Respondent: (1) changed the conditions of employment of employees; (2) issued warning notices against employees; (3) laid off employees; (4) refused to rehire employees; (5) attempted to intimidate and threatened an employee by informing said employee that there was no insurance to cover needed treatment for an industrial injury suffered by said employee on Respondent's premises; (6) discouraged employees from continuing their employment with Respondent by the above-mentioned acts but which also involves a broader and more general practice of subjecting said employees to frequent and unnecessary layoffs, failing to recall them, or some of them, when work was available, and misrepresenting the amount of work available for them when they were recalled.

In the subsequent complaint, Respondent is alleged to have violated Sections 1153(c), 1153(d) and 1153 (a) by committing the following acts because of the employees' support for and acts on behalf of the UFW and for having testified at an ALRB hearing: (1) issued warning notices to employees and;(2) discharged employees.

III. General Background Information

Since 1960,Respondent, a sole proprietorship owned by Rufus Orson, located in Fallbrook, San Diego County, has been engaged in the business of raising and selling a variety of floral

plants to wholesale and retail outlets. From January 1979, Jack Jester has been Respondent's general supervisor and Luz Escobedo has been, in effect, assistant general supervisor.

In the years 1970 to 1973, Respondent's main production line was azaleas but in the latter year it began to raise green foliage plants. It gradually increased its foliage plant production until it reached its peak in 1977. Thereafter the green foliage began to decline as the nursery began to increase its poinsettia production. By the beginning of 1979 the green foliage production was terminated completely.

In November and December 1978,the/UFW conducted a campaign to unionize the nursery employees. In January 1979, the ALRB conducted a representation election which the UFW won by a vote of 14-4. General Counsel alleges that since the UFWs election victory the Respondent has been engaged in a campaign to rid itself of the pro-union employees it employed in January 1979, almost all of whom had voted for the UFW. General Counsel alleges that this campaign has been directly principally against 12 employees who are Elias Gonzalez, Maria Gonzalez, (the Gonzalezes are husband and wife), Justina Wichware, Elvira Martinez, Victorino Olivas, Juana de Varela, Yolanda Navarro, Maria Cortes, Jose Oliveros, Guadalupe Ruiz, the daughter of Elias and Maria Gonzalez, Pedro Rivas, and Miguel Pereda. General Counsel contends that Respondent's anti-union tactics had included the following acts and conduct: a) changing employees' status from that of permanent employees to temporary employees, b) harassing employees with disciplinary notices based on unfounded charges, c) introducing a system of frequent lay offs and recalls, d) providing misleading information to employees concerning the amount of work available

at the nursery. According to General Counsel the purpose of these acts and conduct was to discourage the pro-UFW employees from continuing to work for Respondent, i.e., to induce them to quit their employment and seek jobs elsewhere. In addition to these alleged acts and conduct, Respondent allegedly discharged two of the employees who had voted in the election because of their membership in or support of the UFW, and/or testifying at an ALRB hearing.

Respondent contends that because it terminated its green foliage program, which involves year-round care of plants, and switched to the production of azaleas and poinsettias, seasonal plants sold on holidays, its needs for agricultural labor now fluctuate throughout the year rather than remaining steady as in the years up to 1979 and thus frequent layoffs are necessary.

In this decision, I will first review and consider Respondent's attitude and actions toward its employees and the UFW since 1975, the year the ALRA was enacted, and whether Respondent had union animus and knowledge of his employees' union activities and recourse to the ALRB. Secondly I will consider the specific unfair-labor-practice allegations concerning the disciplinary notices to employees, the layoffs and recalls, and the two discharges. Lastly I will consider the matter of Respondent's alleged anti-union acts and conduct aimed at eliminating the pro-union employees from its work force.

IV. Respondent's union animus and knowledge of employees' union activities and recourse to the ALRB.

A. Facts

Raul Vega, [1/] Respondent's former general manager, testified

[1/] Raul Vega began to work for Respondent in 1966 and became general manager in 1972, a position held until his discharge on January 24, 1979.

at length about Rufus Orson's attitude and actions toward pro-union employees from 1975 through 1978.[2/]

Two weeks before the ALRA went into effect in 1975, Raul Vega was present at a conversation with Rufus Orson and Marilyn Abigit, Respondent's office manager. The gist of the conversation was that if the UFW should win an election at Respondent's nursery, it would demand such high wages that it would put Respondent out of business. Rufus Orson told Vega that if any employee showed any leadership qualities or discontent, the employee should be fired because otherwise he would be organizing and helping the UFW. Orson advised Vega to utilize pretexts in discharging employees to foreclose or minimize the likelihood of unfair-labor-practice charges being filed.

Between 1975 and 1978, Raul Vega discharged approximately 10 employees because they were pro-UFW, or led the employees in protected activities, or complained about working conditions. In accordance with Orson's instructions, Vega did not inform these employees of the real reasons for their discharges but utilized a variety of pretexts.

During the same period, Vega, again following Orson's suggestions, warned the employees of the negative aspects of the UFW,i.e., the UFW[1] s inability to keep its promises, its negative attitude toward undocumented workers based on its opinion they caused depressed wages, and the UFW's hiring-hall practice of

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[2/]My findings of fact as to Rufus Orson's conduct vis-a-vis his employees and the UFW between 1975 and 1978 are based on Raul Vega's testimony which I find fully credible. Vega had a good memory and obviously took great care in being accurate about the details of his testimony. Respondent offered no evidence to contradict Vega's testimony.

forcing employees to work outside the city, and threatened employees that if the UFW won the election it would be better for Respondent to shut down its operations. Beginning in October 1978, Respondent's employees began to talk about the UFW organizing for an election and a possible strike. Raul Vega reported these conversations to Orson and told Orson of the employees' dissatisfaction with their wages and working conditions. Orson told Vega that he was unable to grant any wage increases because of economic reasons.

In November 1978, Orson advised Vega that he had heard there was increased organizing activity by £he UFW, that he expected a petition for an election to be filed within a day or two, and that a representation election was imminent, adding that he was not going to take this lying down. Vega replied that he was going to take a neutral position; to which Orson retorted that in situations like this one a person had to be on one side or the other.

In December 1978, Orson called Vega to his office and told him he did not want any unfair labor practices committed by Ruline Nursery, and asked Vega to keep him informed of any union activities among the employees, especially any conversations or rumors about a strike. Vega asked Orson whether he preferred committing unfair labor practices to having the union and Orson replied "by all means". In December 1978, Orson also instructed supervisors Luz Escobedo and Jack Jester to report to him any indications of a possible strike by the nursery employees.

On November 27, 1978, the UFW held a meeting for Respondent's employees at the Fallbrook High School. Oscar Vega, a brother of Raul Vega then employed by Respondent as a supervisor,

distributed leaflets announcing the meeting to all the employees and also to supervisors Raul Vega and Luz Escobedo.

Luz Escobedo commented to Oscar Vega that she did not believe in unions and that she was not going to attend the meeting. She queried him about his reason for attending since he previously had disparaged the UFW. Vega answered that this time it was different.

Escobedo also asked employee Pedro Rivas whether he was going to attend the UFW meeting and,when he replied in the affirmative, she remarked that that would be equivalent to his being "a bad guy with the employer".

Almost every employee in the 35-man work force told Escobedo that he or she intended to attend the meeting. Escobedo relayed this information to Orson a day or two later.

Elvira Martinez, an employee, signed an authorization card and on one occasion Luz Escobedo asked Martinez whether she supported the UFW and Martinez answered her in the affirmative. Escobedo asked Justina Wichware, an employee, who had initiated "this thing about the union" and Wichware replied, "We don't know anything".

Among other individuals present at the counting of the ballots at the January 10, 1979, election were Luz Escobedo, Jack Jester, Pedro Rivas, Elias Gonzalez, Maria Luz Gonzalez, Elvira Martinez, Yolanda Navarro, Victorino Olivas, Jose Oliveros, Miguel Pereda, Guadalupe Ruiz, Juana de Varela, Justina Wichware and Rebecca Ponce. Jack Jester testified that almost all of the eligible voters were present at the counting of the ballots and he observed that when the results were announced, the employees with the exception of RebeccaPonce, Respondent's observer, showed

signs of approval by exclamations of satisfaction and clapping of hands.

Jester also testified that he knew that Lucio and Teresa Corona were anti-UFW or pro-company. Rebecca Ponce, who refused to sign an UFW authorization card, was Respondent's observer during the election and remarked in February or March that she was against the UFW.

At the hearing, employees Elias Gonzalez, Maria Gonzalez, Justina Wichware, Elvira Martinez, Juana de Varela, Agustin Madrid, Victorino Olivas, and Pedro Rivas all testified that they wore UFW buttons prominently displayed on their garments while at work after the election and every day since. These same employees wore the UFW buttons every day when they received their work instructions from their supervisors Jack Jester and Luz Escobedo, and also wore them at all other times when they were in contact with their supervisors during the day.[3/]

On December 28, 1978, Pedro Rivas and Oscar Vega filed a charge (.Case No. 78-CE-50-X) with the ALRB alleging that Respondent fired 17 of its employees because of their attempts to be represented by the UFW, and also withdrew a Christmas bonus for the same reason. The charge named the following persons as alleged discriminatees: Oscar Vega, "Benjamin", Francisco Serrato, Pedro Rivas, Agustin Madrid, Victorino Olivas, Jose Melo, Luz Elva Enyoque, Alberto Rivas, Guadalupe Camarena, Guadalupe Ruiz, Jose Oliveros, Yolanda Navarro, Elvira Martines, Fortunata Guadarrama, Maria Cortez, and Miguel Pereda.

[3/]Respondent presented no evidence to the contrary.

On January 16, 1979, employees Maria Gonzalez, Justina Wichware, Juana de Varela, and Renalda Garcia filed a charge (Case No. 79-CE-3-SD) with the ALRB alleging that Respondent discriminatorily refused employment to employees Juana de Varela, Renalda Garcia, Martha Aros, Elias Gonzalez, Maria Gonzalez, and Justina Wichware and other unnamed employees because the employees had selected the UFW to represent them as their collective bargaining representative.

Both of these charges were duly served on Respondent, the first one on December 28, 1978 and the second on January 18, 1979.

In July 1979, Respondent paid $15,000, pursuant to a settlement agreement of ALRB Case No. 78-CE-50-X,[3a/] which amount was divided among the following-named employees: Oscar Vega, Juana de Varela, Martha Aros, Elias Gonzalez, Miguel Pereda, Justina Wichware, Maria Gonzalez, Victorino Olivas, Francisco Serrato, Pedro Rivas, Agustin Madrid, Alberto Rivas, Guadalupe Ruiz, Jose Oliveros, Yolanda Navarro, Elvira Martinez, Fortunata Guadarama Maria Cortes, and four others. Respondent paid these amounts by checks made out in the name of each individual employee and the name of each employee and the amount paid were entered into Respondent's payroll journal.

B. Analysis and Conclusion

The facts as set forth above clearly establish certain factors that are essential, or at least of assistance, in determining whether Respondent is guilty of violations of Section 1153 (c), (d) and (a) of the Act.

Union animus on the part of Respondent is clearly shown by the totality of its acts and conduct directed toward eliminating

[3a/]Respondent signed the settlement agreement on June 7, 1979.

actual and potencial union activists from s work force during the period from 1975 to 1978 and also by Respondent's acts and conduct during the two-month period just before the ALRU election in January 1979,as characterized by the actions and comments of Rufus Orson and Luz Escobedo regarding the UFW.

In addition to union animus, the tactics utilized from 1975 to 1978 clearly reveal that Respondent engaged in a practice, making use of surreptitious means, to rid itself of any actual or potential UFW advocates. Respondent utilized this practice from 1975 through 1978, which creates a strong inference that Respondent continued to use such surreptitions means against the UFW influence and infiltration in the succeeding, year 1979. This inference was made even stronger by Respondent's action during the course of the hearing, in discharging Justina Wichware, an employee of thirteen years service, and Victorino Olivas, an employee with four years service, based on obviously pretextual grounds. (See Part XVI and Part XVII, infra)

Union activities by certain employees and Respondent's knowledge of same is also clearly evident from the facts set forth in Section A, supra. Employees Elias Gonzalez, Maria Gonzalez, Victorino Olivas, Juana de Varela, Justina Wichware, Elvira Martinez, Pedro Rivas, Yolanda Navarro, Jose Oliveros, Miguel Pereda, and Guadalupe Ruiz were observed by Respondent's supervisors celebrating the UFW's election victory. Moreafter, thereafter at work Elias and Maria Gonzalez, Rivas, Olivas, de Varela, Martinez and Wichare all wore UFW buttons prominently displayed on their garments.

Respondent had further knowledge of Rivas' and Martinez' union sympathies, as Rivas was the UFW election observer and Martinez admitted to supervisor Luz Escobedo her union support.

The Respondent's knowledge that the twelve alleged discriminatees had utilized the ALRB's process is established by: the names of the twelve as agricultural employees on behalf of whom the charges were filed; the fact that Respondent settled one of the charges and pursuant to such settlement paid back pay to each one of the twelve.

I will now proceed to consider the allegations in respect to Respondent's alleged discriminatory treatment of its employees and refer back to these factors of Respondent's: (a) union animus; (b) practice of utilizing surreptitious means to eliminate pro-UFW employees from its work force; and (c) knowledge that certain employees engaged in union activities and also filed charges or otherwise utilized the ALRB's process.

V. Respondent demoted employee Pedro Rivas by assigning him to general nursery duties. (Paragraph 9 of fourth amended. complaint!

A. Facts

Pedro Rivas had worked for Respondent since 1975.[4/] A few months after he began to work, he was assigned the task of preparing soil mixes for the various plants. This assignment consisted of combining chemicals with peat moss and then mixing them to attain the appropriate texture for the planting of new plants.

Rivas continued with this assignment through April 30, 1979, when the soil-sterilizer machine exploded and burned his face and hands. He was off work for a week because of these injuries and when he returned to work he was not reassigned to

[4/]As has been set forth in Part IV, supra, Pedro Rivas was a UFW activist and Respondent had knowledge of this fact.

soil mixing.

Supervisors Luz Escobedo and Jack Jester, both testified that when Rivas returned he had medicinal salve on his face and hands and requested not to be reassigned to his soil-mixing duties until his face and hands were healed. He explained that the loose peat moss would irritate the tender skin of his face and hands. Jester and Escobedo complied with his request and assigned him to general nursery work. Meanwhile, Jester had assigned employee Jose Oliveros to the soil-mixing job. Oliveros had previously assisted Rivas in the soil mixing and, according to Jester and Escobedo, Oliveros was superior to Rivas in the performance of this assignment as he was faster and turned out a coarser mixture[5/] which was more appropriate for the type of plants being cultivated by Respondent. According to Jester, Rivas continued to wear salve on his face and hands for approximately two weeks. By that time, Jester had noticed that Oliveros was doing an excellent job in soil mixing and, as Rivas had not requested his old job back, Jester decided to leave the situation as it was.

B. Analysis and Conclusion

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." Section 1153(d) of the Act makes it an unfair labor practice "to discharge

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[5/]Jester and Escobedo had explained previously to Rivas that his soil was coming out too fine because of the excess spinning in the soil mixing machines but, according to them, Rivas never corrected this situation.

or otherwise discriminate against an agricultural employee because he has filed charges or given testimony under this part."

General Counsel has the obligation to prove by a preponderance of the evidence that Respondent's treatment of its employees was based on the employees' union activities and/or filing charges with or giving testimony before the ALRB. I find that General Counsel has failed to do so in respect to this allegation. There is insufficient evidence in the record to establish that Respondent's changing of Rivas' work assignment tended to discourage him from engaging, in union activities or from utilizing the ALRB process.

Rivas, himself, admitted in his testimony that he requested reassignment to general nursery duties and never protested to any of the supervisors about the fact that Jose Oliveros thereafter replaced him on the soil-mixing machine. Jester credibly testified that as Rivas did not protest and as Oliveros was better than Rivas at that assignment he decided to leave well enough alone.

Even though General Counsel has shown that Rivas was an active union supporter and that Respondent knew this, which might in other circumstances raise an inference of improper motive, (see previous discussion of employees' union activities and Respondent's knowledge of same in Part IV) Respondent has presented credible and persuasive evidence that it had a legitimate business reason to permanently replace Rivas with Oliveros on the soil-making machine.

Accordingly, I recommend that this allegation of the complaint be dismissed.

VI. Respondent demoted employee Elias Gonzalez by reassigning him from plant selector to general nursery worker.[6/]

A. Facts

Up to mid-January 1979, Elias Gonzalez had been the plant selector for the green foliage plants. His duties consisted of selecting, gathering and preparing for shipment by sleeving the plants, i.e., putting a paper covering around them to protect the leaves.

In the middle of January 1979, Respondent discontinued its green foliage line and reassigned Elias Gonzalez to general nursery duties. General Counsel argues that Respondent could have reassigned Gonzalez to the position of plant selector of the azaleas but declined to do so because of Gonzalez' support of the UFW in the recent election and because he sought to protect his rights under the Act by utilizing the ALRB's process.

Martha Aros was the plant selector of the blooming azaleas until she left the nursery in 1979 and Luz Escobedo succeeded her. Elias Gonzalez had never selected blooming azaleas but had assisted in the selecting of dormant azaleas. Jester testified that the selection of blooming azaleas requires much more expertise than does the selection of dormant azaleas. Jester also testified that the selection process for the green foliage and the blooming azaleas were different and experience gained in the selection of green foliage plants did not qualify one to select blooming azaleas.

[6/]Although this particular change of work assignment was not alleged as an unfair labor practice in the complaint it is related to the charges that Respondent changed Gonzalez' work assignment in June 1979 and it was fully litigated at the hearing. See Sunnyside Nurseries, Inc., (1977) 3 ALRB No. 42 for the authority to consider relevant unfair labor practices not alleged in a complaint but litigated at a hearing.

Although there were still some green foliage plants on Respondent's premises until April 1, 1979, Respondent's employees no longer did any work with these plants as Respondent had sold its remaining green foliage plants and the buyer and/ or his employees periodically visited the nursery to care for the plants until they eventually removed them from the nursery on or before April 1, 1979.

B. Analysis and Conclusion

General Counsel has the burden of proving by a preponderance of the evidence that Respondent's treatment of its employees was based on the employees' union activities and/or filing charges with the ALRB. I find that General Counsel has failed to do so in respect to this allegation.

The record herein does not establish that Respondent's changing of Gonzalez' work assignment tended to discourage him from engaging in union activities or from filing charges with the ALRB.

Respondent had an obvious business reason for reassigning Gonzalez to general nursery duties. Respondent had discontinued the green foliage line and consequently there were no more green foliage plants to be selected, and the position of foliage plant selector ceased to exist. General Counsel tried to show that work with the green foliage plants continued until the first of April so that the reassignment of Gonzalez was premature. However there is no evidence in the record that there were any further shipments of green foliage plants after January 18, 1979. In fact, whatever work there was to be done with the green foliage plants was performed by a buyer's employees rather than Respondent's employees,

As Martha Aros and Luz Escobedo were in charge of the blooming azalea selection and Gonzalez had no experience in that particular task, Respondent had no reason to assign him to selecting blooming azalea plants. Gonzalez' experience as a selector of green foliage plants did not qualify him for the position of plant selector of blooming azalea plants because, as Jester credibly testified, experience with one crop does not qualify one for the other.[7/]

Even though General Counsel has shown that Gonzalez was an active union supporter and that the employer knew this, which in other circumstances might raise an inference of an improper motive (see discussion in Part IV supra) Respondent has presented credible and convincing evidence that it had a legitimate business reason in reassigning Elias Gonzalez to general nursery duties.

Accordingly, I conclude that Respondent did not violate the Act by reassigning Elias Gonzalez to general nursery work and recommend dismissal of the allegation to that effect.

VII. Warning Notices to employees Elias Gonzalez and Miguel Pereda'on June 8, 1979. (paragraph 11 of fourth amended complaint)

A. Facts

Luz Escobedo and Jack Jester testified that on or about June 8, 1979, Baudelio Castaneda, an alleged supervisor, reported to them that earlier in the day he had observed Elias Gonzalez and Miguel Pereda standing at their work station talking and not working

[7/]Jester's testimony in respect to the selection of green foliage plants and azalea plants was uncontradicted.

and that fifteen minutes later he returned and found them still idle. They explained to him that a hose had broken and that Gonzalez had cut the hose to fix it and was about to go to his car to secure a pair of pliers to finish the job. Castaneda told Elias not to worry about it and Castaneda himself fixed the hose.

Castaneda explained to Jester and Escobedo that Gonzalez and Pereda had failed to report a breakdown of equipment, i.e. the broken hose, and had stood around for fifteen minutes doing nothing and that he wanted to give each one a warning notice. After a consultation among Jester, Escobedo, and Castaneda, it was decided to issue Gonzalez and Pereda a disciplinary notice, based on their violations of company rules. Jester made out the warning slips and subsequently Escobedo, Jester and Castaneda delivered them to Gonzalez and Pereda. Gonzalez testified that he refused to sign the notice because he had not remained idle for fifteen minutes. He also testified that neither Castaneda nor any other person in authority at the nursery had ever told him that he should not fix a hose. According to Gonzalez, the first time he was informed that he should not fix hoses was the following day when Jester and Escobedo delivered the disciplinary slips to him and Pereda. At that time, Jester and Escobedo told him that whenever equipment broke down he should notify a supervisor and not try to fix it himself. Gonzalez added that he had fixed hoses several times before without any reprimand from a supervisor. The evidence shows that fixing a hose is an extremely simple matter.

B. Analysis and Conclusion

In discrimination cases under both Section 1153(c) and 1153(d) of the Act, General Counsel has the obligation of proving

by a preponderance of the evidence that Respondent's treatment of its employees was based on their union activities or filing charges or otherwise utilizing the process of the ALRB.

In discrimination cases, there is often no direct evidence that the employer discriminated against employees because of union activities or utilizing ALRB process. With respect to the nexus or connection between an employee's union activity and his subsequent discharge, the Board stated in S. Kuramura, Inc., (1977) 3 ALRB No. 49, "It is rarely possible to prove this by direct evidence. Discriminatory intent when discharging an employee is 'normally supportable by the circumstances and circumstantial evidence[1] Amalgamated Clothing Workers of America, AFL-CIO v. NLRB, 302 F.2d 186, 190 (C.A.D.C. 1962)."

In respect to such circumstantial evidence, a preliminary factor in determining whether an employer treated employees in a discriminatory manner because of their union activities is the determination that the employees engaged in union activities and that the employer had knowledge of such activities.

General Counsel has proven that Elias Gonzalez and Miguel Pereda engaged in union activities and had filed charges with the ALRB and that Respondent had knowledge thereof. (see discussion Part IV, supra.)

Another factor generally taken into account in evaluating the circumstantial evidence in cases such as this is the union animus on the part of the employer. General Counsel has proven this factor and also Respondent's perennial practice of ridding himself of UFW activists by discharging them on pretextual grounds. (see discussion Part IV, supra.)

In view of these factors all pointing to a discriminatory motive on the part of the Respondent, it *is* evident that General Counsel has proven a very strong case that Respondent issued warning notices to Elias Gonzalez and Miguel Pereda because of anti-union motivation.

Respondent argues that it had a legitimate business reason in issuing the warning notices to Elias Gonzalez and Miguel Pereda because they had violated the company work rules by not reporting a breakdown in equipment and by standing around idle for fifteen minutes.

Respondent arguably had a legitimate business reason for issuing a warning notice to Elias Gonzalez and Miguel Pereda for standing idle for fifteen minutes, as Jester and Escobedo could reasonably have believed what Castaneda had told them in this respect. However Jester and Escobedo certainly had no reasonable basis for admonishing the two employees for failure to report a breakdown of equipment. I fail to see how Respondent can characterize a leaky hose as an "equipment breakdown" and one of such magnitude that the employees must notify a supervisor and wait for him to come and fix it. Any weekend gardener with a modicum of mechanical ability can fix a hose connection in a matter of minutes and I take judicial notice thereof.

Previously Elias Gonzalez had a responsible position as a plant selector, but only six months later Respondent would not permit him to fix a leaky hose. The most plausible explanation for this is that Respondent intended to harass Elias Gonzalez wit every conceivable violation of a work rule, e.g. refusal to clean the bathrooms, too many trips to the restroom (see discussion of these purported work-rule violations infra), that

it could concoct and with only one purpose: to humiliate him to the extent that he would become so disgusted with his job that he would voluntarily quit.

Accordingly, I find that Respondent did not issue warning notices to Gonzalez and Pereda for any legitimate business reason but because of their union activities and recourse to the ALRB and thereby violated Sections 1153 (c), (d), and (a) of the Act.

VIII. Respondent's assignment of Elias Gonzalez and Pedro Rivas to clean bathrooms. Warning notice to Elias Gonzalez for his refusal to accept the assignment. (paragraphs 10, 12 and 13 of fourth amended complaint)

A. Facts

In early June 1979, supervisor Luz Escobedo decided to assign men employees to the cleaning of the bathrooms at the nursery. Up to that time, she and other women employees had engaged in this task. Escobedo explained at the hearing that her reason for the change was that she did not consider it fair for the women to be the only ones to clean the bathrooms when both men and women used them.

She first asked Pedro Rivas to clean the restrooms and he complied without any comment. She gave him no explanation of the reason why she had begun assigning men to this job. A week later, Escobedo asked Elias Gonzalez to clean the packing area, the lunchroom, and the adjoining bathroom, again without explaining the reason for her new policy regarding the restrooms. Gonzalez left to do the work. A short time later, he reported back to Escobedo and told her that he would not clean the toilets in the bathroom with a brush in accordance with her instructions but would hose them down. She wrote out and handed him a disciplinary notice and then explained to him the reasons behind the new

policy whereby both men and women would clean the bathrooms.

Escobedo testified that after the reprimand to Gonzalez she decided not to continue the new policy and to revert to the original practice of assigning women to clean bathrooms. She claimed the reason was that she anticipated much resistance to this changeover from the men.

Early in her testimony she recounted how Baudelio Castaneda cleaned bathrooms, giving the impression that Castaneda had cooperated, in contrast to Gonzalez[1] protest. However later on, in answer to a question by the hearing officer, she admitted that Castaneda cleaned only the bathroom adj6ining his house, which is located on the nursery premises and that he had always done so.

B. Analysis an d Conclusion

General Counsel has alleged that Respondent discriminatorily changed the conditions of employment of Elias Gonzalez and Pedro Rivas by assigning them to clean the bathrooms because of their union activities and for having filed charges against Respondent with the ALRB. In addition, General Counsel alleges that Respondent discriminatorily issued a warning notice to Elias Gonzalez, when he refused to accept said assignment, because of his union activities and utilizing the ALRB process.

As stated before, General Counsel has already proven Respondent's union animus, its practice of utilizing pretextual methods to eliminate pro-UFW employees from the work force, and its knowledge of Elias Gonzalez' and Pedro Rivas' union activities and recourse to the ALRB. (see discussion Part *IV,* supra.) So General Counsel has presented strong circumstantial evidence to prove the above-described allegations.

Respondent argues that it had a legitimate business reason for assigning Elias Gonzalez and Pedro Rivas to this task. However, in analyzing the facts it clearly appears that this was another incident in Respondent's continuing plan to harass pro-UFW employees to the point where they would become discouraged about working for Respondent and decide to seek employment elsewhere.

In deciding to implement the "new policy" as to cleaning bathrooms, Luz Escobedo selected the two male employees with the highest seniority, Gonzalez and Rivas, both in their middle years with an obvious traditional attitude toward "woman's work" and assigned them to be the first men to clean toilets in the bathrooms. However, she offered no explanation, to either of them, of the reasons for the new policy of assigning men to this kind of work. Pedro Rivas, more compliant in nature,[8/] said nothing and performed the task. Elias Gonzalez, a more assertive individual,[9/] protested vehemently because, according to him, it was "woman's work" but nevertheless offered a compromise which was to hose down the bathrooms. Escobedo rejected the offer of compromise, but still refrained from explaining to him her reasons for having men do the work. Rather, she presented him with a disciplinary notice and then explained about the new policy.

[8/]An example of Rivas' compliant nature was his failure to protest the assignment of his old job of mixing soil to another employee.

[9/]An example of Elias Gonzalez' assertive character was his refusal to sign warning notices because he considered himself innocent.

If Escobedo were really sincere about effectively implementing this new policy, it is difficult to understand why she did not provide either Gonzalez or Rivas with an explanation right at the start. The only feasible interpretation of these facts is that she was attempting to set both of them up for an infraction of a work rule and, if they failed to comply with her order, Respondent could take advantage of their insubordination by issuing warning notices to them. Rivas complied but Gonzalez refused and, in keeping with Respondent's plan, he was handed a disciplinary notice.

Accordingly, I conclude that Respondent violated Section 1153 (c), (d), and (a) of the Act by the above-described discriminatory work assignments given to employees, Elias Gonzalez and Pedro Rivas. In addition, I conclude that Respondent violated Sections 1153 (c), (d), and (a) of the Act by issuing a Elias Gonzalez a disciplinary notice.

IX. Respondent's warning notices to Elias Gonzalez and Victor Olivas for excessive trips to the bathroom (paragraph I7B of fourth amended complaint)

A. Facts

Luz Escobedo testified that while she walked around the nursery tending to her supervisorial duties she observed that Elias Gonzalez and Victor Olivas each went to and or from the men's restromm five or six times during an eight-hour workday on Friday August 17 and twice on a four-hour workday on August 18. She added that the two were working on the pot-filling machine both days and she considered their excessive trips to the restrooms as a serious violation of work rules, as their absence from the pot-filling machine caused the machines

to stop and resulted in fewer pots being filled on those two days. However, she admitted that she made no criticism or comment to them about their trips to the restrooms or about their bad quality work during those two days. At the end of work on Saturday,she delivered a disciplinary notice to each of them for bad quality work and excessive visits to the restrooms.

Elias Gonzalez and Victor Olivas both testified that they did not remember exactly the number of trips each took to the restroom those two days but stated that it could not have been more than once or twice each day atod that each time they went they arranged for another worker to replace them so the pot-filling machine would continue to function.

Respondent went to elaborate lengths to prove the great importance of the continuous operation of the pot-filling machine and consequently that Gonzalez[1] and Olivas' excessive trips to the restroom were serious work-rule infractions since the effect was to close down the pot-filling machine repeatedly and thus diminish the overall plant production.

B. Analysis and Conclusion

General Counsel has already proven two incidents in which Respondent issued two warning notices to Elias Gonzalez to discourage him about his employment at Respondent so that he would seek employment elsewhere. This is another such incident.

Respondent contends that there was a legitimate business reason for issuing warning notices to both Elias Gonzalez and Victor Olivas. However there are some obvious discrepancies in Respondent's explanation of the alleged

business reason. If the shutting down of the pot-filling machine were such a grave occurence for the efficient operation of the nursery, why did Luz Escobedo not stop either Gonzalez or Rivas as she walked past them and inquire about any possible illness and why did she not warn them that they were going to the restrooms excessively and hampering production? As she failed to do this, there are two plausible explanations, neither of them favorable to Respondent's contentions in this matter.

The first explanation is that these two employees did not take many trips to the restrooms, as Escdbedo claims. If that is the correct version, then the fact that Escobedo contends they took more trips than they actually did clearly indicates that Respondent's asserted business reason was not authentic. The second explanation is that they did so but Luz Escobedo decided not to mention anything to them about their excessive trips because she wanted to find them in substantial violation of the work rules as a basis for issuing warning notices. Of course, Respondent's ultimate purpose was to accumulate warning notices against Elias Gonzalez and any other pro-UFW employee in order to set them up for discharge or to discourage them from continuing to work for Respondent.

As Respondent has failed to show any legitimate business reason for issuing the warning notices to Gonzalez and Olivas I find that its purpose in issuing the notices was to discourage their union activities and utilization of ALRB processes, and that by such actions Respondent has violated Sections 1153 (c), (d), and (a) of the Act.

X. Justina Wichware's loss of seniority.

A. Facts

In July 1979, employee Justina Wichware asked owner Rufus Orson for a month's vacation. He explained that she was entitled to only a three-week vacation and that that was all she would receive.

On Sunday July 22, the day before she was due to return to work after her vacation, she received *a* telephone call from Mexico and learned that her sister was gravely ill with a kidney ailment. She did not report to work the next morning because she had to travel to Compton, California, at the request of a lawyer, to sign an authorization for her daughter, who was in the custody of the state, to have a tonsilectomy.

After the end of work that same Monday, she went to Respondent's office and explained to Orson the reason for her absence that day. She also informed him of her sister's illness and requested an additional week vacation so she could visit her sister in Mexico. Orson said that was not his problem and she should report to work the next morning.

She left, took the trip to Mexico and reported for work the following Monday morning. Orson, through Luz Escobedo, acting as an interpreter, informed her that because she had not reported to work on Tuesday July 24,she had lost her seniority but she would still be able to continue to work there and at the same wages. She agreed and resumed her work duties that day.

B. Analysis and Conclusion

General Counsel contends that Respondent changed Justina Wichware's seniority because of her union activities and

utilization of ALRB process. General Counsel has demonstrated that Respondent harbored union animus and had knowledge of Wichware's pro-union sentiments (see discussion in Section IV, supra) but little else in respect to showing an improper motive on Respondent's part when it nullified Wichware's old seniority date.

On the other hand, Respondent has proven a valid business reason for its action in this respect. Respondent has shown that it does not, as a general practice, extend vacation time limits. Also it appears that Respondent did not penalize Wichware for missing work on the Monday she went to Compton but only for returning to work one week after her vacation had ended. Even though Justina had informed Orson of the reason she wanted an extra week, to visit her sick sister in Mexico, Respondent had no obligation to grant the extension because of its general policy in this respect. Moreover, Orson had reason to suspect that Justina Wichware was either exagerating about or fabricating her sister's illness since Wichware had originally requested a month and he could very well have been skeptical of her informing him of the sick sister in Mexico just on the day her three week vacation ended.

Accordingly, since General Counsel has failed to prove an improper motive on the part of the Respondent with respect to the change in Wichware's seniority I recommend that this allegation be dismissed.

XI. Warning Notice to Maria Luz Gonzalez for bad quality work. [10/]
(paragraph 17G of fourth amended complaint)

A. Facts

On August 30, 1979, in House #30 on Respondent's premises, a group of women employees which included employee Maria Gonzalez made cuttings for pointsettia plantings. Before she and other workers started, Jack Jester, Respondent's general manager, gathered them together and gave them instructions on how to make the cuttings from the pointsettia mother plants and the exact size needed. The woman employees began to make the cuttings and send them over to the house where they were being planted. A number of these cuttings were sent back to House #30 with the complaint that they were too long. Jester explained once again to the woman employees the correct size needed but after he departed Luz Escobedo suggested to them to cut them even shorter. Jack soon returned and explained that the cuttings were now too short and they should be the size of three fingers. The woman employees began to make the cuttings that size and there were no more complaints.[11/]

Supervisor Luz Escobedo testified that Maria Gonzalez was the employee who was making the cuttings the wrong size and that Jack Jester had to explain to her twice about her bad quality

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[10/]At the hearing Respondent moved for dismissal of Paragraph 17G in respect to Justina Wichware. Since there was no evidence in regard to Justina Wichware and this incident, granted Respondent's request and hereby recommend that the allegations in paragraph 17 in respect to Justina Wichware be dismissed.

[11/]I base my findings of fact in regard to the cutting instructions etc. on former employee Esperanza Lupercio's testimony. She testified in a straightforward manner, evidenced a good memory for details and her narration of events remained consistent despite extensive cross-examination by Respondent's counsel.

work, which she failed to correct, so he decided to issue her a warning notice. He instructed Escobedo to deliver the disciplinary slip to her at quitting time so not to embarrass her in front of her fellow workers. Escobedo complied with Jester's instructions and at 4:30 p.m. handed a warning notice to Maria Gonzalez and told her that Jack had complained about her bad quality work. Maria Gonzalez replied that Jack had said nothing to her when he observed her cuttings, but she accepted the notice.

B. Analysis and Conclusion

General Counsel argues that Respondent issued a disciplinary notice to Maria Luz Gonzalez not for any alleged defective work but because of her support of the UFW and utilization of ALRB processes. General Counsel has already proven Respondent's animus against the UFW, its practice of harrassing UFW adherents by means of warning notices based on pretextual grounds, and its knowledge of Maria Gonzalez' support of the UFW and utilization of ALRB process. (see discussion in Part IV.)

These factors are bolstered by the evidence that all of the employees had made the same mistake of making the cuttings first too long and then too short. It is clear that the reason for this was the conflicting instructions given by Jester and Escobedo. Accordingly, Respondent had no reasonable basis for singling out Maria Gonzalez and issuing her a disciplinary notice. The only plausible motive for Respondent's action in this regard was to continue with its tactic to harass Elias and Maria Gonzalez, husband and wife, so that the two of them would become discouraged about working at the nursery and quit voluntarily. Of course Respondent's ultimate purpose was to

retaliate against the Gonzalezes for their support of the UFW and their use of the ALRB's processes for the redress of unfair labor practices committed against them by Respondent.

Accordingly I find that Respondent has violated Sections 1153(c), (d), and (a) of the Act by issuing this disciplinary notice to Maria Gonzalez.

XII. Warning notices to Maria Gonzalez and Elvira Martinez for alleged tardiness. (paragraph 17H of the fourth amended complaint)

A. Facts

Supervisor Luz Escobedo testified that on September 30 she arrived at House #26 on Respondent's premises at 12:37 p.m. and, looking inside, noticed that none of the employees had returned from lunch. She stood outside the house talking to employee Socorro Sandoval, who was emtying trash into a trailer, for five minutes. She then heard the sound of a door swinging and again looking inside she observed Maria Gonzalez, Elvira Martinez, and Justina Wichware entering the house from the other side. She asked Sandoval the time and he informed her it was 12:45 p.m. Later that afternoon,at 4:30 p.m. at the time clock, Escobedo delivered warning notices to Gonzalez, Martinez and Wichware. Gonzalez and Martinez told Escobedo that they had not been late and had entered House #26 just as the second bell sounded and had begun to work immediately. Wichware did not testify about this event.

Both Gonzalez and Martinez testified that Justina Wichware and Lucio Corona had entered the house with them at the same time. Esperanza Lupercio testified that she saw Gonzalez and Martinez leave for work at 12:25 when the warning bell rang; they left from a house five minutes walk away from House #26.

It is noted that Luz Escobedo testified that the recipients of the disciplinary notices in 1979 at Ruline Nursery were Victorino Olivas, Miguel Pereda, Justina Wichware, Maria Gonzalez, Elias Gonzalez, Elvira Martinez, Esperanda Lupercio and Maria Aros. Only the latter two were not known pro-UFW employees.

B. Analysis and Conclusion [12/]

General Counsel contends that this is just another example of Respondent's practice to harass pro-UFW employees in general, and the Gonzalezes in particular, with warning notices based on pretextual grounds. Respondent argues that it had a legitimate business reason to issue the warning notices to Maria Gonzalez and Elvira Martinez because Escobedo based her action in so doing on clear proof that they were both late in returning to work after the noon break.

In analyzing the evidence, the one fact that stands out immediately is that Escobedo refrained from confronting the three employees at the moment of tardiness but waited until quitting time before delivering the warning notices to them and informing them they had been late in returning from lunch. Two purposes would have been served by this immediate confrontation: (1) verification of the time; and (2) proffering of any excuses the employees might have had for the alleged tardiness.

[12/]General Counsel alleged in the Complaint that Respondent had rissued warning notices to Maria Gonzalez and Justina Wichware but failed to mention Elvira Martinez. However the issuance of the warning notice to Martinez was fully litigated by the parties along with the issuance of the warning notice to Maria Gonzalez. See Sunnyside Nurseries, Inc., (1977) 3 ALRB No. 42 for the authority to consider a relevant unfair labor practice not alleged in the complaint but litigated at the hearing.

Luz Escobedo avoided the confrontation and proceeded to have the three warning notices prepared and awaiting the three employees at 4:30. It was evident from this procedure that she was not interested in any explanations from these three experienced employees who had a combined total of 22 years seniority.

General Counsel has already proven that Respondent had knowledge of the pro-UFW attitude of these three employees and that all three had used ALRB processes. He has also proven Respondent's union animus and practice of harassing pro-UFW employees so that they would become disatisfied with working conditions at the nursery and look elsewhere for employment, (see discussion Part IV, supra)

In light of these factors, along with Escobedo's unusual procedure in issuing the warning notices, I believe that even if the three employees were a few minutes late, had it not been for their known UFW propensities, Escobedo would have approached them at the time they returned to House #26 and verified the time with them and if they were actually tardy would have inquired about the reason for said tardiness. But this was not done.[13/]

Accordingly I conclude that Respondent did violate

[13/]Additional evidence which lends credence to the fact that Respondent issued warning notices to Elvira Martinez, Justina Wichware, Maria Gonzalez for pretextual reasons is the fact that all but two of the approximately fourteen of the warning notices issued in 1979 were issued to known pro-UFW employees. In 1980 Respondent issued warning notices to three employees, who were not known as pro-UFW employees, in fact one recipient was Teresa Corona a known anti-UFW employee. Respondent argues that this is proof that Respondent was evenhanded in issuing warning notices to employees. Since during the first four months of 1980 Respondent was defending itself against allegations of discriminatory issuance of warning notices in the case herein, its issuance of warning notices to non-UFW employees could very well be a calculated tactic by Respondent to create the impression it was impartial in respect to disciplinary notices and consequently has little probative value.

Sections 1153 (c), (d), and (a) of the Act in issuing warning notices to Maria Gonzalez and Elvira Martinez.[14/]

XIII. Jack Jester allegedly changed Elvira Martinez' working conditions by lowering the temperature.

A. Facts

On October 23, 1979, while at work Elvira Martinez told Luz Escobedo that she was ill with the flu and fever but continued to perform her duties. The next day she reported to work and even though she was suffering from the same illness, she never mentioned her health condition to anyone in authority. She was assigned the task of removing plants from a cooler. She testified that when she began' to work in the cooler the temperature was comfortable. She noticed that Jack Jester was near the thermostat control. Soon afterwards she noticed that both Jack Jester and Baudelio Castaneda, who had been cleaning within the cooler, had left and that the cooler was beginning to become much colder. Martinez testified that she refrained from making any complaint about their lowering the temperature because, "What could I say?" She added that Jack Jester had observed her condition and that it was obvious that she could hardly talk and had a bad cough and a high temperature.

[14/]General Counsel failed to present any evidence in respect to the warning notice issued to Justina Wichware in his casein-chief, at the end of which, at the request of Respondent, I recommended a dismissal of the allegation in reference to Justina Wichware.

Jack Jester testified that Elvira Martinez is repeatedly complaining about her health, i.e., that she always has a cough, or the flu, or a foot-ache, or some other ailment. He also testified that she unfailingly wears an abundance of clothing, a sweater, a vest, etc. He did not remember the exact incident that Martinez described. However he had the practice of having one or two employees clean out a cooler before filling it with azalea plants and when the cooler was halfway cleaned out he would then lower the thermostat which would start the cooling process.

B. Analysis and Conclusion

Although allegedly Respondent had adopted a practice designed to discourage pro-UFW employees, among whom was Elvira Martinez, from continuing employment with Respondent, there is no evidence that indicates that Jack Jester deliberately lowered the temperature in the cooler to aggravate Martinez' influenza.

General Counsel has failed to prove that Jack Jester had any knowledge of Martinez[1] health condition. It is true the day before she informed Luz Escobedo of her bad health but never mentioned it to Jack Jester. The fact that she reported to work that day would indicate to Jack Jester that she was in good health. Thereafter she proceeded to perform all her work duties despite the lower temperature in the cooler without ever complaining to anybody, including her supervisors, of the possible adverse effect on her health and without suggesting that someone else be assigned to take her place.

General Counsel's assertion that Respondent knew about her condition because it was obvious to all, is speculation. The only testimony supporting this purported knowledge was that of the alleged discriminatee herself and she just assumed that Jester knew of her condition because of her symptoms, or perhaps she thought Escobedo had told him about her comment to Escobedo the day before about suffering from the flu. In addition, Jester credibly testified that Martinez was always complaining of her health so even if he had noticed a cough or any other sympton of a cold, his natural tendency would have been to dismiss it as just another aspect of Martinez' perennial subpar health condition. He also credibly testified that he did not remember the particular incident.

It cannot be inferred from the record evidence that Jester had any knowledge of Martinez' influenza or that it was a deliberate action on his part to intimidate her by lowering the temperature of the cooler.

Accordingly I recommend that this allegation be dismissed.

XIV. 17J Respondent allegedly intimidated Elvira Martinez by telling her no insurance coverage for treatment to her knee. (paragraph 17J of fourth amended complaint)

A. Facts

On August 2, 1979, Elvira Martinez was involved in a vehicle accident on Respondent's premises. She and six other employees were riding on a cart enroute to their work site when the cart tipped over and injured three of the employees including Elvira Martinez. The other two injured employees, Justina Wichware and Maria Arias, who suffered obvious injuries,

requested to go to the emergency room at the nearby Fallbrook Hospital and were taken there by Luz Escobedo and Dana Martin respectively. Elvira Martinez suffered a slight injury to her knee but did not request any medical attention. Later on that day she requested Jack Jester to take her to see her doctor. He complied and drove her to the doctor's office which was just opposite the Fallbrook Hospital. He left her there, crossed the street and entered the Fallbrook Hospital emergency room and inquired about the other two employees' injuries and left.

Luz Escobedo informed the authorities at the hospital that the two employees Justina Wichware and Maria Arias had injured themselves at work and that Respondent's Workers' Compensation insurance would cover all of their medical expenses. She walked out of the hospital and met Elvira Martinez who informed her that she had hurt her knee in the accident but that her doctor would not attend her because she owed him some money. Escobedo made no comment to Elvira Martinez in respect to Respondent's Workers' Compensation insurance covering her injury. Escobedo then drove Elvira Martinez home.

Luz Escobedo was on maternity leave until August 13 and,upon her return to work, Elvira Martinez asked her whether she (Martinez) was covered by any medical insurance. According to Escobedo's testimony, Martinez did not mention for what illness or injury she was seeking medical coverage. Luz Escobedo informed Elivra Martinez that she was not covered by any medical insurance. A few days later Elvira Martinez asked Escobedo when she would be covered by medical insurance

and Escobedo asked her what was the reason for the inquiry. Elvira Martinez explained that her leg was hurting. Escobedo informed her that since she had hurt it on the job Respondent's Workers' Compensation insurance would cover it.

Elvira Martinez made an appointment to see her doctor that day but later the doctor's office sent word that her appointment had been postponed until a later date because the doctor wanted more time to make an extensive examination. When Luz Escobedo informed Elvira Martinez of this message, the latter criticized Escobedo for telling her before that she had no medical insurance and asserted that the reason the doctor would not see her that day was because she, Elvira Martinez, in accordance with the information supplied her by Luz Escobedo and Jack Jester, had told him she had no medical insurance. Escobedo reacted angrily and told Martinez that she should have never told the doctor that there was no insurance coverage since it is common knowledge that all employers by law must carry Workers' Compensation insurance and that Elvira Martinez by telling the doctor the opposite could get Rufus Orson into trouble. Elvira Martinez told Escobedo that she wanted the rest of the day off because her leg was bothering her and she wanted to see the doctor even though she had to pay him with her own money. Escobedo and Jester both testified that they made every effort to convince Elvira Martinez that the insurance coverage question had nothing to do with the postponement of the appointment but were unsuccessful. They gave her the rest of the day off so she could go and see the doctor.

B. Analysis and Conclusion

To establish a violation, General Counsel must prove by a preponderance of the evidence that Respondent intentionally misinformed Elvira Martinez about the Workers' Compensation insurance covering her knee injury to discourage her union activity.

The first requirement is proof that Respondent intentionally misled Elvira Martinez about medical coverage. I find that General Counsel has failed to demonstrate that Luz Escobedo or any other agent of Respondent purposely informed Elvira Martinez that her industrial injury was not covered by Respondent's Workers' Compensation insurance. There was evidently a considerable amount of misunderstanding about medical insurance coverage, principally due to the fact Elvira Martinez did not make it clear to Luz Escobedo that she was seeking medical care for an on-the-job injury. Once it had become clear to Luz Escobedo that it was the knee injury Elvira Martinez was referring to, she immediately informed her that Respondent's Workers' Compensation covered it. In fact, Luz Escobedo's anger over Elvira Martinez telling the doctor otherwise lends credence to Escobedo's sincerity in her testimony that she honestly believed Martinez was seeking medical treatment for an illness or injury which was not job-related.

The only evidence that would indicate that Escobedo intentionally misinformed Martinez about the insurance coverage information was when she met with her during the afternoon of the cart accident in front of Martinez' doctor's office and Martinez told Escobedo that her doctor would not treat her

because she owed him some money. Perhaps Escobedo should have then pointed out to Martinez that she should have told the doctor that it was an industrial injury and that he could therefore look to Respondent's Workers' Compensation insurance for payment and not to Elvira Martinez. However, I believe that Escobedo did not make this suggestion since Martinez was only slightly injured and did not insist on receiving treatment from another doctor.

Accordingly, I find that Respondent did not intentionally misinform Elvira Martinez about Workers' Compensation coverage and consequently I find no act or intention on Respondent's part to interfere with, coerce, or restrain Elvira Martinez because of her union activities or recourse to the ALRB. I, therefore, recommend that this allegation of the complaint be dismissed.

XV. Respondent's warning notice to Elvira Martinez allegedly for testifying at an ALRB hearing.(paragraph 6 of the subsequent complaint)

A. Facts

Elvira Martinez attended the ALRB hearing,, in the case herein, on Friday February 1, in response to General Counsel's subpoena. She had notified Luz Escobedo the day before that she had been subpoened to attend this hearing. As other witnesses' testimony lasted longer than anticipated, she did not testify that day.

She returned to work on Monday but did not inform anyone that she had to travel to San Diego the next day, Tuesday February 5, to testify. She attended the hearing on Tuesday and testified and on Wednesday returned to work and delivered to Jack Jester a copy of the subpoena she had received for her

appearance at the ALRB hearing commencing on February 1.

Later that day, Jester told Escobedo to give Martinez a warning notice for not having notified Respondent ahead of time about her prospective absence of February 5, and delivered the subpoena to Escobedo and told her to return it to Martinez and tell her that it had the wrong date.

At 3:30 p.m. Escobedo delivered the warning notice and the subpoena to Martinez. Escobedo told her that the reason for the warning notice was because she had failed to notify them ahead of time about her absence the previous day and commented that the subpoena had the wrong date on it.

Escobedo testified that the real reason for the warning notice was the failure of Martinez to notify Respondent rather than the "wrong date" on the subpoena and that even if Martinez had submitted a subpoena with the "right date", the warning notice would not have been retracted.[15/]

B. Analysis and Conclusion

General Counsel contends that Respondent issued a warning notice to Elvira Martinez because she testified before the ALRB. To establish a violation, General Counsel must prove this by a preponderance of the evidence and in this instance I find that he had failed to do so.

Luz Escobedo credibly testified that she and Jester decided to give Martinez the warning notice on February 6 because

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[15/]Apparently, Respondent did not know that Martinez' subpoena required her presence at the hearing on and after February 1, until she was properly excused.

she had failed to advise them Monday February 4 or her prospective absence on Tuesday, February 5.

The fact that Respondent gave Martinez as one of the reasons for the warning notice, the wrong date on the subpoena, is inconsequential. I find that Respondent added that reason to convince Martinez that there were more than sufficient grounds to issue her a warning notice and that the essential reason was Martinez' failure to notify ahead of time about her prospective absence.

Accordingly, I find that Martinez failed to give Respondent advance notice of her expected absence on February 5, the disciplinary notice was proper and not a violation of the Act. Therefore I recommend that this allegation be dismissed.

XVI. Discharge of Victor Olivas allegedly for testifying before the ALRB.

A. Facts

Employee Victorino Olivas received three warning notices simultaneously on February 8, 1980, whereupon Respondent discharged him. Respondent contends that Olivas received these notices because he was absent for three consecutive days without notifying Respondent about his prospective absence and thereby violated Respondent's work rules, which provide that three warning notices within a ninety-day period calls for an automatic discharge. Therefore, Respondent maintains, it had a legitimate business reason to discharge him.

General Counsel contends that Respondent issued the warning notices to Olivas and discharged him because of his union activity and his giving testimony at the ALRB hearing.

On February 4, 1980, at approximately 9:00 p.m., Elias Gonzalez, a fellow employee, telephoned Olivas and informed him that Octavio Aguilar, the ALRB attorney, wanted him to attend and testify at the ALRB hearing in San Diego the following day. The next morning, just before leaving his homeat approximately 6:00 a.m., Victorino Olivas attempted to reach Respondent by telephone to inform Respondent that he would not be in that day because of his required attendance at the ALRB hearing, but no one answered the telephone. He heard only a recorded message in English on the other end of the line but could not understand it because of his ignorance of English.[16/] He thereupon drove to San Diego for the hearing but was not called on to testify that day. However, during the morning Octavio Aguilar delivered to him an ALRB supboena which ordered him to appear and testify at the hearing. Olivas credibly testified at the hearing that the reason he made no more attempts to notify Respondent about his absence from work was because he thought that he only had to show his subpoena to Respondent upon his return to work in order to have his absence excused and he would then be able to resume work and not be subject to a warning notice. He testified that the reason he believed that the procedure was such was because Luz Escobedo had led him to believe so. A few days previous he had relayed a message to Luz Escobedo from Maria Gonzalez to the effect that Maria Gonzalez would be absent from work that day because she was testifying at an ALRB

[16/] The recording informed the caller to leave a message which would be recorded.

hearing. Luz Escobedo replied to Olivas that it was not necessary for employees to notify the nursery ahead of time so long as they brought in a subpoena to prove that they had been at an ALRB hearing.

Olivas was not called upon to testify on Tuesday February 5 nor on Wednesday February 6 but, complying with Octavio Aguilar's request, he remained in the building available for testifying during those two days. He did testify on Thursday February 7 and Luz Escobedo was at the hearing and observed his presence.

On Friday February 8, Olivas reported for work at 7:00 a.m. and Escobedo informed him that he had been discharged. She delivered three warning notices to him, one for each of his three days of absence, February 5, 6 and 7 and his final paycheck. She told him that he had been dismissed and that she felt sorry about it but it was a final decision. Olivas testified that he began to explain to her about his telephone call and to show her the subpoena but that she did not give him an opportunity to do so. Olivas seeing that the decision had been made commented, "it's O.K.". [17/] Escobedo admitted in her testimony that Olivas' three warning notices and final check had been made out and ready for him before he arrived at work that morning.[18/]

[17/]The inflection in Olivas' voice when he repeated "It's O.K." in his testimony at the hearing indicated his passive submission the evident fact that he had been fired and not to any agreement on his part to correctness of his dismissal.

[18/]Olivas' and Escobedo's testimony by and large coincide. However where they differ I credit Olivas' version rather than Escobedo's. Olivas appeared to be a sincere and straightforward witness while throughout the entire hearing Luz Escobedo gave the impression that she was modifying her testimony to favor Respondents' case. Some examples of these modifications are as follows: She tried to give the impression that Baudelio Castaneda had consented to clean the bathrooms while Elias Gonzalez, in (ft. 18 cont. on p. 45)

B. Analysis and Conclusion

Respondent contends that Olivas' union activities and his testimony at the ALRB hearing were in no way related to its decision to discharge him. Respondent claims it was merely enforcing its own work rules, which provided: (1) an employee must notify the employer in advance about any prospective absences; (2) an employee who receives three warning notices within a 90-day period shall be discharged. Respondent points out that since Olivas was absent for three days and failed to notify it about his absences in advance that Respondent was entitled to issue him the three warning notices and discharge him.

In the instant case, Respondent knew that Olivas had testified at the ALRB hearing since Luz Escobedo was present in the hearing room when he testified. Thus she had constructive notice of the reason for his absence on at least one of the three days. Respondent also knew about Olivas being pro-UFW and the almost certain possibility that he had voted for the UFW in the January 1979 ALRB election. This has been previously discussed in Section IV of this decision.

> In addition to the circumstantial evidence showing knowledge of Olivas' union sympathies, there is also circumstantial evidence surrounding the summary method of discharge which indicates an improper motive on the part of the Respondent. Before Olivas

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[18/] (cont.)... contrast, had protested. Later she admitted that Castaneda had always been cleaning one bathroom, the one next to his nursery residence. She testified that she could always tear up a previously made-out warning notice if the intended recipient provided an adequate excuse. Nevertheless in incident after incident of the issuing of warning notices, she did not evidence any interest in preferred explanations.

arrived for work that day Respondent had three warning notices and a check waiting for him. Escobedo testified that this was her custom and if the employee presented an adequate explanation she could easily tear up the warning notice. The only problem with this explanation is that she never gave Olivas an opportunity to provide an "adequate explanation". He attempted to inform her of his telephone call and the subpoena but she cut him off. Respondent argues that if Olivas' explanations for his failure to notify Respondent about his absences were true he would have mentioned them to Escobedo when she discharged him. However I observed Olivas on the witness stand on two occasions and he is very slow to express himself and has a passive personality so his failure to press forward with an explanation to Escobedo about the three absences is very much in keeping with his personality. His remark "It's O.K." expressed his passive submission to the discharge rather than any consent, agreement, or waiver on his part.

Escobedo's refusal to listen to Olivas' explanation about his endeavors to communicate with the nursery or to allow him to show her the subpoena clearly indicates that the decision had been made by Respondent to fire him before his arrival at work that morning. This inference is strengthened by the fact that three warning notices and the final check had already been prepared. The actions and attitude of Luz Escobedo that morning clearly indicate that Respondent's true motive in discharging Olivas was because he had testified against Respondent at the ALRB

hearing. Of course the message Respondent wanted to get across to its employees was that if they sought to gain redress of their grievances from the ALRB, Respondent would retaliate by enforcing its rules in respect to the individual employee seeking redress so that a sufficient number of warning notices would be issued with the resulting loss of employment.

Accordingly, I find that Respondent's preferred defense is pretextual and that it discharged Olivas because of his testifying before the ALRB and his union activities and thereby violated Section 1153 (c), (d), and (a) of the Act.

XVII. Two warning notices to Justina Wichware and her sub sequent discliarge

A. Facts

Justina Wichware received three warning notices in January and February 1980 and was thereupon discharged. Respondent's position is that she was fired because she received three warning notices within a 90 day period, which according to Respondent's rules, called for dismissal.

General Counsel contends that Respondent's reasons for issuing the second and third warning notices to and the eventual discharge of, Justina Wichware were because of her union activities and her testifying at the ALRB hearing.

On February 4, the evening before she testified at the ALRB hearing herein, Elias Gonzalez, a fellow employee telephoned her at approximately 6:00 or 7:00 p.m. and informed her that Octavio Aguilar, the General Counsel attorney, wanted her to attend and testify at the ALRB hearing the next day. Wichware also talked to Gonzalez' wife Maria during the same telephone conversation and asked her to inform supervisor Luz Escobedo that she would miss work the next day because she had to attend an ALRB hearing.

Before leaving for the hearing the next morning, Wichware attempted to reach Respondent by telephone at 6:00 a.m. and 6:30 a.m. but heard only a recorded message in English which she could not understand since she does not understand

the English language.[19/]

Wichware attended the hearing on February 5 and testified for the General Counsel against the Respondent. At the end of that hearing day, General Counsel Aguilar gave her a copy of a subpoena which ordered her to appear at the hearing commencing on February 5.

The next day February 6, she reported for work at the regular time 7:00 a.m. and delivered a copy of the subpoena to Luz Escobedo and informed her of having sent a message with Maria Gonzalez and the two morning telephone calls to the nursery. Escobedo made no reply to Wichware's explanation. Jester was also present but made no comment. At the hearing Escobedo testified categorically that Ms. Wichware had not sent a message or had given notice or otherwise informed Respondent that she would miss work on February 5. [20/]

[19/]Respondent presented evidence to the effect that the recorded message that Wichware heard on the telephone when she telephoned the nursery requested the caller (albeit in English) to leave a message which would be recorded. Wichware testified that she does not understand English and is not acquainted with the message recording system. Respondent tried to attack Wichware's credibility by pointing out that at a previous court hearing she had testified that "nobody had answered the telephone at Respondent's" and therefore she was being inconsistent. I find that there is no inconsistency since a "mechanical recording device" can logically be considered not to be a person.

[20/]However there is evidence in the record that substantiates Justina Wichware's testimony that she sent a message about her prospective absence through Maria Gonzalez to Respondent and also evidence that the message was delivered to Respondent on February 5, the day Justina Wichware testified at the ALRB. Luz Escobedo, when she testified about Elvira Martinez, claimed that Martinez had been absent three times to attend ALRB hearings and at the time of one of her absences February 5 she sent a message about her absence. However tne remainder of the evidence indicated and I found that Elvira Martinez was only absent twice and with respect to the second absence, which occurred on February 5, she failed to advise Respondent or send any kind of a message about her absence. The only plausible explanation is that (f.n. 20 cont. on p. 50)

At the end of the work day on February 6, Escobedo delivered a second warning notice to Wichware and informed her the reason for the warning notice was because she had not notified Respondent beforehand about missing work and the subpoena was no good because it had the incorrect date on it. Escobedo made no mention of Wichware's previous explanation about the attempted telephone calls to the nursery or having received any message from Maria Gonzalez.

On Monday February 25, Wichware received her third disciplinary notice. On the previous Friday, Baudelio Castaneda had informed her, Maria Gonzalez, Elvira Martinez and an unidentified fourth employee that they would have to work the next day, Saturday.[21/] Wichware replied that she would be unable to work Saturday since she was going to visit her daughter in Los Angeles.[22/]

(Footnote 20/ continued)
Justina Wichware sent the message via Maria Gonzalez who delivered it to Respondent on February 5 and Escobedo remembering back became confused and thought it had been Elvira Martinez who had sent the message rather than Justina Wichware.

[21/] Escobedo testified that Baudelio Castaneda had reported to her that Wichware had commented to her fellow workers as he turned away from them, "no way am I going to work on Saturday". Respondent never called Castaneda to testify and Escobedo never mentioned his version of Wichware's comment about not working Saturday to Wichware when the latter explained to Escobedo the reason why she missed work on Saturday. So I discredit Escobedo's testimony about what she claimed Castaneda said to her about Wichware's comment regarding Saturday work. Respondent in its post-hearing brief attempted to discredit Wichware's testimony with respect to her comment when Castaneda informed her and her fellow workers about Saturday work by claiming that she had not refered to the nature of her comment in her direct testimony. A review of the transcript indicates that Wichware mentioned her comment to Castaneda about visiting her daughter on Saturday not once but three times in her direct testimony during Respondent's case-in-chief.

[22/]Wichware has a young daughter who has health problems and has been institutionalized as a ward of the State of California. (Footnote 227 cont. on next page)

Wichware did not work on that Saturday. The next Monday she reported to work and Jack Jester informed her that she had been ordered to come to work on the previous Saturday and that she had failed to do so. Wichware informed him that she had visited her daughter in Los Angeles and had so informed Baudelio on the previous Friday when he had talked to her and her fellow employees about the Saturday work. She added that Orson had given her permission not to work on the Saturdays when she visited her daughter.[23/] Jester said that that was not his concern

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[22/](cont.)...Aproximately two years previously a social worker visited the nursery and explained the situation to Rufus Orson. Orson informed Raul Vega the general manager at the time, that Wichware could visit her daughter on Saturdays. Since that time Wichware has had the practice of visiting her daughter on the average of every other Saturday. When Jack Jester took over the management of the nursery and the new rules were read to the assembled employees, Wichware mentioned Saturdays and her visits to her daughter and Orson said she was correct and in effect said that her having Saturdays off to visit her daughter would be an exception to the rules.

[23/]Respondent stated in its post-hearing brief that Wichware's testimony was contradictory and inconsistent in that she testified that a policy had developed at Respondent's which excused her from giving prior notice of her intent to miss work on Saturdays and then later admitted that" she was fully aware of Respondent's policy requiring prior notice and that she always complied with it. The record clearly shows that Wichware never testified that a policy had developed at Respondent's which excused her from giving prior notice about her Saturday absences. Her actual testimony (on direct examination) was that a policy had developed at Respondent's whereby she had permission from Rufus Orson to visit her daughter on Saturdays and then on cross-examination she added that she had always given prior notice of the particular Saturday she would be visiting her daughter. So the effect of her testimony was that she gave prior notice not as a request for permission but just to let them know that they should not count on her reporting to work on a particular Saturday.

and Escobedo said that she and Jester did not know anything about that. Escobedo delivered the final check and the third warning notice to Wichware and informed her that she had been discharged.

B. Analysis and Conclusion

Justina Wichware had worked 13 years for the Respondent. As has previously been explained, she had lost her seniority because of her taking an extra week of vacation in July 1979, but Respondent had permitted her to return to work and had not lowered her rate of pay. She continued to work steadily at the nursery despite her lowered seniority. She continued to take Saturdays off without any objection from Rufus Orson in order to visit her daughter, even after Respondent learned of her pro-UFW feelings in January 1979 at the time of the election when she began to wear a UFW button daily and appeared to be one of the 14 who voted in favor of the UFW.

Then she testified at the ALRB hearing on February 5, 1980 and soon afterwards received two warning notices which resulted in her discharge. General Counsel contends Respondent issued the two warning notices to her because of her union activities and her testifying against Respondent at an ALRB hearing. Respondent contends it had a legitimate business reason to discharge Wichware because she had received three warning notices during a 90-day period and each time it was for violating a company rule which requires an employee to give advance notice to the employer of anticipated absences.

Since there is usually no direct evidence of an employer's unlawful motive in a discriminatory discharge case, the General Counsel must often utilize circumstantial evidence from which a motive may often be inferred.

In the instant case there is no question that Respondent had knowledge of Wichware's union activities and her testifying before the Board. Respondent's timing in discharging Wichware's definitely points to a connection between her discharge and her testimony before the Board since her last two disciplinary notices and her discharge all occurred within a period of three weeks after she testified. In light of these elements General Counsel has presented a prima facie case.

According to ALRB precedent, Respondent has the burden to refute the prima facie case and present convincing evidence that it was solely motivated by a legitimate business reason in its actions. I find that Respondent has failed to meet this burden.

In evaluating Respondent's explanation for the disciplinary notices and discharge, it must be kept in mind that Wichware, had worked for Respondent for a period of 13 years and was Respondent's most senior employee. During this long period of time, Rufus Orson and Justina Wichware had developed a special employer-employee relationship so that Wichware would talk to Orson directly about an personnel matters concerning herself. That is exactly what occured when she asked for an extra week of vacation, was denied it,

still took it, and lost her seniority because of it.[24/] So taking into consideration her long period of employment with Respondent plus her special relationship with him, it would be assumed that any discharge of Wichware would normally require a serious infraction of the work rules by her and the intervention of Rufus Orson in the decision-making process in reference to the discharge.

The day after Wichware testified at the ALRB hearing, she reported to work, delivered her subpoena to Escobedo and explained to her that she had sent a message to Respondent via Maria Gonzalez about her absence and had tried to communicate by telephone. Escobedo made no comment to her about her explanation nor did Jester who was also present. Later that day, at quitting time, Escobedo delivered the warning notice to her and informed her the reasons for the notice were her failure to notify Respondent ahead of time and the fact that the subpoena had the wrong date.

It appears that neither Jester or Escobedo was interested in Wichware's explanations. Escobedo never told her whether or not Maria Gonzalez had given her the message. Escobedo's lack of comment in this respect is significant since there is evidence in the record (see footnote 20 supra) that Maria Gonzalez relayed Wichware's message to Respondent. The fact that both Jester and Escobedo gave no consideration whatsoever to Wichware's explanations of having being informed the night before of her obligation to appear at an ALRB hearing

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[24/]Luz Escobedo also confirmed this special relationship in her testimony.

and having made three attempts to advise Respondent of her anticipated absence indicates that they were without the understanding and resonableness that would normally be accorded an employee with 13 years of seniority.

The clear inference is that Respondent was delighted to be in a position to claim that Wichware had violated the rule about advance notice of expected absences and was not interested in any explanations by Wichware that might exonerate her or mitigate such violation. Respondent was sending, loudly and clearly, a message to its employees that if they dared to testify against Respondent at an ALRB hearing, they would be found guilty of violating some company rules on the basis of any convenient technicality and that management would no longer be reasonable and understanding in respect to any of their explanations.

Just two weeks later, Wichware once again encountered this lack of understanding and reasonableness that would normally be accorded a longtime employee when she decided to visit her daughter on Saturday rather than report for work. In fact, Respondent had her third warning notice and final paycheck already prepared[25/] for Wichware without the formality of listening to any of her explanations. Once again, Wichware preferred her explanations and once again they were rejected not with any

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[25/]Witness Escobedo blithely but unconvincingly testified that Tf" an employee had a valid reason there would be no problem because she could easily tear up the notice. The only problem with this explanation in this case is that neither Jester nor Escobedo permitted Wichware to explain her valid excuse.

counter explanation about Orson's policy of not requiring her to work on Saturdays. Neither Jester nor Luz Escobedo informed Wichware about what Baudelio Castaneda had reported to Escobedo so that Wichware never had the opportunity to reply to Castaneda's version.

It is indeed ironic that Justina Wichware's 13 years of service would be terminated by Respondent because she exercised the privilege granted to her by Respondent's owner, a privilege of visiting her daughter which she had been exercising for two years without any protest from management. It is clear that Respondent, in its haste to rid itself *'of* this pro-union employee, who had dared to testify against Respondent at an ALRB hearing, seized upon her exercise of this long-standing privilege and built it up to such a grave infraction of the work rules that it became the proximate, and pretextual cause for her discharge.

It is obvious that Wichware was discharged not because she exercised her privilege about visiting her daughter on Saturday but because she testified against Respondent at an ALRB hearing. In other words, "but for" her testimony at the ALRB, she would not have received a warning notice for missing work on the day she testified nor the final warning notice for missing work on the Saturday she visited her daughter.

Accordingly, I conclude that Respondent violated Section 1153 Cd) and (a) of the Act by issuing these two disciplinary notices to Justina Wichware and by subsequently discharging her on February 25, 1980.

XVI11. Respondent allegedly carried out layoffs and recalls in a discriminatory manner (paragraphs ~15, 16, 17, 17'c, 17D, 17E, and 17F_ of fourth amended complaint)

A. Facts

On June 30, 1979, Respondent laid off all its employees[26/] except Socorro Sandoval, Lucio Corona, Baudelio Castaneda and Kenny Church. The reason for the layoff, according to Respondent, was that the azalea propagation-and-pinching season had come to an end and there would be no more work until the propagation of the poinsettias would begin four weeks later.

Employees Teresa Corona and Rebecca Ponce continued to work watering plants at Respondent's but on an intermittent basis. Respondent explained that periodic watering of the plants was necessary and that was the regular assignment of Corona and Ponce. Both of them lived at the ranch, Teresa Corona with her husband Lucio Corona, and Rebecca Ponce with her husband, Baudelio Castaneda, and therefore it was more convenient for Respondent to notify them of the days they were needed to work since the requirements of the azalea watering occurred on a day-by-day basis and thus Respondent had a minimum amount of time to notify the workers.

Two undocumented workers, Saul Castaneira and Tiofilo Castaneira, who had worked at Respondent's nursery since April, 1979

[26/]The laid-off employees included Elias Gonzalez, Maria Gonzalez, Elvira Martinez, Pedro Rivas, Juana de Varela, Justina Wichware, Victorino Olivas, Guadalupe Ruiz, Maria Cortes, Yolanda Navarro, Miguel Pereda and Jose Oliveros, all of whom General Counsel alleges were laid off because of their union activities and utilization of ALRB process.

did not continue to work at the nursery after June 30[27/] but began to engage in landscape work at Respondent's residence. Neither of them were paid with Ruline Nursery checks, as were the regular nursery employees, but with cash out of a special cash account of Respondent's because, according to Orson, they would have had difficulty cashing checks because of a lack of indentification cards.

Kenny Church is a university student who is majoring in horticulture and has worked at Respondent's Nursery during vacations and weekends since 1975. He has a thorough knowledge of all the details of Respondent's nursery operations and performs a variety of tasks. Orson testified that he considers Kenny Church as a son.

Respondent contends that Soccoro Sandoval, Lucio Corona,and Baudelio Castaneda are supervisors and that they were so found in a previous representation case (6 ALRB No. 33) before the ALRB. General Counsel disagrees and maintains that these three individuals are not supervisors, that the Board's conclusion, in a prior representation case that they were supervisors is not binding in this case and that Respondent discriminated against pro-UFW employees who had higher seniority than these three persons when it carried out the general layoff of June 30, 1979.

[27/]The only time Saul and Tiofilo Casteneira worked again at the nursery was from August 1st to August 10th when all the seniority employees had been recalled to work and Respondent needed more workers for the poinsettia propagation.

Soccoro Sandoval is the general handyman at the nursery and performs all of Respondent's carpentry, mechanical work, and general repair work. Sometimes he works alone and sometimes works with the assistance of general nursery employees in carrying out his assignments. He also engages in general nursery work at times.

Lucio Corona is in charge of all the work at Respondent's avocado grove. As Rufus testified, "Lucio Corona came with the avocado grove" in 1974 when Respondent acquired it. Orson and Corona collaborate in deciding when and how the avocado harvest should be carried out. The only time he is not in charge of the grove is when Orson sells the crop to a buyer who harvests the crop himself. Most of the time Corona works alone at the grove but there are times when he has the assistance of general nursery employees in carrying out his assignments. When there is no work at the grove, Corona performs general nursery work at the nursery.

Baudelio Castaneda is in charge of the azalea production and engages in the watering, fertilizing, fumigating, etc. of the azalea plants. At times he does this work alone but most of the time he is assisted by general nursery employees. When there is no work to do with the azaleas, Castaneda does general nursery work.

All three of these employees reside in housing at Respondent's nursery.

Respondent has a policy of sending out recall letters

to employees according to seniority. [28/] If five days after recall an employee has failed to report to work, Respondent sends recall letters to additional workers, once again according to seniority, until the requisite number of workers have been employed.

On July 17, 1979, Respondent, as it planned to commence the poinsettia propagation within a week, sent recall letters to Justina Wichware, Maria Gonzalez, Teresa Corona, Juana de Varela, Rebecca Ponce, Maria Cortez and Yolanda Navarro. In doing this, Respondent followed the order of seniority except that it passed over two male employees with a higher seniority namely Elias Gonzalez and Pedro Rivas. Orson explained that he considered male employees, with bigger hands and less manual dexterity, less capable of doing the delicate work of poinsettia propagation than women. Orson testified that in all the years he had raised poinsettia plants at the nursery he had never used male employees for such a task.

On July 23, Maria Gonzalez returned to work at Respondent's nursery and Teresa Corona and Rebecca Ponce resumed

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[28/]The Respondent's seniority list as of June 30, 1979 was as follows: Justina Wichware 4-17-67, Maria Luz Gonzalez 1-29-73, Elias Gonzalez 2-9-73, Teresa Corona 1-24-74, Socorro Sandoval 9-9-74, Lucio Corona 10-11-74, Juana de Varela 3-25-75, Pedro Rivas 9-22-75, Rebecca Ponce 10-1-75, Maria Cortes 10-5-75, Yolanda Navarro 10-6-75, Luz Elva Euyoque 11-1-75, Baudelio Castanada 11-15-75, Victorino Olivas 12-4-75, Miguel Pereda 1-12-76, Augustin Madrid 2-26-76, Guadalupe Ruiz 3-3-76, Elvira Martinez 3-23-76, Alberto Rivas 7-10-76, Jose Oliveros 4-24-78.

their full-time work on the same day. Juana de Varela, Yolanda Navarro and Maria Cortes reported back for work, pursuant to their recall notices, but each one decided not to resume work when they were informed of Respondent's new policy of temporary work only. Justina Wichware came into the nursery also on June 23 to explain why she would not return for another week. The details of her return to work are discussed elsewhere in this decision.

On July 23, Respondent sent recall letters in order of seniority to Luz Elva Euyoque, Fortunata Guadarama, Guadalupe Ruiz, Elvira Martinez, Guadalupe Camarena, Leticia Velesquez, Maria Arias, Aracel Placencia, Rosa Ortiz and Esperanza Lapercio.

Elvira Martinez, Maria Arias and Esperanza Lapercio reported to work within the five days but the remaining employees failed to do so. The letters sent to Euyoque and Valesquez were returned to Respondent by the post office marked undeliverable.

In a settlement agreement entered into by Respondent on June 7, 1979, Respondent agreed to offer Luz Elva Euyoque the first available job to which she was entitled according to her qualifications and seniority. The offer was to be sent by telegram or certified mail.

On July 23, 1979 Respondent sent a certified letter of recall to 1222 Alturas Road, Fallbrook, rather than to 519 Ammunition Road, its last listed address for Euyoque. The post office returned the letter to the nursery marked "unclaimed". Orson testified that Respondent failed to resend the letter to the Ammunition Road address. Orson also testified that even though

Respondent had a telephone number listed for Euyoque no one at the nursery ever attempted to reach Euyoque by telephone regarding the recall to work.

On July 25,recall letters were sent out in order of seniority to the male employees for the first time. Respondent mailed them to Elias Gonzalez, Pedro Rivas, Carmen Ramirez, Victorino Olivas, Miguel Pereda, and Francisco Serrato. Elias Gonzalez, Pedro Rivas, and Victorino Olivas responded to their recall letters and reported to work. Neither Miguel Pereda nor Francisco Serrato responded to the recall letter. Carmen Ramirez decided not to return to work at Respondent's when Orson informed him he could only offer temporary work.

Upon their return to work, the male employees performed general work but did not participate in the actual cutting and planting of the poinsettias.

Following the order of seniority,[29/] Respondent sent recall letters on July 30, 1979 to Alberto Rivas and Jose Oliveros but they never responded. On August 6, Respondent sent a recall letter to Agustin Madrid and he reported to work within the five day period.[30/]

[29/]Agustin Madrid had been laid off in December 1978 and Respondent had consented in the settlement of an unfair labor practice charge to rehire Madrid at the first opening for which he was qualified so Madrid had not worked for Respondent until he reported to work in response to the August 6 recall letter.

[30/]Agustin Madrid had more seniority than Francisco Serrato, Alberto Rivas and Jose Oliveros so his being sent the recall letter on August 6th is the only exception to recall letters being sent by seniority except for the differentation between men and women employees. Rufus Orson testified that he sent the recall letter to Madrid at that late date because he thought he had secured employment elsewhere.

On August 25 Respondent laid off Elias Gonzalez, Pedro Rivas, Victorino Olivas, and Agustin Madrid. Subsequent *to* August 25, Respondent continued to employ women employees with less seniority than the four above-mentioned laid-off male employees, i.e., Teresa Corona who had less seniority than Elias Gonzalez; Rebecca Ponce who had less seniority than Elias Gonzalez and Pedro Rivas/ Elvira Martinez, Marta Arias, Esperanza Lupercio, Magdalena Garcia, Teresa Correa, Maria Calderon, Maria Marcusson, Laurie Work, and Keelie Janikowski, all of whom had less seniority than Gonzalez, Rivas, Victorino Olivas, and Agustin Madrid.

Respondent argues that the reason he made the differentation between the men and women employees was that he never used men to do the preparation and the planting of the poinsettia cuttings, because he did not consider them apt for such work because of larger hands and fingers.

A diary kept by Elias and Maria Gonzalez shows that on Monday, August 27,three women employees worked moving plants and on Tuesday, August 28,three women employees and three men employees Lucio Corona, Baudelio Castaneda, and Soccoro Sandoval, worked moving plants.

B. Analysis and Conclusion

General Counsel has based his allegations of illegal layoffs and recalls on two theories: One is that Respondent's underlying purpose in changing over from permanent to temporary employees and initiating a series of layoffs and recalls was to discourage the pro-UFW employees from engaging in union activities or utilizing the protections of the ALRB and, secondly, Respondent carried out the layoffs and recalls in a discriminatory manner in order to induce the employees to quit. I will first consider the allegations based on his latter theory of a discriminatory implementation of the layoff and hiring practices and then in Part XIX I will decide what Respondent's underlying purpose was in this respect.

On June 30, 1979, Respondent laid off his entire work force except supervisors Jack Jester and Luz Escobedo and his "core" employees Socorro Sandoval, Baudelio Castaneda, and Lucio Corona, and the college student Ken Church.

General Counsel contends that Respondent did not follow his seniority system in this layoff since Justina Wichware, Maria Luz Gonzalez, and Elias Gonzalez had more seniority than any of the three "core" employees or Ken Church, that Juana de Varela, Pedro Rivas, Maria Cortez, Yolanda Navarro, Carmen Ramirez, and Luz Elva Euyoque had more seniority that Baudelio Castaneda or Ken Church and the reason for the out-of-seniority layoffs was because the laid-off employees were union adherents.

Respondent maintains that Sandoval, Castaneda, and Corona are supervisors, having been so found in a previous representation case decided by the Board and therefore their

retention in place of less senior workers was not unlawful.

However there is no need to decide whether these three employees have supervisorial status, since each had a special assignment at Respondent's nursery on a continuing basis and it is evident that Respondent had a legitimate business reason to keep them on apart from their possible status as supervisors.

Each one has a particular speciality that he has engaged in for a period of years at Respondent's. Sandoval is in charge of all carpentry, mechanical and repair work at the nursery, Corona is in charge of the avocado grove, and Castaneda is in charge of the azaleas. They direct other employees from time to time in carrying out tasks involved in their specialties and, despite the fact that they do perform general nursery work at times, their special treatment by Respondent in respect to the layoff can be clearly ascribed to their ability and expertise in carrying out the duties of their respective specialties.

Saul Casteneria and Tiofilo Castenria no longer continued to work at the nursery but switched over to landscape work at Rufus Orson's residence. Even though they were paid out of the nursery account I consider them Rufus Orson's personal employees and therefore they cannot be taken into account in respect to the alleged discriminatory layoff.

General Counsel also contends that Ken Church is a rank-and-file employee and should have been included in the layoff. However Ken Church also falls into a separate category since he was a university student who had a special work relationship with Respondent; he worked only during vacations

and on week-ends and was there not only to help out in a variety of tasks but also to learn the nursery business. Because of this special relationship, Rufus Orson did not lay off Church but kept him working after June 30th. Therefore, I find that Respondent by keeping Ken Church in its employ after June 30th did not discriminate against the laid off pro-UFW employees.

Accordingly, I find that Respondent did not implement his layoff of employees on June 30, in a discriminatory manner.

On July 7, 1979, Respondent failed to recall Elias Gonzalez, Justina Wichware, Pedro Rivas, and Maria Gonzalez but rather recalled Teresa Corona and Rebecca Pohce, two employees with less seniority.

General Counsel contends the reason for Respondent's actions in this respect was to discourage union activities by its employees since Elias Gonzalez, Justina Wichware, Pedro Rivas, and Maria Gonzalez were UFW adherents and Teresa Corona and Rebecca Ponce were not.

Respondent maintains that Corona and Ponce were put to work at the nursery or more senior employees were recalled because the plants had to be watered on an intermittent rather than on a daily basis. Respondent did not know from day to day when the plants would need water and, since both Teresa Corona and Rebecca Ponce lived at the nursery, it was easier to notify them to water the plants on a certain day rather than to go through the procedure of recalling a seniority worker for one or two days of watering plants. Respondent's subpoened records indicate that, between July 1 and July 23 when some seniority employees

were recalled, Corona worked 12 of 21 work days and Ponce 14 of 21 which substantiates the intermittent characteristic of this particular work.

I find Respondent's business justification credible and therefore conclude that Respondent did not discriminate against the four seniority employees when he failed to recall them in July 7 and therefore I recommend that the allegation be dismissed.

General Counsel has alleged in the Complaint that Respondent failed and refused to recall Agustin Madrid and Luz Elva Euyoque because of their union activities and for having filed unfair labor practice charges with the/ALRB. However, Respondent passed over Madrid in the seniority list to send recall letters to Francisco Serrato, Alberto Rivas and Jose Oliveros, known UFW sympathizers and/or utilizers of the ALRB processes, so it is difficult to infer a discriminatory motive on the part of Respondent. In addition, Rufus Orson testified that the reason he delayed twelve days in sending out the recall letter to Madrid was because he had heard that Madrid had secured steady employment elsewhere. Accordingly, I find that General Counsel has failed to prove by a preponderance *of* the evidence that Respondent failed or refused to recall Agustin Madrid because of his union activity or recourse to the ALRB and recommend that this allegation be dismissed.

General Counsel contends that Respondent had an obligation, under an ALRB settlement agreement, to recall Luz Elva Euyoque for the first available job she was qualified for in accordance with her abilities and seniority. Respondent

complied with this obligation in respect to the date it sent out the letter but not in its follow-up to locate Euyoque so as to make the job-offer effective. Respondent failed to send the certified letter of recall to the last listed address in its records but sent it to another address. When the Post Office returned the letter marked "unclaimed", Respondent failed to re-send the letter to the last listed address. Rufus Orson testified that the nursery had a telephone number for Euyoque but admitted that he did not call it up in an attempt to locate her.

Euyoque was named as an alleged discriminatee in ALRB Charge Number 78-CE-50-X, a copy of which was served on Respondent in December 1978 (see discussion in Part IV) Euyoque was also a beneficiary of the settlement agreement disposing of said charge. Consequently Respondent had knowledge that she had utilized the ALRB process.

Taking into consideration Respondent's knowledge of Euyoque's recourse to the ALRB and its perfunctory attempts to notify her that there was a job opening for her, it becomes evident that Respondent discriminated against her because of her utilization of the ALRB process. Accordingly, I conclude that Respondent violated Section 1153(d) and (a) of the Act thereby.

General Counsel has alleged, in the complaint, that Respondent failed and refused to recall Alberto Rivas because of his union activity and having filed charges with the ALRB. However, as Respondent, in following the order of seniority, sent Rivas a recall notice by certified mail, return receipt requested,

on July 30, to which Rivas never responded, I find that Respondent made an adequate and timely attempt to recall Rivas and therefore recommend that the allegation, designated Paragraph 17(c) of the Complaint, be dismissed.

On August 25, Respondent laid off Elias Gonzalez, Victor Olivas, Pedro Rivas, and Agustin Madrid while it retained women employees with less seniority. General Counsel contends Respondent's reason for doing this was because these four men were union adherents. Respondent maintains that the only work that remained to be done was the preparation and the planting of the poinsettia cuttings and that only women employees were capable of such delicate manual work and therefore they were retained while the men laid off.

However, there is no evidence in the record to establish that the only work available at that time was the preparation and planting of poinsettia cuttings. In fact Elias and Maria Gonzalez' diary indicates that on August 27 and 28,the two work days immediately following the lay-off, both men and women employees engaged in the work of moving plants.[31/]

[31/]Respondent argues in its post-hearing brief that Elias and Maria Gonzalez' diary was not reliable evidence because four pages had been torn out and were unaccounted for. It is true that four pages had been torn out of the diary but at the hearing I ordered General Counsel to locate the four pages and turn them over to Respondent's attorneys for their review. He complied with my order. On the record I asked Respondent's attorney Thomas Giovacchini whether he had had an opportunity to review the four pages and he answered in the affirmative.

Consequently I find that there was work available for the four men employees, Gonzalez, Rivas, Olivas, and Madrid.

I have previously mentioned in Part IV that General Counsel has proven Respondent's union animus and knowledge of these four employees' union activities and their recourse to the ALRB. In addition, General Counsel has demonstrated that Respondent did not follow the seniority order in laying off these four employees. Consequently General Counsel has proven a prima facie case which Respondent has failed to offset by any proof of a legitimate business reason. Accordingly, I conclude that Respondent violated Sections 1153 (c), (d), and (a) of the Act by its layoff of Elias Gonzalez, Victor Oliveros, Pedro Rivas and Agustin Madrid on August 25, 1979.

Respondent laid off Elvira Martinez on September 7 and 15 after short recalls and laid off Justina Wichware on September 6 and 15 after short recalls (see allegations in Complaint paragraphs 17(e) and (f).)

General Counsel contends Respondent did this because of their union activities and for having filed unfair labor practices against Respondent. Respondent claims it laid off and recalled employees because it no longer had year-round permanent work for its rank-and-file employees but only seasonal work which called for frequent layoffs and recalls. On the basis of the record evidence, I find that the layoffs and recalls of these two employees in September were carried out in a non-discriminatory manner and that Respondent did follow the order of seniority. Accordingly, I recommend that these allegations in the complaint

be dismissed.

XIX. Respondent's alleged improper motive in changing from permanent employees to temporary ones. (Paragraphs 14 and 15 of fourth amended complaint)

A. Facts

In the period from 1970 to 1973 Respondent gradually increased its azalea production so that by 1973 it raised 200,000 azalea plants. Azaleas comprised 90% of its production during this three-year period during which it employed a steady work force of fifteen employees which increased to twenty by 1973.

In 1973, Respondent began the production of green foilage plants which reached its peak in 1977. Thereafter, the green foliage plants production began to decline until Respondent eliminated the line all together at the end of 1978. In 1976, Respondent began to raise poinsettias, gradually increasing its production thereof until in the year 1978 it raised 150,000 poinsettias plants.

From 1970 through 1977, Respondent never laid off any employees as it provided year-round employment to permanent employees. In 1978 in addition to its green foliage and poinsettia production Respondent raised 250,000 azaleas.

Respondent had its first layoff in March 1978 but it was not because of any fluctuations in its work-force needs but in response to an efficiency study and recommendation by nursery consultant Glenn Stoller. Respondent employed 35 permanent employees throughout 1978.

In October 1978, California Camellia Co. notified

Respondent that after April 1979 it would no longer provide baby azalea plants. Respondent also noticed that it was losing money with its green foliage line. Because of these two factors, Respondent in November decided to cease its green foliage production completely and take up the slack by beginning to propagate its own azaleas and to increase its azalea production from 240,000 to 350,000 per year. Since green foliage production is labor-intensive, Respondent laid off a number of employees at the end of December 1979 when it closed out its green foliage line.

In testifying, Rufus Orson tried to give the impression that it was at this time, just after discontinuing the green foliage line, that he decided to change over from a policy of permanent employees to that of temporary ones. He testified that since his principal crops, azaleas and poinsettias,[32/] would require a fluctuating work force, he had decided to no longer provide permanent work except to supervisors Jester and Escobedo and the three core employees, Baudelio Castaneda, Lucio Corona, and Soccoro Sandoval and they would all be on a salary basis. He added that the rest of the employees would be on a temporary basis. To a query by the Administrative Law Officer of when they became salaried employees, he answered that Jester and Corona had always been on a salaried basis and that Escobedo, Sandoval and Castaneda had been put on a salary basis "over a year ago" (Orson testified to this on March 10, 1979). However

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[32/]Respondent raised a small number of other plant varities such as cinereria, hydrangeas, cyclamen and calediums. These minor flow crops made up 10% of Respondents' total plant production.

on cross-examination, after being shown payroll records that indicated the exact dates of Sandoval's and Castaneda's changeover from hourly wages to salaries, he admitted that they went over to a salary basis on July 2, 1979. In fact the payroll records indicate that Luz Escobedo was still on an hourly wage schedule as late as June 24, 1979.

Despite Respondent's argument in the post-hearing brief that Orson had decided the changeover to permanent employees because of and shortly after the discontinuance of the green foliage line, Respondent continued up to June 30, 1979 to keep most of the alleged twelve discriminatees working full time and provided sufficient full-time work to the remainder so that none of them quit to seek employment elsewhere.

Between October 1978 and April 1979, Respondent received 250,000 baby azaleas from California Camelia Co. which it would sell during the winter 1979 - spring 1980 season. In April, May and June Respondent propagated between 1,000,000 and 1,200,000 azaleas.[33/] The largest volume of cuttings were taken in April when Respondent increased its work force to eighty employees. I take

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[33/]The findings of fact in Ruline Nursery (1980) 6 ALRB No. 3 indicate that Respondent propagated 1,000,000 azalea plants in the spring of 1979. Besides, Respondent planned to increase its azalea production to 350,000 plants per year to compensate for the termination of its green foliage line. As three baby azalea plants are needed to form one six inch plant ready for sale, up to 1,200,000 azalea cuttings were required.

administrative notice of the findings of fact in Ruline Nursery (1980) 6 ALRB No. 3 which indicate that Respondent engaged in a crash program for one week in April 1979 to take a maximum of cuttings, as the "cuttings had to be taken from the mother plants at a critical period in the growing cycle, or when the 'wood' was 'ripe' occuring for a few weeks in the spring."

On June 30, Respondent laid off all of its current employees (23 in number) with the exception of its three core employees. This was the first time Respondent had laid off all (with the exception of the three core employees) of its seniority employees. Nevertheless Respondent gave no explanation to the employees of the reasons for this unprecedented action or of the prospects for future employment. Of course the immediate cause was evident to the employees, the azalea propagation season had come to an end.

A week after the June 30 layoff, Elias Gonzalez and Pedro Rivas returned to the nursery premises accompanied by Guadalupe Ruiz, Juana de Varela, and perhaps Miguel Pereda and Victorino Olivas. Gonzalez and Rivas conversed with Orson regarding future employment and layoffs. Orson replied that he did not have much work and could provide them with only temporary work in the future. He concluded that when he did have work for them he would notify them by mail.

At the hearing, Orson testified that Respondent's employees performed far more man-hours of work with the

poinsettias in 1979 than 1978 and went on to say, "Well we had a whole program. We had...mother stock, starting in April, the care of it all the way through; plus we had to take all the cuttings. And we did not do this the prior year."

As has previously been set forth, there was very little work at Respondent's in July but at the beginning of August, with the poinsettia propagation, work picked up to such an extent that more than fifteen employees worked until September 2, 1979. As has been discussed in Part XVIII supra, Respondent in the latter part of July sent out recall notices according to seniority, with a few exceptions. A number of employees replied but when Respondent informed them that it was offering only temporary employment they decided not to return to work at the nursery. Juana de Varela testified that she accompanied Elias Gonzalez and Pedro Rivas when they returned to the nursery to ask about future employment. When she learned that only temporary employment would be available, she sought permanent employment elsewhere. So upon receiving the recall letter she notified Respondent about her new job and her decision not to return to work at Respondent's. Yolanda Navarro came into the nursery on July 21 and stated that she would not return to work as she had obtained a full-time factory job. Maria Cortes reported to work on July 23 but when Orson informed her it was only temporary work she became very unhappy and quit because she wanted full-time employment. Respondent laid off male employees, including Elias Gonzalez, Pedro Rivas, Agustin Madrid, on August 25, because, according to Orson, they were not capable of

doing the delicate work of making poinsettia cuttings. After being laid off this last time, Gonzalez and Rivas went to the nursery to talk to Rufus Orson about the prospects for future employment. They conversed with Jester and Escobedo because Orson was not present at the nursery at that time. The supervisors informed them that they would be able to return to work but it would be only for a week or two. Pedro Rivas testified that he thereupon decided not to return to work at the nursery because he already had a permanent job and it was not worthwhile to lose it just for a week or two of work at Respondent's. Elias Gonzalez also decided at the same time not to seek further employment at Respondent's.

In the latter part of September, the nursery began to prepare azaleas for the holiday sales. In the year 1979-80 250,000 azaleas were to be sold, approximately 50,000 blooming plants, and approximately 200,000 dormant ones. These sales of azaleas, with all the concomitant tasks, extended through the latter part of April, the last holiday being Mother's day, the second Sunday of May.

Richard Arnesen, the general manager of California Camelia Co., which also has raised azaleas for many years in Southern California, testified that, five to six months after azaleas have been propagated, they are ready to be transplanted into six inch pots. Respondent propagated between 1,000,000 and 1,200,000 azaleas in April, May and June 1979, the bulk of them in April as has been mentioned previously. Consequently most of these baby azalea plants would be ready to be transplanted into

six inch pots in September and October 1979 and the rest in November, December 1979 and January 1980 and even as late as February 1980. [34/] Raul Vega testified that the best time to transplant azaleas into pots is during the autumn and winter months.

Rufus Orson testified that poinsettias are shipped from November 13 to December 23 and that college students are hired in December to help handle the peak shipments which occur between December 5 and 15.

There was a slack in employment in September and October but an average of five to seven employees[35/] continued to work full time during this period. In November, employment markedly increased, up to approximately twenty-eight employees through Christmas day. Respondent's payroll records indicate that in January Respondent employed an average of eight employees full time, in early February there were six employees, in late February there were eleven employees, in March an average of twelve employees, in April there were seventeen employees and during Easter week seventy employees of which forty-five did general clean-up work at the nursery.

[34/]Arnesen, at the hearing on February 27, 1980 testified that at that time California Camelia was still engaged in the transplanting of baby azaleas.

[35/]In citing the number of employees employed during each month the core employees are excluded so that only Respondent's so-called temporary employees are being counted.

In May 1980, at the close of the hearing herein, only two of the twelve original alleged discriminatees were still working for Respondent; they were Maria Gonzalez and Elvira Martinez.

B. Analysis and Conclusion

In Part XVIII I discussed the allegations of discriminatory treatment based on the manner of layoffs and recalls. In this part I will discuss the allegations of discriminatory treatment based on Respondent's underlying purpose in the layoffs and recalls of the twelve alleged discriminatees.

General Counsel has the obligation to prove by the preponderance of the evidence that Respondent's treatment of its employees was a consequence of the employees' union activities, in discrimination cases, there is often no direct evidence that the employer discriminated against employees because of their union activity or sympathies. With respect to the connection between union activity and a subsequent discharge, the Board stated in S. Kuramura, Inc., (1977) 3 ALRB No. 49, "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)."

In respect to this circumstantial evidence, a preliminary factor in determining whether an employer treated employees in a discriminatory manner because of their union activities is the determination that the employees engaged in

union activities and that the employer had knowledge of such activities.

In Part IV of this decision I discussed the evidence in this respect and found that the twelve alleged discriminatees all engaged in union activities and that Respondent had knowledge of same. I have found that the twelve alleged discriminatees utilized the ALRB for protection of their rights under the Act and that Respondent had knowledge of same.

Another factor that is generally taken into account in evaluating the circumstantial evidence in a discrimination case is the timing, i.e. the knowledge of the union activity followed by discrimination. In the instant case, in January 1979 these twelve alleged discriminatees, everyone of whom was known by Respondent to be pro-UFW, were in the employ of Respondent. In May 1980, sixteen months later, only two of those twelve employees were still working for Respondent. Only Maria Gonzalez and Elvira Martinez remained. All of the twelve employees were experienced nursery workers, ten of whom had three to five years of seniority with Respondent, of the two other employees, Justina Wichware had thirteen years seniority and Jose Oliveros had one year. These twelve employees had had full-time jobs with Respondent and had performed satisfactory work for Respondent during their respective periods of seniority. So this drastic reduction in the number of experienced employees at Respondent's nursery over a one-year period - experienced employees who were all union adherents-raises a strong inference that Respondent eliminated them from its work force to discourage union activities at its nursery.

Another factor that is generally taken into account is union animus on the part of the employer. Rufus Orson's strong feelings against the UFW were clearly proven by direct evidence of his explicit directions to Raul Vega, his general supervisor, to eliminate pro-UFW and potential UFW employees from the work force by the utilization of surreptitious means between 1975 and 1978. Subsequently, during the hearing of the instant case, Rufus Orson, once again using surreptitious means, took swift action to discharge Justina Wichware and Victorino Olivas because they had testified at a hearing in the instant case. This latest retaliatory action by Orson provides convincing evidence that his attitude toward the UFW and his methods of insulating himself from its influence have not changed since his 1975-78 anti-UFW campaians and in effect have carried through to the present time.[36/]

[36/]Respondent argues that General Counsel has the burden of proving by substantial evidence that Respondent's alleged discriminatory conduct was motivated by anti-union animus and that General Counsel must do so by "direct evidence" of anti-union animus within the six month period prior to the filing of the unfair labor practice charges,

Respondent cites Great Dane Trailers, Inc. (1967) 388 U.S. 26, 17 L.Ed.2d 1207, 87 S.Ct. 1792, 65 LRRM 2465 as authority for this proposition.

However in Fleetwood Trailers 389 U.S. 375 66 LRRM 2737 the Supreme Court explained the Great Dane Trailers precepts; "in... Great Dane Trailers.... we held that proof of anti-union motivation is unnecessary when the employer's conduct could have adversely affected employee rights to some extent and when the employer does not meet his burden of establishing that it was motivated by legitimate objectives." So in the instant case General Counsel has no obligation to come forward with independent evidence of Respondent's anti-union motivation, let alone within the six month period preceding the filing of the unfair labor practices, until after Respondent has proven a legitimate business practice.

Of course although direct proof of anti-union (f.n. 36 cont. on p.82

In summary, General Counsel has presented a very strong prima facie case in all three of the areas of circumstantial evidence generally evaluated in discriminatory cases: (1) the employer's knowledge of employees' union attitudes and activities; (2) timing; and (3) union animus. Consequently the burden shifted to Respondent to show that he had a legitimate business reason to change over from a complement of full-time permanent employees to a small core of full-time employees supplemented by a large number of temporary employees.

Respondent's explanation is that due to its terminating the production of green foliage plants and the changeover to principally azaleas and poinsettias, it was no longer necessary to have such a large full-time work force. Consequently it switched over to mainly part-time employees and limited its permanent work force to those "core employees" who all resided at the nursery.

On the surface, this appears to be a plausible explanation but under close scrutiny it appears to be just another carefully planned and executed ruse to thwart the UFW ' s organization of its employees.

First of all, Respondent made the decision in reference

[36/] (cont.).. .motivation is not necessary, it is still helpful to shed light on the employer's true motive in its treatment of its employees. The direct proof may be in regard to conduct or actions taking place before, during or after the six-month period prior to the filing of the charges.

See Local Lodge 1424 v. NLRB (Bryan Manufacturing Co.) 362 U.S. 411 80 S.Ct. 822 45 LRRM 3212 (1960) in which the Supreme Court decided that events prior to the six month limitation period may be utilized to shed light on the true character of matters occuring within the limitations period. Consequently Respondent's conduct, i.e. in the instant case the practice of using surreptious means to eliminate pro-UFW employees from 1975 to 1978, may be used to shed light on Respondent's conduct during the six-months limitation period in 1979.

to its new employment policy in June 1979 six months after concluding its green foliage line, not one to two months afterwards in January or February. This fact creates a strong inference that it was not the termination of the green foliage that dictated this radical change.

Respondent argues, to the contrary that it decided to make this extreme departure from its traditional employment policy soon after the green foliage was phased out. To strengthen this contention, Orson testified that he established Castaneda, Corona and Sandoval as his core employees when he transformed their payment process from wages' to salaries, in January or February 1979. In March 1980 he testified he had done this "over a year ago." However later, on cross-examination, Orson, himself, admitted that Castaneda and Sandoval were not changed over to a salary basis until July 2, 1979 which coincided exactly with the massive lay off of June 30, 1979. (Corona had always been on a salary basis.)

Another factor which bolsters the conclusion that Respondent decided on its new course of action in June rather than January or February is that up until June 30 Respondent actually spread out nursery work to provide permanent employment for the twelve seniority employees at least for sufficient numbers that none of them quit to seek employment elsewhere. Still another factor is the fact that Orson had just concluded a settlement agreement on June 7, 1979 with the ALRB which resolved some unfair labor practices having to do with, among other employees, the twelve alleged discriminatees. All of these factors inexorably lead to the conclusion that later *on,* in the same month of

June 1979,he decided on and forged ahead with a new strategy to eliminate, once and for all, the twelve pro-UFW seniority employees from the work force.

Secondly, Respondent made no attempt to give any explanation at all when it laid off twenty-three employees, most of whom had four to five years of seniority, about the reasons for the layoff. Perhaps Respondent's proprietor Rufus Orson refrained from doing this to avoid a confrontation with them where he would be questioned about the amount of work available and why it could not be spread out. It certainly could be anticipated by him that this massive layoff coupled with no explanation would have a maximum effect on the employees to discourage them from continuing to work at the nursery.

Thirdly, the representations made by Rufus Orson to Elias Gonzalez and Pedro Rivas seven days after the layoff, about the lack of work, was false in general and also false in their particular cases because, as has been discussed previously, Respondent did not follow seniority in respect to Gonzalez and Rivas in the layoffs and recalls, so even without spreading the work around he could have kept those two seniority employees in full-time employment year round.

Fourthly, Respondent's informing Gonzalez and Rivas about the lack of work and the new temporary-employees policy and the repetition of this same information to the employees when they responded to the recall letters did in fact result in employees deciding to look for permanent work elsewhere. Pedro Rivas, Elias Gonzalez, Juana de Varela, Yolanda Navarro, Maria Cortes, and Miguel

Pereda all decided to do just that. So at the end of August there were just four of the twelve alleged discriminatees still working for Respondent.

Fifthly, Respondent presented no evidence to indicate that it could not spread out the azalea and poinsettia work throughout the year. On the other hand, the record provides ample evidence that year-round permanent employment could have been provided to all or almost all of the alleged discriminatees.

Respondent actually did provide this permanent employment during the first six months of 1979 even though the green foliage crop had already been eliminated in 'January. Respondent's payroll records demonstrate that in 1980 Respondent could have done the same. Respondent's records show that Respondent employed eight employees in January, six to eleven in February, twelve in March, seventeen employees in April and seventy during Easter week. Thirty of the seventy probably assisted in shipments but the other forty-five did clean-up work which could have been spread throughout January and February very easily. The propagation of the azaleas in May and June provided employment for twenty-five to forty employees.

In respect to the last six months of 1979, the payroll records, plus additional evidence, clearly indicate that Respondent could have provided permanent employment for the alleged discriminatees.

Admittedly there is not much work in July, but Respondent could do what California Camellia does, that is, to arrange for the permanent employees to take their vacations during that

month.[37/]

Respondent's payroll records indicate that there was an abundance of work in August with the poinsettia propagation. It is obvious from the testimony of various witnesses that, with the stepped-up shipments for Thanksgiving and Christmas holidays, there is sufficient work in November and December to provide full-time employment for twelve employees. The shipment of the azaleas starts in the first part of November and then in December there are the shipments of azaleas for Christmas plus approximately 150,000 poinsettia plants.

So only September and October need to be accounted for. The payroll records show that there was enough work at the nursery to keep an average of seven employees actually employed in September. There were no payroll records for October, but Escobedo testified that five employees worked straight through the fall and winter. So all that was needed on the part of Respondent to provide full time employment for the twelve employees was two months of work for six employees in September and October.

There is persuasive evidence in the record that Respondent had additional work available at the nursery during these two months of September and October which it could have had the alleged discriminatees perform. In September and October Respondent had over 500,000 five to six month old baby azalea plants ready to be transplanted since most of the cuttings had been done in April. However Respondent failed to hire additional employees

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[37/]Cnarles Arnesen, owner of California Camellia Co., testified that July is very slow so vacations are granted during that month.

during this two-month period but postponed this work until later on in 1979 or early in 1980. There is additional evidence in the record that work with the azalea crop can be spread throughout the year: from 1970 through 1973 Respondent's plant production consisted of 90% azaleas and Respondent kept fifteen to twenty employees employed year round during those years.

In respect to the poinsettias, Orson testified that there was far more work with the poinsettia crop in 1979 than in 1978 so it also appears that the additional work with the poinsettias could have been spread out at least through the fall months until Christmas.

It has been clearly established that Respondent could have, if it had wished to do so, continued to provide permanent employment at its nursery throughout the year for all or almost all of the twelve alleged discriminatees. The fact that it chose not to is not in itself sufficient grounds to find that it violated the Act. If Respondent had chosen to make the changeover for a legitimate business reason, or for any other reason, so long as it was not to discourage employees from engaging in union activities or to utilize the protections of the ALRB, it would not have violated the Act.

However the law is well settled that if Respondent had other reasons to make the changeover from permanent to temporary employees, a violation still occurs if the moving cause for the changeover is the employees' union activities.

As the Board stated 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 but may be so small as "the last straw that breaks the camel's back,[1] a violation has been established. NLRB v. Whitfield Pickle Co 374 F.2d 576, 582, 64 LRRM 2656 (5th Cir. 1967).

In the instant case, Respondent has advanced only one reason for the changeover: that the fluctuations in the azalea and poinsettia crops dictated that only an employment policy of temporary employees and frequent layoffs and recalls would be appropriate for its nursery operation.

However, I have already found that? the fluctuations of Respondent's flower crops did not bind it to such a policy. Although Respondent presented some evidence, which was incidental to another issue in the case, that savings on insurance premiums would be brought about by shifting from permanent employees to temporary ones, it never contended that was a reason for the changeover.

On the other hand, as previously mentioned, General Counsel has presented an extraordinarily strong prima facie case with abundant and convincing evidence to prove: (a) Respondent's knowledge of employees' union activities and their recourse to the ALRB; (b) Respondent's union animus; (c) Respondent's practice of surreptious methods to eliminate pro-UFW employees from its work force; and (d) timing, i.e. twelve pro-UFW employees permanently employed for approximately four years each at the time the UFW won the ALRB election 14-4 and then one year later there are only two left still working for Respondent.

So it becomes patently obvious that "but for" the employees' union activities and the recourse to the ALRB, Respondent would have not changed its employment policy from permanent to temporary employees nor initiated a series of layoffs and recalls.

Accordingly, I find that Respondent violated Sections 1153 (c), (d), and (a) of the Act by carrying out its policy of changing over to a temporary-employment policy and thus discriminated against Elias Gonzalez, Pedro Rivas, Maria Cortes, Yolanda Navarro, Jose Oliveros, Miguel Pereda, Guadalupe Ruiz and Juana de Varela because of their union activities and recourse to the ALRB.

ORDER

Accordingly, pursuant to Labor Code Section 1160.3 IT IS HEREBY ORDERED that Respondent Ruline Nursery, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a) Discharging, laying off, refusing to rehire, changing employment policies, issuing disciplinary notices, or otherwise discriminating against agricultural employees because of their union membership or union activities.

b) Discharging, laying off, refusing to rehire, changing employment policies, issuing discriminatory notices, or otherwise discriminating against employees because of their recourse to the ALRB for the protection of their rights guaranteed by Section 1152 of the Act, or because of their testifying at any ALRB hearing.

c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 1152 of the Act.

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

a) Offer Elias Gonzalez, Pedro Rivas, Justina Wichware, Victorino Olivas, Juana de Varela, Guadalupe Ruiz, Jose Oliveros, Miguel Pereda, Yolanda Navarro, Maria Cortes, Agustin Madri and Luz Elva Euyoque immediate and full reinstatement to their former positions or substantially equivalent positions without prejudice to their seniority or other rights and previleges.

b) Make whole the employees named above in paragraph 2(a) except Luz Elva Euyoque and Agustin Madrid for any loss of pay and other economic losses incurred by them as a result of the lay off of said employees on June 30, 1979 and/or the continuing discriminatory employment policy utilized by Respondent thereafter plus interest at the rate of seven percent per annum.

c) Make whole Luz Elva Euyoque for any loss of pay and other economic losses incurred by her as a result of not being recalled to work on July 30, 1979 plus interest at the rate of seven percent per annum.

d) Make whole Agustin Madrid for any loss of pay and other economic losses incurred by him as a result of being laid off on August 25, 1979 plus interest at the rate of seven percent per annum.

e) 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.

f) Sign the Notice to Employees attached hereto. After its translations 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.

g) Post copies of the attached Notice at conspicuous locations on its premises for a period of 60 consecutive days, the period and places of posting to be determined by the Regional Director. Respondent shall exercise due care to replace any

Notice which has been altered, defaced, covered, or removed.

h) Mail copies of the attached Notice in Spanish and any other appropriate language, within 30 days after the date of issuance of this Order, to all employees employed by Respondent any time after December 1, 1978.

i) Arrange for a representative of Respondent or a Board Agent to read the attached Notice in Spanish and any other appropriate language(s) 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 of 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.

j) 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: September 19, 1980

Arie Schoorl (SAH)

ARIE SCHOORl
Administrative Law Officer

NOTICE TO WORKERS

After a trial in which each side had an opportunity to present its facts, the Agricultural Labor Relations Board, has found that we interfered with and discriminated against our workers because of their union activities or because of filing charges with and testifying before the Agricultural Labor Relations Board.

The Board has ordered us to post and distribute this notice and to stop discriminating against our employees. We will do what the Board has ordered, and also tell you that: The Agricultural Labor Relations Act is the law of the State of California which gives farm workers these rights:

1. To organize themselves.

2. To form, join, or help unions.

3. To choose, by secret ballot election, a union to represent them in bargaining with their employer for a contract covering their wages, hours, and working conditions.

4. To act together with other workers to try to help and protect one another.

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

Because this is true, we promise that WE WILL NOT do anything in the future that interferes with your rights under the Act, or forces you to do, or prevents you from doing, any of the things listed above.

Especially, WE WILL NOT:

1. Discharge, lay off, refuse to rehire, change employment policies, or issue disciplinary notices to employees because of their union activity, union sympathies or for seeking from the Agricultural Labor Relations Board protection of the rights of farm workers.

The Agricultural Labor Relations Board has found that we discriminated against

Maria Cortes
Elias Gonzalez
Agustin Madrid
Yolanda Navarro
Jose Oliveros
Miguel Pereda
Pedro Rivas
Guadalupe Ruiz
Juana de Varela

by laying them off. We will reinstate them to their former jobs and give them back pay plus seven percent interest for any

economic losses that they suffered as a result *of* such layoffs. The Agricultural Labor Relations Board has also found that we discriminated against Justina Wichware and Victorino Olivas by discharging them. We will reinstate them to their former jobs and give them back pay plus seven percent interest for any economic losses that they suffered as a result of their discharges. The Agricultural Labor Relations Board has also found that we discriminated against Luz Elva Euyoque by failing to recall her to work. We will reinstate her to her former job and give her back pay plus seven percent interest for any losses that she suffered as a result of our refusal to rehire her.

DATED: RULINE NURSERY

By:_____
Rufus Orson, Owner

This is an official document of the Agricultural Labor Relations Board, in an Agency of the state of California.

DO NOT REMOVE OR MUTILATE.