STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of BELLA BAUTISTA, Complainant, and MAC FARMS OF HAWAII, Respondent.	CASE NO. 96-8(CE) DECISION NO. 392 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER

On October 9, 1996, Complainant BELLA BAUTISTA (BAUTISTA), by and through her representative, the International Longshore and Warehouse Union, Local 142, AFL-CIO (ILWU or Union), filed an unfair labor practice complaint against MAC FARMS OF HAWAII (MAC FARMS or Employer) with the Hawaii Labor Relations Board (Board). BAUTISTA alleged that she worked continuously for the Employer during each harvest season from October 11, 1993 to June 15, 1996. However, after assisting with the Union organizing, BAUTISTA was not called back to work on August 22, 1996. BAUTISTA alleged that she was the only person who was not called back to work and that coworkers informed her that the Factory Manager and those in management knew that she was organizing for the Union and she was not called back for that reason. BAUTISTA contended that the Employer discriminated against her because of her involvement with the Union and interfered with her rights, violating

Sections 377-6(1), (3), (8), and (13), Hawaii Revised Statutes (HRS).

On December 16, 1996 and February 14, 1997, the Board conducted hearings on the instant case in both Kona and Honolulu. All parties were afforded full opportunity to present witnesses, exhibits, and arguments before the Board. The parties filed post-hearing memoranda with the Board on April 11, 1997.

Based upon a thorough review of the record, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Complainant BAUTISTA was, at all times relevant, an employee as defined by Section 377-1(3), HRS.

The ILWU is a representative under Section 377-1(4), HRS.

Respondent MAC FARMS OF HAWAII is an Employer as defined by Section 377-1(2), HRS. The Employer operates a macadamia nut orchard and processing factory at Captain Cook on the Island of Hawaii.

John Sullivan (Sullivan) was, at all times relevant, the Factory Manager at MAC FARMS, and a representative of the Employer.

Sally Haina (Haina) was, at all times relevant, the Factory Husker Supervisor and was BAUTISTA's supervisor.

BAUTISTA was hired by the Employer as a factory nut sorter on October 11, 1993. The work is seasonal and normally runs from September to June. The end-of-season layoffs typically begin in late March or early April, with the last liliko, or "clean up" layoff occurring in June 1996. BAUTISTA was called back to work for the 1994 and 1995 seasons. At the time, a total of 55 factory

employees worked on two shifts. Each shift rotates every week, with the shifts alternating between day and night shifts. On June 14, 1996, BAUTISTA's last day of work for the 1995 season, Haina gave BAUTISTA a work performance rating which was adequate or good in most areas but which also indicated that BAUTISTA's attendance was less than acceptable and that BAUTISTA needed to improve her attendance in the upcoming season.

On June 28, 1996, the ILWU filed an election petition with the Board to represent the factory employees at MAC FARMS.

BAUTISTA assisted the Union organizing by visiting the employees in their homes in August 1996. Sullivan admits he was aware that BAUTISTA was assisting the Union in its organizing efforts in June or July. During the third week of August 1996, BAUTISTA called Sullivan and left a message informing him that she was available to work and wanted to know when she would be recalled to work. Sullivan returned BAUTISTA's call and told her that no work was available.

During August and September, the Employer conducted an "educational" campaign for employees and the General Manager met with all employees in August to inform the employees of their rights and the company's benefits and policies. Young met with employees in the factory and the field in August and September. The Employer also held meetings with supervisors where they discussed the Union's meetings.

BAUTISTA sent a letter to Sullivan, dated September 5, 1996, requesting written confirmation on when she would be recalled to work. Sullivan did not respond to BAUTISTA's letter.

The Board conducted the representation election on September 12, 1996. By a vote of 98 to 67, the employees chose not to be represented by the ILWU. During the representation proceeding, BAUTISTA was the ILWU's employee organizer and also the Union's observer during the election.

BAUTISTA was not recalled by the Employer for the 1996 season. The Employer never provided BAUTISTA with the reasons why she was not called back to work other than there was no work available. Sullivan believed it was better to say that there was no work available rather than confront her with the real reasons. According to Sullivan, BAUTISTA was not called back because the Employer did not need her; because she was involved in incidents in which the Employer felt she was disruptive; and her attendance was not up to par.

Sullivan states that the decision not to recall BAUTISTA was made in late May or early June 1996. By memorandum dated May 30, 1996, Sullivan recommended that BAUTISTA not be recalled for the 1996 season because of her disruptive behavior. The memorandum cited BAUTISTA's complaints of incidents dating back to October 1994,[1] October and November 1995,[2] and March 1996.[3]

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[1]In October 1994, BAUTISTA complained to Sullivan that she had difficulties with certain coworkers. Sullivan met with the employees and discovered that the misunderstanding was caused by gossip. Sullivan felt that the issue was resolved after the group meeting.

[2]In October 1995, BAUTISTA filed a grievance complaining that she was verbally assaulted by her Crew Chief Jackie Castenada over an incident involving BAUTISTA's late return to her station after heating her meal. Sullivan conducted an extensive investigation and concluded that there had been no verbal assault as claimed. Sullivan advised BAUTISTA that all employees must conduct themselves in a polite and business-like manner and that disruptions can be considered as violating the company's rules of

Sullivan felt that BAUTISTA disrupted the workplace because of her confrontational behavior and that too much time was taken to address and resolve her exaggerated concerns. Sullivan also called a professional counselor from the Straub Employee Assistance Program to counsel the employees. The Employer took no disciplinary action against BAUTISTA for disrupting the workplace or filing unwarranted complaints.

Sullivan made the May 30, 1996 recommendation not to recall BAUTISTA to Charles Young, former General Manager. Within a few days, the decision was made that BAUTISTA would not be

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conduct and are subject to rules of discipline. Sullivan further recommended that both employees participate in counseling to resolve the difficulties.

Also in her October complaint, BAUTISTA charged another member of her work team with stealing company property. After an investigation, Sullivan found that the employee had purchased the products.

In November 1995, BAUTISTA complained of another crew chief's favoritism towards another sorter. Sullivan met with various employees and had the employees meet to resolve the concerns.

Also in November 1995, the Straub Employee Assistance Program counselor, Laura Schlesinger, met with BAUTISTA and Castenada. In her report, dated December 1995, Schlesinger reported that it appeared that BAUTISTA was not well-liked at work but that she was not sure that BAUTISTA had insight about it. Schlesinger suggested that if problems continued, Sullivan may want to consider taking disciplinary action.

[3]On March 21, 1996, Schlesinger returned to the facility to talk to the employees about people getting along in the workplace. Later that evening, BAUTISTA was sweeping around the sort table when her broom hit the leg of a chair which Segundina Saladino was sitting and the chair slipped and fell against the edge of the table. Saladino gave BAUTISTA an angry look and BAUTISTA became upset and filed a complaint against Saladino.

Sullivan investigated the complaint and found that the other employee had done nothing offensive to BAUTISTA and was actually the victim of an industrial accident.

recalled for the next season. Sullivan informed Haina on June 1 or 2, 1996 of the decision not to recall BAUTISTA.

During the first half of August 1996, the Employer recalled approximately ten employees to prepare the factory for the upcoming season. In late August 1996, Sullivan met with other supervisors to determine how many people were needed and in what positions the Employer needed them in order to call back the employees. Sullivan stated that Haina did not recommend BAUTISTA for recall. Multiple recall lists were created. By the second half of August 1996, 85 to 90% of the employees had been recalled to work.

Sullivan identified three factory nut sorters, other than BAUTISTA, who were not initially called back to work. Two employees were not called back because of the lack of work. One employee, Srue Palik was called back to work in September. The other employee, Feliza Jara, indicated that she wanted to resign to take care of a family member but the Employer placed her on family leave. Another employee, Aileen Castenada was on leave and was called back to work later in September. Sullivan also identified five other employees who chose to resign. Thus, BAUTISTA was the only employee who wanted to work for the Employer and who was not called back.

Sullivan indicated that the overall number of employees needed was reduced because of increased efficiencies based on changes in equipment and infrastructure and BAUTISTA's position as well as others were no longer needed.

The Employer, however, hired new factory workers including laborer sorters who maintain the floor area around the

station and wash down the pallets. They were also trained to do sort work. The laborer sorters perform some of the same tasks which BAUTISTA performed in the factory. Employees still perform nut sorting on the day and night shifts. In addition, a field worker was transferred to fill the nut sorter position and/or hired as a laborer sorter and two new hires perform nut sorting type duties on the other shift. Sullivan makes no mention of the availability of work in his May 30, 1996 memorandum.

Sullivan also cited BAUTISTA's poor attendance as a basis not to recall her. BAUTISTA had three unexcused absences and had the worst attendance on her shift. In reviewing the attendance records of other employees, Sullivan confirmed that there were other individuals who had more sick excuses and the same number of tardies as BAUTISTA but who were recalled. Sullivan referred to a policy set "years before" establishing Employer's requirements of good performance. The policy is not in the record and there is no evidence that the employees were notified of the policy or that they would be subject to discipline for failure to comply with the standards set. The attendance records indicate that BAUTISTA's unexcused absences were taken during the weeks of October 15 and October 29, 1995 and February 11, 1996. The Employer imposed no disciplinary action on BAUTISTA for any unexcused absence and, more pertinent is the fact that Sullivan's May 30, 1996 memorandum does not mention BAUTISTA's attendance as a basis for not recalling her.

Haina confirmed that she met with Sullivan in June 1996 to discuss whether BAUTISTA would be called back. She testified that by September 1996, the company was running at 80%. Sometime in mid-October 1996, the production reached 100%. In 1995, Haina

had 22 people working on her shift. In 1996, there were only 20 people, two less people to split between two shifts. Four people transferred from the field to the factory in 1996. Two were brought in on the other shift as a sorter and helper and two on her shift were huskers/helpers. Haina indicated that no one has taken BAUTISTA's place. According to Haina, the decision not to recall BAUTISTA was made in mid-August. Sullivan however testified that the decision not to recall BAUTISTA was made at the end of May 1996 but the official list to recall employees was not determined until mid-August. BAUTISTA was not on the recall list. Sullivan states that the only written statement in BAUTISTA's file stating that she would not be recalled was his May 30, 1996 memorandum.

DISCUSSION

BAUTISTA alleges that her active involvement in Union organizing activities constitutes the basis for the Employer's decision not to recall her for the 1996 season. BAUTISTA alleges that the Employer effectively terminated her employment because of her Union activities and contends that the Employer violated Sections 377-6(1), (3), (8), and (13), HRS. Those sections provide as follows:

> It shall be an unfair labor practice for an employer individually or in concert with others:
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> (1) To interfere with, restrain, or coerce the employer's employees in the exercise of the rights guaranteed in section 377-4;
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> * * *
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> (3) To encourage or discourage membership in any labor organization by discrimination in regard to

hiring, tenure, or other terms or conditions of employment. . . .;

* * *

(8) To discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony under the provisions of this chapter;

* * *

(13) Based on employment or willingness to be employed during a labor dispute, to give employment preference to one person over another who:
(A) Was an employee at the commencement of the dispute;
(B) Exercised the right to join, assist, or engage in lawful collective bargaining or mutual aid or protection through the labor organization engaged in the dispute; and
(C) Continues to work for or has unconditionally offered to return to work for the employer.

The Employer denies that the Complainant was not recalled to work due to her Union activities. The Employer contends that BAUTISTA was not recalled to work because of a legitimate determination, reached prior to and independent of any subsequent alleged Union activity on BAUTISTA's part, due to her demonstrated behavioral and interpersonal relationship problems which had a disruptive and detrimental effect on the Employer's operations and on the morale of some of her coworkers. In addition, the Employer cited BAUTISTA's job performance as an additional factor in deciding not to recall her. BAUTISTA's attendance record, which cited three separate unexcused absences, was also considered.

Finally, the Employer modified BAUTISTA's position with new and additional qualifications and there was no work available for her.

Complainant alleges that the Employer violated Section 377-6(8), HRS, which provides that it shall be an unfair labor practice for an employer, "[t]o discharge or otherwise discriminate against an employee because the employee has filed charges or given information or testimony under the provisions of this chapter." In reviewing the record, the Board finds that there is no evidence to support a finding that BAUTISTA previously filed charges nor gave testimony under Chapter 377, HRS. Therefore, the allegation that Section 377-6(8), HRS, has been violated is hereby dismissed.

Further, the Board finds that Section 377-6(13), HRS, relating to replacement workers and/or continued employment after and/or during a labor dispute is not applicable here since the Union failed to prove that the election constitutes a "labor dispute."

With respect to the allegations that Sections 377-6(1) and (3), HRS, were violated, the Board must first determine whether the Employer's decision not to recall BAUTISTA to work constituted a termination of services. Evidence was presented that the employees are seasonal, working from August or September through to June of the following year. Once hired, the employees were routinely recalled each season and the Board finds that this practice created a reasonable expectation that employment would be continued. Therefore, the Board majority finds that the decision not to recall BAUTISTA constituted a termination of her employment.

In considering whether the Employer's termination of BAUTISTA constituted discrimination in violation of Sections 377-6(1) and (3), HRS, we are guided by the analysis proposed by the U.S. Circuit Court of Appeals for the Fifth Circuit in NLRB v. Wright Line, A Division of Wright Line, Inc., 662 F.2d 899, 904-05, 108 LRRM 2513 (1st Cir. 1981). Under the Wright Line test, the complainant must present a prima facie case that anti-union animus contributed to the decision to discharge the employee. If the complainant presents such a case, the employer may introduce evidence to demonstrate that the employee would have been discharged regardless of his or her involvement in protected activity. We note here that a pro-union employee cannot cloak herself with protection from discipline or discharge by her involvement with the union. While Respondent's anti-union animus may be apparent from the record, this does not mean that Respondent cannot discharge a union adherent so long as the discharge was not based on the adherent's union activity.

The evidence in this case clearly establishes that BAUTISTA was an active Union supporter and was heavily involved in the Union's campaign to represent the employees at MAC FARMS. These facts were well-known to the Employer and Sullivan admits that he was aware of BAUTISTA's activities as early as June or July 1996. Even if Sullivan became aware of BAUTISTA's activities in early August, Haina testified that the decision not to recall BAUTISTA was made in August when the recall lists were made. Although Sullivan testified that these facts did not motivate his decision to not recall BAUTISTA, her active involvement with the ILWU coincides with the Employer's decision not to recall BAUTISTA

and raises a strong inference of discrimination based on her protected activity. In addition, during this time period the Employer was involved in an educational campaign for the employees to inform them of their rights and benefits in response to the Union's organizing efforts. Thus, the proximity in time between the protected activity and the Employer's decision not to recall BAUTISTA provides further evidence of unlawful motivation.

After careful review of the record, the Board majority concludes that the Union has presented a prima facie case of discrimination based on BAUTISTA's engagement in protected activity. The Employer however contends that BAUTISTA was a disruptive employee and unable to get along with her coworkers. The Board majority finds that while BAUTISTA's work record is not unblemished, there is no evidence of any prior disciplinary action in her employment history. The incidents cited by the Employer occurred over a period of two years with the last incident occurring in March 1996. Although the incidents were investigated thoroughly and well-documented, there was no evidence of any disciplinary action imposed against BAUTISTA for misconduct. The memorandum which outlined the basis for which BAUTISTA would not be recalled is dated May 30, 1996 and the last incident cited by Sullivan was BAUTISTA's complaint in March 1996. While the last incident appears to trigger BAUTISTA's "termination," it is clear that Sullivan viewed BAUTISTA's complaints cumulatively as evidence of her inability to get along with her coworkers because the March incident is not severe enough, in and of itself, to warrant termination since BAUTISTA had never been previously disciplined.

Further, there is an unexplained passage of two months between the March incident and Sullivan's recommendation not to recall BAUTISTA. Moreover, Sullivan's memorandum was not shared with BAUTISTA nor did the Employer warn her that her continued filing of complaints would result in her termination. Inexplicably, the Employer could have taken disciplinary action against BAUTISTA before the end of the season since Sullivan contends that his decision not to recall BAUTISTA was made at the end of May. BAUTISTA was however, permitted to finish the season and was in fact, merely told by Sullivan in August that no work was available.

In the Board majority's view, if Sullivan insists that his decision not to recall BAUTISTA was made on May 30, 1996 as memorialized in his memorandum, BAUTISTA's attendance was not a factor in his decision. Nevertheless, in reviewing BAUTISTA's attendance, in addition to her excused absences, she was tardy and had three unexcused absences. The record indicates that there are employees with worse attendance records. According to Sullivan, there is an attendance policy setting forth the standards for acceptable attendance. However, this policy is not in the record and there is no evidence that the employees are on notice as to what the Employer's policy is and that their failure to comply with acceptable standards would subject them to sanctions, including termination. Further, the Board notes that BAUTISTA's unexcused absences span several weeks or months and the Employer should have disciplined her if in fact, any unexcused absence is unacceptable. However, Haina's evaluation on June 14, 1996, cites the three

unexcused absences and implies that BAUTISTA would be given an opportunity to improve on her attendance.

Finally, with respect to the lack of available work, again this reason was not cited in Sullivan's memorandum. Moreover, nothing in the record suggests that in June, Sullivan had decided to restructure the factory jobs and that no work would be available for BAUTISTA. The record indicates that BAUTISTA was the only employee who wanted to work who was not recalled for the 1996 season. Another nut sorter who was initially not recalled because of the lack of work was eventually called back to work in September. Other employees resigned or chose not to work.

The Employer, however, claims that BAUTISTA was no longer needed because her job was restructured and she was never replaced. While the evidence indicates that no one replaced BAUTISTA on her shift, the evidence in the record indicates that employees were moved from the field to the other shift to perform sorting work. In addition, while other restructured jobs became available which BAUTISTA could arguably have applied for, the record indicates that she was not given the opportunity to apply for work.

In any event, the Board majority tends to discount BAUTISTA's attendance and lack of work as the bases for BAUTISTA's not being recalled because Sullivan indicates that his recommendation not to recall BAUTISTA was made in June 1996 and these reasons were not contained in his memorandum.

Therefore, based upon the foregoing, the Board majority finds that the Employer violated Sections 377-6(1) and (3), HRS, by not recalling BAUTISTA for the 1996 season.

CONCLUSIONS OF LAW

The Board has jurisdiction over the instant unfair labor practice complaint under the provisions of Section 377-9, HRS.

An Employer commits an unfair labor practice by violating the provisions of Sections 377-6(1) and (3), HRS, when terminating an employee on the basis of the employee's engagement in protected activity. The Employer terminated the employment of BAUTISTA by failing to recall her to work on the basis of BAUTISTA's involvement in the Union's efforts to organize the workers of the Employer.

ORDER

The Employer is hereby ordered to cease and desist from discriminating against BAUTISTA because of her Union organizing activities. Further, the Board orders that BAUTISTA be reinstated retroactively to August 22, 1996, continuing to the present, with backpay and benefits. All monies owed as backpay shall be mitigated by monies BAUTISTA received from other employment and unemployment compensation for the time period specified above.

The Employer shall immediately post copies of this decision in conspicuous places at its worksite where employees assemble, and leave such copies posted for a period of 60 consecutive days from the initial date of posting.

DATED: Honolulu, Hawaii, October 28, 1997.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

Chester C Kunitake

CHESTER C. KUNITAKE, Board Member[4]

DISSENTING OPINION

I disagree with the Board majority on their interpretation of the evidence as it applies to the Wright Line test.

As pointed out in the majority opinion, Wright Line requires the party with the burden of proof (in this case, the Complainant) to present a prima facie case. The employer is then required to present evidence to meet the prima facie case. Thus, the employer has the responsibility of producing evidence to balance, not to outweigh, the evidence produced by the Complainant. The ultimate burden of persuasion as to the commission of a violation remains with the Complainant.

The evidence in this case leads me to the conclusion that the Complainant did not meet the burden of persuasion.

Initially, the proximity in time between the protected activity engaged in by the Complainant and the failure to call her back to work, without more, does not establish any unlawful motivation on the part of the Employer. There must also be evidence of animus toward the union or the Complainant in particular. There is no credible evidence of any such animus in this case.

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[4]Although Board Member Kunitake was not present for the hearing in this matter, he has thoroughly reviewed the record and transcripts in this case in order to participate in this decision.

Even assuming, arguendo, that the Complainant presented a prima facie case, the Employer more than met the burden of producing evidence of a legitimate reason for not recalling the Complainant. It is undisputed that the Complainant was involved in a number of incidents that caused disruption in the workplace. As a result, on May 30, 1996, before there is any evidence of Employer knowledge of union activity by Complainant, factory manager John Sullivan wrote a memo describing Complainant's disruptive conduct and recommending that she not be recalled to work for the 1996-1997 season. At the least, this evidence balances Complainant's prima facie case and leads to the conclusion that the Complainant has not met her burden of proving, by a preponderance of the evidence, that the Employer violated Sections 377-6(1) and (3), HRS.

There are some troubling aspects of the Employer's defense which could lead to a suspicion of after-the-fact justification of an unlawful failure to recall. These include shifting reasons for not recalling Complainant, i.e., whether it was because of lack of work, disruptive behavior, or absenteeism, and the failure to warn Complainant regarding her behavior or to impose progressive discipline. However, taking into account the totality of the evidence presented, any such suspicion remains only suspicion and does not meet Complainant's burden of proof.

For the foregoing reasons, I would dismiss the instant unfair labor practice complaint.

BERT M. TOMASU, Chairperson

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