

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

KYUTOKU NURSERY, INC.,)	
)	Case Nos. 80-CE-74-SAL
Respondent,)	80-CE-185-SAL
)	80-CE-186-SAL
and)	81-CE-20-SAL
)	81-CE-53-SAL
UNITED FARM WORKERS OF)	81-CE-93-SAL
AMERICA, AFL-CIO,)	
)	
Charging Party.)	8 ALRB No. 98
)	

DECISION AND ORDER

On December 10, 1981, Administrative Law Officer (ALO) Michael Schmier issued the attached Decision in this proceeding. Thereafter, the United Farm Workers of America, AFL-CIO, and General Counsel each timely filed exceptions and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,^{1/} the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

The Board has considered the record^{2/} and the ALO's 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, with modifications.

^{1/}All section references herein refer to the California Labor Code unless otherwise indicated.

^{2/}General Counsel Exhibit 18 is missing from the record. The exhibit is not necessary to the resolution of the issues before us.

The ALO's references to Respondent's unilateral changes in working conditions, by its establishment of a notice or disciplinary system and a leave of absence system, are inappropriate because those issues were formally settled by the parties prior to the close of the hearing. As a matter of public policy, a settlement agreement may not be used by a party to prove the merits of other allegations unless the parties agree that it may be used as such. Settlement agreements are not evidence of a proclivity to violate the Agricultural Labor Relations Act (Act) (see American Guild of Variety Artists (Harrah's Club) (1972) 195 NLRB 416 [79 LRRM 1345]; C & T Trucking Co. (1971) 191 NLRB 11 [77 LRRM 1336]), or even of anti-union animus (see Poray, Inc. (1963) 143 NLRB 617 [53 LRRM 1373]).

No exceptions were taken to the ALO's conclusion that Respondent violated section 1153(c) and (a) of the Act by suspending employee Oscar Garcia on May 29, 1980, because of his protected concerted activity. As there is no evidence that Garcia's protected concerted activity was also union activity, we affirm the ALO's conclusion only as to the violation of section 1153(a).

As we affirm the ALO's finding that Respondent did not threaten employees Javier Ramirez or Jose Manuel Ponce Gonzalez, we hereby dismiss those allegations of the complaint.

Discrimination cases involving a defense found to be a pretext differ from dual motive discrimination cases. Where an employer asserts what appears to be a legitimate business reason for its alleged discriminatory personnel action but an examination of the evidence reveals that the asserted justification is a sham,

the reason advanced is pretextual and the employer in fact has no legitimate business reason for its action. A dual motive case exists where the proffered business reason exists along with the unlawful motive. (See Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)

In dual motive cases, this Board has adopted the test in Wright Line. (Nishi Greenhouse (Aug. 5, 1981) 7 ALRB No. 18.) Wright Line requires the General Counsel to establish a prima facie case that the alleged discriminatee engaged in union activity, or protected concerted activity, that the employer had knowledge of that activity, and that the employer took adverse action against the employee because of his/her union or protected concerted activity. Once General Counsel has established a prima facie case, the burden of production and persuasion shifts to the employer to demonstrate that it would have taken the same adverse action even in the absence of the protected activity. (Royal Packing Co. (Oct. 8, 1982) 8 ALRB No. 74.)

Applying the Wright Line test, as stated above, we find that even in the absence of the employees' protected activity Respondent would have suspended and later discharged Jose Manuel Ponce Gonzalez, and would have discharged Rafael Comacho, Javier Ramirez, and Oscar Garcia. Accordingly, we affirm the ALO's conclusions as to those issues and hereby dismiss those allegations.

With regard to Respondent's alleged unlawful refusal to rehire Javier Ramirez and Oscar Garcia, we find that General Counsel failed to establish a prima facie case as to either of them. To establish a prima facie case of discriminatory refusal to rehire,

General Counsel must show, inter alia, that the alleged discriminatee made a proper application for employment at a time when work was available and was not (re)hired because of his/her protected activity. (Prohoroff Poultry Farms (Feb. 7, 1979) 5 ALRB No. 9; Giumarra Vineyards, Inc. (July 10, 1981) 7 ALRB No. 17.) Here the General Counsel failed to prove that there was work available when Javier Ramirez and Oscar Garcia each made their applications for rehire.

However, where an employer has a practice or policy of recalling, or giving priority in hiring former employees, a proper application is all that is required; work need not be available at the time of the application. The discrimination occurs if, when work becomes available, the employer fails or refuses to recall or rehire the former employee because of his/her union activity or other protected concerted activity. (Prohoroff Poultry Farms, supra, 5 ALRB No. 9; Miranda Mushroom Farm (May 1, 1980) 6 ALRB No. 22.) There is insufficient evidence on the record to establish that Respondent had a practice or policy of giving priority in hiring to former workers.

We therefore affirm the ALO's conclusion and hereby dismiss those allegations.

ORDER

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

1. Cease and desist from:

(a) Suspending or otherwise discriminating against any agricultural employee because he or she has engaged in any concerted activity protected by section 1152 of the Agricultural Labor Relations Act (Act).

(b) In any like or related manner interfering with, restraining, or coercing any agricultural employee in the exercise of the 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) Make Oscar Garcia whole for all losses of pay and other economic losses he has suffered as a result of his unlawful suspension on or about May 29, 1980, such amounts to be computed in accordance with established Board precedents, plus interest thereon, computed in accordance with our Decision and Order in Lu-Ette Farms, Inc. (Aug. 18, 1982) 8 ALRB No. 55.

(b) Preserve and, upon request, make available to this Board or its agents, for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records relevant and necessary to a determination, by the Regional Director, of the amount of backpay and interest due under the terms of this Order.

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

(d) Mail copies of the attached Notice, in all

appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from May 29, 1980, to June 29, 1980.

(e) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 30 days, the period(s) and place(s) 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.

(f) Arrange for a representative of Respondent or a Board agent to distribute and 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 determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or 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 in order to compensate them for time lost at this reading and during the question-and-answer period.

(g) 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

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

Dated: December 24, 1982

HERBERT A. PERRY, Acting Chairman

ALFRED H. SONG, Member

JEROME P. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office, the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we, Kyutoku Nursery, Inc., had violated the law. After a hearing at which each side had an opportunity to present evidence, the Board found that we did violate the law by suspending employee Oscar Garcia because he engaged in protected concerted activity. The Board has told us to post and publish this Notice. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all 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 protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT suspend or otherwise discriminate against any agricultural employee because he or she has exercised any of the above rights.

WE WILL reimburse Oscar Garcia for all losses of pay and other economic losses he suffered as a result of his unlawful suspension on May 29, 1980, plus interest.

Dated: KYUTOKU NURSERY, INC.

By: _____
Representative Title

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 112 Boronda Roach, Salinas, California, 93907. The telephone number is (408) 443-3160.

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

Kyutoku Nursery, Inc.
(UFW)

8 ALRB No. 98
Case Nos. 80-CE-74-SAL,
et al.

ALO DECISION

Agricultural employees of Respondent engaged in work stoppages on three occasions: (1) September 1979; (2) July 16, 1980; and (3) January 1981. Allegations concerning Respondent's unilateral changes in working conditions by instituting a system of disciplinary notices and a leave of absence system were formally settled prior to the close of the hearing.

The ALO concluded that Respondent violated section 1153(c) and (a) of the Agricultural Labor Relations Act by suspending employee Oscar Garcia on May 29, 1980, because of his protected concerted activity. The ALO dismissed the remaining allegations.

The ALO found that Respondent: (1) lawfully suspended Jose Manuel Ponce Gonzalez and later lawfully discharged him; (2) lawfully terminated Rafael Camacho and Oscar Garcia; and (3) lawfully refused to rehire Javier Ramirez and Oscar Garcia. Although the General Counsel made a prima facie case for each of the aforementioned personnel actions, Respondent produced sufficient evidence to show that each adverse action was taken for a legitimate business reason and General Counsel failed to show that Respondent's proffered business justification was pretextual.

BOARD DECISION

The Board affirmed the ALO's conclusion that Oscar Garcia had been suspended unlawfully but found the suspension to be only a violation of 1153(a) but not of 1153(c) because there was no evidence that the suspension was imposed because of any union activity. The Board affirmed the ALO's conclusions that the suspension and termination of Jose Manuel Ponce Gonzalez, and the termination of Rafael Camacho and Oscar Garcia were lawful and that Respondent would have taken the same adverse actions even in the absence of union or protected concerted activity. The Board found that the General Counsel failed to make a prima facie case regarding the refusal to rehire Oscar Garcia and Javier Ramirez. The General Counsel failed to prove that work was available when Garcia and Ramirez each made a proper application for work, or that Respondent had a past practice or policy of rehiring or giving priority in hiring to former workers.

* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD 1/

* * * * *

In the Matter of: *

KYUTOKU NURSERY, INC.,	*	Case Nos. 80-CE-74-SAL
		80-CE-185-SAL
Respondent,	*	80-CE-186-SAL
		81-CE-20-SAL
and	*	81-CE-53-SAL
		81-CE-93-SAL

UNITED FARM WORKERS OF *
AMERICA, AFL-CIO *

Charging *
Party. *

* * * * *

Arocoles Aguilar, Esq.
of Salinas, California
For the General Counsel

Frederick A. Morgan, Esq.
Bronson, Bronson & McKinnon
of San Francisco, California
For the Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL K. SCHMIER, Administrative Law Officer: This case was heard before me in Salinas, California, on May 27, 28 and July 27, 28, 29 and August 24 and 25, 1981. A complaint issued on December 15, 1980 in Case Numbers 80-CE-74-SAL, 80-CE-83-SAL, 80-CE-185-SAL, 80-CE-186-SAL, 80-CE-257-SAL, and 80-CE-310-SAL. That complaint alleged that Kyutoku Nursery, Inc. (herein called "Respondent") violated sections 1153(a) and (c) of the Agricultural Labor Relations Act (herein called the "Act"). The charges and complaint were each duly served upon Respondent. On May 11, 1981, the Regional Director issued an order consolidating cases, and a notice of hearing and complaint in Case Numbers 80-CE-74-SAL, 80-CE-83-SAL, 80-CE-185-SAL, 80-CE-186-SAL, and 81-CE-20-SAL and 81-CE-53-SAL. That complaint alleged that Respondent violated section 1153(a) and (c) of the Act. The charges and complaint were each duly served upon Respondent.

1/ Herein called the Board.

1 A pre-hearing conference was held on May 27, 1981. The
2 case proceeded to hearing on May 27, 1981. On May 28, 1981, the
3 hearing was continued because of translation problems and in
4 furtherance of settlement negotiations between the parties. On
5 July 16, 1981 an order consolidating cases, notice of hearing and
6 complaint issued in Case No. 81-CE-93-SAL, alleging that Respondent
7 violated section 1153(a) and (c) of the Act. The charges and com-
8 plaint were each duly served upon Respondent.

9 The case again proceeded to hearing on July 27, 1981.
10 The parties at that time, agreed to settle part of the case and
11 presented a partial settlement agreement which I approved on July
12 29, 1981, and which was formally approved by the Board on October
13 13, 1981. This agreement disposed of Case Numbers 80-CE-83-SAL,
14 80-CE-257-SAL, 80-CE-258-SAL and 80-CE-310-SAL. In particular,
15 the settlement disposed of paragraph sections 12(a), 12(d), 12(g),
16 12(h), 12(i), 12(j), and 12(k) of the first complaint, dated
17 December 15, 1980 and paragraph 7(c) of the second complaint, dated
18 May 11, 1981.

19 The remaining charges proceeded to hearing. On July 27,
20 1981, General Counsel moved to dismiss paragraph section 12(b) of
21 the first complaint dated December 15, 1980, due to insufficiency
22 of the evidence. I granted that motion, without objection and
23 with prejudice. The hearing was in session daily until July 29,
24 1981, at which time, again, due to translation problems, the hear-
25 ing was continued. The hearing resumed on August 24, and 25, 1981
26 to its completion.

27 All parties were given a full opportunity to participate
28 in the hearing. The UFW appeared informally at the pre-hearing
conference, but chose not to intervene in the proceeding. The
General Counsel and Respondent filed post-hearing briefs and pro-
posed findings of fact and conclusions of law, pursuant to section
20278 of the Board's Regulations.

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

FINDINGS OF FACT

I

JURISDICTION

The essential jurisdictional facts are undisputed. Re-
spondent has admitted that it is an agricultural employer within
the meaning of section 1140.4(c) of the Act and that the UFW is a
labor organization within the meaning of section 1140.4(f) of the
Act, and I so find. The parties stipulated that the discriminatees
are employees within the meaning of section 1140.4(b) of the Act,
and I so find.

1 II

2 THE ALLEGED UNFAIR LABOR PRACTICES

3 Respondent is alleged to have violated sections 1153(a)
4 and 1153(c) of the Act by discharging employees Oscar Garcia,
5 Rafael Camacho and Jose Manuel Ponce Gonzalez (hereafter "Ponce")
6 and by refusing to rehire Javier Ramirez because of their partici-
7 pation in protected union and concerted activities and their UFW
8 support. Respondent is also alleged to have threatened Javier
9 Ramirez with refusal to rehire if he went to Mexico because of his
10 support for the UFW, in violation of section 1153(a) of the Act.
11 Respondent is further alleged to have threatened Ponce with retaliation
12 if he associated with UFW supporters and with discriminatorily
13 suspending Ponce, prior to his termination because of his participa-
14 tion in protected union and concerted activities and for his UFW
15 support, in violation of section 1153(a) and 1153(c) of the Act.
16 Respondent denies any violation of the Act.

17 III

18 THE FACTS

19 1. Respondent's Operation

20 Respondent grows and packs fresh flowers (carnations) in
21 the Salinas Valley on a seven acre farm with approximately 260,000
22 square feet of greenhouse. Respondent has been in business four-
23 teen or fifteen years, under the sole ownership of John Kyutoku
24 (herein also called "John" or "Mr. Kyutoku") and his wife,
25 Jennie Kyutoku (herein also called "Jennie" or "Mrs. Kyutoku").
26 The Kyutoku's employ approximately fourteen employees outside of
27 the family but have no secretarial or office help. Until the last
28 two years, the Kyutokus employed no other supervisory help with
Mr. and Mrs. Kyutoku alone being in charge. In early 1981, an
employee, Raymond Diaz, was promoted to foreman and Jose Gonzalez
was hired as a supervisor. John Kyutoku, Jennie Kyutoku and Ray-
mond Diaz are admitted as supervisors within the meaning of section
1140.4(j) of the Act. Japanese is the native tongue of John and
Jennie Kyutoku, although they speak some limited English and a
lesser amount of Spanish. The Kyutokus live on their farming
operation, with their residence being approximately ten feet from
the closest greenhouse.

23 2. Previous Board Cases

24 I have been asked to, and do, take official notice of
25 two previous Board cases involving Respondent. Those cases are
26 Kyutoku Nursery, Inc., (May 30, 1980) 6 ALRB No. 32 (4 ALRB No. 55)
and Kyutoku Nursery, Inc., 3 ALRB No. 30. The history proceeding
that decision is set forth in that decision.

27 The first case involves a representation election case
28 following an election in 1975, which was won by the UFW.

1 The Respondent sought judicial review of the 1977 certi-
2 fication. The Board found the Respondent did not have reasonable
3 good faith belief to challenge the election and imposed a make-
4 whole remedy which was upheld by the District Court of Appeal. The
Supreme Court of California denied a hearing in March, 1981. The
parties stipulated that thereafter, the Respondent agreed to bar-
gain.

5 Contemporaneously with the 1975 election, there had been
6 a work stoppage where all the Kyutoku workers were replaced after
7 they refused to accept offers of re-employment. The Board upheld
the lawfulness of the permanent replacement of those employees.
That decision is the second case of which I have been requested to
take judicial notice. Both cases will be discussed briefly below.

9 3. Union and Concerned Activities

10 In September, 1979, there were union activities and con-
11 certed activities, at Kyutoku Nursery, Inc. in which all four
alleged discriminatees participated, with the extent of participa-
tion being somewhat in dispute.

12 Oscar Garcia, Guadalupe Valenzuela and another employee,
13 went to the UFW offices and engaged in handbilling at Respondent
and three other nurseries in September, 1979. John Kyutoku admitted
14 that he had seen Oscar Garcia pass out handbills on his property.

15 A notice of access was also filed, even though the union
was already certified, and that notice was delivered by Oscar Garcia
16 to John Kyutoku. Oscar Garcia further testified that he asked
John Kyutoku for permission to leave the nursery for lunch and John
17 told Garcia and Valenzuela they couldn't leave because they weren't
going to lunch, but to other nurseries. Garcia testified that he
18 told John they were going to other nurseries to talk to the people.

19 I find that John Kyutoku had knowledge of Garcia's union
20 activities, at least to the extent of the handbilling to the em-
ployees and delivering the union letter (i.e., notice of access).

21 Rafael Camacho testified that he participated in the
September, 1979 activities by going to union meetings and distribu-
22 ting leaflets at the company in the presence of John Kyutoku.
Kyutoku denied seeing Camacho pass out leaflets.

23 Javier Ramirez testified about a meeting with labor con-
24 sultant Joe Sanchez, and other employees where the employees were
asked for their help so the union would not come in, and that they
25 replied they were not in agreement because they were united with
their fellow employees. Ramirez testified that he attended union
26 meetings but there was no evidence that Respondent had any knowledge
of union meetings or who attended them.

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28 ///

1 Ponce testified that he had been told by John Kyutoku
2 that the union wasn't good, and that he shouldn't stick around with
3 the Chavistas, but that nevertheless he did hang out with the
4 Chavistas. There was no other evidence respecting union activities
5 by Ponce.

6 The alleged discriminatees also participated to some extent
7 in concerted activities in the form of work stoppages. These
8 stoppages occurred in September, 1979, July 16, 1980, and January,
9 1981. Practically all of the employees participated in stoppages
10 requesting an increase in wages. The stoppages were for a matter
11 of hours except for the one of July 16th, which lasted a day and a
12 half. The union did not participate in the stoppages. Kyutoku
13 denied access to the union representative during one.

14 Garcia testified that he organized the September, 1979
15 stoppage, along with Camacho, Guadalupe Valenzuela, and Isidro
16 Garcia. All of the twelve or thirteen workers then present partici-
17 pated. Garcia testified that he organized the work stoppage of
18 July, 1980, along with Camacho, Garcia and Eliseo Meza.

19 Camacho testified that he organized the work stoppage of
20 1979 along with the others, and that he spoke to John Kyutoku during
21 the stoppage. 2/ John Kyutoku admitted that Camacho may have talked
22 more than other people at that stoppage. Camacho testified that he
23 organized, along with Oscar Garcia, Isidro Garcia, and Eliseo Meza,
24 the July, 1980 stoppage, and that he talked to Jennie Kyutoku about
25 the wage increase at that time.

26 Ramirez testified that he participated in the July, 1980
27 work stoppage, and that he also signed a petition protesting the
28 company rule against talking.

29 Ponce participated in the July, 1980 stoppage which oc-
30 curred almost immediately after he was employed. He returned and
31 started to work on the second day before the other workers returned.
32 He testified that he organized the January, 1981 work stoppage, to-
33 gether with Meza, Isidro Garcia and Sabvas Barrientos, and that
34 he spoke at the stoppage.

35 There was no testimony as to what activities constituted
36 "organizing" the stoppages, or that the Kyutokus had any knowledge
37 as to the identity of the organizers. John Kyutoku testified that
38 he did not know who the leaders of the stoppages were, except to
39 the extent of who talked: He considered the first stoppage to be
40 led by Guadalupe Valenzuela and the other two by Isidro Garcia and
41 Eliseo Meza.

42 ///

43 ///

44 ///

45 2/ John Kyutoku testified that he hired labor consultant Joe Sanchez
46 to help him communicate better with his employees.

1 From the above, I conclude and find that John Kyutoku had
2 knowledge that all four discriminatees were somewhat active in the
3 work stoppages. I also find that John Kyutoku had knowledge that
4 Camacho spoke at one meeting perhaps more than other employees.
5 However, the testimony of the General Counsel's witnesses, as well
6 as the Kyutokus, was that substantially all employees participated
7 and that Guadalupe Valenzuela, Isidro Garcia, Eliseo Meza and others
8 of the non-discriminatees spoke and also participated in organizing
9 the campaigns. Consequently, I cannot conclude that John or Jennie
10 Kyutoku had knowledge that any of the alleged discriminatees were
11 acting as special leaders or spokesmen for the other workers in
12 any significant way.

13 From the standpoint of the Kyutokus, and from their testi-
14 mony, working conditions became very unsatisfactory from the time
15 of the first work stoppage. They testified that they were no longer
16 able to communicate effectively with the workers, and that they
17 hired bilingual supervisors for assistance. Ramon Diaz proved not
18 to be an experience supervisor and thereafter Jose Gonzalez, who
19 had a number of years of previous experience in carnations, was
20 hired on February 9, 1981.

21 In addition to hiring bilingual supervisors, the Kyutokus
22 also made greater use of bilingual labor consultants during this
23 time. They had previously used labor consultants following the
24 election. Labor consultant, Joe Sanchez testified that he was on
25 the Kyutoku property maybe ten or twelve times in 1980 and 1981.
26 Sanchez testified that he talked about the fact that the union had
27 won the election, that the election was being litigated, and fur-
28 ther talked about problems such as absenteeism, and calling in when
not able to come to work. There also was evidence from some of the
workers of private conversations with Sanchez in which he attempted
to discredit the union. Mr. Kyutoku testified particularly that it
was necessary to hire the labor consultants because of his inabil-
ity to communicate with the workers. No violation of the Act was
charged or pleaded respecting the Sanchez conversations, but the
General Counsel contends that they constitute some evidence of
animus. This contention will be discussed below. Next, the evi-
dence as to the four discriminatees will be evaluated.

21 4. Rafael Camacho

22 Camacho was hired in July 1979, and terminated on August
23 9, 1980. John Kyutoku testified he was terminated because he re-
24 ceived three warnings for unexcused absences and because he refused
25 to come in on Saturday after being told on the telephone that day
26 that if he did not come in he would lose his job. Camacho was a
27 satisfactory employee and in fact was of special value to Respon-
28 dent because he acted as a lead person preparing the next job for
other workers.

Camacho testified that before 1979 he had been told to
call in when late or absent, but it did not make any difference
whether he did or not. He said that John Kyutoku talked to him
on giving him his first written warning, or ticket, and said that

1 he had been given lots of chances and things were going to be
2 different now: If he didn't work, and didn't advise the company,
he would get a ticket.

3 The labor consultant, Joe Sanchez, testified that there
4 was an attendance problem. Sanchez told the workers that they had
to attend work when they were supposed to attend, Sanchez went on
to say as follows:

5 Well, as far as attendance was concerned, I
6 believe there was a problem. Some of the
7 employees thought that Saturday was a free
8 Saturday, and if they wanted to come to work
9 they could come to work, which was, I believe
10 a mistaken belief. And I explained to them
11 that as long as they were working for the
12 company, they had to work for the company
whenever the company needed them and not just
whenever they chose to come to work. They had
their regular schedules. If for any reason
they had to miss work, they were supposed to
notify the company ahead of time, or make
some kind of information known to the company
that they would not be able to show up for work.

13 The General Counsel called Eliseo Meza in rebuttal who testified
14 Sanchez did not talk about tickets. However, Meza did not deny
he talked about attendance.

15 John Kyutoku testified that Camacho was one of the worst
16 in attendance and in tardiness. John Kyutoku stated that he finally
gave a written warning to Camacho because he had spoken to him many
17 many times but Camacho had not corrected his absences and tardiness.
John Kyutoku used a written form that he got from the California
18 Floral Council. When he gave the first warning to Camacho he had
a conversation with him and Camacho understood that when he was not
19 coming in he had to telephone.

20 Camacho received four written warnings one of which was
excused. John Kyutoku testified he also gave another ticket which
21 he excused. John Kyutoku further testified that he excused several
absences by Camacho in 1980 without giving tickets, with respect to
22 absences for car repairs, t.v. repairs and similar things. Tickets
and written warnings also were used for Oscar Garcia, Rafael Camacho,
23 Manuel Ponce and Antonio Martinez.

24 Although the General Counsel presented evidence that the
number of written warnings given was very limited, he presented no
25 evidence that employees had unexcused absences in which they were
not given warnings following the adoption of the system. The Gen-
26 eral Counsel also introduced evidence that the time cards had
writings placed on them respecting absences after employees signed
27 them. 3/

28 3/ John Kyutoku marked on the time cards testifying that he made
some writings before and some after a personnel action; despite
the General Counsel's contentions, I do not find these writings
to be any indication of proscribed conduct.

1 Camacho's termination centered on the events of August 8,
2 1980. Normal work on Saturday was 7:00 to 4:30; quitting time the
3 day before had been 4:30 p.m. Camacho did not show up to work on
4 Saturday and did not call in until 12:00 or 12:30 according to his
5 testimony. Camacho told John Kyutoku that he could not come to
6 work because he had been travelling the night before to pick up a
7 brother in Santa Barbara and had not had any sleep. He testified
8 that John Kyutoku told him on the telephone "that if I didn't pre-
9 sent myself to work, I didn't have a job." Mr. Kyutoku testified
10 as follows:

11 "That time I was so busy so I really needed
12 the help, so 'Rafael, you got two tickets
13 already; this is -- if you no come work, this
14 is the last one. You will be terminated.'
15 'It's okay you come afternoon anytime; if you
16 show up to work, you know, I don't give a
17 citation. I don't terminate."

18 John Kyutoku testified that he needed Camacho because his planting
19 schedule was way behind but that Camacho said that he couldn't get
20 there. At the time of the hearing Camacho justified his absence as
21 being due to a headache from lack of sleep. John Kyutoku testified
22 that the trip to Santa Barbara could have been made in three hours
23 each way so that Camacho could have been back in time to sleep.
24 When he returned on Monday, he was terminated. He asked John Kyutoku
25 why John did not just punish him and why he didn't just treat him
26 as on lay-off, or give him vacation. The exit interview paper
27 states, among other things, as follows: "Absence without advance
28 notice and permission, three times". Discharged. "I cannot operate
my greenhouse without good dependable person. Rafael isn't de-
pendable person. I cannot expect him tomorrow which he come or
not".

18 5. Javier Ramirez

19 Ramirez left on a two week leave of absence to go to
20 Mexico on December 16, 1980. He did not return until February 10th,
21 approximately eight weeks later, and was refused re-employment be-
22 cause his return was outside the leave of absence period.

23 The allegations are that he was threatened with a refusal
24 to rehire if he went to Mexico, and was in fact refused rehire be-
25 cause of his participation in union concerted activities. The claim
26 of union activities was his attending union meetings and signing
27 the petition protesting the Respondent's no-talk rule discussed
28 above. Ramirez did not claim that he was a leader or speaker at
any of the concerted activities.

29 Historically, absences to Mexico were handled very in-
30 formally. John Kyutoku testified that he had no policy, and em-
31 ployees normally just left without telling him, sometimes he re-
32 hired them and sometimes he didn't. In 1980, two workers, Guadalupe
33 Valenzuela and Abel Gomez, went to Mexico without any announcement

1 and returned two or two and one-half months later. When John
2 Kyutoku refused to rehire them he received an unfair labor practice
3 charge which he settled, putting them back to work. He concluded
4 from that experience that he didn't want any further unfair labor
5 practices, so he adopted a system of formal leaves with permission.
6 Since that time, no employee was allowed to leave without a written
7 permit. For example, a permit was given for one week off where
8 Lupe had requested two weeks off. When Lupe returned late, John
9 Kyutoku refused to rehire him. There were other similar incidents:
10 for example, requests for emergency leave and written permits to
11 employees Cristobal Panagra and Abel Gomez.

12 There was no testimony that the formal policy had not been
13 followed uniformly after the problem with Valenzuela. There was
14 some dispute as to whether John Kyutoku in the past had refused to
15 rehire some employees following leaves. John Kyutoku prepared a
16 list, and testified as to such employees. Witnesses for the General
17 Counsel testified that some of them had never returned from Mexico.

18 Ramirez was an admitted good worker and apparently a
19 favorite of Mrs. Jennie Kyutoku, who called him "Chapparrito",
20 meaning "Little One". He testified that he had told Jennie Kyutoku
21 substantially earlier that he wanted two months' vacation, and that
22 she had said she could give it to him, but if she did she would have
23 to give it to others: that if she couldn't give him a job she would
24 recommend him to other nurseries and that she wouldn't tell them
25 that he was a pro-union person; if he was against the union it was
26 okay, but if he was with the union it was not okay. Although I find
27 that these matters were discussed between Ramirez and Jennie
28 Kyutoku, I find Ramirez' version implausible. At the outset, having
gone through several years of difficulties requiring the assistance
and expense of labor counsel, it does not strike me as likely that
Jennie Kyutoku would be so unsophisticated as to commit classic un-
fair labor practices through loose talk. It strikes me as more
likely that, upon being apprised as to how semantics can change
legal ramifications, Ramirez' rendition may have been somewhat
tailored. Semantics are difficult to cut through in this case as
the communications involve not one but two foreign languages
(Spanish and Japanese), idioms, mores, customs and practices.

21 Ramirez testified that when he was ready to go he was
22 asked to sign a piece of paper and refused, because it meant that
23 he was in agreement with the employer's view of the amount of time
24 he could take to go to Mexico. On his last day of work, he testi-
25 fied that John Kyutoku asked him to stay at quitting time to talk
26 to him, but he left because John was busy. John Kyutoku thereafter
27 typed up a leave of absence letter, took it downtown to have it
28 translated into Spanish, and then delivered it to Ramirez' home.
John Kyutoku talked to Ramirez, gave him the letter and a
check, and told him to have a nice vacation but to return as soon
as possible. The letter stated:

27 ///

28 ///

1 As you are asking us leave of absence to this
2 holiday season. We Kyutoku Nursey, Inc.
3 grant you two (2) weeks from December 17,
4 1980 to December 31, 1980. As we talked if
5 you wish to come back within this period
6 there will be work for you, but there after
7 we are not responsible for it. We hope you
8 enjoy the holiday. See you at New Years".

9 Ramirez testified that earlier he was asked to sign a
10 paper and he refused, saying it wouldn't be possible, and they said
11 he was going to sign. There was no testimony that he was entitled
12 to more than two weeks off or that at the time he left that he was
13 given more than two weeks off.

14 Ramirez testified that on December 29 he telephoned a
15 friend, Abel Villa, and asked him to call John Kyutoku and tell him
16 it wouldn't be possible for him to come back because his mother was
17 ill. He testified further that Villa was not able to reach John
18 Kyutoku. John Kyutoku stated that he received no calls or notifica-
19 tion from anybody until Ramirez returned in February. Ramirez
20 testified that when he returned, John Kyutoku said he wanted to give
21 him his job back, but he had a lot of workers and would recommend
22 him to other nurseries, and maybe in two weeks give him his job
23 back. Ramirez said that John Kyutoku asked him why he had been
24 so long coming back, and he said he had problems at the border. He
25 testified that he called John Kyutoku two weeks later, and John
26 said that he had no job left and he would not get a job. Kyutoku
27 testified that when Ramirez returned he told him he couldn't do
28 anything for him right now, and asked him why he took so long, and
he said too many immigration officers at the border. Ramirez asked
for help in finding work, and John Kyutoku did not make any effort
because he knew it was a very slow time for all growers. There
was some dispute as to whether John Kyutoku had hired anyone after
Ramirez' return, and after checking his records, John Kyutoku testi-
fied that Ramirez was not rehired because he did not come back
within his leave of absence.

There was testimony by John and Jennie Kyutoku that they
didn't know whether Ramirez would return, that he might want to
work elsewhere and that his father might want him to stay in Mexico.
John Kyutoku testified that when he took the notice to him on
December 16th, Ramirez said he wasn't sure whether he would return.
Between the time he was due to return on December 31 and the time
he did return, John Kyutoku employed seven people, four of whom
were Koreans.

6. Oscar Garcia

Oscar Garcia, herein also called Oscar, was informally
suspended, i.e., sent home, for part of one day, which became two
days, on May 29, 1980 following a disagreement with Jennie
Kyutoku. Respondent refused to rehire Oscar on August 7, 1980,
following his absence since July 23rd. Oscar testified that he,

1 along with three others, organized the 1979 work stoppage, and he
2 also handed out fliers at three other nurseries, talked with workers
3 of Respondent, and brought a letter from the union to John Kyutoku
4 (presumably the Notice of Access). The complaint and underlying
charge contend that Garcia was discharged for these alleged union
activities which were discussed above.

5 On May 26, 1980 Oscar Garcia spoke at a meeting with
Respondent requesting Memorial Day off.

6 Oscar testified that on May 29, 1980 Jennie Kyutoku com-
7 plained that he was not producing and spoke too much. Oscar testi-
fied John Kyutoku made a similar complaint and sent him home for
8 the day. He testified that Jennie Kyutoku would harass everybody,
and tell them to work faster and do more work. When Oscar returned
9 the next day, he was asked to sign a paper before he could go to
work. He wouldn't sign it, and went to the union, and was told to
10 go ahead and sign. The paper indicated that he should obey the
orders of Jennie Kyutoku, since she was an owner. John and Jennie
11 Kyutoku viewed the matter as one of misunderstanding, both stating
that what Jennie Kyutoku said involved no criticism of Oscar. John
12 Kyutoku said his wife stated: "Oscar never finish today." which was
merely a statement of the status of his work, and involved no
13 criticism, particularly since Oscar had just started a new area of
work. However, Oscar became angry with Jennie Kyutoku who testi-
14 fied that she was not sure why Oscar was mad. John Kyutoku testi-
fied that he asked Oscar to sign a paper which he wrote with the
15 following purpose:

16 That mean he didn't listen to my wife so we
17 wanted him take order from my wife as much as
I.

18 When the paper was signed he returned to work.

19 Before the company's refusal to rehire Oscar in August of
1980, he had been given one written warning ticket for not calling
20 in. Oscar also admitted that three days before he was arrested he
had called in, and he admitted that a week before he had been told
21 to call in early when he wouldn't be present. John Kyutoku testi-
fied more precisely from his written notes of those telephone con-
22 versations. He stated that ten days before Oscar's arrest he had
had a conversation where he told Oscar that when he was absent or
23 leaving the area he had to let him know, and between the time of
that conversation and his absence he also had a call asking for
24 an excuse for Oscar because he was sick, and had a memorandum of
that call in his file.

25 Oscar testified that he was arrested on July 23, 1980 and
26 put in jail for eight days. He stated that he did not call John
Kyutoku, but called Lupe Valenzuela, asking him to give John
27 Kyutoku the message.

28 ///

1 "I told him to please call him before 7
2 o'clock because the police had arrested me
3 and I was in jail and I didn't know when I
4 was coming back. He was going to be either
5 one or two weeks."

6 Valenzuela testified that Oscar said to give a message to the
7 employer:

8 "That he had a problem with the police that
9 he was in jail."

10 Valenzuela testified that he called John Kyutoku and told him:

11 "That Oscar had had some problems with the
12 police that he wasn't going to be able to
13 work that day."

14 Valenzuela testified Kyutoku responded:

15 "That I should tell Oscar that if he wasn't
16 there by 7 o'clock he no longer had a job and
17 he told Mr. Kyutoku he wouldn't tell him and
18 that was all in the conversation."

19 Valenzuela had no further conversation with Oscar until he re-
20 turned from Mexico.

21 On cross-examination, Valenzuela said he used the word
22 "police accident", specifically "accidente poliziacio", and that
23 John Kyutoku probably misunderstood him.

24 John Kyutoku testified that Valenzuela called and said
25 "Oscar cannot come to work today because he hospitalized as a result
26 of fighting with his wife." (using Spanish and mixed English) and
27 said he would return in two or three days, and gave the name of
28 Natividad Hospital. The reference to the hospital has substantial
significance because Valenzuela denied that there was any statement
to that effect.

Testimony of General Counsel's witness, Rafael Camacho,
tended to support Kyutoku's version: Camacho testified that on
July 24th John Kyutoku said "Yes. He said that he had noticed that
Oscar had had an accident and was in the hospital, that is to say,
someone else had told him that." 4/

John Kyutoku testified he made two memoranda of the
conversation, one, after the other, which reads as follows:

Oscar Garcia Mena 7/24/80 6:45 notice of
sick. Mr. G. Valenzuela telephone 6:45 a.m.
that Oscar Garcia Mena was hospitalized last
night accident? fighting with his wife.

4/ Camacho stated that John Kyutoku had asked him to find out about
Oscar. John Kyutoku denied this and said he had heard from his
wife that Oscar was in jail. She testified that she had heard that
from Camacho.

1 "7-24-80 7:00 a.m.
2 Guadalupe Valenzuela telephoned that Oscar
3 had a accident last night and hospitalized to
4 Natividad Hospital he cannot able to work 2
5 or 3 days. (He fought with his wife):

6 John Kyutoku testified he heard from his wife that Oscar was in
7 jail and checked, and when Oscar didn't return he called the
8 hospital, the jail and the sheriff. John Kyutoku testified he was
9 not able to find Oscar at any of the hospitals or through the
10 police. John Kyutoku prepared a letter to Oscar Garcia which he
11 mailed, and also took to his residence but he was not able to find
12 it. The letter read as follows:

13 7/29/80

14 Dear Oscar:

15 I got telephone call from Lupe on July
16 24-80 6:45 a.m. that you are not able to come
17 work because you are hospitalized. I hope
18 you doing all right now but I don't hear or
19 receive anythings from you a like request of
20 sick leave or no time of absent. etc. I have
21 to keep my business run so could you give me
22 some information as kind of accident...

23 Since you were not report to work it already
24 five days (5) past.

25 If you don't receive anything within a couple
26 days, and you are not illness I consider that
27 you are voluntary terminated.

28 I hope to see you soon at work.

Sincerely your
John Kyutoku

That letter was returned to John Kyutoku with a post office data
card indicating it was unclaimed.

Two days after writing the letter, John Kyutoku asked
Jose Sanchez to call Oscar's wife. Sanchez reported:

He said that his wife, Oscar's wife, said
they fight with Oscar and he's picked up,
sheriff or police. Then he in the jail.
But he will transfer to Immigration. I think
he was that day or afterwards.

Mr. Sanchez made a written memorandum of the conversation on
7/31/80 at 10 o'clock a.m., reading as follows:

///

///

1 7/31/80 8:10 A.M.

2 Ph. call to wife of Oscar Garcia. I asked if
3 I could talk to Oscar - she said he does not
4 live here anymore. I asked when will he
5 return to work? She said Oscar was turned
6 over to the Immigration and he will be deported
7 to Mexico today.

8 Jose Sanchez

9 Mrs. Oscar Garcia testified that she called John Kyutoku
10 and told him Oscar was in jail, Immigration had a hold on him and
11 that she didn't know when he would come back. She denied that she
12 ever had a conversation with Jose Sanchez.

13 When Oscar returned, John Kyutoku told him, "If you want
14 to work for me you have to bring doctor's certificate." John
15 Kyutoku asked him if he had received the letter and he said no.
16 Oscar asked for his vacation pay to pay the Coyote who brought him
17 back from Mexico. Oscar did not say anything about his absence
18 or why he hadn't come back earlier. John Kyutoku told Oscar, "You
19 bring a doctor's certificate and I give you back job." John Kyutoku
20 testified he did not take Oscar back on August 9th because he didn't
21 bring a doctor's certificate or any document, and he was gone a
22 long time without any excuse.

23 7. Manuel Ponce Gonzales

24 Ponce was hired on July 7, 1980, suspended for five days
25 on March 2, 1980 and terminated on June 13, 1981. His participation
26 in the work stoppages has been discussed above. When hired, Ponce
27 told John Kyutoku that he was experienced, but John Kyutoku said
28 it was quickly apparent that he had no experience. John Kyutoku
testified he had problems with his cutting, his disbudding, with
working too slowly, and talking too much. Kyutoku testified that
when Ponce was talking, he was looking the wrong way, so he couldn't
do his work properly. 5/

29 Shortly after Gonzalez was hired in February 1981, he
30 recommended that Ponce be suspended. Gonzales told Diaz, Ponce's
31 supervisor, "Manuel is doing pretty bad because he is horsing
32 around." Gonzales said he was playing around too much,
33 going to the restroom too much on purpose, playing with his knife,
34 and "that kind of stuff". Gonzales testified he warned Ponce
35 twice before his suspension, then recommended to Diaz and John
Kyutoku that he should be suspended for a week to see if he
would come back and do better. His opinion was that he could
do the work if he wanted to. Ponce was suspended in March, 1981,
and given a written suspension notice.

36 ///

37 5/ When John Kyutoku warned Ponce, Ponce's response was, "Every-
38 body's doing the same." In his employment of less than a year,
Ponce was tardy 50 times.

1 Ponce testified he was told he was being suspended for
2 five days "because I was doing the work very slowly and not obeying
3 the foreman." Again, Ponce said he was doing the work the same as
4 everybody else. John Kyutoku got the suspension language from his
5 attorney over the telephone and also had it translated over the
6 telephone and typed. The translation proved to be not wholly accurate
7 and the word "deliberate" was not included in the translation.
8 However, Jose Gonzales, who was bilingual, translated and explained
9 it to Ponce and Ponce testified he understood the suspension.
10 Ponce in response said he was working the same as everyone, and
11 Gonzales said that was not true, he was fooling around, slowing
12 down, and playing at this work. When Ponce returned, John Kyutoku
13 and Gonzalez again spoke with him. They told him that they had
14 started replanting work, and thus Ponce was put to work with
15 another worker putting up light pipe from the ceiling. Gonzales
16 testified that after two days' work, Ponce again slowed down, and
17 that he warned him five or six times before Ponce was finally fired.
18 He (Gonzales) stated that he counted Ponce going to the restroom
19 nine times one morning between 9:30 and lunch time,
20 and Ponce came back laughing in his face, saying "You can't stop me
21 to go to restroom". Gonzales sought the help of one of the leaders,
22 Isidro Garcia (a conversation that Garcia denied) and stated that
23 Garcia told him "Nothing we can do because we talked to this guy
24 and he's like a baby."

25 John Kyutoku testified that he talked to Ponce on his
26 return, and asked him to do his best, but nothing improved; some
27 things got worse. Ponce was terminated, and the reasons John
28 Kyutoku gave for terminating Ponce were that Ponce was not doing
his work right, not listening, was talking back, was coming in late,
was wasting company time, and for not respecting Mrs. Jennie
Kyutoku, Ramon Diaz and Jose Gonzales, his superiors. John Kyutoku
said that Ponce was the worst employee he had had in fourteen years
of business. Gonzales also testified that Ponce was the worst
employee with whom he had ever worked. Ponce admitted they had told
him he was the worst employee.

29 The suspension stated, "You are suspended without pay be-
30 cause you are deliberately slowdown and refusing perform normal
31 days work. You will be reinstated next Monday, if you are willing
32 to do good day's work." When he was terminated, he was again given
33 a termination slip with the reasons for termination as follows:

34 "Reasons of Termination"

- 35 1. Poor Quality Work
- 36 2. Non-Cooperation
- 37 3. Bad Attitude
- 38 4. Horseplay
- 39 5. Tardiness

1 Suspension: During March, 1981, Kyutoku Nursery, Inc.
2 suspended Manuel Gonzales (Ponce) for five days; thereafter, allow-
3 ing him to return to work. Improvement in the five reasons stated
4 above has not occurred, thereby, Kyutoku Nursery's only alternative
5 is termination."

6 Two days after the termination, Respondent's counsel
7 wrote the UFW bargaining representative stating that he had been
8 unable to reach him by telephone and it had been necessary to
9 terminate Ponce. He stated:

10 At the bargaining table, we have offered to
11 consider terminations as suspensions for a
12 brief period of time while the union has a
13 chance to investigate. I am willing that Mr.
14 Gonzales' termination be considered in the
15 same way, although he has been terminated.
16 If you wish to investigate the facts and
17 discuss it with me, I would be happy to do
18 so.

19 There was no evidence that the union ever sought to intervene on
20 behalf of Ponce with the employer.

21 John Kyutoku, Jennie Kyutoku and Gonzales all testified
22 that Ponce was disrespectful although John Kyutoku said the dis-
23 respect was not that important. John Kyutoku testified that Ponce
24 was trying to make them angry, to aggravate them, or start some-
25 thing; Ponce would see Jennie Kyutoku and say good morning, and
26 then he would repeat the same thing five other times; he would
27 whistle for half a day; when they approached him he would start
28 whistling or talking louder; he did this many, many times; he
29 would do it more when they got close, and he was a showoff. Jennie
30 Kyutoku testified to the same effect and said that when Ponce re-
31 peated his greeting over and over again, "I feel he's just provok-
32 ing something". She testified further that one day Ponce said,
33 "You look nice, Baby", and "Baby is a word that I felt wasn't the
34 kind of word to say to the boss' wife." She felt it was disre-
35 spectful. Moreover, Ponce would use the women's restroom forcing
36 Respondent to lock the restroom to keep him out.

37 Jose Gonzales testified that he talked to Ponce, warning
38 him not to talk to Jennie Kyutoku and he agreed, yet later the
39 same day he stated, "Hi, Baby, how are you doing? You look beauti-
40 ful this morning." Jose Gonzales testified further that every time
41 he talked to Ponce he would say such words as "Come on, Baby,
42 there's nothing you can do. Do whatever you want." Jose Gonzales
43 was upset when Ponce told Sabas Barrientos that Jose Gonzales call-
44 ed Barrientos a son of a bitch. Gonzales made the decision to fire
45 Ponce.

46 None of these conversations were ever denied. Ponce
47 was not recalled after such testimony. Nor was there effective
48 cross-examination of Jose Gonzales on this subject. Consequently,
49 since Ponce was not recalled, the entire testimony of Gonzales and

1 John and Jennie Kyutoku respecting Ponce was left substantially
2 un rebutted.

3 The allegations of the complaint with respect to Ponce
4 are that he was discriminated against for his union sympathies
5 and participation in protected union activities, 6/ and that Jose
6 Gonzales threatened to fire him for talking with union supporters;
7 the suspension and termination are claimed to be for his union
8 sympathies and union activities. There is no evidence that Ponce
9 engaged in any union activities, that he attended union meetings,
10 or that he handed out union literature. The evidence that he
11 participated in concerted activities in the second and third work
12 stoppages was discussed above. The second occurred immediately
13 after he went to work, and he was the first employee to go back to work
14 The third work stoppage in 1981 was led by others, and practically
15 all employees talked, even according to Ponce's testimony. Ponce
16 said that his only statement in the meeting was, "If they could
17 increase". He admitted that Isidro Garcia, Eliseo Meza and Sabas
18 Barrientos, three members of the union committee, spoke also.

11 The record was silent with respect to any statement, as
12 alleged, by Jose Gonzalez, warning Ponce he would be fired for
13 talking to Chavistas. John Kyutoku testified that when he corrected
14 Ponce for talking too much, Ponce blamed the talking on the other
15 workers, (Chavistas) saying they had harrassed him after he had
16 gone back to work following the second work stoppage. John Kyutoku
17 told Ponce that if he didn't want to talk to them he should stay
18 away from them. John Kyutoku denied ever using the word Chavistas.

16 Ponce testified that Mrs. Jennie Kyutoku called Isidro
17 Garcia and Eliseo Meza, "poor people," (Chavistas). Jennie Kyutoku
18 stated that her reference to poor people had been an erroneous use
19 of the word "pobrecito." She testified she used the word to express
20 sympathy, but that it made some employees mad and she was told not
21 to use it because it had a different meaning, and since then she
22 had refrained from using it.

20 Ponce also complained of not being allowed to talk to
21 Maria Diaz who he testified was not a Chivista. Maria was the wife
22 of the foreman, Ramon Diaz, and Ponce testified Ramon called him
23 the "author" of all of his problems. Isidro Garcia testified that
24 he heard Diaz say a bad word about Ponce to Maria, and Diaz said he
25 did not like Ponce anymore than he disliked him.

23
24 6/ Ponce claims that he was separated, apparently, for union
25 reasons, and complained. He was told by Gonzales that it had
26 nothing to do with the union and that he had to do the work.
According to Gonzales, thereafter he was put to work cutting
flowers and doing the same work as others.

27 ///

28 ///

IV

DISCUSSION AND ANALYSIS

This case ultimately turns the ability of the General Counsel to carry the burden of proof that the reasons offered by Respondent for the terminations, suspensions and refusals to rehire were pretextual. Resolution of the allegations will be determined largely by a weighing of the General Counsel's evidence offered to prove that Respondent's reasons were pretextual, and Respondent's evidence to the contrary.

The Board has recently clarified and simplified the law to be applied in these cases, following the precedents of the National Labor Relations Board and the courts. See Nishi Greenhouse, 7 ALRB No. 18 (Aug. 5, 1981) following Martori Bros. Distributors v. ALRB, 175 Cal. Reprtr. 626 (July 27, 1981), Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980); Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). See also Montebello Rose Co. v. ALRB, 119 Cal. App. 3d 1 (1981), and Texas Dept. of Community Affairs v. Burdine, 67 L.Ed.2d 207 (1981). The United State Supreme Court enunciated clearly in Burdine the test which I will follow here, which essentially is a three-part test. First, the General Counsel has the burden of establishing a prima facie case, by which is meant the introduction of sufficient evidence "to permit the trier of fact to infer the fact at issue", i.e., unlawful motivation. 67 L.Ed.2d at 216. If no such showing is made, the case must be dismissed.

Second, assuming a prima facie showing is made, the burden shifts to the Respondent to produce evidence - not prove - that the actions in question were taken for a legitimate, non-discriminatory reason:

The defendant need not persuade the court that it was actually motivated by the proffered reasons (citation omitted). It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. 67 L.Ed.2d at 216.

Third, the Respondent having introduced evidence of a non-discriminatory reason, the General Counsel can prevail only by proving, by a preponderance of the evidence, that the proffered reason was a mere pretext and not the true reason for the action in question. In this regard, the General Counsel, as always, retains the ultimate burden of proof. 67 L.Ed.2d 215, 217 ["The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."]

As the California Supreme Court explained in Martori Bros. Distirbutors v. ALRB, 175 Cal.Rptr. 626 (July 27, 1981), the rationale behind this type of "but for" approach is that just

1 as an individual who engages in protected activity should not be
2 penalized for that fact, neither should he be insulated from dis-
cipline or discharge simply by virtue of such activity:

3 Just as we declined to permit school
4 authorities to mask an unconstitutional
dismissal behind a statment of valid causes,
5 so we cannot allow a teacher genuinely
6 dismissed for valid causes to be reinstated
because school authorities were also displeased
7 with his exercise of constitutional rights.
If it were otherwise a teacher about to be
8 dismissed for valid causes could insulate
himself from dismissal simply by engaging in
9 political activities offensive to his superiors.
175 Cal.Rptr. 630-31 (citation omitted).

10 If the Respondent meets this burden of producing evidence
of valid reasons for its actions in question, then there can be no
11 finding of unlawful activity unless the General Counsel meets its
burden of showing that the action would not have been taken "but
12 for" the protected activities. The General Counsel must prove the
reasons advanced were pretextual. As the court noted in Martori:

13 When it is shown that the employee is guilty
14 of misconduct warranting discharge, the discharge
should not be deemed an unfair labor practice
15 unless the Board "determines that the employee
would have been retained 'but for' his union
16 membership or his performance of other protected
activities."
17 175 Cal.Rptr. 631.

18 In all of these cases, including the present one, the
ultimate burden of proof remains with the General Counsel. The
19 above test has been adopted specifically by the ALRB in Nishi
Greenhouse, 7 ALRB No. 18 (Aug. 5, 1981). The NLRB had adopted
20 the Mount Healthy test in 1980 in Wright Line, Inc., 251 NLRB No.
150.

21 Turning to the case at issue, I have little difficulty in
22 finding that the General Counsel has met its burden of establishing
a prima facie case. As discussed above, the evidence shows clearly
23 that all four alleged discriminatees engaged in either union or
concerted activities, or both to some extent, and that the Kyutokus
24 had some knowledge of those activities. The actions complained of
followed closely enough upon the protected activities so that a
25 prima facie case is established fairly easily, assuming that there
is some evidence of animus. The General Counsel, to establish
26 animus, relies upon the conduct of Respondent with respect to the
1975 election proceedings and the Board finding of lack of good
27 faith on the part of Respondent as to the election not being
conducted in a fair manner, and alleged anti-union statements
28 of the Kyutokus and labor consultatant Sanchez.

1 The General Counsel argues at length that the employment
2 of the labor consultant was itself evidence of bad faith, and that
3 the Kyutokus were able to speak Spanish, and that the claim of needing
4 language help was untrue. A serious claim made by the General
5 Counsel was that foreman Diaz made a statement that Respondent was
6 scared and wasn't going to hire Mexicans any more, but was going
7 to hire Filipinos, Koreans and Japanese. Diaz was never called as
8 a witness by Respondent, but Kyutoku denied any such policy or
9 statement, or having heard any supervisor make such a statement.
10 The evidence was clear that Respondent for the first time hired Korean
11 in 1981, although it was not established that they ever approached
12 being a majority of the work force.

13 Without wholly resolving the conflicts in this evidence,
14 I find that General Counsel produced sufficient evidence of animus
15 to support a prima facie case. Diaz may or may not have been a
16 supervisor at the time he was alleged to have made his statement re-
17 specting hiring Filipinos, Koreans and Japanese. John and Jennie
18 Kyutoku and labor consultant Joe Sanchez may or may not have made
19 the precise statements attributed to them by General Counsel's
20 witnesses respecting the undesirable features of the union.
21 Respondent's conduct in resisting the election proceedings may or may
22 not have been as anti-union and ill-advised as the General Counsel
23 suggests. Jennie Kyutoku may have spoken Spanish in the most
24 limited way to simply function as an employer, or she may, as
25 contended, have been able to converse well enough to convey an opin-
26 ion or statement as to unionism. These questions need not be here
27 resolved. I do find that Mrs. Kyutoku used words like "poor people"
28 and "no good" in reference to the UFW and its supporters in such a
manner as to convey her strong feelings against the union. I cannot
accept the contention that her command of Spanish was very limited.
Even if I resolved all credibility matters against the General
Counsel, which I do not do, the undisputed evidence still shows a
strong resistance by Respondent to unionization. The uncontradicted
evidence in the record certainly raises sufficient support for an
inference of animus.

For all of the above reasons, I find that the General
Counsel met the burden of establishing a prima facie case, that the
concerted or union activities of the alleged discriminatees were
known to Respondent and were not welcomed.

Respondent, in its case in chief, responded to the
prima facie case made by General Counsel. Respondent attempted to
show that it had legitimate non-discriminatory reasons for
its actions as to all four individuals. For the reasons discussed
immediately below, I conclude that the Respondent did meet that bur-
den of producing evidence justifying all its actions, save one.

I begin by noting that from Respondent's standpoint, the
working conditions and employee relations became very difficult
about the same time as the first work stoppage. The existence of
three work stoppages themselves, although protected activity, would
clearly demonstrate that from an employer's standpoint, its employees

1 were not well satisfied. However, the testimony of John Kyutoku and
2 his wife Jennie went further: that the employees became very unre-
3 sponsive and they, as owners, simply were not able to communicate
4 effectively with the employees; that this was the reason for the
5 employment of Ramon Diaz and Jose Gonzalez, two bilingual super-
6 visors, and the labor consultant, Jose Sanchez. Some of the evidence
7 of General Counsel's witnesses tended to confirm this view of an
8 unhappy work climate, namely, that Jennie Kyutoku in their view was
9 harassing them, urging them to work too quickly, or in the word of
the General Counsel, "overzealous". The work rules against the play-
ing of radios and speaking too much, are also undisputed evidence
of the work climate. More serious from the standpoint of the em-
ployer was Respondent's purported belief that almost half of its
work force was engaged in [a statutory unprotected] slowdown.
That was the testimony of John Kyutoku and of Jose Gonzalez. It
is against this background that the actions of Respondent must
be evaluated.

10 Respondent attempted to establish non-discriminatory
11 reasons as follows: for the termination of Camacho with evidence
12 that he received three warning tickets for unexcused absences, and
13 that he refused to report to work one day after being told that he
14 would be terminated unless he did; that Ramirez had a two week
15 leave of absence to go to Mexico, and instead he stayed two months
16 without permission or justification; that Oscar Garcia was absent
for two weeks without obtaining a leave or a doctor's certificate
as required, or without an acceptable excuse being communicated to
Respondent; and that Ponce was suspended for deliberately slowing
down and refusing to perform normal work, and terminated for non-
cooperation, poor attitude, horseplay, tardiness and disrespect.

17 These proffered reasons for Respondent's actions and
General Counsel's rebuttal thereto are now discussed.

18 1. Rafael Camacho

19 As to Camacho, the evidence was clear that he was told
20 many times that he had to work as scheduled, and he had to call
21 in when not able to work; that the employer adopted a system of
22 warning tickets, with termination after three tickets; that that
23 system was explained to Camacho at the time he received his first
ticket, and that he understood it; that he did receive three un-
excused tickets and did refuse to come to work when he was told
that the penalty would be termination.

24 The General Counsel presented evidence that the warning
25 system was adopted without bargaining with the union, but the
26 General Counsel abandoned its allegation that this constituted an
27 independent violation of the Act. Ignoring that aspect of the
28 evidence, there is nothing unlawful or discriminatory on the face
of it in adopting a system of warnings and formalized discipline.
It was not pleaded that the system was established in retaliation
against protected activities, as suggested by General Counsel's
opening statement. Moreover, there is a failure of proof that the
changes made by Respondent were adopted in retaliation for the

1 1979 work stoppage: the first ticket given to Camacho was in April
2 1980, seven months after the stoppage and union activities in
3 September. John Kyutoku testified that he had problems of absences,
4 that he had gotten no response after many talks with Camacho, that
5 he adopted a formalized system and used the forms recommended by the
6 California Floral Council, in order to make a record in case of
7 problems. John Kyutoku presumably could, without the system, have
8 terminated Camacho for too many absences. Adopting a system requir-
9 ing written warnings in itself is neutral with respect to protected
10 activities. Whether it was applied in a non-discriminatory fashion
11 is another question. General Counsel argues that one of the three
12 warnings applied to an absence for which Jennie Kyutoku had granted
13 permission. John Kyutoku testified that he had excused and destroy-
14 ed one warning ticket, that he had forgiven several other absences,
15 but that there were still three unexcused absences. The evidence
16 with respect to the warning on April 19, 1980, which was claimed
17 have been forgiven, was contradictory and unclear as to whether Camacho
18 was going to meet a brother or a cousin, and is inconclusive.
19 But even if that "second" ticket was forgiven, another "second"
20 ticket admittedly was given on May 3rd which Camacho did not con-
21 test. Moreover, both Kyutoku and Camacho testified that on the
22 critical date of the third ticket, John Kyutoku told Camacho that he
23 had three tickets and he had to come to work that day or be termi-
24 nated. Camacho made no claim at that time that there were only two
25 tickets. Nor when Camacho returned did he claim that he had not
26 received three tickets. He merely asked John Kyutoku to lay him
27 off or give him some punishment other than termination. Consequent-
28 ly, I find that there was a warning system established, and that in
the understanding of John Kyutoku and Camacho, there were three un-
excused absences.

I thus find that the Respondent produced evidence of a
reasonable justification for terminating Camacho. The question re-
mains, was the reason pretextual? Would Camacho have been termi-
nated "but for" his union and concerted activities? Initially, I
note that while Camacho engaged in concerted and union activities,
there was no evidence that John Kyutoku believed or had reason to
believe that he was one of the strongest leaders of the union group
other than his speaking. I note also that Camacho was a valued
employee. Importantly, if the reason given was pretextual, there
certainly was no reason for Kyutoku to offer Camacho the opportunity
of coming in on Saturday when he called in late. He had already
failed to call in during the work day for four or four and a half
hours, by his own testimony, and merited a ticket for unexcused
absence. That would have been sufficient justification if John
Kyutoku were trying to rid himself of a strong pro-union employee.
Camacho had the opportunity and made his own choice. Similar
reasoning applies to the suggestion that Kyutoku was unreasonable
in expecting Camacho to come to work when he had a headache for lack
of sleep. That may have been unreasonable by some standards, but
under the system he had established, John Kyutoku had no reason or
need to forgive Camacho after he had failed to call in until 12:20
on that work day. Camacho admittedly had been told before, as had
other employees, that when he was going to be late he should call

1 in early, not after the work day had partially elapsed.

2 Finally, Respondent is not held to the standards of
3 "just cause" under a collective bargaining agreement, or to the
4 standards of an enlightened and sophisticated employer. The warning
5 notes, the language used, the records kept, and the reasons given,
6 all show a lack of sophistication. They also show a simple straight
7 forward approach which I find difficult to conclude is pretextual.
8 The many months elapsing after the September stoppage negate the
9 idea that the reason for termination was manufactured.

10 General Counsel argues that others (two pro-
11 union employees) were absent without excuse and were not given
12 tickets. That suggestion is based on notations on the time cards
13 and there is no evidence as to whether or not the absences were
14 forgiven. In other words, whether the absences were excused or not
15 was not litigated, and is not shown by the time cards. More would
16 be needed to show a discriminatory application of this absence-
17 ticket system. Moreover, I note that nearly all of the employees
18 were involved in protected activities, not just the ones who were
19 disciplined.

20 This conduct of John Kyutoku was not so unreasonable as
21 to lead to a conclusion that the reasons given it were pretextual.
22 In other words, while there is a possibility that John Kyutoku's
23 refusal to forgive Camacho was pretextual, another likely explana-
24 tion is one of a literal application of the ticket system that he
25 had established. I conclude that General Counsel has not met the
26 burden of proving by a preponderance of the evidence that the reason
27 was pretextual and that Camacho would not have been terminated "but
28 for" his protected activities.

17 2. Javier Ramirez

18 Ramirez' case involves similar considerations to those of
19 the Camacho termination. Like Camacho, Ramirez was a valued em-
20 ployee. Like Camacho, his concerted activities were established,
21 but they were not so overwhelming as to make a reasonable person con-
22 clude that Respondent had resolved to rid itself of Ramirez at any
23 cost. Like the Camacho case, Ramirez was terminated under the
24 terms of a clearly adopted, and clearly explained, system of per-
25 sonnel procedures.

26 There is no dispute that John Kyutoku gave Ramirez a
27 written leave of absence for two weeks only. It is also clear that
28 Ramirez resisted receiving such written notice, that he did receive
it and that he did not comply with it by his own choice. John
Kyutoku, as discussed above, testified that he adopted the system
of written leaves (two weeks ordinarily but one week for emergency
leaves) following his having to settle an unfair labor practice
case and reinstate two workers who had gone for two months or more
without any notice to him and without permission. Certainly that
experience would be adequate reason to establish some formal system,
as advised by the California Floral Council. The establishment

1 of the system would in itself be neutral, i.e., there is no reason
2 to believe that pro-union people would be more likely to violate the
3 terms of a leave. Perhaps it could be inferred that most workers
4 of Mexican origin would customarily return to Mexico on occasion,
5 and therefore a rigid system of leaves would be directed against
6 such employees. But that was not alleged nor proved.

7 Thus, the establishment of the system was not pleaded nor
8 proved as a violation of the Act after the General Counsel abandoned
9 any claim as to unilateral changes. Nor is there sufficient evidence
10 on this record upon which to base a finding that the adoption of the
11 system was for proscribed reasons or motivations. The question
12 again remains, was the system applied in a discriminatory fashion?
13 Respondent produced evidence which was not contradicted and included
14 documentary evidence that written leaves of absence were given to
15 all people taking leaves after the system was adopted. There was
16 evidence that before the system was adopted, workers may have gone
17 to Mexico and returned freely, with some exceptions. However, that
18 evidence does not show that the system, once adopted, was dis-
19 criminately applied. The General Counsel also produced evidence
20 that Jennie Kyutoku stated that if Ramirez was for the union it was
21 not okay to go for two months, but if he was against the union it
22 was okay. As noted for the reasons indicated above, it seems im-
23 plausible to me that such a statement was made. This evidence was
24 offset largely by testimony from the same witnesses that Jennie
25 Kyutoku said that if she gave that time to Ramirez she would have to
26 do it for other people. Whether Ramirez at one time may have
27 thought he would have a two month leave of absence, clearly when he
28 left, he could not have had any such belief. John Kyutoku had gone
to the trouble of typing the leave, having it translated, and de-
delivering it to him at his home late in the evening after Ramirez
had refused to wait for John Kyutoku at the end of the work day.
Again, Ramirez' telephone call to his fellow employee some weeks
later asking the employee to tell John Kyutoku he couldn't return
because his mother was sick showed he clearly understood that he
was obligated to return. Therefore, there is no substantial evi-
dence that the system, once adopted, was discriminatorily applied.

21 Once more, while the question is not without doubt, the
22 General Counsel has not carried his burden to prove that the justi-
23 fication offered by John Kyutoku is pretextual. Any inference
24 that the reason was pretextual would have to be based on the im-
25 plausible statements attributed to Jennie Kyutoku about it not being
26 okay for Ramirez to go to Mexico for two months if he was for the
27 union. It may well be that the employees understood Jennie Kyutoku
28 to say something to that effect in her broken Spanish; but as in-
dicated; it seems unlikely to me that she would have said that. I
do not find that there is adequate evidence to show that the refusal
to rehire Ramirez when he returned after seven weeks from a two
week leave of absence was pretextual. Stronger evidence would be
needed for the General Counsel to meet the burden, showing that
Ramirez would have been rehired "but for" his concerted and
union activities.

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1 3. Oscar Garcia

2 The case of Oscar Garcia is different, and perhaps unique.
3 The first charge was that he was suspended for his union activities.
4 Clearly, Garcia was more active than Camacho or Ramirez. I have
5 found that a prima facie case was established. It was admitted on
6 both sides that his one or two day suspension followed a substantial
7 personal dispute between Jennie Kyutoku and Oscar Garcia which led
8 to his being asked to sign a piece of paper saying he would follow
9 her orders before he was allowed to return to work. He did sign
10 the paper before he returned upon the advice of the union.

11 However, three days before, on May 26, 1980, the workers
12 spoke to John Kyutoku about receiving pay for the Memorial Day
13 holiday. Oscar Garcia was an active spokesperson at that meeting.
14 A few days later, on May 29, 1981, Jennie Kyutoku approached Garcia
15 and complained about Garcia talking too much and not producing.
16 Garcia was sent home that day. The following day, he was sent home
17 again, for initially refusing to sign a paper written in English,
18 which he later signed after having someone at the union office
19 translate it and counsel him.

20 What emerges from this two-day scenario is that Garcia was
21 perceived as one of the main leaders in the union and work stop-
22 pages. He was sent home just three days after leading a protected
23 work stoppage. The following day, upon his return, he was told
24 he couldn't work until he signed a paper that he didn't understand.
25 Even though Kyutoku explained to Garcia what the paper was about,
26 Garcia, who does not speak or read English, was understandably
27 cautious to verify the contents of the document before he
28 signed it. The incident with Jennie Kyutoku that happened the day
29 before may have been an attempt to keep Garcia from talking to the
30 other employees about the union or protected concerns. More likely,
31 Jennie Kyutoku was upset with Oscar and his "talking" from his role
32 as an active spokesman. I find, under Wright Line, supra, that this
33 two-day lay-off would not have occurred but for Garcia's involvement
34 in the protected work stoppage, three days earlier, and his union
35 activities. Respondent's apparent business justification is that
36 Oscar Garcia was not producing and was talking too much. Respondent
37 presented a business justification for its action. However, there
38 are inferences that can be drawn from the context and the
39 timing of the incident that Respondent was retaliating because of
40 its concern that Garcia was talking about union or concerted
41 activities and that Respondent was angry because of Garcia's role
42 as speaker at the meeting of employees where the employees sought
43 a paid holiday. I draw this inference in the basis of timing alone,
44 not on the basis of any credibility resolution. 7/ There is no

45 7/ Although I have found, as indicated above, that but for his
46 protected activities, Oscar Garcia would not have been suspended,
47 I indicated that I do not base this finding on credibility, but
48 rather on timing to provide the inference as to proscribed
49 motivation. It is noted that the cases are legion where employees

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1 record that any other employees were forced to sign a paper as
2 Oscar Garcia was forced to do. Neither was there any evidence
3 presented by Respondent that this was a typical disciplinary
4 action to send people home as they did Garcia.

5 Respondent's proffered business justification does not
6 adequately rebut the General Counsel's prima facie case that Garcia
7 would not have been layed off but for his participation in the work
8 stoppage a few days earlier and his known union activities. I
9 therefore conclude that Garcia's five day suspension constituted a
10 violation of Sections 1153(a) and (c) of the Act.

11 The question of the refusal to rehire Garcia following
12 his return from Mexico is difficult. Once more, Respondent has pro-
13 duced evidence of the rule respecting unexcused absences. According
14 to Kyutoku's testimony, extensively discussed above, Garcia well
15 knew the rule; and in addition the only communication he received
16 on behalf of Garcia, about his absence, was the telephone call from
17 Guadalupe Valenzuela. All the other communications John Kyutoku
18 obtained were on his own initiative.

19 The conflicts in the testimony are more apparent than
20 real. Valenzuela testified that he called John Kyutoku as follows:

21 That Oscar had had some problems with the
22 police that he wasn't going to be able to
23 work that day.

24 He stated he used the word "accidente policiazo" and that John
25 Kyutoku probably misunderstood him. It is to be noted that he did
26 not use the word "jail".

27 John Kyutoku testified that Valenzuela said "Oscar cannot
28 come to work today because he is hospitalized as a result of fight-
ing with his wife." His two written memoranda made contemporaneous-
ly both mention hospital and fighting with the wife, but fail to
mention "jail". General Counsel's witness, Camacho, testified that
on the same day, July 24, John Kyutoku said to him "that Oscar had
had an accident and was in the hospital, that is to say, someone
else told him that." From the above, I conclude that John Kyutoku
understood Valenzuela to say that Oscar Garcia was in the hospital

7/ ft.note cont'd.

attempt to use the cover of protected activities to shield them
from proper discipline for insubordination and the like. In these
circumstances, the employees often become arrogant in flaunting
their "power" over the employer, who may become, as a practical
matter, unable to utilize his right at law to discipline or
discharge employees for cause or no cause. This may have been
the reality of the instant case where Garcia was perceived by the
Respondent as being punished for his slow work, talking too much
or hubris, but the record evidence in this area is not sufficient
to rebut the inference of to which the General Counsel is entitled.
Marx-Haas Clothing Co., 211 NLRB 350, 87 LRRM 1054 (1974); Howard
Johson Co., 209 NLRB 1122, 86 LRRM 1148 (1974); D.M. Rotary Press
Inc., 208 NLRB 366, 85 LRRM 1477 (1974); enforced, 524 F 2d
1342, 91 LRRM 2240 (CA 6, 1975); Uniroyal, Inc. 197 NLRB 1034, 80
LRRM 1694 (1972); Atlantic Marine, 193 NLRB 1003, 78 LRRM 1460
(1971); Shivvers Corp., 213 NLRB No. 15, 87 LRRM 1753 (1974).

1 and had had a fight with his wife. I think it is most probable that
2 John Kyutoku misunderstood Valenzuela, or that Valenzuela failed to
3 be frank and say that Garcia was in jail. I note that according to
4 Valenzuela's own testimony, he did not tell John Kyutoku that Garcia
5 was in jail. I note also that the Spanish word "accidenta" possibly
6 was subject to misrepresentation. I observe further that John Kyutoku
7 notes of conversation wspecifically mentioned hospitalization and
8 fighting with his wife, and do not mention jail, and they were made
9 contemporaneously. I therefore find that John Kyutoku's version of th
10 conversation with Valenzuela and his claimed understanding of that
11 conversation to be plausible, particularly because of the written
12 documentation. However, it is also clear that John Kyutoku heard
13 shortly thereafter that Oscar was in jail and was to be deported.
14 John Kyutoku admitted that he heard this from his wife. There is no
15 dispute that two days earlier John Kyutoku wrote Oscar Garcia using
16 the word "hospitalized" and complaining because he had received no
17 request for leave of absence or sick leave, stating as follows:

10 Since you are not report to work it already
11 five days (5) past. If I don't receive
12 anything within a couple days, and you are
13 not illness I consider that you are voluntary
14 terminated. I hope see you soon at work.

13 The letter showed that it was delivered but unclaimed, and Henrietta
14 Garcia, Oscar's wife, testified it was received but not accepted.

15 Finally, and of substantial importance, is the undisputed
16 evidence that when Oscar Garcia returned two weeks after he had left
17 he said nothing about his absence; and was told by Kyutoku "You
18 bring doctor's certificate and I give you back job." John Kyutoku
19 testified that he refused to take him back because he was gone a
20 long time without excuse and he didn't bring a doctor's certificate
21 or any document. There was no testimony that there was any work
22 available for Garcia at that time.

19 The testimony was conflicting as to Henrietta Garcia's
20 conversations. She denied the conversation with Sanchez, but testi-
21 fied she called John Kyutoku, telling him that Oscar was in jail,
22 that Immigration had a "hold" on him, and that she didn't know when
23 he would come back. John Kyutoku denied the conversation.

22 In evaluating this testimony, it is to be noted that John
23 Kyutoku originally believed Oscar Garcia to have been hospitalized;
24 that while he had heard he was in jail, there is no evidence of a
25 strong reason to conclude that John Kyutoku actually believed that
26 he was in jail. John Kyutoku had in fact called the jail, the
27 sheriff, and his written notes do not show that he had been able to
28 learn that he was in jail.

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1 In all John Kyutoku called the Sherriff's Department, the jail,
2 Natividad Medical Center, Salinas City Police, and Salinas Valley
3 Hospital. Consequently, it would be fair to conclude that while
4 John Kyutoku had heard Garcia was in jail and in the hospital, he
5 did not know for sure where he was. It is also of perhaps even more
6 importance that the matter was not clarified when Garcia returned
7 from Mexico because the parties had no conversation at that time
8 about his absence.

9 John Kyutoku's conduct was not so unreasonable as to show
10 that his reasons for not rehiring Garcia were pretextual. If he
11 had known for sure that Garcia was in jail and not in a hospital, it
12 might not seem reasonable to insist on a doctor's certificate, unless
13 as a matter of policy for all employees, a doctor's certificate was
14 to be deemed an excuse saving a job -- i.e., a benefit bestowed
15 on all employees. But, whether John Kyutoku would have been satis-
16 fied with any appropriate excuse is not clear. It is to be noted
17 that when Kyutoku wrote Garcia, he mentioned not re-
18 ceiving "anything", and stated if he didn't receive "anything" with-
19 in a couple of days he would consider him voluntarily terminated.
20 Likewise, John Kyutoku testified that the reason he did not take
21 Oscar Garcia back was because he did not receive a doctor's certi-
22 ficate or any document, and that he was gone a long time without any
23 excuse. Consequently, from John Kyutoku's standpoint, Oscar Garcia
24 was gone without any adequate excuse, or permission, and without
25 any explanation whatsoever on his return. Even from Oscar Garcia's
26 testimony, he did nothing except ask Valenzuela to call Kyutoku.
27 Perhaps it was all a misunderstanding, which could have been cleared
28 up by an adequate conversation on Garcia's return. But there was
no such conversation. Perhaps the standard of just cause was not
met. The question here, however, is whether the conduct was so
unreasonable as to alone meet the General Counsel's burden of
showing that the reason was pretextual. That I cannot conclude.

18 All of John Kyutoku's efforts to establish and learn the
19 circumstances of Oscar Garcia's absence and his letter to Garcia,
20 are all inconsistent with using the absence as a pretext
21 The question is certainly open to doubt, but the burden is
22 with the General Counsel and he has not been met.

23 4. Ponce

24 Ponce worked for Respondent for less than a year. Kyutoku
25 testified of the many problems with Ponce's work, his attitude, his
26 tardiness of 50 times in less than a year, and his disrespect. Jose
27 Gonzalez, hired as a supervisor in February of 1981 with years of
28 experience in carnations, almost immediately recommended that Ponce
be suspended because his work was so bad, even though Gonzalez
thought Ponce was capable of doing the work. Ponce admitted he was
told when he was suspended it was because "I was doing the work
very slowly and not obeying the foreman." He also admitted that he
understood the suspension. Nevertheless, when he returned, his
work did not improve and his attitude seemed to have gotten worse,
according to the testimony of John and Jennie Kyutoku and Jose

1 Gonzalez.

2 I note that the testimony of Jose Gonzalez was not effect-
3 ively undercut by cross-examination, and was not rebutted by General
4 Counsel's witnesses, (except as to testimony that several employees
5 occasionally also used the women's rest room in rebutal of Respon-
6 dent's evidence that Ponce used the women's rest room in a disre-
7 spectful manner). I credit the testimony of Gonzalez and John
8 Kyutoku as to the work performance of Ponce. His case would seem
9 to be a classic example of the situation meant to be covered by the
10 rationale of Mount Healthy and Martori; that is, his work perform-
11 ance was so bad that it appears he would have been terminated what-
12 ever his union sentiments were. His union activities cannot shield
13 him from the consequences of his poor work performance. Evidence of
14 his attitude, to some substantial extent, was not rebutted; General
15 Counsel's witnesses attempted to say that Ponce worked the same as
16 everyone else, but they did not make any effort to rebut his dis-
17 respectful statements and actions reflecting his attitude. Ponce
18 was not recalled to deny that extensive evidence. I credit Respon-
19 dent's testimony that Ponce was, in its view, deliberately slowing
20 down. Finally, I credit the testimony that Ponce's attitude and
21 actions were disrespectful and provocative. John Kyutoku and
22 Jose Gonzalez both testified of conduct which was clearly disre-
23 spectful in more than a minor way.

24 I am unable to find that Ponce was threatened with retal-
25 liation for associating with Union adherents, as discussed above.

26 Finally, in evaluating testimony with respect to Ponce,
27 it is quite clear that there were several other employees much more
28 active in the union, and more capable of leadership, who were not
terminated. As a young employee of very limited seniority, Ponce's
only union activities were associating with the Chavistas, partici-
pating in the second and third work stoppages, and his alleged
speaking at the third stoppage. There was no evidence that Ponce
engaged in any union activities, attended meetings or handed out
literature. Ponce himself admitted that Isidro Garcia, Eliseo
Meza and Sabas Barrientos all spoke at the same meeting at which
he claimed to have spoken; they were still employed by Kyutoku and
constituted the union committee at the time of the hearing.

Consequently, I find that the Respondent has met its bur-
den of coming forward with evidence showing that the suspension and
termination was for business reasons, that is, poor work perform-
ance, attitude and bad attendance. Further, I find that the Gen-
eral Counsel did not meet his burden of showing that those reasons
were pretextual. In the latter respect, I note particularly that
Respondent first suspended rather than terminated Ponce and clearly
explained the reasons, and gave Ponce an opportunity to meet Re-
spondent's objections to his work performance. These facts are
not consistent with pretext. Nor was there any other substantial
evidence of pretext.

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1 In summary, uncontradicted and documentary evidence of persuasive
2 form establishes good business reasons for the terminations, refusal
3 to rehire, and Ponce's suspension. Ramirez and Camacho knowingly broke
4 company rules and seek immunity simply because of their union
5 activities: this is not proper under Wright Line and Mt. Healthy.
6 Ponce was a poor employee. Garcia failed to provide notice or a
7 timely excuse for his absence. While General Counsel makes out
8 each prima facie case, except for the suspension of Oscar Garcia,
9 General Counsel failed to prove that when Respondent took the other
10 actions, the motivation was proscribed by the Act.

7 V

8 CONCLUSIONS OF LAW

9 1. Respondent Kyutoku Nursery, Inc. is an agricultural
10 employer within the meaning of Section 1140.4(c) of the Act.

11 2. The United Farm Workers of America, AFL-CIO, is a
12 labor organization within the meaning of Section 1140.4(f) of the
13 Act.

14 3. Rafael Camacho, Javier Ramirez, Oscar Garcia and Jose
15 Manuel Ponce Gonzalez were agricultural employees of Respondent
16 within the meaning of Section 1140.4(b) of the Act.

17 4. Respondent violated Section 1153(a) and 1153(c) of
18 the Act by suspending Oscar Garcia May 29, 1980.

19 5. Respondent did not violate Section 1153(a) or 1153(c)
20 of the Act by:

21 (a) Discharging Oscar Garcia, Rafael Camacho and
22 Jose Manuel Ponce Gonzalez;

23 (b) By refusing to rehire Javier Ramirez;

24 (c) By threatening Javier Ramirez with a refusal
25 to rehire;

26 (d) By threatening Jose Manuel Ponce Gonzalez with
27 retaliation;

28 (e) By suspending Jose Manuel Ponce Gonzalez.

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1 Upon the basis of the entire record, the findings of
2 fact the conclusions of law and pursuant to section 1160.3 of the
Act. I hereby issue the following recommended:

3 ORDER

4 Respondent, Kyutoku Nursery, its officers, agents, suc-
5 cessors, and assigns shall:

6 1. Cease and desist from:

7 (a) Suspending employees or otherwise discriminating
8 against, any agricultural employee in regard to tenure of
employment or any term of condition of employment because he or she
9 has engaged in any union or concerted activity protected by section
1152 of the Act.

10 (b) In any like or related manner interfering with, re-
11 straining, or coercing any agricultural employee(s) in the exercise
of the rights guaranteed them by the Labor Code section 1152.

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

13 (a) Reimburse Oscar Garcia for all wage and other eco-
14 nomic losses he has suffered as a result of Respondent's discrimi-
natory two day suspension. Such losses shall be computed accord-
15 ing to the formula stated in J & L Farms, 6 ALRB No. 43 (1980).
Interst, computed at the rate of 7% per annum, shall be added to
16 the net back pay to be paid to Oscar Garcia.

17 (b) Preserve and, upon request, make available to this
Board and its agents, for examination and copying, all payroll
18 records, social security payment records, time cards, personnel
records and reports, and all other records relevant and necessary
19 to a determination, by the Regional Director, of the backpay
period and the amount of backpay due under the terms of this order.

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

23 (e) Mail copies of the attached Notice, in all appropriate
languages, within 30 days after the date of issuance of this
24 Order, to all employees employed by Respondent at any time during
the period from May 29, 1980 until the date on which the said
25 Notice is mailed.

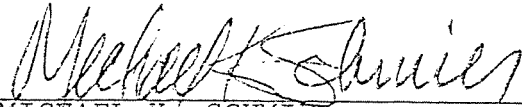
26 (f) Post copies of the attached Notice, in all appropriate
languages, for 60 days in conspicuous places on its property, the
27 time(s) and place(s) of posting to be determined by the Regional
Director, and exercise due care to replace any copy or copies
28 of the Notice which may be altered, defaced,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

1 (g) Arrange for a representative of Respondent or a
2 Board agent to distribute and read the attached Notice, in all
3 appropriate languages, to its employees on company time and property
4 at time(s) and place(s) to be determined by the Regional Director.
5 Following the reading, the Board agent shall be given the oppor-
6 tunity, outside the presence of supervisors and management, to
7 answer any questions the employees may have concerning the Notice
8 or employees' rights under the Act. The Regional Director shall
9 determine a reasonable rate of compensation to be paid by Respon-
10 dent to all non-hourly wage employees in order to compensate them
11 for time lost at this reading and during the question-and-answer
12 period.

13 (h) Notify the Regional Director in writing, within 30
14 days after the issuance of this Order, of the steps Respondent has
15 taken to comply therewith, continue to report periodically there-
16 after, at the Regional Director's request, until full compliance
17 is achieved.

18 Copies of the Notice attached hereto shall be furnished
19 Respondent for distribution by the Regional Director for the
20 Salinas Regional Office.

21 Dated: December 10, 1981

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MICHAEL K. SCHMIER
Administrative Law Officer

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