

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

MARIO SAIKHON, INC.,)	
)	
Respondent,)	Case Nos. 77-CE-128-E
)	77-CE-130-E
and)	
)	
UNITED FARM WORKERS)	
OF AMERICA, AFL-CIO,)	5 ALRB No. 30
)	
Charging Party.)	

SUPPLEMENTAL DECISION ON REVIEW

On November 15, 1978, Respondent submitted, pursuant to 8 Cal. Admin. Code 20393 (c), a Motion for Reconsideration of this Board's Decision and Order in Mario Saikhon, Inc., 4 ALRB No. 72 (October 13, 1978). By Order dated November 29, 1978, we granted Respondent's Motion and served notice thereof on all parties pursuant to 8 Cal. Admin. Code 20393(d). No opposition to Respondent's Motion or response to our notice has been submitted by either the Charging Party or the General Counsel.

In its Motion for Reconsideration, Respondent does not challenge our finding that this Board's subject-matter jurisdiction extends to the layoff or discharge which was alleged in the Complaint. Neither does Respondent challenge our acceptance of uncontested facts found by the Administrative Law Officer (ALO) nor our dismissal of the allegation that Respondent violated the Agricultural Labor Relations Act (Act) by its failure to offer employment to Ephrain Robles between November 13, 1976, and December 20, 1976. The treatment of these issues in our Decision

of October 13, 1978, page 1 through line 17 of page 9, requires no comment or correction.

Layoff and Failure to Rehire

Respondent has satisfactorily demonstrated in its Motion for Reconsideration that our analysis of evidence in certain of Respondent's time-books submitted as exhibits by General Counsel was erroneous. Having re-examined the time-book entries and the entire record, we conclude that Respondent's layoff of employee Ephrain Robles on March 26, and refusal to rehire him on March 29, 1977, were not discriminatory and did not violate the Act.

Under the established standard, the General Counsel was required to prove by a preponderance of the evidence that the Respondent discriminated against Robles in laying him off and that after being laid off Robles made a proper application for work at a time when work was available. Labor Code Section 1160.3; *Kawano, Inc.*, 4 ALRB No. 104 (1978); *Prohoroff Poultry Farms*, 5 ALRB No. 9 (1979). Although circumstantial evidence can be sufficient to establish a violation of the Act, the evidence presented by the General Counsel and relied on by the ALO does not support the finding of a violation with respect to either Robles' layoff or Respondent's failure to rehire him. The record evidence is at least as consistent with Respondent's contention that Robles was laid off because of his low seasonal seniority, for valid business reasons, as it is with the allegation of illegal discrimination in the layoff. As to Respondent's failure to rehire Robles, the record fails to show that Robles made a proper application for work at a time when work was available.

As the General Counsel has failed to meet the requisite burdens, the unfair labor practice allegations in the Complaint are hereby dismissed in their entirety.

Dated: May 2, 1979

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

Members RUIZ and PERRY concurring:

We are constrained by the record in this case to agree with the other Board Members that no violation of the Labor Code has been proved. We wish to note, however, that parts of the testimony of Mr. Mario Saikhon, Respondent corporation's president, were inconsistent with Respondent's argument that, because seasonal seniority was the only sort of seniority recognized by Respondent, Robles' short tenure during the 1976-77 season was the reason he was laid off. Mr. Saikhon's testimony contains several remarks which tend to show that cumulative, year-to-year seniority was also observed by Respondent for some purposes. Under a cumulative seniority system Mr. Robles' eight or nine years of service with the Respondent would almost certainly have protected him from being laid off on March 26. Since the General Counsel did not pursue the inconsistencies in Mr. Saikhon's testimony, we are not able to assess the extent to which the seasonal seniority system may have operated as a device to eliminate a prominent UFW supporter

without technically violating the law. Our suspicions along this line are neither quelled nor confirmed by the record before us; that record therefore compels the decision the Board has reached.

Dated: May 2, 1979

RONALD L. RUIZ, Member

HERBERT A. PERRY, Member

CASE SUMMARY

Mario Saikhon, Inc. (UFW)

5 ALRB No. 30

Case Nos. 77-CE-128-E
77-CE-130-E

BACKGROUND

This matter came before the Board on Respondent's Motion for Reconsideration of the Board's earlier decision in Mario Saikhon, Inc., 4 ALRB No. 72. In that case, the Board concluded that Respondent was an agricultural employer operating in California, with its principal place of business in this state, that it had been properly served with a charge and complaint, and that employee Robles was an agricultural employee within the meaning of the Act. The threshold issue in the case was whether the Board has jurisdiction to hear and decide a case involving an alleged unlawful discharge or layoff of an agricultural employee whose employment by an agricultural employer commenced, and was substantially maintained, in California, where the alleged unlawful discharge or layoff occurred in Arizona. The Board held that it does have jurisdiction over the cause as well as over the parties.

The Board adopted the ALO's basic factual findings and found additional support for his conclusion that employee Robles had been unlawfully discharged by an examination of the business records in evidence.

As a remedy, the Board ordered Respondent to reinstate Robles with back pay and to post, distribute, and read to its workers a remedial Notice to Employees.

BOARD DECISION:

Upon reconsideration of its prior decision and based on a reexamination of the entire record evidence, the Board concluded that General Counsel had failed to prove by a preponderance of the evidence that Respondent had violated the Act by its discharge or layoff of Robles, and dismissed the complaint in its entirety.

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