Holtville, CA

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON , INC . , Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 77-CE-128-E 77-CE-130-E 4 ALRB No. 72

DECISION AND ORDER

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

On July 1, 1977, Administrative Law Officer (ALO) Sanford Jay Rosen issued the attached Decision in this matter. Thereafter Respondent filed timely exceptions and a supporting brief .

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

At the hearing, Respondent moved to dismiss paragraph 6 (b) of the complaint, alleging as unlawful the discharge of Efrain Robles on March 26, 1977, [1/] on the ground that as the alleged discharge occurred within the State of Arizona, this Board was without jurisdiction over the matter. The ALO took the motion under submission pending development of the record and the filing of briefs. He ultimately held that the Board did have jurisdiction

[1/] Unless otherwise noted, all dates hereinafter refer to 1977.

over this incident, and concluded that the discharge of Robles was a violation of Section 1153 (c) and (a) of the Act. We affirm both conclusions of the ALO, for the reasons set forth below and in the ALO's Decision.

The Jurisdictional Question

The complaint alleged, and Respondent admitted in its answer, that it is engaged in agriculture in California and is an agricultural employer within the meaning of Section 1140.4(c) of the Act. It is clear, and we find, that Efrain Robles was, at all times material herein, an agricultural employee of Respondent within the meaning of Section 1140.4 (b) of the Act.

Respondent's headquarters is in Holtville, California, where its sole owner, Mario Saikhon, maintains his office and where the personnel records of its employees and its management and clerical support staff are maintained. Respondent has lettuce farming operations in both the Imperial Valley of California and in the Welton, Arizona, area. After a period of thinning and weeding, the lettuce harvest begins each November in Welton. Once the harvest commences, Respondent expands its work force through hiring in Calexico, California. Each morning at approximately 3:00 to 4:00 a.m., a bus or buses, driven by Respondent's employee(s) and met or accompanied by a company supervisor, picks up the harvest workers at a gasoline station in Calexico. The workers are then transported for approximately two hours, a total distance of nearly 120 miles, across California into Arizona to work. At the end of each day the workers are transported back to Calexico. Usually in early December Respondent's harvest activity shifts to its

California fields and continues there into late March. Thereafter, the crews return to work in Arizona during the spring Welton harvest which, depending upon market and weather conditions, usually ends in middle or late April.

Efrain Robles commenced his employment with Respondent on December 14, 1976, during the Imperial Valley (California) harvest, and worked continuously from that date until the date of the layoff, March 26, 1977. On that date, as the bus was ready to leave the Arizona work-site and return to Calexico, a company supervisor boarded the bus and read off the names of 9 workers, including Robles, who were laid off effective immediately. Thereafter, the bus transported Robles and the other crew members back to Calexico.

On the basis of the uncontested facts found by the ALO and set forth above, there can be no doubt that the Board has jurisdiction over the Respondent: it is a corporation doing business in California as an agricultural employer and having its principal place of business in this state, where it was duly served with the charge and complaint in this proceeding. Either by its answer or by want of exception to the ALO's Decision it concedes: its status as an agricultural employer; the status of Robles as an agricultural employee; and the UFW's status as a labor organization within the meaning of the Act.

In view of these facts, the basis of the Respondent's motion for dismissal must be that even if the allegations of the complaint be proved, the Board lacks subject-matter jurisdiction to remedy the unlawful layoff or discharge of an agricultural

employee whose employment commenced and was substantially maintained in California, whose employer is engaged in agriculture in this state and maintains its principal place of business here, solely because the discharge or layoff occurred in the state of Arizona. In agreement with the ALO, we find this contention to be without merit, and accordingly, we affirm his denial of Respondent's motion to dismiss.

The ALO held that the ALRB has subject-matter jurisdiction over a discharge occurring in another state when the employer's contacts with California, particularly the effect of his agricultural business on California farm workers, is not insignificant. We find it unnecessary to reach such a broad conclusion of law, as the facts of this case support the assertion of jurisdiction on a more limited ground. Here, the record shows that Respondent has substantial contacts with California, that Respondent hired Robles within the state, and that, as found by the ALO, Robles' discharge was because of his protected activity within the state.

Both the California Supreme Court and the Supreme Court of the United States held more than 40 years ago that the formation of an employment relation within this state was by itself a sufficient jurisdictional basis for the regulation of that relationship within California and the creation of incidents thereto (e.g., Workers' Compensation benefits) which would be recognized within the state even where the relation was entered into solely for the rendition of services in another state. Thus, in Alaska Packer's Ass'n. v. Ind. Acc. Com'n., 1 Cal. 2d 250, (1934), despite the Employer's claim of unconstitutionality, the

California Supreme Court upheld the jurisdiction of the California Industrial Accident Commission to award benefits to a non-resident alien, hired in California to work exclusively in the Alaska fishing industry, who was injured in Alaska and filed a claim in California upon his return. In the course of its opinion, the Court expressly noted the special interest of California in providing a remedy to injured seasonal workers recruited in the state who were to be returned there at the completion of the season. Id. at 261-62.

On appeal, the Supreme Court of the United States affirmed the decision, and rejected arguments similar to those being made by Respondent in the present case. The Court first rejected the claim that the award gave an improper extraterritorial effect to the statute:

> The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals, nor did the judgment of the state supreme court give it any. The statute assumes only to provide a remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur.
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> Alaska Packer's Ass'n. v. Ind. Acc. Com'n. of Cal., 294 U.S. 532, 540 (1935).

The High Court then analyzed the nature of the claim of lack of jurisdiction in terms equally applicable to the instant case:

> Obviously, the power of the state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences. That it has power, through its own tribunals, to grant compensation to local employees, locally employed,

> for injuries received outside its borders, and likewise has power to forbid its own courts to give any other form of relief for such injury, was fully recognized by this Court .... Objections which are founded upon the 14th Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process. (Emphasis supplied). 294 U.S. at 541.

Analogously, by the passage of the ALRA the Legislature has chosen to regulate the employment relation in California agriculture by providing for a system of collective bargaining with the attendant array of statutory rights, obligations, and prohibitions necessary to the proper functioning of such a system, Its authority to do so in connection with the purely intrastate activities of agricultural employers, unions, and employees is clear. That it has also the power to provide for relief in this state to an agricultural employee who has been injured, within the meaning of the Act, outside the state, as an incident to that regulation is clear on the basis of the above precedent. This exercise of power must, of course, be consistent with the demands of due process. The question for resolution then, is whether the Legislature intended to exercise this power. We believe that it did, and that the requirements of due process will be met on a case-by-case basis.

In his Decision, the ALO noted that by the passage of the ALRA, the state sought to guarantee justice to agricultural workers and establish stability in labor relations. See Section 1 and 1.5 of Stats. 1975, 3d Ex. Sess., cl. 1. He found the assertion of jurisdiction in this case to effectuate these

purposes of the Act. We note, in addition, that the ALRA defines "agriculture," "agricultural employer," and "agricultural employee" in broad, functional terms, without express limitation as to time or place. Labor Code Section 1140.4 (a), (b), and (c). The record in this case shows no change in the pertinent functions or relationships from one side of the California-Arizona border to another. To the contrary, Respondent grows and harvests the same crop, using the same crews, by the same method in both states.

In view of the legislative goals and statutory language set forth above, and the record in this case, we conclude that the Board does have jurisdiction over the discharge allegation of the complaint. Such a conclusion is promotive of both justice and of stability in labor relations and provides a uniform and symmetrical statutory coverage corresponding to the operational realities of the agricultural industry in California. It also avoids significant negative effects which, in our view, the Legislature did not intend, but which would likely flow from a contrary reading of the statute. For example, to hold otherwise would create a class of California agricultural employers who would not be liable for their unlawful activities because by virtue of size or geographical location they farm in both California and Arizona and engage in unlawful activity in Arizona. Another effect might well be the growth of leaseholds or other forms of operation in Arizona which would not have arisen in that state because of market forces.

Insofar as standards for the exercise of jurisdiction in this and in future cases of this kind are concerned, those which have evolved concerning the reasonableness of the exercise of

jurisdiction over, non-resident defendants are valuable analogously. In Belmont Industries, Inc., v. Superior Court, 31 CA 3d 281, 286 (1973) the Court identified these factors as follows:

> 1. The interest of the state in providing a forum for its resident and in regulating the business involved;
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> 2. the relative availability of evidence and the burden of defense and prosecution in one place rather than another;
>
> 3. the ease of access to an alternative forum;
>
> 4. the avoidance of a multiplicity of suits and conflicting adjudications; and
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> 5. the extent to which the cause of action arose out of the defendant's activities in the forum state.

When applied to this case, these factors disclose the propriety of the Board's assumption of jurisdiction. The first factor is satisfied here. California's special interest in the business involved is symbolized by the existence of the ALRA. Although Robles does not have his domicile or residence in California, the protection afforded by the Act to all agricultural employees is not denied to non-residents or non-citizens, and Respondent is clearly a resident of California.

The second factor is also satisfied here: the hearing has in fact been conducted in California, all parties were present and participated, and there was no claim of burdensome defense.

With regard to the third factor, at the time of the hearing, Arizona would have been the alternative forum.

The fourth factor is not, however, applicable. There is no evidence that a charge was filed in Arizona during the permissible period, and since the Arizona Agricultural Employment

Relations Act has since been enjoined as unconstitutional, there is no current possibility of a conflicting adjudication. [2/] Respondent has not, in any event, made any showing that Arizona law is in conflict with California law on this subject.

The fifth factor is clearly present here. Respondent is a California corporation, with its principal place of business in this state. It has most of its property here; employs the majority of its employees here; and the layoff at issue arose out of its agricultural operation, centered here. Moreover, as the ALO found, Respondent's layoff of Robles was in part in retaliation for his participation in Board processes and in protected concerted activity which occurred in California.

The Discharge Allegation

The ALO concluded that the evidence did not support the allegation that between November 13 and December 20, 1976, Respondent violated the Act by its failure to rehire Robles. As no exception has been taken to this finding, we hereby dismiss that allegation of the complaint. However, we agree with the ALO's conclusion that by its discharge or layoff of Robles on March 26, 1977, and by its subsequent refusal to rehire him, Respondent violated Section 1153 (c) and (a) of the Act.

Respondent does not challenge the ALO's finding that Robles was a highly visible union activist while in its employ. His activity, clearly within the knowledge of Respondent, is set out in detail in the ALO's Decision (See ALOD, p. 5). There are

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[2/] See United Farm Workers, et al, v. Babbitt, 449 F. Supp. 449 (1978).

also other facts pertinent to an analysis of the discharge allegation. We note that the 1977 unfair labor practice hearing in which Robles played such an active role ended on March 16, 1977, and that Robles was laid off ten days later. It is also noted that Respondent's decision to limit seniority to work performed during the current season, and to lay off according to such a seniority list was imposed for the first time during March, 1977.

If seniority for the 1976-77 season only were the sole basis for Respondent's action, it would appear that Robles was properly included in the group which was laid off, as records show that only two employees had less seniority than he on that basis. Subsequent events, however, indicate that Respondent's action on March 26 was not in fact a layoff, but, rather, a device to discriminatorily discharge Robles. The time book maintained by the supervisor of Crew No. 3 [3/] for the payroll period including March 30, 1977, shows that in the week following the "layoff" every crew member other than Robles worked at least two days. [4/] Yet on March 29, the Tuesday following the layoff, when Robles confronted Supervisor Vera in Arizona regarding the layoff, he was not told that hiring was in fact occurring, but only that he had been laid off on the basis of a seniority list compiled

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[3/] General Counsel's Ex. No. 8.

[4/] The individual payroll records for the members of Crew 3 corroborate payment for this work to two of these workers, Jesus Torres and O. Ivanez. The payment to O. Ivanez for work on April 6 and 9 is shown by these records to be for work with Crew 4. This is inconsistent with the appearance of Ivanez' name in the time book for Crew 3 on these days. We rely on the time book, a record made contemporaneously by the supervisor of the crew, as the more accurate documentary evidence.

from company records.

Respondent offered, as an explanation of this situation, evidence that increased absenteeism traditionally occurs near the end of the Arizona season and that, as a result, the hiring of replacements becomes necessary. However, as the ALO properly noted, this fact tends to show that there was no legitimate business purpose requiring the layoff on March 26, as normal attrition would have reduced the crew sizes to the desired levels. Moreover, in its brief to the ALO, Respondent notes that the record shows that on March 28 there were 12 absent employees, on the 29th there were 11, and on March 30 there were 15 absentees. The pertinent exhibits show, however, that on each of these days, some of those laid off on March 26 are counted among those "absent," thereby appearing to justify the need for new employees. [5/]

The Respondent's purported rationale for these layoffs was the need to reduce the number of trios in Crew 3 from 13 to 10. Yet its own records do not show this occurring until the second week after the layoff. During the week immediately following the layoffs, despite the appearance of 46 names in the time book, there is no day on which more than 36 persons are working in Crew 3. These days of highest employment occur on Thursday and Friday, March 31 and April 1.

Conclusion

The record as a whole shows the layoff of a leading

[5/] Of the 12 employees absent on March 28, 5 had been laid off on March 26; of the 11 absent on the 29th, 5 had previously been laid off; and of the 15 absent on the 30th, 8 had been laid off on the 26th.

union activist occurring shortly after he had played a major role in organizing witnesses for, and assisting in the presentation of, an unfair labor practice case against Respondent. The layoff was undertaken on the basis of seniority in the 1976-77 season only; a system not previously utilized. Respondent's business records disclose that in the week after the layoff every laid-off employee, except Robles, had resumed working. [6/] During this same week, when Robles confronted his supervisor regarding the basis for his layoff, he was not informed that because of absenteeism jobs were available.

Finally, in its defense to the complaint, Respondent took inconsistent positions. While it contended on the one hand that it reduced the crew size to promote efficiency, it pointed to the customary end-of-season absenteeism as the basis of its hiring in the week after the layoff. To show the need for this hiring, Respondent pointed in part to the absence of the very workers it laid off on March 26 as demonstrating the need for additional hiring. Actually, during the week following the layoff, Respondent's crew size was not reduced; rather, it reached its peak on Thursday and Friday of that week. On the totality of this evidence, we adopt the ALO's conclusion that by its discharge of Efrain Robles on March 26, 1977, Respondent violated Section 1153(c) and (a) of the Act.

ORDER

Pursuant to Labor Code Section 1160.3, Respondent Mario

[6/] The supervisor's time book, GCX8, has a check beside Robles' name on Friday, April 1. As no party claims that he did work after March 26, we treat this as a clerical error.

Saikhon, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

a) Discharging or otherwise discriminating against its agricultural employees because of their union activities.

b) In any other manner interfering with, restraining or coercing its agricultural employees in the exercise of their rights guaranteed under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act;

a) Immediately offer Efrain Robles full reinstatement to his former position without prejudice to his seniority or other rights and privileges, beginning with the date in the 1978 season when the crop activity in which he is qualified commences, and make him whole for any economic losses he has suffered as the result of Respondent's discrimination, plus interest thereon at 7 per cent per annum.

b) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, Social Security payment records, timecards, personnel records, and other records necessary to determine the amount of backpay due and the rights of reinstatement under the terms of this Order.

c) Execute the Notice to Employees attached hereto. Upon its translation by a Board Agent into appropriate languages, Respondent shall reproduce sufficient copies in each language for the purposes, set forth hereafter.

d) Within 30 days from receipt of this Order, mail

a copy of the attached Notice in appropriate languages to each of the employees on its payroll during March, 1977, and thereafter provide a copy to each of its employees employed during its 1978 peak season.

e) Post copies of the attached Notice in all appropriate languages for 60 days in conspicuous places on its property, the timing and placement to be determined by the Regional Director. Respondent shall exercise due care to replace any copy or copies of the Notice which may be altered, defaced, or removed.

f) Arrange for a representative of Respondent or a Board Agent to distribute and read this Notice in all appropriate languages to its employees assembled on company property, at times and places to be determined by the Regional Director. Following the reading, the Board Agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or employees' rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees to compensate them for time lost at this reading and the question-and-answer period.

g) Notify the Regional Director within 30 days from the issuance of this Decision and Order of the steps he has taken

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

Dated: October 13, 1978

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

NOTICE TO EMPLOYEES

After a trial at which each side had a chance to present its case, the Agricultural Labor Relations Board has found that we interfered with the rights of our workers. The Board has told us to send out and post this Notice.

We will do what the Board has ordered and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

1. To organize themselves;

2. To form, join, or help unions;

3. To bargain as a group and choose whom they want to speak for them;

4. To act together with other workers to try to get a contract or to help or protect one another; and

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

Because this is true, we promise that:

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

Especially:

WE WILL NOT refuse to hire or rehire any employee, or otherwise discriminate against any employee in regard to his or her employment, to discourage union membership, union activity, or any other concerted activity by employees for their mutual aid or protection.

WE WILL offer Efrain Robles his old job back, and we will pay him any money he may have lost because we did not rehire him, plus interest thereon computed at seven percent per year.

MARIO SAIKHON, INC.

Dated: _____ By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California.

DO NOT REMOVE OR MUTILATE.

CASE SUMMARY

Mario Saikhon, Inc., (UFW)

4 ALRB No. 72
Case Nos. 77-CE-128-E
77-CE-130-E

ALO DECISION

The ALO concluded that the ALRB did have jurisdiction over this complaint alleging the discriminatory discharge of employee Robles, even though the discharge was effected in Arizona, and therefore denied the Respondent's motion to dismiss the discharge/layoff allegation of the complaint. The ALO thereafter concluded that by its layoff and refusal to rehire Robles, the Respondent had violated Section 1153 (c) and (a) of the Act.

The ALO found the Respondent to be an agricultural employer, with its principal place of business and records within the State of California. He reasoned that an examination of traditional due process considerations supported the Board's assumption of jurisdiction. In addition, in the ALO's view the statutory goals of protecting agricultural employees and providing stability in labor relations would be served by the Board's exercise of jurisdiction. Finally, the ALO found analogous authority for the exercise of jurisdiction in the state worker's compensation scheme and cases decided under it.

Turning to the discharge allegation itself, the ALO found that Robles was a conspicuous union activist, that the Respondent knew of this activity, that the seasonal seniority system was put into effect for the first time in March, 1977, that the Respondent's argument of economic necessity for the layoff of Robles did not withstand scrutiny, that new employees and others laid off were hired after March 26, but Robles was not, and that the layoff occurred shortly after Robles' conspicuous activity in the ULP case against Respondent. On the totality of this evidence, the ALO found a violation of Section 1153 (c) and (a) of the Act.

BOARD DECISION

The Board affirmed the ALO's findings, rulings, and conclusions and adopted his recommended Order, as modified.

The Board affirmed the ALO's finding that it had jurisdiction over the discharge allegation of the complaint. The Board found on the basis of uncontested evidence that Respondent was an agricultural employer in California, with its principal place of business in this state, that it had been properly served with a charge and complaint, and that Robles was an agricultural employee within the

meaning of the Act. The Board characterized the ultimate issue as whether it had the power to remedy the unlawful discharge or layoff of an agricultural employee whose employment by an agricultural employer commenced, and was substantially maintained, in California, solely because the discharge or layoff occurred in Arizona. It held that it did have the jurisdiction to order a remedy.

The Board found that on the record, Respondent had substantial contacts with California and that Robles had been hired in the state, for work both within and without California. On the basis of the 40 year old precedent of Alaska Packers' Ass'n. v. Ind. Acc. Com'n. (1934), 1 Cal. 2d 250, aff'd., (1935) 294 U.S. 532, the Board reasoned that if the state constitutionally had the power to provide relief for workers injured outside the state solely because they had been hired in this state, it also had the power to provide relief to an agricultural employee hired in this state by an employer with substantial contacts with California where the employee spent a substantial part of his time working within the state. Proceeding from the statutory language, the Board concluded that it was the Legislature's intent to reach an incident like the present one, with some multi-state aspects. This conclusion, in the Board's view, promoted the statutory goals of guaranteeing justice to workers and establishing stability in labor relations. The Board found analogous value in the due process factors which have been identified in cases where jurisdiction over non-resident defendants was in issue and indicated it would generally apply these factors in the future. Citing the decision in Belmont Industries, Inc. v. Superior Court (1973), 31 CA 3d 281, 286, the Board identified these factors as:

1. The interest of the state in providing a forum for its resident and in regulating the business involved;

2. the relative availability of evidence and the burden of defense and prosecution in one place rather than another;

3. the ease of access to an alternative forum;

4. the avoidance of a multiplicity of suits and conflicting adjudications; and

5. the extent to which the cause of action arose out of the defendant's activities in the forum state.

It found all of the relevant factors pointed toward the propriety of Board jurisdiction in this case.

The Board adopted the ALO's basic factual findings and found additional support for his conclusion that Robles had been unlawfully discharged by an examination of the business records in evidence. Thus, the supervisor's book for crew #3 showed every laid-off employee other than Robes working in the week following the layoff. The records showed no actual reduction in the number of those working for Respondent until the week following the week of the layoff. Also, the Board stressed that the Respondent took conflicting positions in defense of the charge. Thus, it argued the need to cut crew size on the one hand, to justify the layoff, and pointed to customary end-of-season absenteeism on the other, to justify hiring in the week following the layoff. On the totality of the record, the Board found Robles discharge to be violative of Section 1153 (c) and (a) of the Act.

As a remedy, the Board ordered the reinstatement with back pay of Robles, and the Notice issuance, reading, and posting actions which have become standard in the ULP cases.

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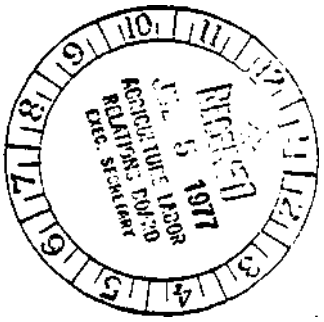
STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of: MARIO SAIKHON, INC., Respondent, and UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging Party.	Case Nos. 77-CE-128-E 77-CE-130-E



John Moore, Esq.,
of Fresno, California, for
the General Counsel.

Dressley, Stoll & Jacobs,
by Charley Stoll, Esq., and Rob Roy
of Newport Beach, California,
for Respondent.

Lupe Gamboa and Deidre Olsen, of
Calexico, California, for the
Charging Party.

DECISION

Statement of the Case

SANFORD JAY ROSEN, Administrative Law Officer: These cases were heard before me in El Centro, California, on May 16 and 17, 1977. The Notice of Hearing and Complaint issued on April 12, 1977. (GC Ex. 2) The complaint alleges violations of Section 1153(a) and (c) of the Agricultural Labor Relations Act (hereinafter the Act), by Mario Saikhon, Inc. (hereinafter Respondent). The complaint is based on charges filed on March 29 and 31, 1977 (GC Ex. 3 and 4) by the United Farm Workers

of America, AFL-CIO (hereinafter Union). Copies of the charges were duly served upon Respondents.

All parties were given full opportunity to participate in the hearing, and, after the close thereof, the General Counsel and Respondent each filed a brief.

At the hearing the Respondent moved that its attorney be permitted to tape record the proceedings to facilitate the writing of his brief. That motion was denied. The Respondent's motion that the Administrative Law Officer request a transcript of the hearing to facilitate the writing of his decision was denied at the close of the hearing. The Respondent's motion to sequester the witnesses was granted with the provisos that the Charging Party, Mr. Efrain Robles, could remain at the hearing as a party representative and that any persons subpoenaed as witnesses would in fact be called to testify.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction Generally

Mario Saikhon, Inc., is a lettuce grower, the owner of which is Mario Saikhon. It is engaged in agriculture in Imperial County, California, as well as in and around Welton, Arizona. The headquarters of Mario Saikhon, Inc., are in Holtville, California, where Mario Saikon maintains his office. Mario Saikhon, Inc.'s employment records are apparently maintained at the headquarters. It is an agricultural employer within the meaning of § 1140.4(c) of the Act. I also find that the Union is a labor organization representing agricultural employees

within the meaning of § 1140.4(f) of the Act.

II. The Alleged Unfair Labor Practices

The complaint alleges that § 1153(c) of the Act was violated by the discriminatory failure and refusal of the Respondent to hire Efrain Robles for approximately five weeks in late 1976 (from about November 13, 1976, through December 20, 1976) and by discriminatorily discharging him on or about March 26, 1977, in order to discourage or encourage membership in a labor organization. The complaint further alleges that these actions by Respondent unlawfully interfered with the rights guaranteed by § 1152 of the Act in violation of § 1153(a) of the Act.

Respondent denies that any refusal to hire was unlawfully motivated or unlawfully interfered with rights guaranteed under § 1152. Respondent also denies that Robles was fired, as opposed to laid off, or that any such discharge or layoff was unlawfully motivated or unlawfully interfered with rights guaranteed under § 1152.

At the outset of the hearing, the Respondent moved for the first time to dismiss the charge that Mr. Robles's discharge on or about March 26, 1977, violated § 1153(a) and (c) of the Act on the grounds that the alleged act occurred in Arizona, and therefore the ALRB is without jurisdiction to hear the matter. The motion was taken under advisement pending study of the record as it established the facts bearing upon this question of jurisdiction.

A. Operation of Mario Saikhon. Inc.

Mario Saikhon, Inc., operates lettuce farms in Imperial County, California, and in Welton, Arizona. Each year the Respondent begins the lettuce harvest in Welton, Arizona, during

November. (This harvest is preceded by several weeks of thinning and weeding, also in Welton, Arizona.) The harvest crews are later shifted to Imperial County, California, where they harvest lettuce from December to March. Late in March, they are returned to Welton, Arizona, for the spring harvest that is concluded in April.

Some of the harvest workers perform the pre-harvest thinning and weeding work in Welton and continue to work through the harvest. It is uncontested that workers who perform this pre-harvest work, which apparently is less prized and less financially rewarding than harvest work, receive at least some job security for employment during the harvest.

The exact date for the start of the harvest varies from year to year. Generally, it starts around the first week in November.

When the harvest starts, employment of additional workers becomes necessary. These additional workers are hired at a Gulf gasoline station in Calexico, California.

The workers must be at the gas station at 3:00 a.m. for the two-hour ride to Welton, Arizona. This trip is made every workday when harvest occurs in Welton, Arizona. The bus is driven by an employee of Respondent. A large percentage of the workers who start the harvest season with Respondent remain with Respondent through the end of the harvest in April.

Respondent's workers are organized into crews, consisting of about 30 to 35 workers. Each crew has about ten to thirteen "trios" in which two workers cut lettuce ("cutters") while the third does the packing.

Respondent starts the harvest season with about three crews. With the increased need, the number of crews and the number of

trios on each crew is increased. (During the 1976-1977 season, the maximum number of crews was four.) As the volume of lettuce to be harvested decreased, the number of crews decreased. Each crew is supervised by a foreperson and an assistant foreperson.

B. The Union Activities of Efrain Robles

Besides being an experienced and skillful lettuce cutter, Efrain Robles also had a leadership role in Crew No. 3, as the United Farm Workers' representative of the crew in dealings with Respondent.

The workers at Mario Saikhon, Inc., had engaged in an economic strike in February of 1976. During the negotiation of a settlement of the strike, Crew No. 3 elected Robles to be their representative. In the course of negotiations, Robles met and spoke with Mario Saikhon.

During February and March of 1977, while working for Respondent in the Imperial Valley, Robles organized Crew No. 3 to testify in an unfair labor charge hearing against Respondent. Robles and another worker collected money from the crew to compensate witnesses for work time lost while testifying. Robles himself was present at the hearing, in which he took notes and assisted the United Farm Workers until March 11, 1977. At that time, he was placed under subpoena by Respondent and excluded from the hearing. However, he was never called upon to testify. Shortly after the termination of the hearing, Robles was laid off.

Respondent acknowledged that Robles was known to them to be a Union supporter. They also acknowledged that Crew No. 3, as a whole, was a strongly pro-union crew. Indeed, none of the facts recited above is contested.

C. The Refusal to Rehire Efrain Robles

Robles testified that on November 8, 1976, the first day of the harvest in Welton, Arizona, he went to the gas station in Calexico seeking work. However, he arrived at about 4:15 a.m. and the buses had already left. He returned to the station the next day, November 9, 1976, at 3:00 a.m. But his former fore-person, Jesus "Chuey" Vera, was not there and Robles did not wish to talk to Amador Sandoval and Leonardo "El Prieto" Barriga. Robles found the lack of greeting from these forepersons to be in marked contrast to his experience in previous years when he had been warmly greeted and invited to work for Respondent. Because of the changed atmosphere, Robles did not feel free to present himself to Barriga, a foreperson, or Sandoval, an assistant foreperson.

Three weeks into the harvest, when he heard that a third bus had been added to transport workers to Welton, Robles approached Amador Sandoval to request work. Sandoval informed him that Crew No. 3, Robles's former crew, did not need any more workers. At that point, Robles decided to seek other work until Crew No. 3 moved to the Imperial Valley harvest in December. Robles testified repeatedly that at that time he wanted to work only for Chuey Vera on Crew No. 3. He was not interested in working for other forepersons on other crews.

On December 6, 1976, Robles complained to Lupe Gamboa, the Union's Field Office Director in the Imperial Valley. On Gamboa's advice, Robles presented himself to Chuey Vera in the field in Imperial Valley. Vera told Robles that there was no work for him and that all the people then working had helped in the thinning in Welton, Arizona. Robles then returned to the Union office to confer again with Gamboa. Gamboa returned with Robles to the field where he confronted Vera, asking him why he would not give Robles work. Vera replied that he was told not to hire any new workers, and repeated his statement that

all people then working had helped in the thinning in Welton. Gamboa disputed that statement.

Gamboa spoke with Mario Saikhon by telephone later that that day. The next day, December 7, 1976, Robles and Gamboa met with Saikhon. Gamboa testified that he requested a job for Robles, with full seniority, largely on the grounds that Robles had been a good employee for nine seasons and that it was unfair not to give him a job. (Saikhon and all of his supervisors agreed that Robles was an excellent worker.) Saikhon promised to call Gamboa or Robles back with an offer of work upon the first opening. On December 14, 1976, at Robles's request, Gamboa called Saikhon who said that Robles was to report to work the next day. He was then hired by Vera after telling Vera that Saikhon had approved his hiring as an additional worker.

Respondent disputes that Amador Sandoval told Robles during the third week into the harvest that there were no jobs available. Sandoval testified that he did not see Robles until December, 1976, when he went to see Vera in the field in Imperial Valley. Respondent also disputes that Saikhon agreed to give Robles back seniority when hiring him. Saikhon testified that he did not recall any such agreement. He refused to give Robles seniority credit in March, 1977.

Based on my observation of the witnesses, I find the historic facts are correctly stated by the Charging Party as set forth above. That the different parties had different perceptions of these historic facts and drew different inferences from them is equally clear. In view of my findings and conclusions which follow, it is not necessary for me to determine whose perceptions and inferences are more accurate. For example, it is not necessary for me to decide whether Saikhon "agreed" to re-employ Robles with full "seniority," and what such "seniority" would have involved.

D. The Discharge of Efrain Robles

On March 26, 1977, Crew No. 3 conducted spring harvest in Welton, Arizona. After work that day, members of Crew No. 3 boarded their bus to return to Calexico. At that time, Amador Sandoval boarded the bus and read a list of nine employees who had been laid off. They included Efrain Robles, Oscar Ivanez, Gregorio Castillo, Adolfo Gonsalez, Pedro Arroyo, Uriel Barriga, Melchor Torres, Jesus Torres, and Alfonso Torres.

Robles testified that he wished to speak to Vera about the layoff immediately, but that the bus was leaving and there was no time to discuss the matter. Sandoval testified that Robles was the first of several employees to applaud when he received the news that he had been laid off. Lucio Padilla testified that it was true that several people in the bus applauded, although he was not sure whether Robles was one of them. Robles's testimony indicated that if he did applaud, his actions were intended and should have been understood to have been ironic.

Robles spoke to Gamboa on the day of the "layoff." By chance, Gamboa met Robles at the Gulf Station in Calexico when the bus returned from Welton, to talk to him about a scheduled activity of the Union. Robles informed Gamboa that he had been fired. Gamboa and Robles agreed to talk to Vera. On Tuesday, March 29, 1977, they went to Vera's house in Arizona and waited three hours to see him. They asked Vera why Robles had been laid off. Vera apologetically explained that a list from the Company stated which employees were the last hired, and therefore the employees to be laid off. That night, Gamboa talked to Saikhon by telephone. He explained that he understood Robles was hired in December with full seniority. Saikhon said he did not recall making that agreement, and that he would check with the foreperson regarding Robles's layoff. An angry conversation followed in which Gamboa said Robles would file an unfair

labor practice charge unless he was re-hired. After a while, Saikhon hung up on Gamboa. Robles was not re-hired.

I find, based on my observation of the witnesses, that the above-stated facts are correct with respect to the discharge.

E. Saikhon's "Seniority" System As Applied to Robles and the Layoffs From Crew No. 3

Of central importance to this case is the structure of Saikhon's seniority system. With respect to the seniority system, I make the following findings of fact. Prior to the 1976-1977 season, the Respondent's seniority system was loosely structured and designed to retain those employees who had either worked for the Company over a number of years or who had begun work very early in that particular season. Forepersons, and where appropriate assistant forepersons, had virtually absolute discretion to hire, fire, lay off and recall workers, operating loosely within the parameters of this "seniority system. "

Robles had worked for the Company at least four and most likely nine years. He was universally aclaimed as an excellent worker. In 1975-1976, he had been present briefly for the thinning at Welton. In other years, however, he stated that he did not participate in the thinning, except for a one or two day period during one other season. Ordinarily, he waited for the start of the harvest to be hired by Respondent.

In 1976-1977, for the first time, the harvest supervisor, Carl Fiori, directed that the forepersons should ask the office in Holtville, California, for a list of least-senior employees before laying off workers. He acted on Mario Saikhon's instructions. In previous years, the Company had

relied on the independent judgment, and memory, of the fore-person to determine which employees were least senior. However, Respondent's witnesses testified that this practice had led to some hard feelings among those workers who were laid off. They claimed they had been treated unfairly.

Vera testified that on March 26, 1977, he was told by Fiori to cut Crew No. 3 from 12 to 9 trios. Fiori and Saikhon testified that Fiori acted on instructions from Mario Saikhon, after Saikhon had observed the operations at Welton. Fiori informed Vera that he was to use a list from the Company office to make the layoffs. Fiori then telephoned Mrs. Carol Rye, Respondent's Payroll Clerk, in Holtville, California, and requested a list of the 8 or 9 employees who were the last hired on to Crew No. 3. He did not inform her of the purpose of the list. Nor did he request that she consider the attendance records or years of prior service of the employees. Rye called back with a list of 9 employees who were the last hired. Fiori wrote down the names as Rye read them to him over the phone and then gave the list to Vera who, in turn, gave it to Sandoval. Sandoval then made his announcement when the bus was about to leave Welton.

Apparently, such a list was used for layoffs only from Crew No. 3. Respondent certainly put on no evidence that layoffs from other crews in 1976-1977 were made on the basis of such lists.

Based upon all the evidence, including my observation of the witnesses, I find the historic facts as stated above. I further find, as recited below, that the layoffs, especially of Mr. Robles, resulted from anti-union motivation.

Respondent's witnesses testified that the layoffs were designed to reduce the number of workers in Crew No. 3 to make the harvest operation more efficient. However, the record

shows that new employees were hired after the layoffs of March 26, 1977, and that two of the employees who had been laid off were rehired by Respondent.

Carl Fiori testified that the nine workers were laid off from Crew No. 3 on March 26, 1977, because a smaller crew would be better supervised and would work more efficiently. The employment records, hwoever, indicate that, despite the expressed reason of Respondent that the layoffs were to reduce the size of Crew No. 3, Respondent in fact hired four new employees following the layoffs. (Respondent's Br. at 16.) In addition, at least two of the employees who were laid off on Saturday, March 26, 1977, were working for Respondent on Monday, March 28, 1977.

Respondent's claim that new hires were necessary because of the high rate of absenteeism toward the end of the season conflicts with its stated objective in laying off the nine workers on Crew No. 3. Respondent knew that the rate of absenteeism always increased at the end of the harvest season. The layoffs, therefore, must in fact have been motivated by something other than economic considerations because Respondent knew the usual high rate of absenteeism at the end of the season would, by itself, reduce the size of the crew, obviating the need for layoffs.

Respondent defends the hiring of the four new employees over the re-hiring of the laid-off employees. It claims that it is easier to pick up new workers at the Gulf Station in Calexico than to attempt to contact laid-off employees who may have moved or returned to Mexico. The argument reveals the insubstantiality of the Respondent's claim that it followed a "seniority system," in making employment decisions; particularly in light of the fact that Respondent knew very well that Robles could be contacted through the United Farm Workers office.

All the evidence compels the inference that, as applied to Robles, the layoff resulted from Robles's Union activities rather

than from permissible reasons. I so find.

F. Jurisdictional Contacts With California

I find that Respondent has substantial contacts with California. I further find that the March 26, 1977, layoffs had substantial contacts with California. At its headquarters in Holtville, California, Respondent maintains its employment records and Mario Saikhon maintains his office. The layoffs of nine workers, which is central to this case, were directed from California. The list of those employees to be laid off was obtained from the California office. Robles was recruited and hired in California, He worked for Respondent primarily in California. While working in Arizona, Robles and many of the workers travelled daily by bus from the Gulf Station in Calexico to the field in Welton and then returned to Calexico at the end of the work day.

III. Discussion of the Issues and Conclusions

A. The ALRB Has Jurisdiction Over the Alleged Unfair Discharge of Efrain Robles.

A threshold issue to be resolved is whether the Board has subject matter jurisdiction over the alleged unfair discharge or layoff of Robles. At the hearing on May 16, 1977, Respondent moved to dismiss paragraph 6(b) of the complaint, alleging unfair discharge in violation of § 1153 (a) and (c) of the Act, on the grounds that the ALRB does not have jurisdiction because the discharge occurred in Arizona. Petitioner argued that the intent to discharge and the initial acts resulting in the discharge occurred in California. The motion presented a question of first impression and was taken under submission.

The General Counsel argues that jurisdiction must be assumed "for acts outside of California that affect

employer-employee relations within the State." The General Counsel cites the transient nature of the work force and the desirability of stability and fair play between employers and employees that does not terminate at the border. (General Counsel's Br., p. 3.) In addition, the General Counsel refers to analogous jurisdictional problems of the National Labor Relations Board ("NLRB") and the Workers' Compensation Appeals Board of California. For the reasons discussed below, the Respondent's motion to dismiss is denied.

Jurisdictional questions generally involve the statutory power of a tribunal to hear a case, the physical presence of the parties within the forum, and attendant procedural due process issues such as convenience of forum and accessibility of evidence. In this case, an examination of the personal jurisdiction issues, including presence of the parties, convenience, and, generally, procedural due process, indicates that jurisdiction before the ALRB of California is appropriate. Respondent has his business headquarters here in California. The records of employment and many witnesses are in California.

The issue of law to be resolved is whether the California legislature vested the ALRB with jurisdiction over alleged violation of the Act where some incidents of the violation occurred outside the State. It is hardly consistent with the legislative purpose in establishing the ALRB to permit a California employer to fire or lay off an agricultural employee recruited and generally employed in California, in apparent violation of the Act, provided that the employer informs the employee of his termination outside the State of California. Nor could the Legislature have intended that an Arizona employer be subject to the California ALRB for discriminatorily firing an Arizona employee in Arizona. This case lies somewhere between these two illustrations.

The Act does not limit the ALRB's jurisdiction to events

occurring wholly within the borders of the State of California. I hold, therefore, that the ALRB has subject matter jurisdiction over a, discharge occurring in another state when the employer's contacts with California, particularly the effect of his agricultural business on California farm workers, is not insignificant. The statutory scheme for Workers' Compensation in California and the decisions of the NLRB support this conclusion. Further, the expressed intent of the Arizona legislature in enacting its Agricultural Employment Relations Act ("AERA"), and its similarity to California's Act, leads me to conclude that this construction of California's jurisdictional power does not infringe upon Arizona's power. Rather, it will provide the two states with the opportunity for reciprocation in their common goal of ensuring the peaceful resolution of agricultural labor disputes.

1. California Legislative Purpose

The California Legislature stated its purpose in enacting the Act as follows:

> Sec. 1. In enacting this legislation the people of the State of California seek to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations.
>
> This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state. The Legislature recognized that no law in itself resolves social injustice and economic dislocations.
>
> However, in the belief the people affected desire a resolution to this dispute and will make a sincere effort to work through the procedures established in this legislation, it is the hope of the Legislature that farm

laborers, farmers, and all the people of California will be served by the provisions of this act.

Sections 1, 1.5 of Stats. 1975, 3d Ex.Sess., c.l, p.--, reprinted in Cal.Lab.Code § 1140.

Thus, the State's interest in passing the Act was the protection of California workers and the stabilization of labor relations through the creation of a procedure for resolving disputes. With respect to the present case, both interests are served by the ALRB's assumption of jurisdiction.

a. Protection of California Agricultural Workers

The Union represents Robles, who is a citizen of Mexico. Robles resides in California for several months of the year while picking lettuce in the Salinas Valley of California. He also picks lettuce for several months in the Imperial Valley of California. His status as a California farm worker for a large part of the year entitles him to the protection of the Act, which "guarantee[s] justice for all [California] agricultural workers." Prior to Robles's termination, he was travelling from Calexico, California, to Arizona every day and returning to Calexico at the end of the day. He was recruited and employed in California. Although he was working in Arizona at the time of his termination, his extensive contacts with California as an agricultural worker entitle him to protection under the Act.

b. Stabilization of Labor Relations

Respondent, as a California employer, must be subject to the stabilizing influence of the Act. Respondent recruited and hired Robles in California, had him work primarily in California, and kept the records of his employment in California. Respondent's agent also received Robles's name on the list of those to be laid off from Respondent's office in California.

The extensive, agriculturally-related contacts of Respondent and Robles with California are sufficient to confer jurisdiction upon the ALRB with respect to the allegedly unfair layoff. Failure to conclude that the ALRB has jurisdiction in this case could lead to an anomalous result. If California were to decline jurisdiction, enforcement of its agricultural labor relations policy would depend on whether Arizona accepted jurisdiction. We can only speculate as to whether Arizona would act in this case. We are not faced with an actual occasion of concurrent or conflicting exercise of jurisdiction by agencies or courts of more than one state. [1/]

Congress has abstained from regulating agricultural labor relations. I am aware of no Act of Congress prohibiting the states from regulating this kind of incident, nor do I know of any court decisions which would lead me to conclude that California, and a fortiori Arizona as well, are prohibited from such regulation under the United States Constitution's Commerce clause.

To decide the issue of jurisdiction in this case against the General Counsel risks creation of a no-man's land, desired by no government agency, in which neither California nor Arizona could exercise jurisdiction.

2. Workers' Compensation

The issue in the instant case is illuminated by the law of Workers' Compensation. The California Legislature has made special provisions to care for workers injured outside the State, Cal. Lab. Code § 5305 provides, in relevant-part:

[1/] Respondent's reliance on conflicts of law analogies might be helpful in resolving such questions. Conflicts precedents are not, however, helpful in resolving the fundamental jurisdictional question. Even applying a conflicts of law analogy, however, the ALRB of California should exercise jurisdiction. See, e.g.

(continued on p. 17)

> The Division of Industrial Accidents ... has jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is *a* resident of this state at the time of the injury and the contract of hire was made in this state...

Cal.Lab.Code § 3600.5 provides, in relevant part:

> (a) Domestic employment; foreign policy. If an employee who has been hired or is regularly employed in the state receives personal injury by accident arising out of and in the course of such employment outside of this state, he ... shall be entitled to compensation according to the law of this state.

The Workers' Compensation law is illustrative of California's governmental interest in protecting the individual worker involved in multi-state incidents, and in protecting the State as a whole from the effects within California of extraterritorial injuries to California workers.

The above-quoted sections of the Workers' Compensation Law were construed in Travelers Insurance Co. v. Workmen's Compensation Appeals Board. 68 C.2d 7, 64 Cal.Rptr. 440, 434 P.2d 992 (1967). In Travelers, a California resident was injured while working on a job in Utah which he had acquired through a Colorado employment agency. If the court found that he was hired in California, then he would be entitled to California compensation. The court held that California law must be applied to decide whether the worker was employed in California. In making this determination, the court defined the governmental interests of California to include a legislative scheme designed to protect

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L. Ratner, Choice of Law: Interest Analysis and Cost-Contribution, 47 S.Cal.L.Rev. 817 (1974).

California workers and an interest in assuring maximum coverage to prevent the necessity of relief for the worker's family. Likewise, California's interest in protecting the farm workers who harvest its crops and insuring that the crops will be harvested is met by providing a mechanism for the resolution of agricultural labor relations disputes. The ALRB of California must have jurisdiction even over multi-state incidents, such as the instant one to effectuate the Act.

3. Analogy to NLRB

As the General Counsel acknowledged, reliance on NLRB precedent is of limited value because federal law is burdened by commerce clause requirements and territorial treaties. However, the NLRB has assumed jurisdiction outside the United States of the claims of foreign residents when the exercise of jurisdiction fulfilled the purpose of the National Labor Relations Act.

In Grace Lines, Inc., 135 N.L.R.B. No. 70, 49 LRRM 1562 (1962), the NLRB found that it had jurisdiction over the foreign maritime operations of a United States shipper notwithstanding the fact that the voyages in question began and ended in a foreign nation. In Panama, the ship picked up a "coast crew" to prepare the ship for unloading in South American ports of call. The crew, which was largely Panamanian, was returned to Panama after making the voyage to South America. The issue was whether the coast crew should be included in a particular bargaining unit. The Board found that it had jurisdiction because (1) the voyages had to be considered in their entirety, and could not be limited to one segment of the trip, (2) the operation in question involved a domestic (i.e. United States) employer and its American flag vessels, and (3) the employer's contacts with the United States were substantial.

These principles are equally applicable to the instant case. In particular, Respondent is a California employer with substantial

contacts in the State. Its operations cannot be segmented.

4. The Arizona Agricultural Employment Relations Act

The Arizona Agricultural Employment Relations Act ("AERA"), Ariz.Rev.Stat. § 23-1381 et seq., and the California Act are very similar. This similarity and the expressed purpose of the Arizona Legislature lead me to conclude that the California ALRB's exercise of jurisdiction in this case does not infringe upon or disrespect Arizona's power. Exercise of jurisdiction in this case will strengthen both states' common goal of ensuring peaceful resolution of agricultural labor disputes.

First, there is no conflict relevant to this case between the two Acts. The AERA, like the California Act, provides in almost identical language for the prohibition of unfair labor practices.[2/] Thus, the illegality of firing a worker for impermissible reasons or with impermissible effects is the same in both states. The remedies for the commission of an unfair labor practice are the same in both states. They include cease and desist orders, reinstatement of the employee with or without back pay, and any other relief deemed appropriate. Ariz.Rev. Stat. § 23-1390C.E; Cal.Lab.Code §§ 1160-1160.9.

Furthermore, the AERA contains a declaration of policy which states:

> The overriding special interest of the state of Arizona with respect to certain secondary boycott activities originating in this state, but extending across statelines and directed at employers in other states, must be

[2/] Ariz.Rev.Stat. § 23-1385 provides in relevant part:

> A. It shall be an unfair labor practice for an agricultural employer:
>
> 1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 23-1383 and

(continued on p. 20)

recognized, and such acts must be made unlawful and subject to control by the police power of this state.

Ariz.Rev.Stat. § 23-1381.

This statement is a recognition, on the part of the Legislature of Arizona, of the transient nature of agricultural labor and agricultural disputes, and the necessity for state jurisdiction to extend sometimes beyond the borders of the State of Arizona. In the absence of evidence to the contrary, we may assume the State of Arizona would recognize California's jurisdiction over matters which may have originated in California but affect the State of Arizona as well as the State of California. Further, as noted above, this case does not involve a conflict of jurisdiction between the two agencies.

In summary, I find that the ALRB has jurisdiction to resolve the charge contained in paragraph 6(b) of the complaint.

B. Amador Sandoval Was a Supervisor.

I conclude that Amador Sandoval was a supervisor within the meaning of the Act.

The term "supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such

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articles 1 and 3 of this chapter, or to violate the protection of employees from the practices described in article 4 of this chapter.

* * * *

3. By discrimination in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 1140.4(J).

Respondent denied that Sandoval was a supervisor, in paragraph 5 of its Answer to Complaint. Based on the testimony of witnesses, it is uncontested that Sandoval had the authority to direct, hire and fire employees, and in fact exercised that authority. Based on these facts, I conclude that he is a supervisor. [3/]

C. The Charge of Paragraph 6(a) Alleging Refusal to Re-hire Efrain Robles For His Support and Activity on Behalf of The UFW Is Dismissed.

I conclude, based on the facts gathered at the hearing, that between November 13, 1976, and December 20, 1976, Respondent did not violate § 1153(a) of the Act by interfering with Robles's exercise of the rights guaranteed in § 1152, or discriminatorily refuse to re-hire Robles within the meaning of § 1153(c).

Robles was not re-hired for several reasons, none of which includes proven Union animus. He arrived late the first day of the harvest, missing the bus. The next day, he arrived on time but did not present himself to the hiring supervisors. It is understandable that he was surprised that they did not greet him and offer him work when he arrived at the gas station; however, the fact remains that Robles did not step forward and request work. Three weeks later, when Robles actually approached

[3/] At the hearing, without objection, the Complaint was amended to conform to the evidence that two admitted supervisors -- Fiori and Barriga -- were involved in the various events complained of.

Sandoval requesting work, he was told no work was available. The General Counsel made no proof that this statement was untrue. Sandoval's statement by itself certainly does not indicate that Respondent denied Robles's rights under § 1153(a) or discriminated against him because of his Union activities under § 1153(c).

With respect to § 1153(c), for example, the General Counsel has the burden of establishing the elements which prove the discriminatory nature of the failure to re-hire Robles. Lu-ette Farms, Inc., 3 A.L.R.B. No. 38 (May 10, 1977). He also has an affirmative burden under § 1153(a). In Lu-ette Farms, the ALRB held that where a supervisor was instructed to lay off up to five employees because the fields were wet, the choice of, among others, two UFW sympathizers for the layoff shortly after the UFW won an election there, was not sufficient evidence of unlawful motivation on the part of the employer.

In the instant case, Robles's lack of vigorous pursuit of a job, because he had expected to be sought out and hired by Respondent, is insufficient evidence to establish an unfair labor practice. Robles's affront that he was not greeted as a friend adds little to his claim. Certainly, he had some obligation to take affirmative action before he could seek the protection of the Act. The facts he marshalls simply are insufficient from which to draw inferences of illegality necessary to sustain this charge.

In my discussion of the second charge, which follows, I treat the evidence of anti-union motivation which led the employer to discharge Robles. Because Robles took no affirmative steps to secure employment between approximately November 13 and December 5, 1976, and he was employed shortly after he took such steps, this evidence cannot be relied upon to sustain his charge that Respondent unfairly failed or refused to hire him. In addition, some important facts evidencing anti-union motivation occurred after Robles was hired by Respondent on December 14, 1976. They occurred in connection with the unfair labor practice proceedings in February-March, 1977.

D. Respondent Engaged in Unlawful Activity When It Discriminatorily Discharged and Refused to Rehire Efrain Robles Because of His Support and Activity on Behalf of the Union.

I conclude that Respondent engaged in unlawful activity in discharging or laying off Robles on or about March 26, 1977. First, Robles enjoyed a substantial, leadership role in Union organizing activities at Mario Saikhon, Inc.; second, the circumstances of adoption of the "list" method of determining seniority strongly imply that this system was devised and operated to apply only to Crew No. 3, which was a center of Union strength; third, the size of Crew No. 3 was not markedly decreased following the March 26th layoffs, indicating the insubstantiality of Respondent's economic reaons for the layoffs; fourth, two of the nine persons laid off were shortly thereafter re-hired, but Mario Saikhon personally refused to re-hire Robles; fifth, after the layoffs, new workers were hired for Crew No. 3 before laid-off workers were recalled; sixth, Robles's layoff followed shortly upon his visible and substantial Union activity in connection with the February-March, 1977, unfair labor practices hearing.

It is an unfair labor practice for an agricultural employer "[b]y discrimination in regard to the hiring or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization." § 1153(c). In addition, it is an unfair labor practice to interfere with an employee's rights guaranteed under § 1152. § 1153(a).

The General Counsel has the burden of proving discrimination by the preponderance of the evidence. In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26,34, 65 LRRM 2465 (1967), the Supreme Court spoke to that burden. In Great Dane, the employer promised vacation benefits to non-union employees, but denied them to union workers who were on strike. The Court characterized this as discrimination in its simplest form. If an employer's conduct is "inherently destructive" of important employee rights, no additional proof of anti-union motivation is needed, and an

unfair labor practice has been committed even if the employer introduces evidence that the conduct was motivated by business consideration. However, if the adverse effect on employee rights is "comparatively slight," an anti-union motivation must be proved to sustain the charge if the employer has come forth with evidence of legitimate and substantial business justifications for the conduct.

The Respondent's actions in this case do not have the "inherently destructive" characteristics described in the Great Dane case. Therefore, anti-union motivation must be shown by the Charging Party.

Layoffs motivated by economic considerations are not unfair labor practices. For example, in Houston Shopping News Co., 223 N.L.R.B. No. 174, 92 LRRM 1074 (1976), the Board held that where a company suffered a 62% loss in earnings due to a particular part of its operation, it was not an unfair labor practice to lay off large numbers of that department's employees.

To prove that a layoff or discharge is unlawfully discriminatory, there must be more evidence of anti-union motivation than the mere fact that the discharged employee was a member of the union. NLRB v. Montgomery Ward, 157 F.2d 486, 19 LRRM 2008 (8th Cir. 1946) (where the employee's discharge could have been for other reasons; he had been warned by supervisors; remarks by non-supervisors were not evidence of discrimination.) On the other hand, the failure of an employer to give the reasons for his layoff of an employee may be considered in determining whether a layoff was motivated by the employer's discriminatory purposes. NLRB v. Condenser Corporation of America, 128 F.2d 67, 10 LRRM 483 (3d Cir. 1942).

In Central Casket Co., 225 N.L.R.B. 37, 92 LRRM 1547 (1976), the Board considered several factors in determining that an

employee had been discriminatorily discharged: The employee had a good work record, and no warnings, he had signed a union card just prior to discharge; the employer confined productivity review to the department in which seven of the nine workers had signed union cards, and the employer offered no justification for this selectivity; the employer's president believed the employee had been soliciting employees to join the union and vowed to discharge him for that reason; following the employee's discharge, the supervisor indicated that the employee and another worker had been discharged for discussing the union. The facts of the instant case as set forth above are very similar.

In Tex-Cal Land Management, Inc., 3 A.L.R.B. No. 14 (1977), the Board held that an unfair labor practice under 1153(c) could be inferred from the totality of the evidence. It noted that:

> Where, as here, the record shows a totality of conduct including illegal interrogation of employees, threats regarding the consequences of union adherence, denial of access, assaults on organizers, and the company's expressed anti-union stand, the discriminatory motivation may properly be inferred. [citations omitted.]
>
> 3 A.L.R.B. No. 14 at p.5.

While the case before me does not have the blatant characteristics of anti-union discrimination found in Tex-Cal, the sequence of events, and the prominence of Robles as a union representative for Crew No. 3, itself a center of union activity, leads me to the conclusion that Robles was discriminatorily discharged. I also conclude that the Respondent violated § 1153(a) by interfering with Robles's rights under § 1152 of the Act.

In Hemet Wholesale, 3 A.L.R.B. No. 47 (June 17, 1977), the Board, in adopting the Administrative Law Officer's decision,

held that an illegal transfer of several employees was a violation of both §§ 1153(a) and (c).

In Valley Farms and Rose J. Farms, 2 A.L.R.B. No. 41 (Feb. 25, 1976), the Board adopted the Administrative Law Officer's finding that the Employer had engaged in unfair labor practices in violation of both §§ 1153(a) and (c). The Administrative Law Officer held that exhortations on the part of a supervisor that certain employees not vote in a representation election was a violation of 1153(a).

I hold that the illegal discharge in the instant case is an equally flagrant violation of Robles's right to participate in concerted activities free from employer interference.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to § 1160.3 of the Act and § 20234.1 of the Board's Regulations, I hereby issue the following recommended:

ORDER

Respondent, Mario Saikhon, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:
   (a) Discharging or otherwise discriminating against employees because of their union activities.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by §§ 1152, 1153(a) and 1153(c) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Efrain Robles full reinstatement to his former position, beginning with the date in the 1977 season when the crop activity in which he is qualified commences.

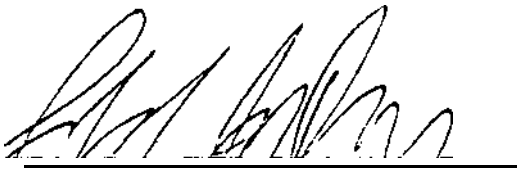
(b) Make Efrain Robles whole for any loss of earnings suffered by reason of the discrimination against him, with interest computed at the rate of 7% pursuant to Valley Farms and Rose J. Farms, 2 A.L.R.B No. 41 (1976). The determination of the actual amount thereof to await further proceedings by the Board.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and all other records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of this Order.

(d) Issue the following NOTICE TO EMPLOYEES (to be printed in English and Spanish) in writing to all present employees, wherever geographically located, and to all new employees and employees re-hired, and to post such Notice at the commencement of the 1977 harvest season for a period of not less than 60 days at appropriate locations proximate to employee work areas, including places where notices to employees are customarily

posted. In addition, the Notice shall be read in English and Spanish at the commencement of the 1977 harvest season, on Company time, to all those then employed, by a Company representative or by a Board agent, and the Board agent will be accorded the opportunity to answer questions which employees might have regarding the Notice and their rights under § 1152 of the Act.

Dated: July 1, 1977.



Sanford Jay Rosen
Administrative Law Officer

NOTICE TO WORKERS

After a trial in which all parties presented evidence, an Administrative Law Officer for the Agricultural Labor Relations Board of California has found that Mario Saikhon, Inc., violated the Agricultural Labor Relations Act by unfairly dicharging Efrain Robles on or about March 26, 1977. We have been ordered to notify all persons coming to work for us now through the next harvest season that the violation will be remedied and that employees' rights will be repected in the future. Therefore, each of you is advised that we will do what the Board has ordered, and also tell you that:

The Agricultural Labor Relations Act is a law that gives all farm workers these rights:

(1) To organize themselves;
(2) To form, join or help unions;
(3) To bargain as a group and choose whom they want to speak for them;
(4) To act together with other workers to try to get a contract or to help or protect one another;
(5) To decide not to do any of these things.

Because this is true we promise that:

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

WE WILL NOT ask you whether or not you belong to any union, or do anything for any union, or how you feel about any union;

WE WILL NOT threaten you with being fired, laid off, or getting less work because of your feelings about, actions for, or membership in any union;

WE WILL NOT fire or do anything against you because of the union;

WE WILL NOT prevent union organizers from coming onto our land to tell you about the union when the law allows it;

WE WILL OFFER Efrain Robles his old job back if he wants it, beginning in this harvest, and we will pay him any money he lost because we laid him off.

Dated:

MARIO SAIKHON, INC.

By: _____
(Representative) (Title)

This is an official Notice of the Agricultural Labor Relations Board, an agency of the State of California. DO NOT REMOVE OR MUTILATE.