Holtville, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON , INC . , Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	)	Case No. 77-CE-56-E 4 ALRB No. 107

DECISION AND ORDER

On or about May 9, 1977, Administrative Law Officer (ALO) Kenneth Cloke issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to dismiss the complaint in its entirety.

The ALO concluded that Respondent violated Labor Code Section 1153(c) and (a), on or about January 26, 1977, by discharging its employee Ignacio Bernal Gonzalez. We rely solely on the record evidence to support our contrary findings that Gonzalez was hired initially to substitute for an absent irrigator, that he worked in that capacity for two weeks, and then was laid off because of a temporary interruption in the

irrigation schedule.

Gonzalez sought employment from Respondent's irrigation crew foreman, Miguel Bastides, prior to the start of work on January 14, 1977. Bastides first suggested that he wait around, and 15 minutes later gave him a job assignment when another irrigator failed to report for work. Gonzalez admitted that the duration of the new employment was never discussed, but testified that he assumed it would be permanent on the basis of his perception of industry practice. Bastides, however, testified that he advised Gonzalez at the time of hire that the job was expected to last from a few days to two weeks at the most. Another irrigator, Cleofas Morales, corroborated Bastides' testimony.[1/]

Gonzalez worked through Thursday, January 27, when Bastides advised him that he would be laid off for three days due to a lack of work.[2/] When Gonzalez picked up his paycheck

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[1/]The ALO discounted Morales' testimony in its entirety for the sole reason that he was not present during the entire course of the pre-hire discussion between Bastides and Gonzalez. We are satisfied,, however, that Morales was competent to testify as to the relevant portions of that conversation.

[2/]General Counsel contends that at the time Respondent laid off Gonzalez due to a claimed lack of work, its irrigation activity was actually on the increase and necessitated the hiring of additional employees, Jose Calles, Jose Beltran and Isaias Rosales in particular. There is ample support for this contention in the record, but there is nothing in the record to establish that Gonzalez would not have been rehired after his layoff, when more irrigation work became available, had he continued to seek such work. According to Respondent's payroll records, the irrigation crew worked a combined total of 716 man hours during the week in which Gonzalez was hired and 1,784 hours during the week ending January 27, the date on which Gonzalez was laid off. Calles

[fn. 2 cont. on p. 3]

on January 28, Bastides asked him to telephone in the following Monday about returning to work. Despite this encouragement, Gonzalez testified, he had a "feeling" that he would not be re-hired and that his layoff was directly attributable to his union-related discussions with other employees.[3/] Accordingly, on Saturday, January 29, Gonzalez filed the charge which gave rise to this proceeding; a copy of the charge was mailed to

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[fn. 2 cont.]

worked a total of 37 hours on Tuesday, Wednesday and Thursday of the week ending January 27 while Gonzalez worked every day of that same week for a total of 60 hours. A comparison of Gonzalez' and Calles' work schedules for the last three days of the work week establishes that both men started work each day at the same time but finished at different times. As Respondent's irrigators usually work in teams of two or more, the varying quitting times appear to indicate that Gonzalez and Calles worked in different crews, thereby negating any inference that Calles was hired as Gonzalez' replacement. Beltran appears on the payroll for the first time during the week ending February 2; Rosales was hired during the week ending February 23. Employer records also indicate that at least five new employees were added to the irrigation crew during the week which ended on February 9.

[3/]The UFW had won a representation election more than a year earlier, and a hearing on post-elections objections was pending during the time Gonzalez was employed by Respondent. The discussions to which Gonzalez alluded appear to have been merely casual conversations about the benefits of union membership in general. Gonzalez told one employee, Salvador Cardenas, that he had knowledge of the pending ALRB hearing involving Respondent. When Cardenas inquired how Gonzalez knew about the hearing, he responded that he was close to the UFW and was kept informed. Gonzalez testified that this was the only time he specifically referred to the UFW by name. Although other employees later warned Gonzalez that they believed Cardenas was a company informer, Bastides testified that he never discussed Gonzalez with Cardenas in any context and denied any knowledge of Gonzalez' union affiliation. Although the ALO faulted Respondent for its failure to call Cardenas as a witness, Respondent noted that until the hearing it had no idea that Gonzalez had ever spoken to Cardenas. Even if Cardenas had knowledge of Gonzalez' -union sympathies, such knowledge may not be imputed to Respondent absent proof of agency or communication of such knowledge, and the General Counsel failed to establish either of these elements.

Respondent on Monday, January 31.

According to the testimony of Gonzalez, he telephoned Bastides on Monday, as requested. Bastides told him that new fields were not yet irrigable, but that he should telephone again on Wednesday, at which time he would be given a specific work assignment. Gonzalez did so but was again told that the fields were not ready. Gonzalez mentioned that he was calling from his home in El Centro, apparently some distance from Respondent's work-site. In response, Bastides suggested that if he should find employment in his home area, "Do not take me into consideration, but if you don't, call me back." The record does not reveal whether Gonzalez had any further telephone or personal contacts with Bastides. The complaint did not allege a violation of Labor Code Section 1153(d), discrimination against an employee based on the filing of unfair labor practice charges, and that issue was not litigated at the hearing.

The ALO failed to find any evidence that Respondent had actual knowledge of Gonzalez' union membership but relied on the NLRB's "small-plant" doctrine to infer knowledge. This doctrine was first invoked by a reviewing court to demonstrate circumstantially that an employer is more likely to be aware of union organizing activity which takes place within a small staff or in a small-plant setting. NLRB v. Abbott Worsted Mills, Inc., 127 P. 2d 438 (1st Cir. 1942), 10 LRRM 590.

Although a finding of knowledge of union activity may be inferred from circumstantial evidence, the doctrine does not eliminate the necessity of proving employer knowledge in every

case, nor is reliance upon the doctrine alone sufficient to establish the requisite proof. NLRB v. Mid-State Sportswear, Inc., 168 NLRB 559, 67 LRRM 1057 (1967), enforced in part, 412 P. 2d 537 (5th Cir. 1969), 71 LRRM 2370. See, also, NLRB v. Joseph Antell, Inc., 358 F. 2d (1st Cir. 1966), 62 LRRM 2014, in which the court stated:

> Actually, the term small-plant doctrine is quite misleading. The smallness of the plant, or staff, may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question.

We reject application of the small-plant doctrine to the particular circumstances herein for two reasons. First, the line of cases in which the doctrine has been invoked generally involved active union organizing activity. No such activity was in progress with respect to Respondent's operations when Gonzalez was hired or while he worked there. The UFW had won a representation election held in a unit of Respondent's employees more than a year earlier, although resolution of post-election objections was still pending. Secondly, Gonzalez testified that, "as an irrigator, you are [work] by yourself." Moreover, the record establishes that supervision was limited and sporadic, that Bastides made an occasional "round" of the work-site by pickup truck and therefore it was unlikely that he observed more than one worker at a time.

As the union activity of Gonzalez was minimal, and in the absence of proof, or a valid basis for inferring, that Respondent had knowledge thereof, the record herein does not support a finding that Respondent laid off, or failed or refused

to rehire Gonzalez because of his union sympathies or union or concerted activities.

ORDER

Pursuant to Section 1160.3 of the Agricultural Labor Relations Act, the Agricultural Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated: December 21, 1978

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Mario Saikhon, Inc.

4 ALRB No. 107
Case No. 77-CE-56-E

ALO DECISION

The ALO found, as charged, that Respondent hired Ignacio Bernal Gonzalez, an irrigator, as a permanent employee and discharged him two weeks later for a claimed lack of work shortly before accelerating its irrigation schedule. Although unable to find that Respondent had actual knowledge of Gonzalez' union activity, the ALO, in finding that the layoff was discriminatory, relied on the NLRB's so-called "small plant" doctrine as a basis for finding that it was likely that Respondent observed, or otherwise learned about, the union activity in question.

BOARD DECISION

The Board dismissed the complaint in its entirety, finding that Gonzalez was hired initially to fill in for an absent employee and that he was advised at the time of hire that the job might not last more than two weeks. He was laid off on Thursday, January 27, and was advised to telephone his foreman the following Monday concerning rehire. Gonzalez telephoned on Monday as requested and again on Wednesday, February 2, but was informed each time that new fields were not yet irrigable. Although he testified that he was asked to remain in contact with the foreman, there is no evidence to indicate that he thereafter continued to seek such work with Respondent.

The Board specifically rejected application of the "small plant" doctrine in this case. Unlike the usual case in which that doctrine is invoked, there was no union organizing activity at the time of Gonzalez' hire or layoff nor was the work setting such that Respondent was likely to be aware of Gonzalez' minimal union activity.

* * *

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of :	)	
MARIO SAIKHON , INC. ,	)	
Respondent,	)	
and	)	Case No. 77-CE-56-E
UNITED FARM WORKERS OF AMERICA AFL-CIO	)	
Charging Party	)	

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Representatives for Mario Saikhon, Inc., Respondent

D E C I S I O N

KENNETH CLOKE, Administrative Law Officer:

STATEMENT OF THE CASE

This case was heard before me in El Centro, California, on April 11 and 12, 1977. The Notice of Hearing and Complaint were filed on March 17, 1977 and served on the same day, alleging violations of §1153 (a) and (c) of the Agricultural Labor Relations Act, herein referred to as the ALRA, or the Act, by Mario Saikhon, Inc., herein referred to as Respondent. The Complaint is based on charges filed on January 31, 1977 and served on the same date on Respondent by the United Farm Workers of America, AFL-CIO (UFW), herein referred to as the Union. On March 24, 1977, Respondent, through its counsel, filed an Answer admitting the allegations contained in Paragraphs 1-4 of the Complaint and denying the rest, together with a Motion for Continuance, and both were served on the same day. The continuance was not granted.

All parties were given full opportunity to participate in the hearing, and following the close thereof, both parties submitted briefs in support of their respective positions. Several motions were made by Respondents, which decisions were reserved by me and incorporated herein.

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

FINDINGS OF FACT

I. Jurisdiction

Respondent, Mario Saikhon, Inc., is a company engaged in agricultural in Imperial County, California, and is an agricultural employer within the meaning of §1140.4 (c) of the Act. This Union, as charging Party, is a labor organization within the meaning of §1140.4(f) of the Act. Miguel Bastides, herein referred to as Foreman, is foreman of the irrigating crew and in charge of hiring and firing for Respondent, and as such had direct supervision over

irrigation and shoveling employees, including Ignacio Bernal Gonzalez, aka Ignacio Bernal, herein referred to as Employee.

II. Unfair Labor Practices

The evidence established that Respondent had some years earlier had a contract with the International Brotherhood of Teamsters and that, following an organizational campaign, an election was conducted by the ALRB on Respondent's ranch on January 7, 1976, which was won by the Union (UFW). Respondent filed objections to the election and to this date, no hearing has been held on these objections, and no contract has been signed by Respondent with the Union. Several unfair labor practice charges have been filed against Respondent, and a hearing has been held, but no findings of fact or conclusions of law have yet been issued.

Testimony established that the Foreman regularly supervises a crew of about 9-10 irrigators, along with a number of shovelers, that irrigators often work as shovelers, but shovelers do net work as irrigators, and that when there is not enough irrigation work, shovelers are laid off first. Furthermore, Respondent regularly hires and fires according to the seniority system, understood by the Foreman to refer to the length of one's employment. During the months of January, February and March, the number of irrigators employed remain roughly constant, but in 1977, Respondent employed 9 or 10 irrigators in January, and about 14 in February. Irrigating crews, however, work all year, and sometimes workers are exchanged between crews. Testimony established that 3 or 4 new employees were hired after January 28, 1977, and that these new employees did not have seniority. The reason given for new hires was an increase in work.

The Employee, Ignacio Bernal Gonzales, was hired by Respondent's Foreman after another employee had failed to show up for work, on an unspecified date toward the middle of January

and he worked approximately two weeks as an irrigator and shoveler, at the end of which period, he was terminted by the Foreman. Testimony by Respondent's witnesses that the Employee had only been hired as a temporary replacement for a short duration was contradicted by the Employee, who gave uncontradicted testimony that the custom in the industry was to hire on a permanent basis, and that in over twenty years' work as an irrigator this was his shortest period of work. It was further contradicted by the Foreman, who testified that it was common for workers hired for a short period to remain on permanently, and that he had not intended to hire the Employee for any specific period.

It was further established that the Foreman had never complained about the Employee's work, or heard any complaints about it, except that one employee preferred to work on a different shift, and while he kept a regular record of employee misbehavior, Gonzales' name did not appear in it. The Employee had never been warned, disciplined or investigated for misbehavior. This record was introduced into evidence as General Counsel's Exhibit 1C, and at the request of the Administrative Law Officer, was translated by the official translator from Spanish into English. The contents of this record book, as translated, are as follows:

"Cleofas Morales 10/26/76
Watered field 5 Rektor
11-1-76 A problem because he was drunk in the field
WUAKT
2-7-77 He was drinking OASIS &7
2-10-77 Cleofas Morales arrived 7 hours in the morning and he is going to irrigate.
3-7-77 Cleofas did not show up to work and did not notify on Monday."

"Alvino Garcia 11-1-77
Begun at 7 a.m. and was drunk
2-16-77 Alvino Garcia did not show up to work
and gave no notice.
2-5-77 Did not show up to work on Saturday and
dit not notify.
3-7-77 Alvino Garcia did not show up and give no
notice on Monday.
Alvino did not show up to work 4-8-77; 4-9-77
Friday and Saturday and give no notice."
"Emeterio Gallegos 10-28-76
Was drunk at work in the field Oasis I
11-29-76 Removed the pipes from field oasis 7
when four irrigations were needed.
1-17-77 I send him to Oasis I and went to Oasis 3
2-4-77 Eslikt 5 left two water lines running at night.

Oasis 8
2-11-77 Emeretio Gallegos, I send him to place the boards
in the border for 11-30. He made it his own way.
He place them as I told him.

3-13-77 Esllk - let the water overflow. It spread
water in the road of the same field.
4-8-77 Emeterior was drunk and told me how much I
bothered him. He was drunk and had irrigated
Friday . "
"Lorenzo Ramirez - 12-16-76

Did not show up to Work and give no notice."
"Carlos Padilla 11-12-76

Missed work" and did not notify
1-25-77 - Missed work and did not notify."
"Lorenzo Contreras 1-8-77
Did not give notice
2-12-77 Sanchez 6 carrot irrigation.
Lorenzo Contreras left with no permission
at 10:00 a.m. and started working at 6:00 a.m.
2-16-77 In the field 2 of Rektor left dry rows.
2-21-77 Did not come to work and did not give notice.
Lorenzo Contreras and Cleofas Morales committed
A 2-12-77 an error while measuring borders . "
"Javier Ramirez 12-16-76
Did not show up and give no notice .
1-10-77 - Did not give notice
Did not show up 1-11-77 Did not show up
2-25-77 We had difficulties because I call to their
attention that they were breaking a lot
of equipment."

"Isaias Rosales
Let water run in the field ESLIK 5
Irrigated the road
Isais Rosales did not show up to work on Monday
4-4-77 and gave no notice."

"Ezequiel Correa 2-5-77
Did not show up to work on Saturday and gave no notice.
2-16-76 - did not show up to work and give no notice.
3-7-77 - did not show up to work and give no notice on Monday."

"Javier Rodriquez - did not show up to work.
4-4-77 No.

While he had often taken disciplinary action against individuals noted in the record, the Foreman had not fired any of them. All three of the employees who replaced Mr. Gonzalez are mentioned in this book, however, and all three continue to work for Respondent.

The Foreman gave no specific reason for terminating the Employee, but only generally stated he was dissatisfied with his work. While the Foreman testified he was unaware of union activities, had no feelings whatsoever concerning the Union, and was not aware of any attitude on the part of the Respondent toward the union, it is the opinion of the Administrative Law Officer, having observed the demeanor of the witness, given the events which had earlier transpired, and small size of the Foreman's crew, that this testimony is to be discounted.

The Foreman recalled having hired at least three new workers shortly after having terminated the employment of Mr. Gonzalez. None of the three had seniority at the time and all three are still employed: Jose Bertran, Jose Calles and Isais Rosales, whose pay records are contained in General Counsel's Exhibit ID.

The Foreman also regularly kept time sheets which were accepted into evidence as General Counsel's Exhibit IB, and on which the names of these individuals appear as having been hired after the Employee was terminated, and demonstrating that they did work in the months following January.

An examination of this exhibit further reveals the total

number of hours worked in each of the weeks, so that for January and February the following figures are given:

Week	Number of employees listed	Total of hours worked
1/6/77	22	517 1/2
1/3/77	20	874
1/20/77	22 (including Gonzalez)	842
1/26/77	23 (including Gonzalez)	1023 1/2
2/2/77	23	1279
2/9/77	28	1167
2/16/77	25	1671
2/23/77	17	936

The Foreman testified that he had not spoken with an employee named Cardenas about union activities and was not friendly with him, while other testimony established that Cardenas lived in a company house and had the reputation of being a company informer. In ambiguous testimony, the Foreman stated he "didn't think" any employee had spoken to him about Gonzalez' union activities. The Foreman told Gonzalez on a Thursday after about two weeks' employment that there was no work, but asked him to call back on Sunday or Monday of that week, in case there was additional work, and again later that Wednesday. On Sunday night he spoke to the Employee by telephone and told him there was no work but to call back on Wednesday, as there might be work then.

The Employee testified that he had worked for approximately two weeks for Respondent, that he had been hired as an irrigator and shoveler, and that he had been an irrigator for at least 20 years, and had not had a single complaint about his work until now. He stated that he had worked for one company for eight years as an irrigator, for another for five years, and for others for different periods and that the shortest period of time he had ever worked was for Respondent. The Employee had been hired by the Foreman after another worker had failed to appear, but he had

not been informed as to the length of his employment, and the custom in the industry was not to hire for a definite period of time. He assumed, because of the nature of the work that it would be for a long period, and worked every day that there was work to do.

The Employee testified that he was an active member of the Union, that he had joined in 1970, had been an active participant in the Salinas strike of 1970, and had been a member ever since. He understood "active" membership to mean attendance at union meetings, talking union to your fellow workers, and supporting the union at work. He testified that while he had worked at Saikhon, no cricitism of his work had been offered, and that he believed the reason for his termination was union membership and activity.

He further testified that he had worked with Mr. Cardenas, had spoken to him of a hearing to be conducted by the ALRB against Respondent concerning unfair labor practice charges which had been filed by the Union, and that he had supported the union's position, while Mr. Cardenas had been unwilling to support the union because he feared he would lose his company home. Another older employee had told him that he had been fired by Respondent after signing up for the Union, but had later been rehired.

The Employee testified that employees were aware of these hearings and were afraid to oppose the Respondent concerning the ALRB hearings because other workers known as "Pancho Bijote", also known as Primitive Ortiz, and "Shorty", also known as Isais Monray, were believed to have been discharged, only a few days after having been hired, for having supported the union. Furthermore, fellow employees had warned him not to speak to Cardenas, that Cardenas "would tell the foreman everything." Cardenas was not called as a witness; On the last day of his employment, he had been sent to a different field, by himself.

and had been approached by the Foreman in an imperious or commanding manner, and had the feeling that he was being fired.

The Employee testified he had been told by the Union of its unfair labor practice charges against Respondent before beginning to work there, and while he did not distribute union literature or petitions (he stated that he was not able to read or write) or wear buttons, he had spoken often of the union to fellow employees and made "lots of comments" about the union and working conditions on the job. While he wasn't certain of the date, he had telephoned the Foreman on Monday and had been told to call back on Wednesday to find out what field he was to work in, but when he called on Wednesday he was told the land was not ready, and if he found other employment he should take it.

Dierdre Olson Gamboa testified that she had been an organizer for the Union for four years, had been assigned to organize Respondent's employees since 'September of 1976, and regularly spoken to Respondent's employees, as often as once a day during the lettuce season. She testified that, in her opinion, employees at Respondent s ranch were frightened of supporting the union, that Respondent had a reputation as a "tough nut" and for being "anti-union." She testified that she had spoken with employees and management, had investigated allegations and prepared and filed unfair labor practice charges and believed Respondent's anti-union attitude responsible in part for the failure to reach a collective bargaining agreement, and that as a result of the Respondent's anti-union attitude workers had become discouraged from joining or being active in the Union

She had filed charges for several employees who had been laid off, one having allegedly worked there for 9 years. On one occasion, she had gone out to the fields to speak with Respondent' employees, who stood to listen to her, but when the General Foreman came along they ducked out of sight, including one worker

whom she believed had never so behaved and who had been laid off recently. In her opinion, based on conversations with other organizers and employees, the employees believed that if they supported the Union they would be laid off. Employees also had told her that foremen had told them that they did not like the union, and that one foreman had reportedly stated that if the union came in he would return to his home town in Mexico. Ms. Gamboa further stated that "most of the people who have been laid off in the past two years" stated that "it was because of the union", and that quite a few of these had been crew representatives for the Union. At another point the witness described Respondent as "very anti-union."

While Cleofas Morales testified to having been present when employment was offered to Gonzalez and having heard the Foreman state that he was to work only a few days, his testimony is discounted since he admitted 'to having heard only a fragment of the conversation for "one or two minutes" while he put on his boots, and because the Foreman admitted that he had often hired workers for a short period and then kept them longer.

Another employee, Emeterio Gallegos Gonzales testified that he had worked on one shift with the Employee, had been dissatisfied with his cooperativeness and believed the Employee had slept on the job, yet he admitted that he had never mentioned this to the Foreman or complained to anyone about it. Furthermore Respondent has not claimed the Employee was fired for cause, and the Foreman gave no testimony on this point.

There were no other witnesses or relevant testimony, and on the basis of the above testimony and demeanor of the witnesses, I therefore find the following facts, not already indicated in the foregoing summary:

1. That the Employee was not hired only for a brief period, but regularly.

2. That he was not discharged for cause.

3. That his termination was discriminatory, in that employees who had committed worse offenses had not been discharged, and in that he had not been notified, warned or investigated for misbehavior.

4. That the adverse effect of the discharge on employee rights was comparatively slight.

5. That the Respondent did not cone forward with evidence that disclosed a legitimate and substantial business justification for termination, in that work increased during the following month and additional workers without seniority were hired.

6. That the above facts, together with Respondent's failure to satisfactorily explain the Employee's discharge, and the small size of the crew, give rise to an inference that Respondent had knowledge of the Employee's union membership and/or concerted activity, and that these were the reasons for his discharge.

7. That this inference was not rebutted by the Respondent.

8. That General Counsel failed to prove by substantial evidence, that Respondent was motivated by anti-union animus.

9. That a natural and foreseeable consequence or effect of Respondent's action in discriminatorily terminating the Employee was that Respondent's employees would be discouraged from joining the union, or participating in its activities.

10. That the foregoing facts give rise to an inference that Respondent's termination of the Employee was motivated by anti-I union animus.

11. That this inference was not rebutted by the Respondent.

12. That in balance, the discriminatory discharge of the Employee by reason of his union membership and/or concerted activity interfered with, restrained and coerced Respondent's employees in the exercise of rights guaranteed in §1152 of the Act.

The initial question raised for decision by the evidence elicited in hearing is the difficult problem of establishing the proper relationship between proof of anti-union "motive" "intent", "animus", "urpose" or "effect", and the largely hearsay character of the evidence. Initially, it is necessary to survey existing law on the subject, a law which is unclear from the U.S. Supreme Court on down.

In Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954), the Supreme Court declared that:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§8(a) (3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.

The problem of motive arises under §8(a) (3) because only discrimination "to encourage or discourage" union membership is prohibited, yet the specific language of 8(a) (3) is ambiguous, and in neither of the NLRA or ALRA provisions mentioned are "motive", "animus" "intent", "purpose", "effect" or any similar expressions used or defined. The language of the statute may fairly be read to require any of the above, however, or simply to prohibit the "effect" of discrimination, without regard to the issue of the quantum of evidence necessary to sustain a finding.

In an effort to distinguish motive from intent, Professor Oberer has relied on the common-law distinction. Thus,

> If an employer discharges an employee who is actively engaged in seeking to organize the employer's plant, the employer may be presumed to intend to discourage union membership, since the latter follows not only foreseeably but, it would seem, inescapably from the employer's act, however much he might regret it because of the loss of union leadership and the fear and suspicion generated among his employees. However, if the real motive for the discharge is shown to be a breach of shop rules by the employee, the discouragement of union membership is justified or privileged; the employer has committed no offense, despite the unavoidable, and hence intended (pursuant to the common-law presumption), consequence of discouraging union membership. Oberer, "The Scienter

Factor in Sections 8(a) (1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails", 52 Cornell L.J. 491, 505 (1967).

Oberer concludes, if the analogy to common-law rules holds true, that

> the burden should fall upon the employer at least to raise the issue of his justifying motive by the presentation of supporting evidence. Otherwise the trier of fact (the Board) is entitled to find against him on the basis of what is at minimum a prima facie case. Id. at 506. See also, Gertman, "Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice", 32 U. Chi. L-Rev. 735, 743 (1965).

Both the NLRA and ALRA require that the evidentiary rules prevailing respectively follow "so far as practicable" the rules of evidence in the Federal Rules of Civil Procedure and California Evidence Code. Originally, the Wagner Act §10(b) provided that ordinary rules of evidence would not be controlling, and the Board routinely accepted hearsay evidence. See, e.g., In re Roth Packing Co., 14 NLRB 805, 817 (1939). However, the Taft-Hartley amendments in 1947 gave the section its present language, Professor Forkosh has written that this language "provides additional leeway to the admission of evidence, so that hearsay evidence is still admissible even though carefully screened..." Forkosh, A Treatise on Labor Law 647 (1965). See also, e.g. Northern Virginia Sun Publishing Co. v. NLRB, 330 F.2d 231 (CA DC, 1964), permitting evidence concerning the background of bargaining in order to prove motivation.

Exact rules of evidence certainly need not be applied. NLRB v. General Longshore Workers, I.L.A., 212 F.2d 846 (CA5, 1954). Yet with respect to "motive" or "intent", liberal rules of evidence alone are insufficient, and at least part of the problem is structural, in that it is difficult to distinguish between speech and conduct, reason and rationale, or intent and effeet.

Only five months after passage of the NLRA and in its first

decision, the Labor Board faced the difficult evidentiary problem of making these distinctions in discharge cases. In Pennsylvania Greyhound Lines, Inc., 1 NLRB 1, 23 (1935) enforcement denied in part , 91 P. 2d 178 CA 3, 1937), rev.d, U.S. 261 (1938), the Board wrote:

> Here, as generally, in discharging these employees the respondents did not openly state that they were being discharged for union membership or activity, so that standing by themselves the actual discharges constitute equivocal acts in the light of the conflicting reasons that are advanced. In reaching a decision between these conflicting contentions, the Board has had to take into consideration the entire background of the discharges, the inferences to be drawn from testimony and conduct, and the soundness of the contentions when tested against such background and inferences....[A]s the Supreme Court has stated "Motive is a persuasive interpreter of equivocal conduct."

The difficulty in discrimination cases has been identified by Professor Morris:

> The NLRB reports are full of cases in which an employer is accused of having fired an employee in order to discourage union membership, and the employer offers evidence that some other motive (reduction of force due to slackening production needs, neglect of work, abseenteeism, fighting, refusal to follow orders, poor workmanship, etc.) was the true cause for the termination. It is the Board's task to weigh the evidence, both direct and circumstantial, to credit and discredit testimony, to draw inferences, and to make ultimate findings of fact as to whether a violation of Section 8(a)(3) has occurred. Morris, The Developing Labor Law 116 (1971)

Thus, as Morris comments in a different section, "most Section 8(a)(3) cases turn upon findings of fact and problems of credibility." Id at 29. Furthermore, as the Ninth Circuit declared in Shattuck Denn Mining Corp. v. NLRB, 362 F. 2d 466, 470 (1966) :

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not condlusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.

The Board repeated this sentiment in its Second Annual Report:

> In no case has a respondent admitted in its pleadings or at the hearing that it has discriminated against employees because of their union activity. Frequently, however, clear evidence of discrimination has gone uncontradicted. 2 NLRB Ann. Rep. 70 n.9 (1937). Cf. Club Troika, Inc. 2 NLRB 90, 93 (1936).

In an excellent article in the Yale Law Journal, Thomas G. S. Christensen and Andrea H. Svanoe point out that motive evidence is not particularly helpful:

> Over the years the proper role of motive in determining what constitutes an unfair labor practice has been warped from the original statutory design; furthermore that both motive and the requisite proof of motive are factors which, in current usage, often disguise rather than clarify the thrust of the prohibitions contained in the Act and unnecessarily hamper its proper administration. Finally, it is the conclusion of this study that the Court must reassess both motive and its necessary evidentiary support in terms which will better disclose what Professor Summers terms the "actual grounds" of decision. "Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality", 77 Yale L.J. 1269, 1270(1968)

They argue that the early NLRB cases under $8(a)(3) did not require motive:

> Not only did the early litigation under the Act fail affirmatively to establish intent to discourage or encourage membership as an essential element of a Section 3(a)(3) violation, but both the Board and the Supreme Court gave explicit recognition to the opposite conclusion. Discrimination which discouraged union membership was held to constitute a violation of the statute even in circumstances negating any showing of an intent to achieve that aim. Republic Aviation, together with the other cases referred to above, make this evident beyond contest. In those cases any motive to discourage or encourage was either absent, as a matter of record evidence, or was contradicted by the record evidence. The result--the impact of discouragement--was nonetheless accepted as fulfilling the requirments for the violation. 77 Yale, supra, at 1317.

The original basis for the motive requirement is generally held to be the following language from NLRB v. Jones & Laughlin Steel Corp., 301 US 1, 45-46 (1937):

> The Act does not interfere with the normal exercise of the right of the employer to select his employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and represenation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. See also, Associated Press v. NLRB. 301, U.S. 103 (1937). at 132.

Commenting on this language, the authors of the Yale Law Journal article argue:

> While this statement has since bean cited as establishing a requirement that the Board must find a motive to discourage or encourage union membership in Section 8 (a) (3) cases, it is clear from the context that the Court did not mean to advance any such proposition. The Court was dealing with problems of proof, not enunciating the legal elements of an unfair labor practice. A discharge resulting from union activity is discriminatory and hence illegal; one based upon cause is not. Where the circumstances are equivocal, inquiry must be made as to the probably causation. 77 Yale L.J. supra, at 1275.

In support of this proposition, they cite among other evidence,

the Board's holding in Eureka Vacuum Cleaner Co., 69 NLRB 878, 879 (1946) that:

> "the law is well settled that 'when it is once made ,to appear from primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives, even where it is shown that the employer not "wilfully violated' the Act." Citing, NLRB v. Hudson Motor Car Co., 128 F. 2d 528 (6th Circ. 1942); and NLRB v. Gluck Brewing Co., 144 P. 2d 847 (8th Circ. 1944).

In the course of promulgating the Taft-Hartley Amendments, 61 Stat. 136 (1947), 29 USC §§ 141-87 (1964), and especially in the debate over § 10(c), considerable legislative discussion was directed at the question of motive, but without any clear resolution. (See, 3.g., Legislative History of the Labor Management Relations

Act (2 vols) and sources collected in 77 Yale, supra at 1279 ff.] It was not until Radio Officers' Union v. NLRB, 347, U.S. 17 (1954), NLRB v. International Brotherhood of Teamsters, Id, and Gaynor News Co. v. NLRB, Id., that the motive requirement became an element of the violation of 8(a)(3), Justice Reed declaring for the Court, that the employer's "purpose in discriminating" was "controlling", Id at 44, but that:

> "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a) (3). . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfied the instant requirements. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequence of his conduct, [citations omitted] Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. Id. at 44-45.

Justice Reed did not, however, at any point indicate which varieties of discrimination provided their own proof of motivation, or whether this evidence was rebuttable, and if so by what standard Thus, while motive and effect may be essential elements of the violation, it is also plain from the Court's opinion that either may be established without specific evidence, and improper motive may be inferred where a "natural and foreseeable consqeuence" of the act is the prohibited effect. No actual or immediate effect need be proven, nor any result to the discriminatee. For this reason, Justice Frankfurter in concurrence declared that any finding concerning an employer's state of mind was "an unnecessary and a fictive formality." Id at 56.

In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), concerning the granting of "superseniority" to non-strikers, Justice White wrote that the problem was essentially one of balancing competing

interests, finding he Court of Appeals had erred in holding, in the absence of a finding of illegal intent, that a "legitimate business purpose" was always a defense to a violation of 8(a) (1) and (3):

> As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task... of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the busines ends to be served by the employer's conduct. Id at 228-29.

Thus, because the alleged business purpose could not outweigh the "necessary harm to employee rights," the Board could "properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose. "Id at 236-37.

While, therefore, under Radio Officers, supra, intent might be shown either by direct evidence or by inference, it is only in the latter case that "business justification" becomes relevant, and the burden of proof shifts to the employer. Whatever the justification, however, the problem of foreseeable consequences remains, and the test is one of balancing competing interests, re lying on the Board's expertise.

It has been the law at least since NLRB v. Burnip & Sims, Inc. 379 U.S. 21, 23 (1964), that an employer who honestly but mistakenly punishes an employee for alleged misconduct relating to protected concerted activities may be guilty of an unfair labor practice regardless of motivation. See also, e.g., Air Master Corp., 142 N.L.R.B. 181 (1963), enforcement denied, 339 F. 2d S(3d Circ. 1964), Swift & Co., 128 N.L.R.B. 732 (1960, "enforcement; denied, 294 F.2d 285 (Ca 3, 1961); Novak Logging Co., 119 N.L.R.B. 1573 (1958), B.M. Reeves Co., 128 N.L.R.B. 320 (1960); Electronics; Equipment Co., 94 N.L.R.B. 62 11951), enforcement denied, 194 F. 2d 650 (CA 2, 1952), 205 F.2d 296 (CA 2, 1953), and especially

American Shuffleboard Co., 92 N.L.R.B. 1271, enforced sub norm. Cusano v. N.L.R.B., 190 F.2d 898 (CA 3, 1951) where it was held "immaterial that the Respondent may have acted upon good faith belief."

Justice Douglas, writing for the Court in Burnip & Sims, saw no need to discuss the issue of motivation under § 8(a) (3), because the discharge had violated the far broader provisions of §8 (a) (1), which did not require proof of motive. Cf. American Ship Building Co. v. NLRB, 380 U.S. 1300 (1965) ; N.L.R.B. v. Brown, 380 U.S. 278 (1965).

This distinction between the requirements under § 8(a) (1) and I $ 8(a) (3) was accentuated in the extraordinary case of Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263 (1965), concerning the right of a company to shut its plant rather than sign a union contract. In spite of clear evidence of anti-union animus! and unlawful effect, the Court, per Justice Harlan, held no violation. Harlan also, however, distinguished the §8(a) (i) charge from §8 (a) (3), arguing the former was violated "only when the inference with §7 rights outweighs the business justification for the employer's action...A violation of Section 8(a)(1) alone therefore presupposes an act which is unlawful ever absent a discriminatory motive. Id. at 268. Cf., NLRB v. Exchange Parts Co., 374 U.S. 405 (1964).

Where "business justifications" are "peculiarly matters of management prerogative", it was held, only § 8(a)(3) is violated, yet this highly speculative and subjective formula was nowhere defined, In answer to the charge that this made specific proof of motive necessary, the Board, after its fifth hearing in the case, concluded otherwise, finding adequate evidence of anti-union purpose and "chilling" effect:

> "Respondents argue that the Supreme Court is requiring ....concrete, specific, independent proof...of a purpose to chill unionism. Insofar as this formulation is intended to be a restatement of the Court's standard that there must be '...a showing of motivation which is

> aimed at achieving the prohibited effect' we concur. But the requisite motivation may be proved by something less than direct evidence, rarely obtainable in cases of this kind. In this branch of the law, as in all others, proof of motive may be supplied by circumstantial evidence which afford a sound basis for drawing inferences." 165 NLRB No. 100, 65 LRRM. 1391 (June 27, 1967).

In relation to effect, the Board found that the closing of the plant 1.) would be communicated to other employees, 2). that these employees would connect Darlington with their mills, and 3.) that they would fear similar consequences if they were to unionize. Darlington, however, is sui generis, in that anti-union intent was clearly shown, yet the employer's interest in being able to cease business was held to outweigh the employee's interests in the exercise of §7 rights.

It was not until NLRB v. Great Dane Trailers, Inc. 388 U.S. 26 (1967), that the relation between motive and business justification began to clarify. An employer's refusal to pay strikers the vacation benefits granted to non-strikers was held by Chief Justice Warren to be a violation of the Act. Warren's opinion, however, created two categories of §8(a)(3) violation; those in which the discrimination is "inherently destructive "of important employee rights, where no proof of anti-union motive is required, even in the face of business justification, and those in which the "adverse effect" on employee rights is "comparatively slight", in which case anti-union motive must be shown, "if" (original emphasis) "the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." Id. at 34.

In NLRB. v. Fleetwood Trailor Co., 389 U.S. 375 (1967), the Court relied on its test in Great Dane Trailers, and declared:

> A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments. And because the employer here has not shown "legitimate and substantial business justifications," the conduct constitutes an unfair labor practice without reference to intent. Id.at 380 (emphasis added).

The authors of the Yale Law Journal article previously cited concluded that the "two-category" approach "can be interpreted as an implied partial rejection of the motive requirement in, at least, its Radio Officers form." 77 Yale L.J., supra at 1321. Therefore, [u]nlawful 'motive" is implicitly assumed to exist, for purposes of a technical reading of the Act, whenever the balance rests upon the side of employee rights." Id. at 1330.

The article concludes:

> The White-Warren-Goldberg approach requires, in such circumstances , that the Board assess the degree fcf which encouragement or discouragement of membership will result, the degree to which employer or union interests are involved, and to reach a judgment as to which of the two factors has greater weight. That this is neither an easy task nor one readily yielding predictable results is obvious. It is, however, a process of judgment which openly grapples with that which is truly in dispute—the relative advantage or disadvantage which is to be accorded one of the contestants in an economic battle. It is a process of judgment, moreover, which at least attempts the creation of objective standards rather than placing reliance upon the fictions of judicial imagination. Id at 1331

Justice White had earlier commented, in Erie Resistor, supra, that public policy was what really stood behind motivation requirements

> "Preferring one motive to another is in reality the far more delicate task...of weighing the interest of employees In concerted activity against the interest of the employer in operating his business in a particular manner...". Id at 228.29.

The essential problem of motive as a requirement, however, is more seriously involved with public policy, in that:

> It may well be asked whether the thrust of the National Labor Relations Acts is to prohibit bad thoughts, or to curb harmful conduct. And if the latter, are bad thoughts to be held to make harmless conduct illegal? If the Congress in 1935 intended to punish all employers then harboring unkind views as to unions it invested the Board with a truly Herculean task. It is more probable that Congress attempted to curb employer action rather than employer thought, and that the concern was with injury to employee rights, however pure or impure the motivation for that injury. 77 Yale L.J., supra at 1326-7.

Furthermore, while an act punishing an employee for union activity is evidence of anti-union motivation, this is not the same as requiring such motivation as a necessary part of the proof of prohibited conduct.

Returning, however, to the difficult evidentiary problem of proof of discrimination, the reality has been that motive has been

a substitute for clear evidence of discrimination. Vet, employer treatment of like categories of employees differently, rather than state of mind, it is the sum and substance of §8(a)(3), see, NLRB v. Mueller Brass Co., 509 P. 2d 704 (CA 5, 1975), and S3 (a) (3) does not prohibit employer action taken to serve "legitimate and substantial business interests", even though the act may tend to discourage union membership. American Ship Building Co. v. NLRB, supra. Nonetheless,

> "Where encouragement or discouragement of membership in a labor organization can be reasonably inferred from the nature of the discrimination, it is not necessary to introduce substantive evidence of employee response to the discrimination." 48 Am.Jur.2d §542, citing Radio Officers v. NLRB, 347 U.S. 17 (1954).

The necessity of specific proof of motive, however, as stated above, depends on which of two categories the employer's acts falls ints:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer produces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967) (emphasis original).

Because the employer did not, in Great Dane Trailers, come forward with evidence of legitimate motives for its discriminatory action, the Board's conclusions were held supported by substantial evidence.

In Laidlaw Corporation, 171 NLRB No. 175, 68 LRRM 1252 (1968) aff'd, 414 F2d 99, 71 LRRM 3054 (CA 7, 1969),cert. denied, 397 U. S. 920, 73 LRRM 2537 (1970), see also, Note, 67 Mich., L.Rev. 1629J

(1969)., the by-passing of economic strikers in favor of inexperienced replacements was held to be conduct "inherently destructive" of employee rights and a violation of §8(a)(3), in the absence of legitimate and substantial business justifications, without regard to the existence of anti-union animus on the employer's part. See also, American Machinery Corp. v.

NLRB, 424 F. 2d 1321 (CA *5,* 1970).

To rephrase and summarize, the requirements of proof with regard to motivation are as follows:

> If it can reasonably be concluded that the employer's conduct was inherently destructive of important employee rights, no proof of anti-union motivation is necessary and the NLRB can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Apparently, sufficient employer proof that his conduct was motivated by the legitimate objective of serving important business purposes precludes a finding that he violated 29 USC S 158(a)(3), but an employer's mere protestation that he did not intend to encourage or discourage union membership is unavailing where a natural consequence of his conduct was such encouragement or discouragement.
>
> If the adverse effect of an employer's discriminatory conduct on employee rights is comparatively slight, and he comes forward with evidence of a legitimate and substantial business justification for the conduct, an anti-union motivation must be proved to sustain an unfair labor practice charge under 29 USC S 158(a)(3) on proof of discriminatory conduct carrying a potential for adverse effect on employee rights, that is, proof of discriminatory conduct having a comparatively slight adverse effect on employee rights." 48 Am. Jur. 2d 3.80-1.

"Business justification," of course, is only another label for a specific type of motive which, if offered by an employer and found to be significant and legitimate, can outweigh the implied motive o encouragement or discouragement based upon the known effect of the discrimination.

Professor Gorman has commented:

> In any event, it is not necessary that the General Counsel demonstrate that union activities were the sole actuating cause for the discharge or lesser disicipline. The record in many cases will justify the inference that the discipline was precipitated in part by union activity and in part by a poor work record. In such cases a violation may be found, although there is no consensus as to what should be the required Quantum of anti-union, animus in order to make out a violation. Gorman, Basic Text on Labor Law, Unionization & Collective Bargaining, 138.

At least one circuit has held that if improper motive contributed in some part, that is sufficient. S.A. Healy Co. v. NLRB, 453 F. 2d 314 (CA 10, 1970), and circumstantial evidence may be relied on. Lapeer Metal Products Co., 134 NLRB 1518, 49 LRRM 1380 (1961), Standard Dry Wall Products, Inc. 188 F. 2d 162, Enforcing 91 NLRB 544 (1961).

Irrespective of the degree of evidence required on the question of motive, the acts of employers have been carefully examined by the Board and Courts for evidence of discriminatory treatment.

Thus, in Santa Fe Drilling Co. v. NLRB, 416 F. 2d 725 (CA 9, 1969), a claim that the employee's discharge was a result of violations of company rules was rejected where evidence as to how strictly the rule was enforced was conflicting and the employee had been given disparate treatment. In May Department scores Co., 59 NLRB 976 (1944), enforced, 154 F 2d 533 (CA 8, 1946) cert, denied, 329 U.S. 725 (1946), the "failure to conduct a fair investigation" was cited I as evidence of discrimination. Furthermore, discrimination has been found where an employer did not offer jobs to experienced laid-off employees but at the same time hired new employees who had no experience. See, e.g., Ellenville Handle, Works, Inc. 331 F. 2d 564 (CA 2, 1964); 53 LRRM 1152. See also Warren Co., Inc. 90 NLRB 689, 26 LRM 1273 (1950).

In NLRB v. El Paso-YsletaBus Line, 190 F. 2d 261 (CA 5, 1951), 28 LRRM 2229, an employee, George Lusk, was laid off:

> "Reynolds suggested that Lusk keep in touch with him and promised to talk to him if any jobs became available. That same afternoon, however, a new driver was hired, and the following day Lusk observed another new employee driving one of company buses."

The Court of Appeals concluded chere was substantial evidence of discrimination, where other employees had not been so treated. The allegation that an employer's new product had not achieved the volume of sales anticipated was similarly discounted where the employer's "all-around handy man" spent two-thirds of his time performing work formerly done by the discharged driver: Beverages, Inc., 182 NLRB No. 136, 74 LRRM 1604 (1970).

In another case an employee's peremptory layoff without warning was held to be a "suspicious circumstance" where the employer "had never reprimanded him in any way before his layoff and the

employer did not in any way attempt to substantiate his testimony that the customer had cancelled and refused to order because of the employee's errors." Gem City Mattress Mfg. Co., 136 NLRB 1317, 50 LRRM 1015, 1017 (1962)

Here again, a supervisor was hired to perform work previously assigned to the employee. See also, NLRB v. Seamprufe, Inc., 66 LRRM 2275 (CA 10, 1967) where employees on layoff" were recalled to perform duties which the dismissed employees had been performing." Id at 2277. See also, e. g. , NLRB v. Tidelands Marine Service, Inc 338 F. 2d 44 (CA 5, 1964), 57 LLRM 2456, where new employees were hired while a crew was laid off.

The absence of prior criticism likewise has been held to be a "suspicious circumstance." In Seamprufe, supra, the discharge of "an employee alleged to hve been the "least efficient" of an employer's inspectors was held to have been discriminatory where production records did not corroborate this allegation, and where her work as not criticized until after the employer had received evidence I hat she was a union sympathizer. In Mid-South Mfg. Co., 128 NLRB 230., 41 LRRM 147 (1958), similarly, the employee's production record was comparable to other employees and "she had not been reprimanded for poor performance any more often than other employees." See, also Tasty Box Lunch Co., 175 NLRB No. 7, 70 LRRM 1515 (1969).

Prior tolerance of conduct identical to that used as a pretext for a firing which takes place after union activity has begun has also been regarded as evidence of the anti-union nature of the discharge See e.g., NLRB v. Princeton Inn Co., 424 F. 2d 264, 73 LRRM 3002 (3rd Cir. 1970); NLRB v. Finesilver Mfg. Co., 400 F. 2d 644, 60 LRRM 2307 (5th Circ. 1968).

In F. W. Woolworth Co. d/b/a Woolco Department Store, 189 NLRB No. 47, 76 LRRM 1661, no complaints had been registered with the employee's supervisor and she had been "criticized only once for making mistakes." Furthermore, the number of mistakes "was not excessive when compared to the number of mistakes made by two of the other three full-time cashiers." Id. at 1662. Similar cases abound. See, e.g., Yale & Towne Mfg. Co., 10 NLRB 1321, 3 LRRM 530 (1939); F. Jaden Mfg. Co., Inc., 19 NLRB 170, 5 LRRM 486 (1940); Baldwin Locomotive Works, 20 NLRB 1100, 6 LRRM 59(1940); Reynolds Corp., 61 NLRB 1446, 16 LRRM 148 (1945); Wire Ropa Corp. of America, Inc., 62 NLRBB 380, 16 LRRM 185 (1945), etc., and numerous cases collected in LRRM Cumulative Digest at 57.2756 and 57.2782 (2180 after vol. 21).

Since discrimination may be found to result either from membership in a labor union, or for engaging in "concerted activities," the evidentiary problem may become further complicated.

As to membership, it is clear that circumstantial evidence may be the only evidence available concerning employer knowledge. Thus, the Board and Courts have used the "Small Plant Doctrine" to establish an inference in determining the existence of employer: knowledge or suspicion. Thus, where the employer or supervisor worked with a small staff, it can be inferred that the employer was aware of union membership or activities, or had at least suspected it. See, e.g., NLRB in Mid-State Sportswear, Inc. , 412 F. 2d 537 (CA 5, 1969); NLRB v. Lone Star Textiles, Inc., 386 F. 2d 535,67 LRRM 2221 (CA 5, 1967).

Moreover, it is clear that the basis of §8 (a) (3) is encouragement, or having the effect of encouraging.

Thus, in an early article, §8(a)(3) was characterized as follows:

> In each of subsections (1) (2), (4) and (5) the definition of the substantive unfair labor practice follows immediately the word "to"; that is, the

> the conduct which is made the basis of liability for violation of the Act is described after the word "to" in four out of the five subsections. There is no reason to believe that is not also true in the fifth case, that of subsection (3). The unfair labor practice under subsection (3), then—the basis of liability--is for an employer "to encourage or discourage membership in a labor organization." The words preceding "to" in subsection (3) must be given effect, then, as a condition to liability, not as a basis of liability. In other words, "discrimination" is the proscribed means of encouragement or discouragement, but the prohibited conduct is the encouragement or discouragement. Chester Ward, "Discrimination" Under the National Labor Relations Act" 48 Yale L.J. 1152, 1156 (1939). (emphasis in original). See also, Sheiber and Moore, "Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive," 33 La.L. Rev. 1 (1972).

In the case of "concerted activities," on the other hand, the principal problem is one of policy arising out of Section 7. See, e.g., Cloke, "Concerted Activity and the National Labor Policy," 5 S.P.V.L. Rev. 289 (1976); Rosenfarb, The National Labor Policy and How It Works (1940). For this reason, the definition of "concerted activity: has been broad and far-reaching. Id.

Section 8(a) (1), of the NLRA and its parallel in §1153 (a) of the ALRA, declares it illegal for an employer to "interfere with, restrain, or coerce" employees in the exercise of rights guaranteed under &7, &1152. As Professor Gorman has pointed out,

> It is also generally agreed that, to establish a violation of section 8(a)(l), it is not necessary to demonstrate - by direct testimony of employees or otherwise - that particular employees were actually coerced. It is sufficient if the General Counsel can show that the employer's actions would tend to coerce a reasonable employee. This objective standard obviously facilitates the development of a record and the trial of an unfair labor practice case, and. also avoids the need to place employees in the discomforting position of testifying against their employer. The test for a section 8(a)(1) violation is objective in a second respect. It is sufficient to demonstrate that the employer action has the effect of restraint or coercion. It is not necessary to demonstrate that the employer intended to produce that effect. Supra.

The essence of §8(a)(1), therefore, is the balancing of interests of the employee and employer. See also, Sheiber and Moore, supra, 33 La. L. Rev. at 51-52.

The Supreme Court has held, for example, that the language of §7 "is broad enough to protect concerted activities whether they take place before, after or at the same time...a demand is made." NLRB v. Washington Aluminum Co., 370 U.S. 9, 14, (1962). Furthermore, an individual employee's attempt to enforce a collective bargaining agreement has been held to constitute concerted activity, even in the absence of a similar interest by fellow employees. NLRB v. Interboro Contractors, 388 F 2d 495, 67 LRRM 2083 (CA 2 1967), enforcing 157 NLRB 1295, 61 LRRM 1537; Gray-Burke Co. 208 NLRB No. 102, 85 LRRM 1197 (1974).

The Board has also found concerted activity where an employee joined in a conversation in which a complaint was being made by another employee, Oklahoma Allied Telephone Co., 210 NLRB No. 123, 86 LRRM 1393 (1974), rejecting Chairman Miller's argument in dissent that to be concerted the protest must be authorized or inspired by fellow employees or directed toward inspiring a concerted plan by fellow employees.

Concerted activity may likewise be found in the spontaneous or informal activity of discussing grievances with fellow employees. See, e.g. "Spontaneous or Informal Activity of Employee as that of 'Labor Organization' or 'Concerted Activities' Within Protection of Labor Relations Act," Anno.,19 ALR 2d 566; "Discharge of Employee for Complaining About Wages, Hours, or Working Conditions as Unfair Labor Practice," Anno.,22 ALR Fed. 113. Thus, "it has been recognized that the activities of a single employee may be concerted if engaged in for the purpose of inducing group action." 22 ALR Fed., Id. at 122.

In Mushroom Transport Co. v. NLRB, 330 F. 2d 683 (CA 3, 1964), concerted activity was found in a single employee's conversations,

with other employees, the Court recognizing that concerted activity must begin with conversations between individuals.

Some of the problems of proof with respect to §8 (a) (3) have carried over to §8{a)(l), however the requirements of the latter section have generally been more easily satisfied.

Thus, under NLRA §8(a)(1), no proof of coercive intent or actual effect is required, the test being whether the employer's conduct reasonably tends to interfere with the free exercise of employee rights. Munro Enterprises, Inc., 210 NLRB 403, 86 LRRM 1620 (1974); NLRB v. Litho Press of San Antonio, 512 F. 2d 73 (CA 5, 1975)? Melville Confections, Inc. v. NLRB, 327 F. 2d 689 (1964), cert, denied 377 U.S. 933 (1964).

> For example, "inference, restraint, and coercion under §8(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which,<fenay reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Cooper Thermometer Co., 151 NLRB 502, 503, n. 2, 59 LRRM 1767 (1965); American Freightways Co., 124 NLRB 146, 147, 44 LRRM 1302 (1959); see also NLRB v. Illinois Tool Works, 153 F. 2d 811, 17 LRRM 811 (CA 7, 1946). Cf. Harlan's opinion in NLRB v. Burnip and Sims, supra.

Professor Oberer, however, in an excellent law review article on "The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails," 52 Cofln. L.Q. 491 (1967) has suggested that two possible varieties of proof might be required. It is generally accepted, that 58(a)(1) is violated, either (1) when any other 8(a) section is violated, or (2) independently, as 8(a)(1) is broader than any of the more specific sections which follow it. Thus,

> There is no necessity for reading a state-of mind requirement into 8(a)(1). Its very purpose, as illuminated in the legislative history, is to serve as a blanketing protection, reaching beyond the limitations of 8(a)(3) and the other 8(a) subdivisions. But otherwise, the purpose of 8(a)(1) is to afford the Board a vehicle for dealing with employer practices which

> "interfere with, restrain or coerce" employees in the exercise of their statutory rights without running afoul of any of the other, more particularized subdivisions of 8(a). It undercuts this purpose to saddle 8(a)(l) with a state-of-mind requirement appropriate for 8(a) (3)." (emphasis original). Id.at 496. See also e.g. Republic Aviation Corp. v. NLRB 324 US 793 (1945); NLRB v. Babcock Wilcox Co. 351 US 105 (1956)

While in cases of overlapping violation with §8(a)(3) therefore, Professor Oberer suggests that the "8 (a) (3) dog" may be permitted to wag its "8 (a)(1) tail" on the subject of motive, where an independent violation of 8(a)(l) is made out, motive is irrelevant, and the balancing process takes over.

Balancing may play a role even where motive is present, as was made clear in the "super-seniority" case, NLRB v. Erie Resistor Corp., supra at 228-30. There, it was held the necessary intent might be:

> [Flounded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases might be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. [Citing Radio Officers, supra.] But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate buiness ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act Nevertheless, his conduct does speak for itself --it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended, (emphasis original).

CONCLUSIONS OF LAW

The articulated purpose of the Agricultural Labor Relations Act is "to secure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations", and further, to "bring certainty and a sense of fair play" to agricultural labor relations. Cal.Lab.Code §114. None of these ends will be served by permitting Respondent to establish two procedures for discharge: one based on cause and regularly kept records, and another informal method for possible use against union members or activists.

It is only the failure of Respondent to offer any satisfactory reason for discharge and the clear contradiction of Respondent's sole explanation that the Employee was hired only for a few days, that permits the drawing of inferences on which these conclusions rest. General Counsel failed otherwise to prove the existence of anti-union animus, by not present evidence of prior employer statements or conduct, or subpoenaing other employees of Respondent, and by relying heavily on hearsay testimony by interested parties.

Simultaneously, the fact that Respondent did not place Cardenas on the stand when it was alleged that he had been the source of knowledge of union activities, together with the altogether ambiguous and unconvincing character of the Foreman's assertion of complete ignorance of union activity or attitudes, meant that circumstantial evidence of discriminatory treatment, which is obvious from the disciplinary record kept by the Foreman alone, might create an inference sufficient to find a violation.

Respondent relies in its Brief on California Evidence Code §412, which provides:

> If weaker and less satisfactory evidence is offered and it is within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

Yet this section works against both parties. Furthermore, the section is directly followed by §413, which reads, in part:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him....

The essential problem remains that of a failure to explain the obviously different treatment afforded two classes of employees and the lack of any specific reason for discharge. Hearsay evidence was excluded by the Administrative Law Officer at the hearing, and was not relied on in reaching either findings of fact or conclusions of law. It is nonetheless difficult, if not impossible, to prove an employer's state of mind or knowlege without it, at least insofar as better evidence is unavailable and precautions are taken to guarantee its trustworthiness . Respondent also relies on NLRB v. Lowell Sun Publishing Co. 320 F. 2d 835, 841, 53 LRRM 2480 (1963) . In its well researched Brief, Respondent quotes the following language from Lowell:

> "One of the reasons relied upon by the trial examiner in holding that the discharge was impelled by anti-union animus was testimony of Weisberg that one Sargent-the respondent's sport editor had told him of hearing a "report" that the respondent had "set a trap" for Breen--vis a vis his attendance at the Dracut town meeting. Sargent denied this but the trial examinder credited Weisberg. There was no evidence as to the source of the report - whether it was rumor, speculation or a "report" actually initiated by Breen Himself. This testimony was hearsay of the rankest variety and its acceptance by the trial examiner and utilization to support his findings of a discriminator discharge was error. In this court the Board apparently recognizes the infirmities in the admission of such evidence but claims that it should be accorded "its rational probative value." Suffice it to say that, in our view, evidence of this character was neither probative, rational nor of value and its receipt was, plain error."(Emphasis added by Respondent).

But Lowell is distinguished from the present case in that persuasive evidence existed demonstrating that the real reason for discharge was dereliction of duty, whereas here, no persuasive evidence has been offered as to the real reason.

In addition, this opinion has not relied on testimony respecting Cardenas, but the "Small Plant Doctrine", the discriminatory treatment of the Employee, the increase in work and hiring of new employees in following months, the lack of any allegation of cause, the allegations of fear on the part of employees, and the history of conflict at Respondent's ranch.

Furthermore, in the same case, when the employee Dudley was transfered to night shift, the Court upheld the Board's conclusion that a discriminatory transfer without explanation or notice to the employee was a reasonable basis on which the Board might find Respondent's explanation inadequate and conclude there had been anti-union animus.

General Counsel urges in her brief, that:

> The Board and the Courts have also held where an employer relies during litigation on different reasons for the discharge than advanced at the time, the suspicison is heightened that the real reason for the discharge' was the employee's union activities. See e.g. Federal Moaul Corn., Sterling Aluminum Co. Div. v. NLRB, 391 F. 2d 713', 67 LRRM 2686(8th Cir.1968). Id at p. 13.

And again that:

> A supervisor's knowledge of employee activities is routinely imputed to the employer. NLRB v. Alabama Marble Co., 83 NLRB 1047, 24 LRRM 1179 (1949); NLRB v. MacDonald Engineering Co., 202 NLRB No. 113, 83 LRRM 1646 (1973). Id.

General Counsel then suggests that:

> Once a prima facie case has been established that an employee was discharged because of his union activities, "it becomes incumbent upon Respondent, if it would avoid that result, to come forward with a valid explanation" for the discharge. NLRB v. Miller Redwood Company, 164 NLRB 389, 65 LRRM 1118 (1967), enforced. 407 F.2d 1366, 1370, 70 LRRM 2868 (9th Cir(1969); NLRB v. Standard Container Company, 171 NLRB 433, 68 LRRM 1158 (1968), enforced, 428 F. 2d 793,794, 74 LRRM 2145, 2146 (5th Cir. 1970) , rehearing en bane denied, 428 F. 2d 793, 74 LRRM 2560 (5th Cir. 1970); NLRB v. Okla-Inn, 84 LRRM 2585, 2591 (10th Cir. 1973).

These points are well taken, as additional rationale for the inferences relied on. General Counsel also cites NLRB v. Bird Machinery Co., 161 F. 2d 589 (CA 1, 1947) where it was said:

> ". . . . Direct evidence is seldom attainable when seeking to probe and employer's mind to determine the motivating cause of his actions. [Citations]. Moreover the weight to be accorded the inferences by the Board [that the discharge was discriminatory] is augmented by the fact that the explanation of the discharges offered by the Respondent did not stand up under scrutiny." Id at 12.

I therefore find that Respondent, through its foreman, Miguel Bastides, in terminating the employment of Ignacio Bernal Gonzalez on or about January 26, 1977, did interfere with, restrain and coerce its employees in the exercise of rights guaranteed in Section 1152 of the Act and did commit an unfair labor practice in violation of Section 1153(a) of the Act.

I further find that Respondent, as described above, did discriminate in regard to the hiring or tenure or terms or conditions of employment of its employees, by discouraging membership in a labor organization, and did commit an unfair labor practice in violation of Section 1153(c) of the Act. I hereby deny Respondent's motions taken under submission by me to dismiss the complaint of the General Counsel, or in the nature of a non-suit or directed verdict.

Respondent's motion for attorney's fees for one-half day consequent on the granting of a subpoena duces tecum is denied, as General Counsel's request had merit. Teamsters, Local 901 (F.F. Instrument Corp.) 210 NLRB No. 153, 86 LRRM 1286, (1974).

General Counsel's request for reinstatement, back-pay and suitable notice to employees, as appears in the Appendix,

will be granted. As Professor Morris has stated:

> Remedies for employer discrimination in violation of Sections 8 (a) (3) and (4) are tailored to the discrimination involved and are as varied as the violative discriminatory acts. In the typical discrimination case where an employee is discharged for union activity or discriminated against because of charges or testimony under the Act, the Board normally orders reinstatement of the employee with back pay in addition to the posting of a notice in which the employer states that he will not engage in further discriminatory activity and will take the affirmative action Ordered. Morris, supra at 854, citing Chase National Bank, 65 NLRB 827, 829 17 LRRM 255 (1956); of Phelps Dodge Corp., 171 NLRB No. 175, 68 LRRM 1252 (1968), enforced, 414 F2d 99, 71 LLRM 3054 (CA 7, 1969), cert, denied, 397 US 920, 73 LRRM 2537 (1970) ; Am. Machinery Corp. v. NLRB, 424, F2d 1321, 73 LRRM 2777 (CA5, 1970), Little Rock Airmotive, 182 NLRB No. 98, 74 LRRM 1199 (1970).

A "notice to Employees" is appended to the Decision, and Respondent will be ordered to read this notice in English and Spanish to his employees, as there is evidence that some of them are unable to read, and to post it.

Agents of the Board will be directed to visit Respondent's premises next year to check on the effectiveness of these remedies. See, e.g., Valley Farms and Rose J. Farms, 2 ALRB No. 41. This remedy is indicated as a result of testimony to the effect that employees of Respondent have been frightened and intimidated from engaging in union membership and activity.

It does not appear from the evidence, however, that a personal or public apology is necessary, and this request for relief is denied. Neither does it appear that any purpose will be served in requiring Respondent to mail copies to last year's peak season employees, as to whom, if they are not already employed by Respondent, it has not been shown that Respondent has any knowledge as to their present location.

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

ORDER

Respondents, its officers, agents and representatives, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in the Union, or any other labor organization, by unlawful interrogations or by telling them not to vote in an employee election, or by discharging, laying off, or in any other manner discriminating against individuals in regard to their hire or tenure of employment or any term or condition of employment, except as authorized in Section 1153 (c) of the Act.

(b) In any other manner interfering with, restraining and coercing employees in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage -in other concerted activites for the purpose of collective bargaining or other mutual aid or pro tection, or to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment as authorized in Section 1153(c) of the Act.

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

(a) Offer to Ignacio Bernal Gonzalez immediate and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges, and make him whole for any and all losses he may have suffered as a result of his termination.

(b) Preserve and make available to the Board or its agents, upon request, for examination and copying all payroll records, social security payment records, time cards, personal records and reports, and other records necessary to analyze the back pay due.

(c) Give to each employee hired up to and including the peak employment season in 1977 copies of the notice attached hereto and marked "Appendix." Copies of this notice, including an appropriate Spanish translation, shall be furnished Respondent for distribution by the Regional Director for the El Centro Regional Office. Respondent is required to explain to each employee at the time the notice is given to him that it is important that he understand its contents, and Respondent is further required to read the notice to each employee or to all of them, and to post the notice in a conspicuous and suitable location on Respondent's property.

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

APPENDIX

NOTICE TO EMPLOYEES

After a hearing in which all parties presented evidence, an Administrative Law Officer of the Agricultural Labor Relations Board has found that we have engaged in violations of the Agricultural Labor Relations Act, and has ordered us to notify all persons working for us in irrigation or shoveling that we will remedy these violations, and that we will respect the rights of all our employees in the future. Therefore we are now telling each of you:

(1) We will reinstate Ignacio. Bernal Gonzalez to his former job and give him back pay for any losses that he had while he was off work.

(2) All our employees are free to support, become or remain members of the United Farm Workers of America, or of any other union. Our employees may wear union buttons or pass out and sign union authorization cards or engage in other organizational efforts including passing out literature or talking to their fellow employees about any union of their choice provided this is not done at times or in a manner that interferes with their doing the job for which they were hired. We will not discharge, lay off, or in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to engage in these and other activities which are guaranteed them by the Agricultural Labor Relations Act. We will not discriminate between employees in order to encourage or discourage union membership.

Signed:

DATED: _____ MARIO SAIKHON, INC.

By_____

(Title)