Union City, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

KITAYAMA BROTHERS, Respondent, and LABORERS INTERNATIONAL UNION, LOCAL 304, AFL-CIO Charging Party.	)	Case Nos. 79-CE-40-S 79-CE-40-1-S 9 ALRB No. 23

DECISION AND ORDER

On December 4, 1981, Administrative Law Judge (ALJ)[1/] Jennie Rhine issued the attached Decision in this proceeding. Thereafter, General Counsel timely filed exceptions and a supporting brief, and Respondent filed a reply brief.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (Board) has delegated its authority in this matter to a three-member panel.

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

No exceptions were filed to the ALJ's findings and conclusions that Respondent violated section 1153(c) and (a) by

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[1/] At the time of the issuance of the ALJ's Decision, all ALJ's were referred to as Administrative Law Officers. (See Cal. Admin. Code, tit. 8, § 20125, amended eff. Jan. 30, 1983.)

[2/] All section references herein are to the California Labor Code unless otherwise specified.

refusing to reinstate or rehire Clemente Gomez. As the record supports those findings and conclusions, we hereby affirm them.

We find no merit in General Counsel's exception to the ALJ's conclusion, based upon her credibility resolutions, that Respondent's discharge of employees Heriberto Jauregui and Florentino Jauregui did not violate section 1153(c) and (a). To the extent that an ALJ's credibility resolutions are based on demeanor, we will not disturb them unless the clear preponderance of the relevant evidence demonstrates that they are incorrect. (Adam Dairy dba Rancho Dos Rios (1978) 4 ALRB No. 24; Standard Dry Wall Products (1950) 91 NLRB 544 [26 LRRM 1531].) We have reviewed the record and find that the ALJ's credibility resolutions are supported by the record as a whole. However, we reject the ALJ's partial reliance on Ben Lopez' presumed expertise as a labor consultant as a basis for crediting his testimony, as an individual's occupation is not a factor in evaluating his or her credibility.

The ALJ found that, "At the opening of the hearing if not before, ... an unconditional offer of reinstatement was made [by Respondent] to and refused by Gomez." For that reason, the ALJ stated, Respondent "... should not be required to offer reinstatement again ... but Gomez should be made whole ...."

We reject the ALJ's erroneous assumption that Respondent's offer obviates the necessity of our issuing the conventional order providing reinstatement with full backpay plus interest as a remedy for a discriminatory discharge or an unlawful refusal to rehire. "[R]einstatement and backpay are remedies which

the Board provides in the public interest to enforce a public right. No private right to such relief attaches to a discriminatee which he can bargain away or compromise ...."[3/] This Board has the exclusive responsibility for vindicating the public policy as defined in section 1140.2 of the Act, based on section 1160.9, which states that the procedures set forth in sections 1160 through 1160.8 "... shall be the exclusive method of redressing unfair labor practices." Moreover, section 1160.3 of the Act requires this Board, when it has found an unfair labor practice (e.g., discrimination in employment), to issue an order directing the respondent to cease and desist from such conduct and, in discrimination cases, to reinstate the discriminatee(s), with or without backpay, as appropriate.

Accordingly, we shall modify the ALJ's proposed remedial Order to provide for Clemente Gomez our usual remedy of reinstatement with backpay, plus interest. In so doing, we are not precluding Respondent from raising and/or litigating, during the compliance stage of this proceeding, the issues of whether Respondent addressed its prior offer of reinstatement directly to Gomez; whether the reinstatement it offered was to his former or substantially equivalent position; whether the offer included full seniority and other accrued employment benefits; and whether the

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[3/] See Winston Rose and Mary Louise Rose d/b/a/ Ideal Donut Shop (1964) 148 NLRB 236, 237-238 [56 LRRM 1486], enforced (7th Cir. 1965) 347 F.2d 498 [56 LRRM 2573], where the court held that even if the employer had made a full and unconditional offer of reinstatement, which the employee rejected, and paid him backpay, the National Labor Relations Board properly ordered the employer to offer him reinstatement and backpay in order to remedy the discrimination against him.

offer was so understood by Gomez. If so, the backpay period, which shall commence as of the date Respondent first refused to rehire Gomez, may be held to have ended on the date of such an offer. (See, e.g., Pyro Mining Company, Inc. (1977) 233 NLRB 233 [96 LRRM 1510].)

We have extended the ALJ's recommended mailing period because, unlike M. B. Zaninovich, Inc. (1980) 6 ALRB No. 23, the unfair labor practice committed by Respondent was not isolated. The ALJ in this hearing, and the ALJ in the representation hearing (Kitayama Brothers (1979) 5 ALRB No. 70), found that Respondent threatened to deport or discharge employees if the Union won the representation election. These threats were made to groups of employees during company meetings. Gomez' role in the Union's campaign was visible to employees and he was an election observer. Respondent's discharge of Gomez almost two weeks after the election would be viewed by employees as a retaliatory act for Gomez' exercise of section 1152 rights and discourage employees from exercising these rights. The mailing period in our Order extends from the date of the election, June 13, 1979, until June 13, 1980. Such a mailing period will assure that the migrant employees for various seasons, who may have heard of Respondent's retaliatory discharge from its permanent labor force, will know that their exercise of rights under the Act is protected from employer retaliation.

ORDER

By authority of Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders that

Respondent Kitayama Brothers, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to reinstate or rehire, or otherwise discriminating against, any agricultural employee in regard to hire or tenure of employment or any other term or condition of employment because he or she has engaged in any union activity or other 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) Offer to Clemente Gomez immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other employment rights or privileges.

(b) Make whole Clemente Gomez for all losses of pay and other economic losses he has suffered as a result of the discrimination against him, 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. (1982) 8 ALRB No. 55.

(c) Preserve and, upon request, make available to this Board and its agents, for examination, photocopying, and otherwise copying, all payroll records and reports, and all other

records relevant and necessary to a determination, by the Regional Director, of the backpay period and the amounts of backpay and interest due under the terms of this Order.

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

(e) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the date of issuance of this Order, to all agricultural employees employed by Respondent at any time during the period from June 13, 1979, until June 13, 1980.

(f) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property for 60 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.

(g) 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 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.

(h) Notify the Regional Director in writing, within 30 days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms, and continue to report periodically thereafter, at the Regional Director's request, until full compliance is achieved.

Dated: April 29, 1983

ALFRED H. SONG, Chairman

JOHN P. McCARTHY, Member

JEROME R. WALDIE, Member

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Sacramento Regional Office, the General Counsel of the Agricultural Labor Relations Board issued a complaint which alleged that we, Kitayama Brothers, 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 discriminating against an employee by refusing to rehire him because of his union activity. The Board has told us to post and publish this Notice and to mail it to those who worked at the company from June 13, 1979, until June 13, 1980. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

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

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

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

WE WILL OFFER Clemente Gomez his old job back and we will pay him any money he lost, plus interest, as a result of our refusal to rehire him.

WE WILL NOT refuse to rehire, discharge, lay off, or otherwise discriminate against any agricultural employee with respect to his or her job because he or she belongs to or supports the Laborers International Union, Local 304, AFL-CIO, or any other union.

Dated: KITAYAMA BROTHERS

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 Road, 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

Kitayama Brothers
(Laborers International Union)

9 ALRB No. 23
Case Nos. 79-CE-40-S
79-CE-40-1-S

ALJ DECISION

The ALJ found that Respondent's refusal to rehire an employee was motivated by both anti-union animus and legitimate business interests. The ALJ applied Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169] to this case, requiring Respondent to prove that it would have taken the same action absent the protected activity.

The ALJ found that Respondent had anti-union animus because its labor consultants threatened employees with reprisals for supporting the Union at company meetings, and it offered money and other benefits to Clemente Gomez if he would campaign against the Union.

The ALJ found that Clemente Gomez engaged in union activities by distributing union authorization cards, by attending a large union meeting on company property, and by being an election observer for the Union. The ALJ found that Respondent knew of his union activities because Respondent's supervisor admitted that he knew Gomez was an election observer, and because of the offers made by Respondent to discourage Gomez' support of the Union. The ALJ rejected Respondent's defense that company policy required the dismissal of Gomez because he had lied in his request to take leave, and had worked during that period for another employer. The ALJ found: there was no evidence to support such a defense; Respondent's policy was unknown to its supervisors; there was no evidence that other workers were similarly treated; and Gomez was not allowed to rebut or explain the unverified accusations. The ALJ concluded Respondent violated section 1153(c) and (a) of the Act, and recommended that the Board issue a cease and desist order, backpay, and the usual reading, posting, distributing and mailing remedies. The ALJ did not recommend an order requiring Respondent to offer reinstatement because Respondent had made such an offer before or during the hearing.

The ALJ found that Respondent's knowledge of Heriberto Jauregui's and Florentino Jauregui's union activities could be inferred, but that credible evidence was insubstantial. The ALJ concluded that Respondent would have discharged these two employees, even absent their union activities, for poor work performance and the destruction of company property, respectively. The ALJ recommended dismissal of the allegations as to these employees.

BOARD DECISION

The Board affirmed the ALJ's findings and conclusions that Respondent violated section 1153(c) and (a) of the Act by refusing to reinstate or rehire Gomez because they were supported by the record and no exceptions were filed concerning this matter. The Board modified

the ALJ's recommended Order so it would require Respondent to offer reinstatement, as well as backpay plus interest, to Gomez. Citing sections 1160.9 and 1160.3 of the Act and Winston Rose and Mary Louise Rose d/b/a Ideal Donut Shop (1964) 148 NLRB 236 [56 LRRM 1486], the Board stated that their inclusion of the reinstatement offer protects the public interest in the enforcement of the public rights of the Act and that a discriminatee does not have the private right to bargain away or compromise such relief. The Board stated that if it is determined during the compliance hearing that Respondent made a fully satisfactory offer to Gomez, the Respondent's backpay obligation may be held to have been tolled on the date of Respondent's offer to Gomez.

The Board distinguished the case from M. B. Zaninovich (1980) 6 ALRB No. 23, and extended the ALJ's mailing period to a one-year period which began on the date of the representation election.

The Board upheld the ALJ's conclusions respecting Heriberto Jauregui and Florentino Jauregui because her findings were based on credibility resolutions determined according to demeanor. The Board rejected the ALJ's partial reliance upon a witness' occupation as a factor relevant to a credibility resolution.

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

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STATE OF CALIFORNIA

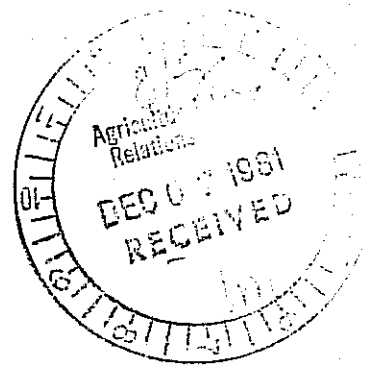
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of KITAYAMA BROTHERS, Respondent, and LABORERS INTERNATIONAL UNION, LOCAL 304, AFL-CIO, Charging Party.	Case Nos. 79-CE-40-S 79-CE-40-1-S DECISION OF ADMINISTRATIVE LAW OFFICER

Arocoles Aguilar and Eduardo Blanco (on the Brief), Salinas, for the General Counsel

Frederick A. Morgan of Bronson, Bronson & McKinnon, San Francisco, for the Respondent

W. Daniel Boone of Van Bourg, Allen, Weinberg & Roger, San Francisco, for the Charging Party



STATEMENT OF THE CASE

Jennie Rhine, Administrative Law Officer: This action arises from an unfair labor practice charge, filed on 13 December 1979 and amended on 11 January 1980, by the Laborers International Union, Local 304, AFL-CIO (Laborers #304 or LIU), against Kitayama Brothers. A complaint was issued on 24 February 1981. The complaint alleges that one person, Clemente Gomez, was refused reinstatement and two others, Heriberto Jauregui and Florentino Jauregui, were discharged in violation of sections 1153(c) and (a) of the Agricultural Labor Relations Act

(ALRA or Act).[1] The respondent filed an answer denying the substantive allegations.[2]

After a pre-hearing conference on 29 June 1981, the matter was heard on 30 June and 1, 3 and 6 July 1981 at Hayward, California. The general counsel and the respondent were present throughout the hearing, and had an opportunity to present evidence and examine witnesses. After its motion to dismiss the complaint, opposed by the general counsel, was denied at the pre-hearing conference, the charging party did not appear except during the testimony of a union official. Post-hearing briefs were filed by the general counsel and the respondent.

Based upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs, I make the following findings of fact and conclusions of law.

THE EVIDENCE

Introduction

Located in Union City, at the time in question Kitayama Brothers was a grower and wholesaler of cut flowers and potted plants. (It has since ceased production of potted plants.) Approximately 150 workers were employed in the rose, carnation and potted plant departments and the wholesale house. Following an election on 13 June 1979, Laborers #304 was certified as the collective bargaining representative of the Kitayama agricultural employees. See Kitayama

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[1]Cal. Labor Code, §§ 1140-et seq. All statutory references are to the Labor Code unless otherwise specified.

[2]The respondent raised the statute of limitations (Labor Code § 1160.2) as an affirmative defense in its answer, but conceded at the hearing that the charges were timely filed. Another affirmative defense, asserting that the LIU had agreed to solicit the withdrawal of all charges as part of a settlement agreement, was stricken at the pre-hearing conference upon motion of the general counsel because the general counsel was not a party to the agreement and did not consent to the withdrawal of charges.

Brothers Nursery (5 Dec. 1979), 5 ALRB No. 70. The alleged discriminatees here, professed union activists in the election campaign, lost their jobs later in the year. There had also been a union election, featuring the United Farm Workers of America, AFL-CIO (UFW), in 1975-76. That election did not result in a certification, but the company was found to have discriminatorily terminated two UFW activists. See Kitayama Brothers Nursery (30 Oct. 1978), 4 ALRB No. 85.

The company is owned by Tom Kitayama and his brothers. As the production and personnel manager for the last three years, Gunter Gmelin oversees all growing operations and is responsible for personnel. Under him, Trinidad (Trino or Trini) Cazares supervises the carnation department; during the relevant period Bob Cooper was replaced by Gerrit (Jan) Kuipers as manager of the rose department; and Kim Platzek supervised the potted plant department. Ricardo Brotarlu is a foreman in the roses, who worked under Kuipers; and Lena Martinez was propagation forewoman in the potted plants, under Platzek.

The respondent has admitted in its answer or stipulated that within the meaning of the Act Kitayama Brothers is an agricultural employer, the LIU is a labor organization, the alleged discriminatees are agricultural employees, and Tom Kitayama, Gunter Gmelin, Trinidad Cazares, Jan Kuipers, Ricardo Brotarlu, Kim Platzek and Lena Martinez are or were its agents or supervisors. I find accordingly.

Admissibility of Calendar Entries

Before moving on to substantive matters, I consider an evidentiary issue, rulings on which were reserved at the hearing. Under the business records exception to the hearsay rule, the respondent offers pages from calendar books maintained by supervisors Gmelin and Kuipers.[3] Gmelin's calendar contains notes

[3]See Respondent's Exhibits (RX) A (excerpts from Gmelin's calendar), B (excerpts from Kuipers' calendar), and E (a typed transcription of the (continued)

about the three alleged discriminatees as well as other personnel matters. Some entries concern actions or information reported to him by others, while others are notes about actions he personally took. The entries were made close to the time of the events in question. Gmelin testified that he made such notes "very infrequently," when he throught he might need in the future to recollect or explain his actions. From his prior experience with unions and the National Labor Relations Board, he believed such documentation was important. He was not told by anyone at Kitayama Brothers to keep such records; it was his own policy.

In addition to scheduling matters and personal notes, Jan Kuipers' calendar contains notes of encounters with alleged discriminatee Florentino Jauregui, among other employees. Kuipers testified that he made notes in his calendar upon the advice of Gmelin, to have a "personal reference" to enable him to remember what happened. He made entries regularly in a small notebook he kept with him, and at the end of the day transferred those concerning repeated or large-scale incidents to the calendar. (The notebook entries were discarded as he either decided that the situation was resolved or made note of it in the calendar.)

(Note 3 Cont'd) entries concerning the alleged discriminatees, admissible only if RX A and B are) for identification. (The admissibility of RX D, ruling on which was also reserved, is considered below. See note 8 and the accompanying text.)

Evidence Code section 1271, the business record exception, states:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition or event if:
> (a) The writing was made in the regular course of business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Gmelin and Kuipers both had an opportunity to use their calendars to refresh their recollection as they testified.

I conclude that the calendar entries should not be admitted into evidence. The object of the business records exception to the hearsay rule is to eliminate the necessity of calling each witness to an act, condition or event and to substitute the record of the transaction instead. Nichols v. McCoy, 38 Cal. 2d 447 (1952); People v. Crosslin, 251 C.A.2d 968 (1967). The exception is based on the recognition that records made and relied upon in the regular course of business may be regarded as trustworthy without verification by all persons who contribute to them. People v. Crosslin, supra; People v. Gorgol, 122 C.A.2d 281 (1953) (emphasis added).

The calendar entries here were not made for use in the regular course of the business of Kitayama Brothers, nor were they relied upon in the regular course of that business. Rather, they were made for the personal use of the supervisors who recorded them, to enable them to remember and justify their actions. They were made not routinely, but selectively, based upon subjective judgments about the significance of the events. It is also clear that Gmelin's entries, at least, were prepared with an eye toward having to justify his actions to the union or a labor relations board, that is, in contemplation of litigation. Records prepared in contemplation of litigation are ordinarily not sufficiently trustworthy to come within the business records exception. Palmer v. Hoffman, 318 U.S. 109 (1943); Gee v. Timineri, 248 C.A. 2d 139 (1967). Under these circumstances, the method of preparation of the records is not reliable enough to warrant their admission.

Furthermore, some entries or portions of them are not admissible because they state opinions or conclusions rather than an act, condition or

event.[4] Only a record of an act, condition or event is admissible. See Evid. C. § 1271. Whether an opinion or conclusion is based upon personal observation and sound reason, and whether it is formulated by a person qualified to do so and to testify to it, can only be established by examination of the declarant under oath. See People v. Reyes, 12 Cal. 3d 486 (1974); People v. Arauz, 5 C.A.3d 523 (1970); People v. Terrell, 138 C.A.2d 35 (1955).

Finally, other entries are inadmissible because it is apparent, either from the entry itself or the entry in conjunction with testimony, that the entry does not record an act, condition or event personally observed by the recorder; in other cases, it is not clear whether the entry is based upon personal knowledge.[5] In neither situation can the record be considered reliable, competent evidence of the underlying facts. "The chief foundation of the special reliability of business records is the requirement that they must be based upon the first-hand observation of someone whose job it is to know the facts recorded." McCormick on Evidence, p.602, §286, quoted in MacLean v. City & County of San Francisco, 151 C.A. 2d 133, 143 (1957).

The respondent relies upon Franco Western Oil Co. v. Fariss, 256 C.A.2d 335, 66 C.R. 458, 464-465 (1968). There an entry in a witness's "diary of business events of the day," described by the court as "effectually a business log,"

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[4]See, e.g., from RX E, Kuipers' 9/20 entry re Florentino Jauregui Garcia ("his reaction was worse than the first time;" "he gave me a big mouth"); his 11/26 entry ("Florentino lied to Roberto"); his 12/17 entry ("although he knows how to pinch;" "he treated me like a child"); Gmelin's 7/11 entry re Clemente Gomez ("because he lied in order to get [a] LA [leave of absence]"); Gmelin's 9/19 entry re Heriberto Jauregui in its entirety; and his 9/19 and 12/17 entries re Florentino Jauregui Garcia ("Florentino's attitude is generally one of indifference;" "Terminated. . . with ample reasons").

[5]See, e.g., from RX E, Kuipers' 9/11 entry re Florentino Jauregui ("Then he goofed off and started at least one hour later . . ."); the first part of his 11/26 entry; almost all of his 12/3 entry; Gmelin's 7/6 entry re Clemente Gomez; his 9/19 entry re Heriberto Jauregui; and his 9/19 and 9/20 entries re Florentino Jauregui Garcia.

was held admissible under the business records exception to corroborate the witness's testimony. The circumstances under which this diary was kept are not set forth in the opinion, but it appears to have been a daily record. In Gallup v. Sparks-Mundo Engineering Co., 43 Cal. 2d 1, 7 (1954), the case cited in Franco Western to support the admissibility of a business log, the supreme court was considering an ambulance log book, a permanent record of the ambulance company in which ambulance calls were recorded. Entries in Gmelin's and Kuipers' calendars were made too sporadically and selectively to consider the calendars business logs.

Having concluded that the calendar excerpts should not be admitted,[6] I proceed to summarize the evidence of the company's anti-union animus and knowledge of union activities of the alleged discriminatees, and the circumstances surrounding the individual terminations. An analysis of the evidence, including factual findings, and conclusions of law follow.

Alleged Anti-Union Animus and Knowledge of Union Activities

Kitayama Brothers openly took a no-union position during the 1979 LIU campaign. Among other actions such as the distribution of handbills, Tom Kitayama arranged for two Spanish-speaking outsiders--Ben Lopez, a labor consultant, and Henry Franco, a retired local businessman--to urge employees at company-called meetings not to vote for the union. Except for introducing the speaker, company supervisors and foremen did not attend the meetings. Reports about what occurred differ. Only those aspects that indicate conduct unprotected by the free speech

[6]Given the conclusions reached about the Jauregui brothers, the respondent suffers no prejudice from my ruling here. Were I to consider Gmelin's entries about Clemente Gomez, the conclusions concerning him would not be affected.

provisions of the Act (see section 1155) are discussed here.

The only workers who testified about the meetings are the alleged discriminatees. Clemente Gomez testified that at one meeting Lopez told the workers they should not support the union because Tom Kitayama was the mayor of Union City and a very powerful man. Another time Franco said the workers were wrong to support the union because most of them did not have immigration papers, and Kitayama could report them to the immigration office and then easily replace them. After Franco told the workers it was better for them to tell Kitayama themselves what benefits they wanted, Gomez spoke up to say that he had asked (unsuccessfully) for better working conditions and to specify a number of complaints.

Heriberto Jauregui testified that at a meeting addressed by Lopez, he told Lopez he was wasting his time, because the workers knew what they were doing and would be successful. Heriberto[7] said that he gave his name and acknowledged that he wanted the union in response to questions by Lopez; he later added that he also wrote his name for Lopez. At a meeting addressed by Franco, Heriberto again spoke up, and again gave his name and confirmed his desire for the union when asked. In the course of telling the workers to think about what they were going to do, Franco referred to their not having immigration papers.

According to the testimony of Florentino Jauregui, Lopez told the workers that since they did not have immigration papers, if they joined the union they could be taken away by immigration officers and would not get their jobs back when they returned, but if they did not support the union, when they returned after being taken away they would still have their jobs. Florentino said that he had nothing to worry about because, although he did not have his immigration

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[7]The given names of the Jaureguis, who are brothers, are used to distinguish one from the other.

papers, he was working on it. Lopez responded that Florentino should think about it because he needed a lot of papers to get his status. When Florentino replied that he already had them except for a work letter, Lopez responded that that was a very important point, for if Florentino joined the union he would not get his work letter. Florentino said he thought Kitayama was legally obliged to give him the letter, and Lopez told him that it was not against the law for the company to give him the letter or not, as it wanted.

Florentino also testified that soon after the meetings he was told by foreman Trinidad Cazares that Cazares knew he was involved in union activities and talked at the meetings. When Florentino asked how he knew, Cazares replied that Lopez reported to Tom Kitayama and described the people who spoke. Although he agreed that Florentino was defending his rights, Cazares said that Kitayama did not want that, and Florentino could be fired because he created many troubles with the union.

Ben Lopez testified that he advised the workers of their rights under the Act, and stressed the advantages of being non-union and the disadvantages of having a union. He told them there would be no repercussions if they supported the union. Without specifically referring to immigration raids, he said that if there was a union and the workers left their jobs for any reason, their return would be controlled by rules established by the union; but without a union they could be rehired as they had in the past, by coming to the door and asking for a job. In his speech, his only reference to immigration matters was to tell the workers they had the same rights under the Act regardless of their citizenship or immigration status. In response to questions about Florentino Jauregui, Lopez testified that frequently workers asked questions about legalizing their status, which he answered, but he did not remember anyone in particular and he never told anyone it would be more difficult to obtain papers from the company if the union

came in. Lopez denied asking for names of people who spoke, or giving them to Kitayama or anybody on his staff.

Henry Franco testified that after hearing there were labor problems at Kitayama Brothers, he volunteered to help and Tom Kitayama asked him to speak to the workers. Although he assumed that Kitayama did not want a union, Kitayama did not tell him that and they did not discuss what Franco would say. Franco reported that he told the workers he was not there to tell them to join or not to join a union, he only advised them to make sure they chose the right union, the one that could do the best job for them; he then opened the meetings for questions. He did not initiate any discussion about immigration status, and he recalled only one woman asking about it. In response to her, he said that only the immigration service could help them achieve legal status, neither the union nor their boss nor anyone else could help. People only asked questions, no one argued or spoke for the union, and he had no idea who was a union supporter. He could not have told Kitayama in any event, because they did not speak again for a couple of months.

In addition to the meetings, the alleged discriminatees described their union activities and reported other incidents which, if credited, demonstrate anti-union animus and knowledge on the part of the company. Clemente Gomez testified that he distributed union authorization cards to other workers and attended a large union meeting that the company permitted to be held in its parking lot. While his participation in these activities may have been noted by company supervisors, that fact is not established by the evidence. Gomez also testified that he served as a union observer at the election, however, and that Tom Kitayama was present when he was selected. Kitayama conceded that he learned the day before the election that Gomez would be an observer. Gunter Gmelin, the supervisor directly involved in Gomez's termination, denied knowing of Gomez's union

activities, but reluctantly admitted that he knew Gomez was an election observer. Gmelin also more generally denied knowledge of union activities or supporters, but Kitayama identified Gmelin as the source of his own information about the campaign.

Gomez also reported several union-related encounters with Kitayama and company supervisors that are disputed. According to Gomez, about two weeks before the election he was approached by foreman Trinidad Cazares, who told him that his union involvement was known and suggested that he could get some money. Cazares said that Kitayama was going to talk to Gomez later. Later that day, as Gomez delivered some roses to the cooler, he found Kitayama and Cazares waiting for him. Cazares, translating for Kitayama (Kitayama does not speak Spanish, and Gomez does not speak English), told Gomez that Kitayama knew of Gomez's union activities and influence on others, and wanted to know why Gomez wasn't in favor of the company--he "'would get some money if [he] was in favor of the company.'" Cazares asked Gomez what he had to say about such a tempting offer, and Gomez replied that he supported the union, was fighting for rights, and was not selling himself. The conversation ended with Cazares telling Gomez to think about it.

Gomez further testified that two or three days before the election he again met Kitayama outside the cooler, accompanied by another foreman, Bob Cooper. Cooper told Gomez in understandable Spanish that Kitayama wanted to know what Gomez thought about their earlier conversation. Gomez replied that his answer was the same. Gomez, who was with another worker, encountered Kitayama once more, the day before the election, this time accompanied by an unidentified office employee who interpreted for him. The office worker asked Gomez why he did not talk to the people and said there was still time for Kitayama to arrange to get immigration papers for everyone; Kitayama had received complaints about Cooper and, wanting them to realize that he kept his promises, had fired Cooper. The

office worker also told Gomez that he had been elected president of the company's credit union, an organization Gomez knew almost nothing about; when Gomez laughed and asked why, the person replied that "'they'" thought he was a good worker and the right person for the job.

Gomez also reported another encounter with Cazares, shortly before the election. Cazares asked Gomez how the union activities were going. When Gomez replied that Cazares would find out the day of the election, Cazares responded that it could be that "'they'" won, but that also Immigration could step in and take all the workers away; Kitayama could hire new workers, and that would be the end of the union.

These reports are denied by Cazares and Kitayama. Cazares, in addition to specifically denying the conversations Gomez related, testified that he never knew anything about the union and never talked about it with any employees. In the 1979 ALRB representation hearing, however, Cazares testified that he heard about union organizing efforts from Clemente Gomez, among others. Cazares' denial of knowledge about the campaign is further contradicted by evidence that the company's supervisors, presumably including him, were given instructions by Kitayama and his attorney about how to conduct themselves during it.

Kitayama denied knowing of any offers of money to employees. Asked when he first learned of the accusation, he replied that the first time was at this hearing. It was established that he was present throughout the earlier representation hearing, and that Gomez also testified there about being offered money. (Gomez's testimony there was uncontradicted. See Kitayama Brothers Nursery, 5 ALRB No. 70 (1979), IHE decision at 9.)

Heriberto Jauregui testified that he too distributed authorization cards and urged others to support the union, sometimes in the presence of Lena Martinez, his forewoman, or supervisor Kim Platzek. He said that Martinez

once told him they could lose their jobs for being involved in union activities. He also reported observing Bob Cooper writing down names and numbers from three or four timecards. One timecard Heriberto recognized as his own, and on another he was able to see the name of another person he knew to be a union activist. He asked Martinez why Cooper was taking the names and numbers, if it meant they were going to be fired, and Martinez told him Kitayama wanted to know the names of those more involved with the union.

Heriberto's testimony was contradicted by Martinez, who testified that she never discussed the union with him or any workers. She also said that Cooper did not work near the timecards for her area, and she never saw him copying down information from them or spoke to Heriberto about it. Platzek testified that he was unaware that Heriberto was involved in union activities. He overheard employees talk about the campaign but did not remember anyone in particular. He also recalled seeing a crowd of workers in the parking lot one time, but did not know what it was about.

Florentino Jauregui identified himself as one of the most active union supporters. He handed out authorization cards and spoke to people, but not in front of foremen or supervisors. The remaining incidents related by Florentino that connect his union activity with his discharge are reported below, in the discussion of his termination.

Finally, there is uncontradicted evidence that key union supporters remained employed at Kitayama Brothers beyond the terminations of the alleged discriminatees.

Refusal to Reinstate Clemente Gomez

Employed since August 1977, Clemente Gomez worked in the roses. Around the end of June 1979, a little more than two weeks after the union election, he

requested and was given time off from work; when he returned he was denied reinstatement.

Having heard that his mother was ill in Mexico, Gomez asked Gunter Gmelin for time off to go there. Trinidad Cazares interpreted. Gomez testified that though he said his mother was ill, what he asked for was two weeks vacation; Gmelin testified that he granted Gomez an emergency leave of absence for up to four weeks. (The company gave its employees vacation pay on their anniversary dates; if they also wanted time off, a mutually convenient time was worked out; an employee could arrange up to four weeks off with a combination of vacation time and leave of absence.) Gomez asked for a written assurance of his job on his return, but Gmelin told him it was unnecessary. Gomez reported that when giving him permission to leave, Gmelin told him work was slow; but Gmelin, corroborated by Kitayama and Cazares, testified that it was a busy period.

Gmelin heard, while Gomez was away, that he had not gone to Mexico but was working elsewhere in the area. Believing that Gomez had lied to him, Gmelin testified, he spoke to Tom Kitayama about the situation and learned for the first time that the company had a policy of not reinstating employees who left to work elsewhere. Employees were not routinely advised of this policy, and no evidence establishes that Gomez was aware of it.

Gomez returned in a little less than two weeks. Through Cazares, Gmelin told him that he had lied, he had not gone to Mexico but had worked here, and the company would not take him back. According to Gomez, Gmelin also said the company would not take him back because he was a bad worker, a member of the union who caused problems. Without explicitly denying this statement, Gmelin testified that he considered Gomez a good worker whom he would like to have back. Gomez also testified that he told Gmelin he had not been working at another job. Gmelin, on the other hand, reported that he was not sure what response, if any,

Gomez made to his accusation, but he did not think Gomez had directly rebutted it. Gmelin further testified that he was very definite about not being able to give Gomez his job back under the circumstances, and Gomez "let it go at that." Describing himself as being left "with a word in my mouth," Gomez said that Gmelin cut him short by leaving.

Cazares, the other person present at the conversation, testified that Gomez asked if he still had his job, and Gmelin replied that Gomez had lied to him and had been replaced; Gomez responded that that was fine with him, he only wanted to know if he had his job or not; and that was the end of the discussion. No evidence apart from Cazares' testimony indicates whether Gomez's job had already been filled.

Gomez testified that he had not gone to Mexico, because he had learned that his mother's illness was not serious, but he denied taking another job. There is no competent evidence that he in fact worked elsewhere.

Kitayama testified that in October 1980, during the course of union negotiations, the company offered to reinstate Gomez, but refused to take back the other two alleged discriminatees. This testimony is uncontradicted, but nothing indicates whether or when Gomez was advised of the offer.

Heriberto Jauregui's Discharge

Heriberto Jauregui had worked at Kitayama Brothers for about ten months prior to his discharge on 18 or 19 September 1979. The company contends that his poor work performance, rather than his participation in union activities, was the reason for his termination.

Heriberto was hired at the request of his brother Florentino, the third alleged discriminatee. Heriberto began as a sprayer, first in the carnations and then in the potted plant department supervised by Kim Platzek. Heriberto testified that his work as a sprayer was frequently praised by Lena Martinez, his

forewoman in the potted plants, and that he was asked to train others to mix and apply the sprays. In May 1979, apparently affected by the sprays, Heriberto got sick on the job. (Testimony elicited from both Jauregui brothers about the company's response is not repeated here because it is not material to the issues in the case.) Heriberto continued to feel ill, and after a few weeks a doctor recommended that he change jobs. He was transferred to general work in the potted plant department.

According to Heriberto, he was summoned to the office on the morning of 18 September without warning, and was told by Platzek that he was fired for a number of reasons, including singing, talking too much, sitting and lying down on the job, and not doing his work well. He had not previously been aware of any complaints about his work, although after the election he no longer received any compliments on it. Platzek told him he could finish out the day, but Heriberto chose not to.

After the conversation with Platzek, Heriberto testified, he spoke to Tom Kitayama about getting his pay and a paper that would permit him to collect unemployment insurance. Kitayama gave him a document in English, which he asked someone to translate. He was told that the document said he had decided to quit at noon and had gone to the office for his paychecks. This was the only document he received. Because it would not enable him to collect unemployment, Heriberto returned the paper to Platzek, but Florentino brought it home later and Heriberto subsequently gave it to Laborers #304 business manager Pete Moreno. (Heriberto was also told by both Platzek and Kitayama that he could not get the paychecks due him right away, Kitayama explaining that the computer system that produced them was located in Colorado. Heriberto returned two days later and collected his pay.)

Kim Platzek, who has not worked at Kitayama Brothers for a year, was

unavailable to testify until the last minute, and took the witness stand with virtually no opportunity for preparation of his testimony. Platzek testified that the decision to discharge Heriberto was made by him after consulting with his superior, Gmelin, over a period of several months.

Heriberto's performance did not meet minimum standards, according to Platzek, even though efforts had been made to improve it. Platzek himself had discussed Heriberto's work with him at least four times. Platzek's memory was vague in this regard, but he recalled speaking to Heriberto once about failing to spray in a particular area, another time about increasing his productivity in filling pots for plants, and a third time about interfering with his own and other's work by talking too much. When he told Heriberto he was being terminated, Platzek testified, he offered to let Heriberto finish the week, but Heriberto, angry, refused.

Platzek also said that when he fired Heriberto, in addition to telling him the reasons he gave Heriberto a paper outlining them; he could not remember what he wrote. Following instructions from Gmelin to document problems with employees, Platzek usually wrote memos when he discussed their work with employees. He recalled writing several memos concerning Heriberto. The original of all such memos was kept in personnel files maintained in the potted plant department and a copy was given to Gmelin; affected employees did not usually receive one although many times they were told that a copy would go in their file. Platzek did not recall whether Heriberto in particular was told. Platzek's testimony is unclear on this point, but, taken as a whole, it appears to be that the only time he gave Heriberto a written notice was when he fired him. (Except for a copy of a later draft of the paper given to Heriberto, the company did not produce any

such memos.[8]) Platzek said that when he last saw it, the notice was in Heriberto's hand.

Gunter Gmelin testified that he spent a good part of his time in the potted plant department and had observed Heriberto's work, but had not discussed it with him. He described Heriberto as spending "a good deal of time not being productive." He also testified, however, that the more "intelligent" sprayers were chosen to mix the sprays. Gmelin confirmed that Platzek had spoken to him many times about the poor quality of Heriberto's work and that the decision to terminate Heriberto was Platzek's. Although called to rebut other testimony, Lena Martinez was not asked and did not testify about Heriberto's job performance.

Pete Moreno, Local 304 business manager, testified that soon after Heriberto was terminated he gave Moreno the paper he had been given. Moreno subsequently gave it to an ALRB agent. As Moreno recalled it, the paper stated that Heriberto was terminated because he did not follow instructions and could not get along with foremen.

Florentino Jauregui testified that when he was told by Heriberto that

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[8]Platzek identified RX D as a copy of a memo he wrote one or two days after Heriberto's termination, a redraft of the paper he had given Heriberto. A ruling on its admissibility was reserved.

Counsel for the respondent advised that good faith efforts to locate other memos were unsuccessful: the potted plant department had been closed after Platzek's departure and any records maintained by him (the company did not require that personnel files be maintained in the departments) were lost or destroyed. However, Gmelin was not asked about the copies purportedly given him by Platzek, and the preservation of RX D alone was not explained.

Given that RX D is offered by the respondent and, for the most part, summarizes earlier events rather than records current events, I conclude that it does not satisfy any exceptions to the hearsay rule and is inadmissible for the truth of the matters stated therein. In any event, since it is not an exact copy of the document purportedly given to Heriberto Jauregui and since the company failed to explain its preservation or produce similar records, the probability of undue prejudice substantially outweighs any probative value, and makes the document inadmissible for any purpose. See Evid. C. § 352.

he had been fired, Heriberto said he did not know why. Florentino asked Platzek for an explanation, and Platzek replied that he did not know, it was Gmelin's business. After asking if Florentino was also looking for his check, Platzek told him Gmelin had said that if Florentino wanted an explanation he should see Gmelin, that one of the two of them had to be fired. Florentino did not go talk to Gmelin. Gmelin was not examined about this portion of Florentino's testimony. Platzek testified that he tried to explain to Florentino the reasons for Heriberto's termination and suggested that Heriberto would do better in another line of work.

Florentino Jauregui's Discharge

Heriberto's brother, Florentino Jauregui Garcia, was fired on 17 December 1979, after having worked at Kitayama Brothers for somewhat less than fifteen months. The company contends that Florentino's job performance, through indifference or deliberate provocation, was unsatisfactory for an extended period, culminating in the willful destruction of marketable flowers on the day of his discharge.

Florentino worked as a sprayer in the carnations, under the supervision of Trinidad Cazares, until August 1979. The parties stipulated that Florentino was capable of performing the work of a sprayer. Florentino reported that his work was highly praised by both Cazares and Gmelin. Cazares testified, however, that he spoke to Gmelin about Florentino more than five times; at least two times concerned complaints Cazares had received from Florentino's co-workers about working with him. Cazares and Gmelin looked for places where Florentino could work by himself. Cazares also said that he spoke to Florentino many times, whenever he made a mistake. The last time, the one occasion that Cazares detailed, he reported that Florentino asked him repeatedly for a glove, first for the left hand and then for the right, until Cazares, taking Florentino to select his own gloves, told him that he was not Florentino's toy but had others to look after as well.

Cazares agreed that Florentino was capable of doing the work.

Gmelin testified that at first Florentino's work was satisfactory, but after several months Cazares began to complain about him. As time went on, Cazares complained more frequently, on a weekly basis at least. Gmelin also said that Florentino was not needed full-time in the carnations so he also sprayed in the potted plant department, but Kim Platzek complained about him there to the point that Gmelin confined his work to the carnations. (Platzek did not testify about Florentino's work.) Gmelin said that he himself spoke often to Florentino, encouraging him to be more pleasant with others, because he was needed.

In August 1979, Florentino, through Cazares, asked Gmelin for permission to go to Mexico, because he had an appointment there about his immigration status. According to Gmelin, he made clear to Florentino that his poor performance did not warrant a guaranteed job upon his return. According to Florentino, Gmelin said only that he could not guarantee the job but would have to think about it, so Florentino later asked Cazares why Gmelin did not want him back; Cazares responded that he thought Florentino would get the job back, but if he did not, it would be because he was creating a lot of complaints, because he was with the union. Cazares was not asked about either conversation.

Florentino returned around the 27th of August. In the interim, Gmelin testified, Cazares had spoken to him again about not wanting to supervise Florentino, and Gmelin had decided not to rehire him. When Florentino asked for his job Gmelin refused at first, but subsequently agreed to take him back after talking to Tom Kitayama. According to Gmelin, Kitayama convinced him that the time was not appropriate to get rid of Florentino, since he had compelling reasons for taking the leave to go to Mexico. Gmelin did not recall discussing the union with Kitayama in the context of reinstating Florentino. After warning Florentino that he needed to improve his performance in order to retain his job, Gmelin

assigned him to the rose department.

Florentino testified that Gmelin told him he could return only upon certain conditions, including that he not "create so many problems, . . . and . . . become involved in many troubles with the union." Gmelin said Florentino was being assigned to another foreman because Cazares had said that he made many complaints "with things related to the union."

Cazares testified that when Florentino first reported for work, Gmelin told him that there was no work for a day or two, that he had to think about where to place him. When asked about his response to the news that Florentino was being assigned to the rose department, Cazares testified, "It was perfect for me. I did not need him at the moment."

From late August until his discharge in December, Florentino was supervised by Jan Kuipers. Kuipers was hired to manage the rose department in July 1979, after the election; he left Kitayama Brothers in August 1980. Kuipers testified that Florentino sprayed, ground cut rose stalks, and did general labor. Kuipers agreed that Florentino was capable of doing the work if he wanted. Initially he did well, but after a few weeks he produced only about half of what the others did. Kuipers spoke to Florentino about his work more than ten times altogether. At times Florentino answered that nobody liked him. Kuipers tried assuring him that he liked him, and assigned him to different jobs. Repeatedly, after starting off well, Florentino's work deteriorated. When Kuipers criticized his work, Florentino responded at least one time to the effect of "'Get off my back[;] otherwise I can go to the union.'" Kuipers told him to go right ahead. Kuipers also said that he often discussed Florentino's performance with Gmelin, and Gmelin advised him to keep cool and try to win Florentino's respect so the work would be done well. When asked whether he repeated Florentino's threat about going to the union to Gmelin, Kuipers answered that he did not think so, because

he did not think it worth mentioning, but he might have.

As he made his rounds in the afternoon of December 17th, Kuipers testified, he found a large number of cut roses on the floor of the greenhouse section where Florentino worked. The roses were marketable flowers, cut a day or two before they should have been, and there were over a hundred of them throughout the section. Kuipers picked up a bunch and looked for Florentino. In the presence of foreman Ricardo Brotarlu, Kuipers showed Florentino the flowers and asked why he did that; Florentino answered either that he did not know or that he did not know who did it. Kuipers asked who was going to pay for the flowers, and Florentino responded that Kitayama could, he had money enough. Kuipers took the flowers he had gathered to Gmelin and told him what had happened. Gmelin agreed that Florentino should be fired, so after obtaining his paycheck, Kuipers paid him off and gave him a copy of a termination notice written by Gmelin.

Kuipers added later that he spoke to Florentino two or three times that day before giving him his paycheck. He said that the first time, as he approached Florentino, he saw Florentino cutting flowers and throwing them on the ground. Kuipers was alone when he spoke to Florentino that time; he returned with foreman Brotarlu so someone else would hear what happened. It was in the first conversation that he asked Florentino about paying for the flowers; otherwise the conversations were essentially the same.

Kuipers also testified that Florentino alone was responsible for that particular section of the greenhouse, except that someone else watered the flowers. The flowers must have been cut that afternoon because they were still fresh; it was sunny and had they been cut earlier, or the previous day, they would have been wilted. At that particular time flowers were being cut for market, not pinched or debudded.

The testimony of Ricardo Brotarlu, Florentino's foreman, differs in

some details. Brotarlu reported that it was he who discovered cut flowers that afternoon on the floor of Florentino's section of the greenhouse. He picked up a bunch of about 24 of them (he did not say how many there were altogether), and took them to Kuipers; then Kuipers and he went to speak to Florentino. When Kuipers asked Florentino why he had nipped or clipped the flowers, Florentino answered that someone else might have done it earlier. Brotarlu was present when Kuipers asked who was going to pay, and Florentino responded, "'The company, of course, Kitayama.'" Brotarlu and Kuipers took some of the flowers to Gmelin, who agreed that Florentino could be fired. Brotarlu did not speak to Florentino again that day. He had previously reprimanded Florentino for discarding marketable flowers.

Gmelin confirmed that Kuipers and Brotarlu came to him with cut flowers and told him Florentino was cutting and throwing them on the floor, and that he wrote Florentino's termination notice.[9] Brotarlu, Gmelin and Kitayama (who was shown the flowers that day by Gmelin), as well as Kuipers, testified that the roses were freshly cut.

Florentino denied having ever received complaints or warnings about his work. He also implicitly, but not directly, denied cutting the flowers that led to his discharge. He confirmed that at that time he worked in his own section of the greenhouse and knew how to properly cut and debud roses. That afternoon, he reported, Kuipers, accompanied by Brotarlu, showed him a bouquet of flowers and asked what they were doing in his section. When he responded that he did not know what Kuipers was talking about, Kuipers told him that the roses were thrown

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[9]RX C-1 is a copy of the termination notice given to Florentino. RX C-2 is another copy, modified subsequently and retained by Gmelin, and RX C-3 is an addendum written by Gmelin for the files. They were admitted without objection. Since they consist of either conclusory statements or statements of events not personally observed by Gmelin, they are not considered for the truth of the matters stated therein.

on the floor in his section and asked if he was going to pay for them. Florentino replied that he would not, because he was not sure that the roses had come from his section, and if they had, they had not been cut that day but the day before, because they were dead. (The previous day was a Sunday, and Florentino had not worked. He explained that he thought the flowers had been cut then because people work hastily on Sunday, in order to go home early, and sometimes flowers fall on the floor and are damaged.) Kuipers responded that the flowers had been cut that day, and asked who was supposed to pay for them. Florentino answered that he did not know, perhaps Kitayama if anyone, because they were his. Kuipers left without saying more but returned as Florentino was getting ready to leave work, and gave him a check and a termination notice. Kuipers told him it was his last day and refused to explain further, saying only that Florentino could go to the union or do whatever he wanted, it was his own business.

ANALYSIS AND CONCLUSIONS

Legal Principles

The respondent is charged with having violated sections 1153(c) and (a) of the Act by these three terminations. Section 1153(c) makes an unfair labor practice of "discrimination in regard to hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." Under section 1153(a), it is an unfair labor practice for an agricultural employer to "interfere with, restrain, or coerce" agricultural employees in the exercise of their organizational rights. The section 1153(a) violations alleged in the complaint are derivative: that is, the violation necessarily follows from a finding of a section 1153(c) violation. See Maggio-Tostado, Inc., 3 ALRB No. 33 (1977); Tex-Cal Land Management, Inc., 3 ALRB No. 14 (1977), enforced, 24 Cal. 3d 335 (1979).

Once discriminatory action against an agricultural employee is shown,

and there is evidence which supports the inference that the employee's protected conduct was a motivating factor in the employer's decision, a prima facie violation of section 1153(c) is established. The burden then shifts to the employer to produce evidence of a legitimate reason for the action. Where the evidence indicates that an employer was motivated by both anti-union bias and legitimate business interests,[10] the employer has the burden of proving that it would have taken the same action absent the protected activity. See Martori Brothers Distributors v. Agricultural Labor Relations Board (27 July 1981), 29 Cal. 3d 721; Nishi Greenhouse (5 Aug. 1981), 7 ALRB No. 18; Wright Line, Inc. (1980), 251 NLRB No. 150, 105 LRRM 1169.

Rarely is there direct evidence that action was taken against an employee because of the employee's protected conduct. Unlawful motivation may be inferred from evidence showing that the employer was hostile to the protected activity and knew that the employee was engaged in it. Knowledge of an employee's protected activity may itself be inferred from circumstantial evidence. In the instant case the respondent contends that a prima facie case has not been made out because the evidence of company anti-union animus and knowledge of the alleged discriminatees' union activities is insufficient to support an inference of unlawful motivation.

Anti-Union Animus Is Established.

Turning first to the issue of animus, I find ample evidence in the record to support an inference of unlawful motivation. The company concedes that it campaigned for a no-union election result. As part of its campaign, its

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[10]The so-called dual motive case. In Wright Line, Inc. (1980), 251 NLRB No. 150, 105 LRRM 1169, the NLRB distinguishes a dual motive case from a pretext case: the latter is one in which the employer's affirmative defense is "wholly without merit," whereas in the former, the affirmative defense has "at least some merit." Wright Line, Inc., supra, 105 LRRM at 1170 n.5.

employees were addressed by outside speakers who, I find, threatened the workers with reprisals for supporting the union. I credit the testimony of the alleged discriminatees to the effect that the workers were told, in essence, that: they should not support the union because Kitayama was powerful; they could easily be deported and replaced, since most did not have immigration papers; and the company would no longer assist their efforts to legalize their immigration status or give them their jobs back when they returned after deportation, if there was a union. Taking into account both demeanor and their self-serving and inherently implausible testimony, I do not give credence to the denials of Ben Lopez or Henry Franco. I also rely on the Board's finding in the representation proceeding that the two men threatened the workers. See Kitayama Brothers Nursery (1979), 5 ALRB No. 70.

I find, as he reported, that Clemente Gomez was offered money and less tangible benefits--help in obtaining immigration papers, prestige as president of the credit union--in return for using his influence with other workers to oppose the union. Gomez's demeanor and testimony in general were credible. Also, it is unlikely he would manufacture conversations in this instance that, according to him, five other people[11] were in a position to refute. On the other hand, Trinidad Cazares, who denied not only Gomez's report of offers but also any knowledge of the union or discussion of it with Gomez, was impeached by his prior testimony. Kitayama testified that he first heard of the offers at this hearing even though he sat through the representation hearing, where Gomez gave similar uncontradicted testimony, and presumably received copies of the IHE's and Board's decisions there. His tone of surprised innocence contributes to my finding his denials untrustworthy.

In its post-hearing brief the respondent argues that in the absence of

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[11]Cazares, Kitayama, Bob Cooper, the unidentified office worker who interpreted once, and Gomez's co-worker, Jesus Ortiz. Only the first two testified.

actual payments, the offer of payments does not lead to a strong inference of anti-union animus. I disagree. The issue is the employer's intent. The fact that Kitayama was willing to and did offer money, whether or not the offer was accepted, demonstrates the lengths to which he was willing to go in order to discourage support for the union.

Clemente Gomez reported that on one occasion Trinidad Cazares said that the union might win, but Immigration could also take the workers away and Kitayama could hire new ones, and that would be the end of the union. Finding Gomez more credible than Cazares, I conclude that Cazares made the statement, despite his denial. The statement is an implied threat attributable to the company and, consequently, additional evidence of its hostility toward the union.[12]

Some evidence is not relied upon in deciding that anti-union animus is established. Although unlawful motivation was found in Kitayama Brothers Nursery (1978), 4 ALRB No. 85, that decision is not given weight here because hostility toward the UFW in 1975-76 is not very probative of hostility toward the LIU in 1979. I also reject Heriberto Jauregui's report of seeing Bob Cooper take down names of union activists from timecards. Lena Martinez's denial is persuasive, both because she was a believable witness, and because Heriberto's testimony that the names were copied while he was close enough to identify them is improbable. Because Martinez is more credible, her denial that she spoke to workers about the union is accepted over Heriberto's assertion that she told him he could lose his job for being involved in union activities.

Anti-union animus is found despite the fact that known union supporters were not terminated by the company. The retention of some union adherents does not preclude a finding of unlawful discrimination. See Desert Automated Farming

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[12]Conduct such as the threats and the offer of money to Gomez violates section 1153(a). No independent violations of section 1153(a) are found, however, because none were alleged in the complaint and the general counsel represented during the hearing that no such findings were being sought.

(1978), 4 ALRB No. 99; Tex-Cal Land Management, Inc., supra, 3 ALRB No. 14.

Clemente Gomez's Termination Is an Unfair Labor Practice.

The conclusion that the company had identified Clemente Gomez as a union activist is inescapable. Awareness of his role as an election observer for the union was acknowledged by Kitayama and Gunter Gmelin. Gomez testified that he distributed authorization cards and attended a union meeting on company premises. Whether these activities were observed or not, both Cazares and Kitayama indicated that they knew of his union involvement when they offered him money to support the company. Any doubts they may have had could not remain after he rejected the offers. Cazares' testimony at the representation hearing also establishes that he knew Gomez was involved in union affairs.

The elements of a prima facie violation are therefore established: Gomez was discriminatorily denied reinstatement; he was known to be an incorruptible union supporter; and the company's anti-union animus is demonstrated. The burden shifts to the company to prove that it had a legitimate reason to terminate him and would have done so in the absence of his protected activity.

The following facts are based on uncontradicted, credible testimony. Gomez asked for and was granted permission to leave work to go to Mexico because he had heard that his mother was ill. After leaving his job, he learned that her illness was not serious and so he did not actually go to Mexico. While he was away from work, Gunter Gmelin received an unverified report that he was working in the vicinity. Gmelin spoke to Kitayama and learned that the company had a policy of not taking back employees who left their jobs to work elsewhere. Gomez was not, in fact, working elsewhere.

Whether Gomez's time off was a vacation (Gomez) or an emergency leave of absence (Gmelin) is immaterial. Having been given the time off, Gomez had no reason to believe that he should return immediately upon learning that his planned

trip was unnecessary. No evidence suggests that he was told otherwise. Unlike the respondent, I attach no significance to the fact that he returned in slightly less than two weeks. It indicates nothing more than a decision to return early, for any of a number of reasons.

When Gomez returned, Gmelin told him he had lied--he had not gone to Mexico but had worked here--and the company would not take him back. Gomez testified that he replied that he had not been working. Gmelin testified that he expected a response from Gomez but did not get a satisfactory answer. However, from Gmelin's testimony that he was very definite about Gomez's not getting his job back and Gomez "let it go at that," as well as from Gomez's testimony that Gmelin left him "with a work in [his] mouth," it is apparent that Gmelin did not give Gomez much of an opportunity to explain. Gomez may well have said that he had not been working without Gmelin's having heard it.

The respondent's contention that Gomez was refused reinstatement only because Gmelin believed in good faith that he had worked elsewhere and had lied about his leave does not withstand scrutiny. The company offers no evidence that other workers were similarly treated and admits that Gomez was a good worker. The report Gmelin received was unverified, yet Gomez was given virtually no opportunity to rebut it.

Gomez was terminated approximately one month after the election. Gmelin's testimony that he knew nothing of Gomez's union activities is impeached by his reluctant admission that he knew Gomez was an election observer, and indirectly contradicted by Kitayama's testimony that Gmelin was the source of most of his own information about what was going on. Cazares, who certainly knew of Gomez's activities, reported directly to Gmelin.

Furthermore, Kitayama undeniably knew of Gomez's union support. With or without giving a reason, he may have told or urged Gmelin to get rid of Gomez,

using the company's "policy" of refusing to reinstate people who worked elsewhere, which Gmelin had not known about previously, as an excuse. Finally, while Cazares' report of Gmelin's conversation with Gomez upon the latter's return is otherwise given little weight because of its variance with the reports of the principals, his testimony that Gmelin told Gomez he had been replaced supports the inference that the decision had already been made.

I find virutually no merit in the company's affirmative defense. Whether this is considered a pretext case or a dual motive case, the employer has not met its burden of proving that it would have refused to reinstate Gomez absent his protected activity.

The Company Had Legitimate Reasons to Discharge Heriberto and Florentino Jauregui.

The company's knowledge of the Jauregui brothers' union activities is less certain. I reject the inference that Ben Lopez or Henry Franco told Kitayama about them (or Gomez either) after they spoke up at the company-called meetings. Heriberto Jauregui's testimony about giving his name to both speakers at their request is not credible. Surely there would be corroboration if both speakers asked for the names of apparent union supports (which they denied), yet none was forthcoming from either Gomez or Florentino Jauregui. It also seems unlikely that Ben Lopez, an experienced labor consultant, would risk such easily verifiable intimidation. Heriberto's later-added detail about writing out his name for Lopez only adds to the implausibility. Regarding the report by Florentino that Cazares told him Lopez had described him to Kitayama, I simply do not think that Lopez was capable of giving such an identifiable description. Eliminating Franco and Lopez as sources of information does not preclude the company's discovery of the workers' outspoken roles at the meetings by other means, of course, even though supervisors and foremen were not present.

I have already discounted Heriberto Jauregui's account of seeing his

name taken down by Cooper and being told by Martinez that he could lose his job for union involvement. The remaining evidence of company knowledge--Heriberto's testimony that he distributed cards and urged support for the union, sometimes in the presence of Martinez or supervisor Kim Platzek--is not directly contradicted. Platzek denied knowing of Heriberto's union activities, however, and I generally find Platzek to be a credible witness, in contrast to Heriberto.

Identifying himself as one of the most active union supporters, Florentino Jauregui testified that he too distributed cards and spoke to people, but not in the presence of foremen or supervisors. The only direct evidence of company knowledge is Florentino's testimony about statements purportedly made to him in connection with his work, which I discount below.

In sum, although company knowledge of the Jaureguis' union activities could be inferred, credible evidence of it is not substantial. In light of my conclusion that the company has proved they would have been terminated in the absence of protected activity, the question need not be resolved.

Heriberto Jauregui was not discharged until three months after the election. Kim Platzek, Heriberto's supervisor, was in his demeanor a credible witness; his credibility was enhanced by his not having recently worked for the company, his testifying with little preparation, his admitted memory lapses, and his testimony against the company's interests about keeping records it failed to produce. I therefore find, as Platzek testified, that Heriberto's work in the potted plants was unsatisfactory over a period of several months and that he spoke to Heriberto about it several times.

This finding is reconcilable with the evidence that when he sprayed, Heriberto's work was complimented and he was given extra responsibilities, for Heriberto was transferred from that work at his own request more than three months before he was fired and only one of the complaints specified by Platzek concerned

spraying. The absence of corroboration about Heriberto's work performance from his forewoman, Lena Martinez, is not significant, because the general counsel as well as the respondent had the opportunity to examine her. Platzek was corroborated by Gunter Gmelin, who testified that Platzek spoke to him often about Heriberto's work, which he too observed and found wanting.

Although Heriberto's testimony gives the impression that Kitayama attempted to falsify the reasons for his termination by giving him a notice stating that he quit, that impression is dispelled by union representative Pete Moreno, who testified that the paper given him by Heriberto set forth grounds for discharge. Heriberto confirmed that he was given only one paper, and that paper ended up in the possession of the ALRB, according to Moreno. If it would have supported Heriberto's testimony, he and the agency must bear the brunt of the failure to produce it.

Finally, concerning Platzek's and Florentino Jauregui's subsequent discussion about Heriberto's termination, I credit Platzek's testimony over Florentino's. Platzek may have been unable to satisfy Florentino and therefore referred him to Gmelin, but I do not believe he told Florentino that Gmelin had said one of the two Jaureguis must be fired. Platzek is the more reliable witness of the two, and Florentino's accusation is too inconsistent with Platzek's assumption of responsibility for the decision to discharge Heriberto (corroborated by Gmelin) and his reasons for it. I conclude that the termination of Heriberto Jauregui was justified by his poor work performance and would have occurred in the absence of protected activity.

The company had legitimate reasons and would have fired Florentino Jauregui despite his protected activity, as well. Florentino's discharge occurred six months after the election. Apart from the events that preceded his transfer

to the rose department,[13] events there, particularly on his last day, justify his discharge.

By all accounts Florentino was capable of doing his work, yet Jan Kuipers, manager of the rose department, testified to repeated efforts to place him in a position where he would perform up to his capabilities. Kuipers' difficulties with Florentino appear similar to those reported by Cazares, Florentino's previous supervisor. Kuipers' credibility is heightened by his detachment. He had not worked for Kitayama Brothers for almost a year prior to testifying, and he was not hired until after the election. Significantly, Florentino did not attribute to either him or foreman Ricardo Brotarlu, a longtime Kitayama employee, any anti-union statements like those he attributed to Cazares and Gmelin.

Concerning the espisode that caused Florentino's discharge, although Kuipers and Brotarlu differ on details such as who first found the cut flowers or what precisely was said in particular discussions with Florentino,[14] they agree

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[13]Because subsequent events justify the discharge, a detailed review of the events preceding Florentino's transfer to the rose department is unnecessary. I note only that I do in general credit Cazares' and Gmelin's testimony about Florentino's unsatisfactory performance and the warnings he was given. I do not agree with the general counsel's position that Cazares' reaction to learning of Florentino's transfer--"It was perfect for me. I did not need him at the moment."--contradicts Gmelin's testimony that Cazares was dissatisfied with Florentino. The remainder of Cazares' own testimony makes clear his dissatisfaction, though the frequency of his complaints may have been exaggerated by Gmelin. I infer from the quoted statement that Cazares was simultaneously glad to be rid of Florentino and relieved that his departure was not inconvenient.

Finding Florentino to be an unreliable witness, I do not credit his testimony about being told by Cazares and Gmelin that his job depended upon his not being involved with the union.

[14]Contrary to the general counsel's argument, Kuipers and Brotarlu do not contradict each other on the number of cut flowers. Kuipers testified that there were more than 100 altogether; Brotarlu testified that he gathered up about 24, but was not asked how many there were in all.

on basic elements and I find accordingly: a large number of freshly cut, marketable roses was found on the floor of Florentino's section of the greenhouse, and Florentino evidently was responsible for them. No plausible alternative suggests itself. Florentino's theory that the flowers were cut the previous day is not persuasive because their appearance in his section in the middle of the afternoon is still unexplained and because his statement that the flowers were dead is contradicted by Gmelin and Kitayama, as well as Kuipers and Brotarlu. Florentino confirmed that he worked alone in the section and knew his job too well to have cut the roses inadvertantly or through inexperience.

The suggestion that the flowers were not actually found in Florentino's section is contrary to the general counsel's position that Brotarlu is a credible witness. The general counsel's alternative explanations that perhaps the flowers were deliberately "planted" in Florentino's section or were discarded by some other employee are unsupported conjecture.

Since the company was justified in the belief that Florentino Jauregui willfully destroyed marketable flowers, it satisfied its burden of proving that he would have been discharged in the absence of protected activity.

THE REMEDY

In June 1979 the respondent refused to reinstate Clemente Gomez in violation of section 1153(c) and, derivatively, section 1153(a) of the Act. It did offer reinstatement subsequently, though when the offer was first conveyed to Gomez remains to be determined.[15] The company should not be required to offer reinstatement again under these circumstances, but Gomez should be made whole for

[15]The record does not reflect whether the company's offer in October 1980, during the course of negotiations with the union, was unconditional or whether it was conveyed to Gomez. At the opening of the hearing if not before, however, an unconditional offer of reinstatement was made to and refused by Gomez.

the period between the initial refusal and notice to him of the company's willingness to reinstate him. Since other workers were aware of Gomez's protected activity and the refusal to reinstate him, the customary notice provisions are also appropriate.

The allegations concerning Heriberto and Florentino Jauregui were not proved, and should be dismissed.

Accordingly, pursuant to section 1160.3 of the Act, I recommend the following:

ORDER

Respondent KITAYAMA BROTHERS, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. Refusing to reinstate or otherwise discriminating against any agricultural employee in regard to hire or tenure of employment, or any term or condition of employment, because he or she has engaged in any union activity or other protected concerted activity; or

b. In any like or related manner interfering with, restraining, or coercing agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act.

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

a. Make Clemente Gomez whole for any loss of pay and other economic losses suffered as a result of Respondent's refusal to reinstate him, plus interest;

b. Preserve and, upon request, make available to agents of this Board for examination and copying, all payroll and other records relevant and necessary to determine the backpay period and the amount of backpay due under

the terms of this order;

c. Sign the attached Notice to Employees and, after its translation by a Board agent into the appropriate languages, reproduce sufficient copies in each language for the purposes that follow;

d. Post copies of the attached Notice to Employees, in all languages, in conspicuous places on its premises for 30 days, the time and places of posting to be determined by the Regional Director, and exercise due care to replace any notice which is altered, defaced, covered, or removed;

e. Within 30 days after the issuance of this order, mail copies of the attached Notice to Employees in all languages to all employees employed by Respondent at any time during the month of June 1979;

f. Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice to Employees, in all languages, to its employees assembled on company time and property at times and places to be determined by the Regional Director; following each reading a Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the notice or employee rights under the Act; the Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all employees whose compensation is determined in whole or part by a bonus or piece rate, to compensate them for time lost at this reading and question-and-answer period;

g. Notify the Regional Director in writing, within 30 days after the issuance of this order, of the steps taken to comply with it; and continue to make periodic reports as requested by the Regional Director until full compliance is achieved.

IT IS FURTHER ORDERED that the allegations in the complaint concerning

Heriberto Jauregui and Florentino Jauregui Garcia be, and they hereby are, dismissed.

Dated: 4 December 1981

Jennie Rhine
Administrative Law Officer